No.

# In the Supreme Court of the United States

F.W. WEBB COMPANY,

*Petitioner*,

v.

JULIE A. SU, ACTING SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

The Fair Labor Standards Act (FLSA) creates an overtime exemption for "administrative" employees as that term is "defined and delimited from time to time by regulations of the Secretary" of Labor. 29 U.S.C. § 213(a)(1).

The Secretary's published regulations make that exemption employee-specific and fact-intensive; it turns on "the type of work performed by the employee." 29 C.F.R. § 541.201; see also, *e.g.*, *id.* § 541.700(a) ("Determination of an employee's primary duty must be based on all the facts in a particular case.").

The First Circuit, however, instead applies an extratextual test called the "relational analysis," which makes the employer's business—rather than the nature of the employee's duties as such—the dispositive factor in determining the applicability of the exemption.

The question presented is whether this judicially created "relational analysis" can be used to decide the FLSA's administrative exemption, in contravention of the Secretary's regulations.

## CORPORATE DISCLOSURE STATEMENT

Petitioner F.W. Webb Company has no parent corporation and no publicly held company owns 10% or more of its stock.

## RELATED PROCEEDINGS

- *Su* v. *F.W. Webb Co.*, No. 23-1793 (1st Cir. Aug. 1, 2024)
- *Su* v. *F.W. Webb Co.*, No. 20-cv-11450 (D. Mass. June 16, 2023)

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner F.W. Webb Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

### OPINIONS BELOW

The opinion of the First Circuit (App., *infra*, 1a-16a) is reported at 110 F.4th 391. The district court's ruling (App., *infra*, 17a-51a) is reported at 677 F. Supp. 3d 7.

### JURISDICTION

The court of appeals entered judgment on August 1, 2024, and denied rehearing on September 4, 2024. App., *infra*, 52a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are set out in the appendix.

### STATEMENT

This case presents an important question about a frequently litigated provision in a frequently litigated statute: whether, in applying the so-called administrative exemption from the FLSA's overtime guarantee, a court may look dispositively to the business purpose of the employer—such that an employee who conducts tasks relevant to that purpose is categorically non-exempt—or whether the analysis must focus instead on the administrative or non-administrative nature of the employee's work, as the governing regulations provide.

In adopting the former approach, the First Circuit broke with multiple other courts of appeals, which

hold that the kind of relational analysis applied by the court below should be at most one tool out of many in determining whether an employee's work is administrative, not a dispositive test. And it therefore reached a substantive result that is at odds with the decisions of additional courts faced with similar factual circumstances.

The First Circuit's approach is also wrong: It is unsupported by the text of the statute or binding regulations; was adopted in reliance on now-superseded law; and leads to the absurd result that two employees performing the exact same function at two different companies (say, sales) will be classified differently—with one entitled to overtime pay and the other not—based solely on the court's characterization of the employer's business purpose.

Particularly in light of the importance of the FLSA in general (thousands of FLSA cases are filed each year) and the administrative exemption in particular (likely the most-litigated of the statute's exemptions), the Court should not permit the First Circuit's atextual and anomalous approach to stand. Certiorari is warranted.

### A. Statutory Background

Enacted in 1938, the FLSA covers "more than 143 million workers." U.S. Dep't of Lab., *Small Entity Compliance Guide to the Fair Labor Standards Act's Exemptions*, 2, (Apr. 24, 2024) https://www.dol.gov/agencies/whd/overtime/rulemaking/small-entity-compliance-guide. The FLSA's central promises are well known: employees are guaranteed a minimum wage, plus time-and-a-half pay for when they work over 40 hours a week. *Helix Energy Sols. Grp., Inc.* v. *Hewitt*, 598 U.S. 39, 44 (2023); see 29 U.S.C. §§ 206-207.

