No. 21-1538

In The
Supreme Court of the United States

CLEVELAND COUNTY, NORTH CAROLINA A/K/A CLEVELAND COUNTY EMERGENCY MEDICAL SERVICES,

Petitioner,

v.

SARA B. CONNER, individually and on behalf of all others similarly situated,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

ARGUMENT 1

I. The Court should grant certiorari on the first Question Presented 1

II. The Court should grant certiorari on the second Question Presented 8

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Abbott v. Veasey,
137 S. Ct. 612 (2017) 5

Adair v. City of Kirkland,
185 F.3d 1055 (9th Cir. 1999) 2

Argentina v. Weltover, Inc.,
504 U.S. 607 (1992) 12

A.T. Massey Coal Co. v. Holland,
472 F.3d 148 (4th Cir. 2006) 9

Bay Ridge Operating Co. v. Aaron,
334 U.S. 446 (1948) 6, 7, 8

Chevron U.S.A., Inc. v. Nat'l Res. Def. Council,
467 U.S. 837 (1984) 9, 10

Christensen v. Harris County,
529 U.S. 576 (2000) 11

Donovan v. Crisotomo,
689 F.2d 869 (9th Cir. 1982) 2

Encino Motorcars, LLC v. Navarro,
138 S. Ct. 1134 (2018) 12

Holder v. Humanitarian L. Proj,
561 U.S. 1 (2010) 8

Kisor v. Wilkie,
139 S. Ct. 2400 (2019) 10

Knox v. Serv. Emps. Int'l Lab. Union,
567 U.S. 298 (2012) 8

Larson v. Saul,
967 F.3d 914 (9th Cir. 2020) 9

Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania,
140 S. Ct. 2367 (2020) 11

Lundy v. Catholic Health System of Long Island,
711 F.3d 106 (2d Cir. 2013) 2, 3

Massachusetts v. United States,
333 U.S. 611 (1948) 2

Monahan v. County of Chesterfield,
95 F.3d 1263 (4th Cir. 1996) 2, 3, 4, 6

Nat'l Football League v. Ninth Inning, Inc.,
141 S. Ct. 56 (2020) 5

Roberts v. Baptist Healthcare Sys.,
2022 WL 16702811
(E.D. Tex. Oct. 18, 2022) 3

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) ..... *passim*

Touche Ross & Co. v. SEC,
609 F.2d 570 (2d Cir. 1979) 12

United States v. Braxtonbrown-Smith,
278 F.3d 1348 (D.C. Cir. 2002) 8

United States v. Mead Corp.,
533 U.S. 218 (2001) 11, 12

United States v. Ron Pair Enters.,
489 U.S. 235 (1989) 7

Veasey v. Abbott,
830 F.3d 216 (5th Cir. 2016) 5

Walling v. Youngerman-Reynolds Hardwood Co.,
325 U.S. 419 (1945) 7, 8

Wilderness Soc'y v. U.S. Fish & Wildlife Serv.,
353 F.3d 1051 (9th Cir. 2003),
amended 360 F.3d 1374 (9th Cir. 2004) 9

STATUTES

29 U.S.C. § 207(a) 3, 10

29 U.S.C. § 207(a)(1) ..... *passim*

29 U.S.C. § 207(e) 6, 7

29 U.S.C. § 207(k) 4

29 U.S.C. § 207(o) 4

29 U.S.C. § 207(o)(3)(A) 4

42 U.S.C. § 1973 5

REGULATIONS

29 C.F.R. § 778.109 6

29 C.F.R. § 778.113 6

29 C.F.R. § 778.315 ..... 1, 10, 11, 12

OTHER AUTHORITIES

Jud Matthews, *Deference Lotteries*, 91 Tex. L. Rev. 1349 (2013) 9

Kristen E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235 (2007) 12

REPLY BRIEF FOR PETITIONER

Cleveland County paid Respondent one and one-half times her *regular* rate for every overtime hour that she worked. Even so, Respondent alleges that the County violated the FLSA's overtime provision, 29 U.S.C. § 207(a)(1). Why? She says the County underpaid her *contract* rate, causing it to underpay the overtime compensation she otherwise would have earned. Respondent relies on 29 C.F.R. § 778.315—non-binding administrative guidance—to support her argument. The petition asks this Court to grant certiorari to decide whether the FLSA supports Respondent's claim.