Congress, however, also created exemptions from the overtime guarantee. See 29 U.S.C. § 213(a)-(b). Relevant here, it created an exemption for employees who work in a "bona fide * * * administrative * * * capacity." 29 U.S.C. § 213(a)(1). Instead of defining what constitutes working in a bona fide administrative capacity, Congress expressly delegated that task to the Secretary of Labor. 29 U.S.C. § 213(a)(1). For that reason, the Secretary's regulations are authoritative. See *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2263 (2024) (where a "statute[] 'expressly delegate[s]' to an agency the authority to give meaning to a particular statutory term," that definition controls so long as "the agency has engaged in 'reasoned decisionmaking'" within "the boundaries of [the] delegated authority.")

Shortly after the FLSA's enactment, the Secretary promulgated regulations in Part 541 of the Code of Federal Regulations that provide the operative framework for assessing the administrative employee exemption.[1] Relevant here, Part 541 sets out three elements:

*First*, the employee must be "[c]ompensated on a salary or fee basis" in compliance with the regulations. 29 C.F.R. § 541.200(a)(1).[2]

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[1] See generally Blake R. Bertagna, *The "Miscellaneous Employee": Exploring the Boundaries of the Fair Labor Standards Act's Administrative Exemption*, 29 Hofstra Lab. & Empl. L.J. 485, 495 (2012) (explaining the history behind the administrative exemption regulations).

[2] Section 541.200(a)(1) has been amended in inconsequential ways since this case was initially filed. See *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, 89 Fed. Reg. 32,842,

*Second*, the employee's "primary duty" must be "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." *Id.* § 541.200(a)(2). "[P]rimary duty" "means the principal, main, major, or most important duty that the employee performs." 29 C.F.R. § 541.700(a). And "directly related to the management or general business operations" means "assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201.

*Third*, the employee's primary duty must "include[] the exercise of discretion and independent judgment with respect to matters of significance." *Id.* § 541.200(a)(3).

All three elements—the salary basis test; the primary duty test; and the discretion and independent judgment test—must be met to attain the administrative exemption. In this case, only the primary duty test is at issue.

**B. Factual and Procedural History**

**1.** Petitioner Webb is a wholesaler of plumbing, heating, cooling, and industrial products. App., *infra*, 2a. Based out of Bedford, Massachusetts, Webb operates over 100 locations across at least nine different states. *Ibid*. It specializes in selling to contractors, government organizations, institutions, industrial buyers, and other customers in the fields of construction, facility/building maintenance, and infrastructure. *Ibid*.

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32,971 (Apr. 26, 2024). The remaining regulations have not changed.

Operating such a large business is no easy task. To accomplish it, Webb relies on three types of employees. *First,* Webb's Counter Sales employees provide prices to customers and conduct sales transactions. App., *infra*, 20a. They are analogous to register workers—they "serve the customers at the counter, input orders, create an invoice, help [customers] find products, [and] sometimes order [customers] product if they need it." C.A. J.A. 419. In sum, "they input the order and that's it." *Id.* at 420.

*Second*, Webb employs Outside Sales employees. Outside Sales operates as a "sales force" for Webb—acting as "the greeter" for Webb's customers. C.A. J.A. 285, 422.

*Third*, and most relevant here, are the Inside Sales Representatives, or "ISRs." Webb employs over 600 ISRs nationwide and classifies them as exempt. App., *infra*, 19a.

ISRs are how Webb differentiates itself from the competition. App., *infra*, 35a. ISRs—unlike Counter Sales or Outside Sales—do more than participate in routine sales work. Instead, their job is comprised of three key duties: (1) consultation; (2) advising; and (3) concierge work.

*Consultation*—Webb's ISRs are experts. App., *infra*, 37a. They include electrical engineers, marine engineers, and long-time veterans of the plumbing, heating, and control valve industry. C.A. J.A. 519, 602, 609, 617. Given their experience, Webb calls upon them to "provide * * * consultation [to its customers] with respect to, among other things, the available equipment and systems and as to which products or combination of products would best enable [Webb's customers] to meet their [own] customers' needs." *Id.* at 504. This consulting role takes on many forms, such

as helping customers navigate complex markets to find products, assisting on customer RFPs, and providing recommendations on how to improve customer projects. See*, e.g.*, *id.* at 519-522, 617-620; App., *infra*, 36a. These consultation duties take up a majority of the ISRs work time. In fact, some ISRs report that this duty takes upward of 90 to 95% of their work time. C.A. J.A. 554, 604.