Certiorari is appropriate, and Respondent's opposition does not give any reason that this Court should deny review. For example, Respondent acknowledges that there is a circuit split on the first Question Presented—whether the FLSA allows overtime-gap-time claims. She also argues that the facts are complex, but the Court need not address them to resolve the circuit split. As for the second Question Presented, Respondent highlights the head-scratching way that the lower courts apply *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Certiorari is warranted to ensure consistency for all regulated parties.

ARGUMENT

I. The Court should grant certiorari on the first Question Presented.

Respondent contends that certiorari is improper because the circuits are not split. She also

argues that the FLSA issue is unimportant. Respondent is wrong.

A. The Fourth and Ninth Circuits and the Second Circuit are split on the first Question Presented, and Respondent cannot refute that fact. The split is real, not theoretical. Pet. 13-15.

Respondent first contends that the split is merely theoretical because the alternative holding in *Lundy v. Catholic Health System of Long Island*, 711 F.3d 106, 113 (2d Cir. 2013), is dicta. Br. in Opp. 7. Not so. For starters, Respondent's characterization of *Lundy*'s alternative holding conflicts with precedent. When a court supports its conclusion with multiple holdings, each is binding. *See Massachusetts v. United States*, 333 U.S. 611, 623 (1948). What's more, the opinion below acknowledges *Lundy*'s alternative holding, concluding that the Second Circuit "squarely consider[ed]" the overtime-gap-time issue and that it had "declined to follow" *Monahan v. County of Chesterfield*, 95 F.3d 1263 (4th Cir. 1996). Pet. App. 24a.

Respondent next argues that the Ninth Circuit has questioned *Donovan v. Crisostomo*'s holding.[1] Br. in Opp. 7. But the case that she cites in support, *Adair v. City of Kirkland*, 185 F.3d 1055 (9th Cir. 1999), is inapt. *Adair* rejected a *pure* gap-time claim. *Id.* at 1062-63 (noting that the officers argued that, even if they were not owed overtime pay, "they c[ould] still maintain an action under the FLSA based simply on the fact that they received no compensation for the

[1] 689 F.2d 869 (9th Cir. 1982).

briefings"). Pure gap time isn't at issue here. *See* Pet. i.

Respondent finally contends that any split is stale because the Second Circuit created it in 2013 when *Lundy* departed from *Monahan*. Br. in Opp. 7. That's wrong. Before the decision below, it was unclear if the Fourth Circuit allowed overtime-gap-time claims. As the County explained, *Monahan*'s reasoning about the validity of those claims wasn't necessary to the case's disposition. *See* C.A. Br. 42-44. The employees lost—the court held that they hadn't pleaded an overtime-gap-time claim. 95 F.3d at 1273. Even if Respondent were right, district courts regularly deal with the tension between the Second and Fourth Circuits' decisions. *E.g.*, *Roberts v. Baptist Healthcare Sys.*, 2022 WL 16702811, at *3-4 & n.5 (E.D. Tex. Oct. 18, 2022) (adopting the decision below; highlighting disagreement among district courts); *Whitaker v. Power Enters.*, 2022 WL 289160, at *4 (E.D. Ky. Jan. 31, 2022) (the "prevailing trend" in the Sixth Circuit is to follow *Lundy*). Respondent frames the circuit split's effects as merely possible, but district courts routinely encounter overtime-gap-time claims.[2]

B. The Question Presented is important because overtime-gap-time claims threaten innocent employers with harsh remedies.

Respondent mainly contends that there's no need for this Court's intervention because overtime-

[2] Respondent does not assert that further percolation is necessary. Nor could she. There is no middle ground between the Fourth and Second Circuits' interpretations of § 207(a)(1).

gap-time claims are rare and simply supplement state law. Br. in Opp. 8-11. That argument oversimplifies the issue. Rare or not, overtime-gap-time claims come at substantial cost. *See* Pet. 23-24. For employers operating on a fixed budget, the cost can be devastating. As the International Municipal Lawyers Association points out, municipalities operate on tight margins and need certainty to provide key services, like firefighters and police. IMLA Br. 8. Allowing a federal claim with harsh remedies—like double damages—for a simple breach of contract makes it harder to provide those services.