*Advising*—The ISRs also provide advice not just to customers, but to Webb's managers and sales team. ISRs advise Outside Sales on technical questions, as they are more "technically savvy" than Outside Sales. C.A. J.A. 421-422, 596. ISRs also advise Webb's management—helping management keep tabs on the competition and, in response, develop strategies to beat that competition. *Id.* at 407-408. In that way, they are Webb's "[e]yes and ears on the market." *Id.* at 407.

*Concierge*—Finally, ISRs also help customers post-sale by tracking inventory, monitoring shipping, interacting with third-party manufacturers, and addressing customer concerns and complaints. App., *infra*, 5a.

These responsibilities, beyond any sales duties, are what Webb "values most among the [ISRs'] duties." C.A. J.A. 505. Indeed, what Webb cares about most is that ISRs "create solutions for Webb customers by providing guidance, advice and consultation, which in turn promotes and preserve customers relations and enhances Webb's competitive strength." *Ibid*. These efforts are helpful not just because they generate sales, but because they "promot[e] and preserv[e] relationships with customers so that they will continue to do business with Webb." App., *infra*, 21a. In that way, to Webb, earning specific sales is not

the goal; it is a byproduct of the ISRs' customer service work.

**2.** On July 31, 2020, the Secretary filed this lawsuit in the United States District Court for the District of Massachusetts. App., *infra*, 29a. The Secretary alleged that Webb misclassified the ISRs as exempt employees, and therefore violated the FLSA's overtime and record-keeping requirements. *Id.* at 6a.

The Secretary moved for partial summary judgment on the overtime-exempt status of ISRs. App., *infra*, 29a.[3] The disagreement was narrow. There was no dispute that Webb did not pay the ISRs overtime wages, as would be required if the position was non-exempt. There was no dispute that Webb's ISRs' satisfied the salary test for the administrative exemption. See App., *infra*, 32a-35a. And there was no dispute that Webb's ISRs' satisfied the discretion and independent judgment test of the exemption either. See *ibid*. Additionally, Webb did not argue that the ISRs' primary duty was directly related to the management or general business operations of Webb's *customers*, further narrowing and honing the issue for the district court. Thus, the only issue before the district court regarding the administrative exemption was whether there was a genuine issue of material fact on the exemption's second element: whether the ISRs' primary duty was directly related to the management or general business operations of Webb. See *id.* at 8a-9a.

The district court granted the Secretary's motion. It concluded that the second element to the administrative exemption was unsatisfied, and that therefore,

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[3] The Secretary did not move for summary judgment as to certain ISRs who are independently exempt as highly compensated employees under 29 C.F.R. § 541.601. As a result, the judgment below excludes those highly compensated ISRs. C.A. J.A. 743.

the administrative employee exemption did not apply to Webb's ISRs. App., *infra*, 38a.

In coming to this conclusion, the district court relied on a judicially crafted test the First Circuit had created two months prior—the "relational analysis." App., *infra*, 34a. As the court put it, "the First Circuit has recently clarified that to meet the second element under the administrative exemption test, a 'relational' analysis *is required*." *Id.* at 33a (quoting *Walsh* v. *Unitil Serv. Corp.*, 64 F.4th 1, 5 (1st Cir. 2023)) (emphasis added).

The district court therefore asked (1) what the ISRs' "primary duty" was, and (2) whether that primary duty was (A) directly related to "assisting with the running or servicing of the business"—leading to a finding of exempt status—or "conversely" (B) related to the "employer's business purpose, 'in that they produce the product or provide the service that the company is in business to provide.'" App., *infra*, 33a. To explain (B) another way, "the [c]ourt, when employing the relational analysis, examines whether an employee's primary duties are focused on carrying out the business's 'principal production activity' or on other 'ancillary' matters related to the business's overall operations and management." *Id.* at 33a-34a.

Applying this analysis, the district court concluded that the ISRs' primary duty was "help[ing] sell Webb's products." App., *infra*, 35a. It also concluded that Webb's business purpose was to "produce wholesales of its products to its customers." *Id.* at 34a. Putting the two together, the district court came to its ultimate conclusion: "Since the ISRs' primary duty closely relates to Webb's business purpose * * * Webb cannot meet the second prong of the administrative exemption test." *Ibid*.

**3.** The First Circuit affirmed. On appeal, the panel—like the district court—applied the relational analysis. App., *infra*, 10a-11a; see *id.* at 10a ("Having identified Webb's business purpose, we next conduct a 'relational' analysis.") (quoting *Until Serv. Corp.*, 64 F.4th at 6-7). And it found that analysis dispositive:

> We agree with the district court that the undisputed facts show that the ISRs' primary duty is "to help sell Webb's products" by delivering discrete customer sales, and that this duty is "'directly related' to Webb's business purpose of making wholesale sales of its products." *F.W. Webb Co.*, 677 F. Supp. 3d at 20, 22. *The ISRs are therefore ineligible for the exemption*.

App., *infra*, 11a (emphasis added). The panel therefore dismissed the consulting, advising, and concierge duties that set ISRs apart from Webb's Counter Sales and Outside Sales team. *Id.* at 12a-13a; see also *id.* at 16a ("All in all, it strains credulity to read the ISRs' amorphous customer-service duties as anything but central to Webb's business purpose of producing wholesale sales of its products."). Based on this reasoning, the panel affirmed the grant of the Secretary's motion for partial summary judgment.

The First Circuit denied a timely petition for rehearing en banc. App., *infra*, 52a.

**REASONS FOR GRANTING THE PETITION**

The Court should grant certiorari to address an important question facing employees and employers in FLSA litigation: whether the business purpose of an employer is dispositive to the second element of the FLSA's administrative exemption—as it is in the First Circuit's relational analysis.

More, the decision below conflicts with the decisions of other circuits; the First Circuit's approach contravenes the statutory and regulatory text and leads to absurd results; and the case presents an opportunity to clarify a vague and indeterminate yet frequently litigated statutory provision. Review is warranted.

**A. The decision below conflicts with those of other circuits.**

In treating the relational analysis (and its focus on the business's purpose) as effectively dispositive, the First Circuit's decision below broke with the approaches of multiple other courts of appeals, which consider similar factors as only one of multiple non-dispositive tools. And the resulting outcome—that ISRs are non-exempt employees—is at odds with the results reached by yet another group of courts faced with similar facts. The First Circuit's divergent approach warrants review.

**1.** To begin, the First Circuit's dispositive approach to its relational analysis—it found the ISRs categorically "ineligible for the exemption" because they performed work related to Webb's business purpose (App., *infra*, 11a)—conflicts with the law of multiple other circuits.

In a seminal 2002 decision, the Ninth Circuit explained that the "administrative-production dichotomy" in which the First Circuit's relational analysis "has its roots" (*Unitil Serv. Corp.*, 64 F.4th at 7)[4] is

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[4] The basic thrust of the dichotomy is to distinguish between those tasks that involve "producing" the goods or services the business sells, on the one hand (nonexempt), and administering the business as a business, on the other (exempt). See, *e.g.*, *Unitil Serv. Corp.*, 64 F.4th at 6-7; see also pages 18-21, *infra*.

"but one piece of the larger inquiry," and that courts "must construe the statutes and applicable regulations as a whole" rather than relying on any single rule of thumb. *Bothell* v. *Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002). That is, "the dichotomy is but one analytical tool, to be used only to the extent it clarifies the analysis," and "*not as an end in itself*." *Ibid.* (emphasis added). "Only when work falls squarely on the 'production' side of the line has the administration/production dichotomy been determinative." *Ibid.* (quotation marks omitted).[5] And the court specifically rejected "a formalistic parsing of the company's 'primary' business purpose." *Ibid.*

The Fourth Circuit applies a similar approach, recognizing that "the administrative-production dichotomy is an imperfect analytical tool," and that as a result, "the critical focus regarding this element remains whether an employee's duties involve 'the running of a business.'" *Calderon* v. *GEICO Gen. Ins. Co.*, 809 F.3d 111, 124 (4th Cir. 2015) (quotation marks omitted); see also *ibid.* (adopting *Bothell*'s proposition that "[o]nly when work falls squarely on the production side of the line has the administration/production dichotomy been determinative") (quoting *Bothell*, 299 F.3d at 1127).