Respondent minimizes these concerns, arguing that municipalities can use other parts of the FLSA—like the ability to offer compensatory time, 29 U.S.C. § 207(o), or the more liberal overtime rules that apply to law enforcement and firefighters, § 207(k)—to ensure financial stability. But those are incomplete solutions. Compensatory time has limitations: employers may be limited in how much of it they can award. *See* § 207(o)(3)(A). And § 207(k) applies only to firefighters and law enforcement, not emergency service employees like Respondent. Even more, experience shows that § 207(k) could generate litigation "any time a government employer, attempting to balance budgetary constraints with FLSA compliance, adjusts or reduces the hours its . . . [employees] work in a given pay cycle." *Monahan*, 95 F.3d at 1276. Exposing local governments to these unnecessary expenses leaves them "little, if any, flexibility before [they are] subject to being haled into court to face a purported FLSA claim." *Ibid.* (cleaned up).

Respondent posits that employers can avoid FLSA liability by following state law. Br. in Opp. 8.

This argument misses the point and ignores the realities that employers face. They need to know the consequences if they violate—or are *accused* of violating—an employment agreement. Is the employer looking at contract damages alone, or will the FLSA's harsh penalties, like double damages and attorneys' fees, kick in? These are important questions, and both lower courts and employers need this Court's guidance.

C. Nor can Respondent show that this case would be a poor vehicle.

Respondent first says the Court should decline review because this case arises from a motion to dismiss. This Court sometimes denies review when a case arrives in an interlocutory posture. *See*, *e.g.*, *Nat'l Football League v. Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) ("*NFL*") (Kavanaugh, J., respecting the denial of certiorari); *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari). But there's nothing to be gained here by delaying review. Often, interlocutory cases are unsuitable vehicles because the legal issues are fact-bound and underdeveloped. *See* Br. in Opp. 1, *NFL*, No. 19-1098 (filed July 14, 2020) (addressing the fact-bound rule of reason); *see also Veasey v. Abbott*, 830 F.3d 216, 234-35 (5th Cir. 2016) (en banc) (remanding for further fact-finding under § 2 of the Voting Rights Act, 52 U.S.C. § 10301). Not so with the first Question Presented. It entails a pure legal issue. Everyone knows how much Respondent claims to be owed, and everyone agrees what she was paid. The question is whether the FLSA supports her claim.

Respondent's contention that the "underlying facts" are too "complex" also falls flat. Br. in Opp. 12-13. While the County's pay plan was complex, its specifics are irrelevant. Respondent alleges that the County underpaid her straight-time wages. This Court can assess whether that conduct violates the FLSA without wading into any murky factual issues.

Finally, Respondent's claim that the County didn't develop its FLSA argument below also fails. The County asked the Fourth Circuit to affirm under *Monahan*. Br. in Opp. 12. But it also argued that Conner's theory conflicts with the FLSA's text—the same argument it advances here. C.A. Br. 39.

D. Respondent is wrong on the merits. The FLSA's text is clear—overtime compensation depends on the employee's "regular rate." 29 U.S.C. § 207(a)(1). Under both § 207(e) and this Court's precedent, that rate is an "actual fact" derived from how much the overtime-eligible employee is *actually paid* per week. *See Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 461 (1948); *see also* 29 C.F.R. §§ 778.109 & .113. The text does not require employers to pay employees overtime at one and one-half times their *contract* rate. When an employer breaches an employment agreement, state law provides the remedy.