These courts' inquiries—which make the administration/production dichotomy explicitly non-dispositive—cannot be squared with the First Circuit's relational analysis as applied in this case, where Webb's ISRs were deemed flatly "ineligible" for the

[5] As discussed below (at 20-21), the Secretary incorporated *Bothell*'s approach to the administration/production dichotomy into the 2004 version of the governing regulations, meaning that the First Circuit's break from the Ninth on this point now places its approach in contravention of the regulations themselves.

administrative exemption precisely and solely because they "deliver[ed] discrete customer sales" in line with "Webb's business purpose of making wholesale sales of its products." App., *infra*, 11a; see also *id.* at 12a ("Webb is a wholesaler, and ISRs make those wholesales."). The Seventh and Second Circuits take similar, dispositive approaches to the administration/production dichotomy. See *Schaefer-LaRose* v. *Eli Lilly & Co.*, 679 F.3d 560, 574 (7th Cir. 2012) (stating unequivocally that "when an employee is engaged in the core function of a business, his or her task is not properly categorized as administrative"); *Davis* v. *J.P. Morgan Chase & Co.*, 587 F.3d 529, 535-537 (2d Cir. 2009) (applying the distinction dispositively).

**2.** Applying an unduly formulaic methodology, the court below unsurprisingly reached a substantive result that is at odds with those of other courts faced with similar facts.

As described above, the ISRs here were involved in making sales of Webb's products, but they also shouldered substantial consultation, advising, and concierge duties, helping inform and design solutions for both Webb's customers and other Webb employees. See pages 4-6, *supra*. The First Circuit largely disregarded these additional non-sales responsibilities (having already determined via its dispositive relational analysis that "[t]he ISRs are * * * ineligible for the exemption" because "Webb is a wholesaler, and ISRs make those wholesales"). App., *infra*, 11a-12a.

But multiple other courts of appeals, dealing with similar sales-plus roles, have found the employees to meet the requirements for the administrative exemption. See, *e.g.*, *Smith* v. *Johnson & Johnson*, 593 F.3d 280, 285 (3d Cir. 2010) (concluding that a "Senior Professional Sales Representative" for a pharmaceutical

company, whose job was to obtain pharmaceutical sales from doctors, "satisfied the 'directly related to the management or general business operations of the employer'" requirement and thus was an exempt administrative employee due to the "high level of planning and foresight, and the strategic planning" involved);[6] *Burton* v. *Appriss, Inc.*, 682 Fed. App'x 423, 427-428 (6th Cir. 2017) (finding "Account Manager" position exempt where the employee's "job entailed the selling of Apriss products to existing customers" as well as "manag[ing] relations with, support[ing], servic[ing], and be[ing] a liaison to, existing clients regarding their computer software needs."). Again, these results are hard to square with the First Circuit's panel's decision here.

The First Circuit thus applies a different test, and reaches divergent outcomes, as compared to other circuits around the country. The Court should grant certiorari to bring the courts of appeals into harmony.

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[6] Cf. *Baum* v. *Astrazeneca LP*, 372 Fed. App'x 246, 248-249 (3d Cir. 2010) (applying the same analysis under a state FLSA analogue, and concluding that a "Pharmaceutical Sales Specialist" was an exempt administrative employee, where (in addition to "trying to get physicians to commit to prescribing AstraZeneca products," *i.e.* sales), the employee "visited physicians and organized events, such as access meals, prep programs, and peer-to-peer meetings," which "activities 'disseminated information to the marketplace and increased understanding of customers and competitors' and thus were 'directly related to [AstraZeneca's general] operations.'") (quoting *Reich* v. *John Alden Life Ins. Co.,* 126 F.3d 1, 12 (1st Cir.1997)) (alterations incorporated).

### B. The First Circuit's approach is contrary to statute and regulation, and leads to absurd results.

The Court's intervention is also warranted because the decision below is wrong. The First Circuit's test is impermissible judicial lawmaking at odds with the statutory and regulatory text; it enshrines the very analysis the governing regulations were amended to avoid; and it leads to absurd results in practice. The Court should grant certiorari to correct the court of appeals' misguided approach to this critically important federal statute.

**1.** There is no statutory or regulatory basis for a relational analysis that turns on examination of the employer's business purpose, rather than the inherent nature of the employee's duties, in determining the administrative exemption—and certainly not a dispositive one.

Section 213(a)(1) itself simply exempts "an employee employed in a bona fide * * * administrative * * * capacity" and then empowers the Secretary to "define[] and delimit[]" that "term * * * by regulation." 29 U.S.C. § 213(a).

The regulations in turn require the employee's "primary duty" to be "the performance of office or non-manual work directly related to the management or general business operations of the employer." 29 C.F.R. § 541.200(a)(2). Nothing in this regulation states that an analysis of the employer's business *purpose* (as opposed to whether the employee is supporting "management or general business *operations*") is required or dispositive.

The second element of the administrative exemption is further defined in 29 C.F.R. § 541.201. Just like Section 541.200, nowhere in Section 541.201's

definitions does the Secretary state that an analysis of the employer's business purpose is required or dispositive. To the contrary, it specifies that "[t]he phrase 'directly related to the management or general business operations' refers to the type of work performed by the employee," and that "to meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business." 29 C.F.R. § 541.201(a)(1). Again, the inquiry is whether the employee helps "run[]" or "service[]" the business (if so, he or she is exempt)—not what business the employer is in.

The Secretary further promulgated numerous illustrative examples of jobs that satisfy the administrative employee exemption (29 C.F.R. § 541.203), as well as primary duties that constitute "[w]ork directly related to management or general business operations" (29 C.F.R. § 541.201(b)). Again, in none of these regulations does the Secretary focus the inquiry on the employer's business purpose or its chief product or service, much less make that consideration dispositive. The relational analysis is not a command of Congress or the Secretary, but a judicial creation that has superseded the operative text.

**2.** Not only is the First Circuit's approach not grounded in statute or regulation, but the relational analysis's dispositive weighing of the employer's business purpose is in substantial tension with the Secretary's regulations—which in turn define the scope of the statutory exemption. See *Loper Bright* 144 S. Ct. at 2263 (where, as here, a "statute[] 'expressly delegate[s]' to an agency the authority to give meaning to a particular statutory term," that definition controls so long as "the agency has engaged in 'reasoned decisionmaking'" within "the boundaries of [the] delegated authority.").

Consider 29 C.F.R. § 541.201(a)—the regulation that defines "work directly related to the management or general business operations of the employer." In that regulation, the Secretary states that the phrase "directly related to the management or general business operations" "refers to *the type of work performed* by the employee." 29 C.F.R. § 541.201(a) (emphasis added). The Secretary further makes this clear in 29 C.F.R. § 541.2: "The exempt or nonexempt status of any particular employee must be determined on the basis of *whether the employee's salary and duties* meet the requirements of the regulations in this part." See also *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, 89 Fed. Reg. 32,842, 32,864 (2024) ("For 85 years, the Department's regulations have consistently looked at *both the duties performed by the employee* and the salary paid by the employer in defining and delimiting who is a bona fide executive, administrative, or professional employee exempt from the FLSA's minimum wage and overtime protections.").

Moreover, the regulations are clear that courts are to evaluate an employee's job based on its character. 29 C.F.R § 541.201(a) ("To meet this requirement, an employee *must perform work directly related to assisting with the running or servicing of the business*, as distinguished, for example, from *working on a manufacturing production line* or *selling a product* in a retail or service establishment."). This regulation's focus on the type of work done by the employee, rather than the employer, again places the relational analysis's emphasis on the employer's business purpose in tension with governing law.