Respondent purports to find broader meaning in the FLSA's text, but she ignores the "regular rate" requirement. For example, she notes that the statute calls for employees who work overtime to be paid "for [their] employment." Br. in Opp. 14. But she ignores the balance of that sentence. Employees who work overtime must be paid "for [their] employment" at

"one and one-half times *the regular rate* at which [they] [are] employed." 29 U.S.C. § 207(a)(1) (emphasis added). The regular rate is an hourly rate derived from how much an employee was *actually paid* in a week. § 207(e). While Respondent claims that the County's reading of § 207(e) would "gut" the FLSA, Br. in Opp. 16, that's untrue. Far from gutting section (a), section (e) is the key that unlocks the overtime provision. *See Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945).

Respondent's physician hypothetical is not an accurate understanding of the FLSA's text. Br. in Opp. 14. The hypothetical doctor prescribes 400 milligrams of aspirin, a fixed amount, with directions to take another 75 milligrams, another fixed amount, for "excess" pain. But the regular rate varies based on how much an employee is paid in a given week. *See Bay Ridge Operating Co.*, 334 U.S. at 461. A physician following the FLSA's method thus would not order a patient to take a set amount of aspirin for "excess" pain. She would determine the excess dosage based on how much aspirin the patient had taken that day. The hypothetical shows that Respondent would ask this Court to do what Congress did not: rewrite § 207(a)(1) and replace the phrase "regular rate" with "contract rate."

Given that the statute's text is clear, Respondent's context and precedent arguments carry no weight. *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). But even if the Court were to consider them, they lack merit. Take Respondent's precedent argument. She claims that the County mislabeled wages to avoid the FLSA. But the precedent Respondent cites does not support her conclusion. In

Walling v. Helmrich & Payne, 323 U.S. 37 (1944), the parties agreed to an artificially low regular rate, one not based on what the employee was actually paid for 40 hours' work. *Id.* at 41-42. Overtime gap-time does not affect the 40-hour threshold; it arises only if an employee's regular rate and the contract rate are different.[3]

II. The Court should grant certiorari on the second Question Presented.

Respondent also argues that the second Question Presented is not cert-worthy. She is again wrong.

A. Respondent first argues that the Question is not sufficiently important because the lower courts are not divided on applying *Skidmore*. For support, Respondent claims that all courts apply *Skidmore* in a host of ways. This argument misses the point. The problem is not that the circuits are *split* on application of *Skidmore*; it is that no uniform approach determines when an agency's guidance passes muster. The lower courts apply the case in a

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[3] The same is true of *Bay Ridge Operating Co.*, where the employer tried to pay its employee one rate for "regular" working hours and another for "after" hours. 334 U.S. at 450-51. This Court concluded that the "regular rate" referenced in § 207(a)(1) was the rate for the first 40 hours' work. *Id.* at 461.

Other cases Respondent cites simply hold that money is fungible. *See Knox v. Serv. Emps. Int'l Lab. Union*, 567 U.S. 298, 317 n.6 (2012); *Holder v. Humanitarian L. Proj.*, 561 U.S. 1, 30 (2010); *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352-53 (D.C. Cir. 2002). That fact is irrelevant. Respondent again assumes that the FLSA guarantees the payment of her contract rate. It does not. Instead, it guarantees overtime pay at a rate that is 150% of the hourly rate she was *actually paid*.

haphazard way. This Court's intervention is needed to resolve the disarray.

Skidmore has created chaos. Sometimes, courts defer to an agency's unpersuasive statutory interpretation. *E.g.*, *Larson v. Saul*, 967 F.3d 914, 925-26 (9th Cir. 2020) (agency's interpretation of the Social Security Act was permissible, even if "not sufficiently detailed, careful, or imbued with the 'power to persuade'"). Perhaps that's because, in practice, courts sometimes blur the lines between *Skidmore* and *Chevron*.[4] *See* Br. of W. Va. 13. But sometimes unpersuasive reasoning does not survive review. *E.g.*, *A.T. Massey Coal Co. v. Holland*, 472 F.3d 148, 169 (4th Cir. 2006); *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1068-69 (9th Cir. 2003), *amended* 360 F.3d 1374 (9th Cir. 2004).

Skidmore lacks decipherable rules. "[A]n agency interpretation merits deference proportional to its power to persuade," but "judges may differ on just how 'persuasive' an agency interpretation must be to survive judicial review under *Skidmore*." Jud Matthews, *Deference Lotteries*, 91 Tex. L. Rev. 1349, 1373 (2013). This confused state of play leaves both the regulators and regulated wanting: What factors should a court consider when assessing the validity of an agency's informal guidance? Where is the line between validity and invalidity when a rule is unpersuasive or poorly reasoned? What is the difference between *Chevron* and *Skidmore* in the first place? Litigants and the lower courts need answers to these

[4] *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984).

questions, and they're not coming from the courts of appeals.

B. Ensuring that *Skidmore* is uniformly applied is a vital issue that warrants review. With a grab bag of possible methods and outcomes, regulated parties face acute uncertainty: Should they adhere to the letter of the law or scour agency publications for the latest interpretation? Subjecting the regulated to bureaucratic fiat tosses the due process clause's "inexorable safeguard" to the side. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2428 (2019) (Gorsuch, J., concurring in the judgment).

C. The Fourth Circuit's decision offers this Court the perfect opportunity to clean up the mess *Skidmore* has become. The Fourth Circuit blindly deferred to the Wage and Hour Division's interpretation of § 207(a)(1). Concluding only that § 207(a)(1) was silent on the overtime-gap-time issue, the court did not evaluate whether the text was ambiguous and thus susceptible to interpretation. Pet. App. 15a. Nor did the court ask whether § 778.315 was persuasive based on the FLSA's text. The Fourth Circuit's failure to evaluate the text, coupled with its *Chevron*-style deference, give this Court maximum flexibility to clarify *Skidmore*.

Respondent does not dispute that this case provides a clean vehicle to resolve the Question Presented. She instead argues that certiorari is improper because the case neither involves an agency's litigation position nor is an enforcement action. But those factors shouldn't be prerequisites. *Skidmore* is ever-present. Courts evaluate nearly all agency action under *Skidmore*. This case is the right

vehicle for this Court to explain, and correct, the process.

D. The Fourth Circuit was wrong to grant § 778.315 "considerable deference." Pet. App. 15a. It failed to analyze the FLSA's text. Instead, the court concluded that § 207(a)(1)'s silence on the issue of overtime-gap-time claims gave it the freedom to read whatever it pleased into the text. Concluding that § 207(a)(1) was open to interpretation, the Fourth Circuit also failed to determine whether § 778.315 was persuasive when read in connection with the FLSA's text.

To start, the court ignored the statute's text, jumping straight to administrative deference. A court cannot defer to an agency's guidance every time a statute is silent on an issue. *See*, *e.g.*, *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). "[A]bsent provisions cannot be supplied by the courts." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) (cleaned up). So too here. Section 207(a)(1) guarantees overtime pay, but only at 150% of the employee's regular rate. It does not penalize employers that pay an employee a regular rate different from her contract rate. Only § 778.315 does. The Fourth Circuit should have concluded the Administrator's interpretation conflicted with the text and stopped there.

Even if the FLSA's text left room for interpretation, the Fourth Circuit didn't evaluate § 778.315 for its "power to persuade." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). This Court has instructed that an interpretation may "claim the

merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." *Id.* at 235. The Fourth Circuit relied only on the weakest indicia of persuasiveness.

The court first relied on consistency, deferring to the agency's longstanding interpretation. But the fact that an interpretation is longstanding "does not relieve [courts] of [their] responsibility to determine its validity." *Touche Ross & Co. v. SEC*, 609 F.2d 570, 578 (2d Cir. 1979); *see also* Kristen E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235, 1286 (2007) (describing consistency as the least favored indicia of persuasiveness).

The court also cited the FLSA's purpose. But "it is quite mistaken to assume that whatever might appear to further [a] statute's primary objective must be the law." *Encino Motorcars*, *LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (cleaned up). Courts cannot base their decisions on their understanding of "what Congress would have wanted"; they must interpret "what Congress enacted." *Argentina v. Weltover*, *Inc.*, 504 U.S. 607, 618 (1992) (cleaned up). Had it performed a proper *Skidmore* inquiry, the Fourth Circuit should have concluded—at a minimum—that § 778.315 is poorly explained and in tension with the FLSA's text.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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