**3.** As a result, the First Circuit's relational analysis is just the sort of "[a]textual judicial

supplementation" of a statute that this Court routinely rejects. *Rotkiske* v. *Klemm*, 589 U.S. 8, 14 (2019). Indeed, "[i]t is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts'" (*id.* (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012))—yet by inventing an extra-textual and dispositive requirement that an exempt administrative employee perform work that is distinct from the core business of the employer, that is just what the First Circuit has done. See also *E.E.O.C.* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015) (rejecting a Tenth-Circuit-created knowledge requirement for Title VII because the suggestion "asks us to add words to the law to produce what is thought to be a desirable result. That is Congress's province. We construe Title VII's silence as exactly that: silence.").

Had Congress, or the Secretary, desired for the primary duty test to hinge on the employer's business purpose, Congress or the Secretary would have said so. *Muldrow* v. *City of St. Louis, Missouri*, 601 U.S. 346, 358 (2024) ("Had Congress wanted to limit liability for job transfers to those causing a significant disadvantage, it could have done so. By contrast, this Court does not get to make that judgment.").

The First Circuit's judicially crafted relational analysis also violates "one of the most basic interpretive canons": that a text "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Rubin* v. *Islamic Republic of Iran*, 583 U.S. 202, 213 (2018) (quoting *Corley* v. *United States*, 556 U.S. 303, 314 (2009)); see also, *e.g.*, *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 668 (2007)

(rejecting dissent's "reading" of a regulation because it "would render the regulation entirely superfluous").

Consider 29 C.F.R. § 541.201(b). There, the Secretary has set out an illustrative list of duties that satisfy the definition of "directly related to management or general business operations," including work such as "finance," "insurance," "marketing," and "computer network." Nowhere does the list state that these illustrative exempt categories may be rendered *non*-exempt depending on the employer's business purpose. In fact, if the business's purpose were relevant in determining whether a primary duty is directly related to the management or general business operations of the employer, then the illustrative list in § 541.201(b) would not be illustrative at all. It would, instead, be superfluous.

**4.** The First Circuit (and others) grafted this atextual test onto the statute by relying on superseded law.

Before 2004, the administrative exemption was based in 29 C.F.R. § 541.2 and 29 C.F.R. § 541.205. Courts interpreted these regulations as setting out an "administrative-production dichotomy," or a "production versus staff dichotomy." See, *e.g.*, *Reich* v. *John Alden Life Ins. Co.*, 126 F.3d 1, 9 (1st Cir. 1997); *Davis*, 587 F.3d at 531; *Martin* v. *Cooper Elec. Supply Co.*, 940 F.2d 896, 901 (3d Cir. 1991); *Renfro* v. *Indiana Michigan Power Co.*, 370 F.3d 512, 517 (6th Cir. 2004). The First Circuit looked to this dichotomy in creating its relational analysis. *Webb*, 110 F.4th at 397 n.3; *Unitil Serv. Corp.*, 64 F.4th at 7 (citing the pre-amendment *John Alden Life Ins. Co.*, 126 F.3d at 9-10, in creating the relational analysis, and explaining that the analysis "has its roots in what has sometimes been

referred to as the 'administrative-production dichotomy.'").

But the dichotomy cannot now be turned into a dispositive test—because *the Secretary* has explicitly said it should not be one. In 2004, the Secretary published new regulations defining the administrative employee exemption (which were also relocated to §§ 541.200-204). The Secretary made its position clear: "neither do we believe that the dichotomy has ever been or should be a dispositive test for [the administrative] exemption." *Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,140 (Apr. 23, 2004). To the contrary, the new rules were "intended '*to reduce the emphasis* on the so-called 'production versus staff' dichotomy in distinguishing between exempt and nonexempt workers.'" *Id.* (emphasis added).

The Secretary accomplished this by changing the definition of the phrase "directly related to management policies or general business operations of his employer or his employer's customers." Specifically, the 2004 rule change deleted the language that led to the creation of the administrative-production dichotomy—replacing the word "production" with a comparison to factory-line work:

| **Pre-2004 Regulation**[7] |
|---|
| The phrase "directly related to management policies or general business operations of his employer or his employer's customers" describes those types of activities relating to the **administrative** operations of a business **as distinguished from "production"** or, in a retail or service establishment, "sales" work. |

| **Current Regulation**[8] |
|---|
| The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with **the running or servicing of the business, as distinguished**, for example, from **working on a manufacturing production line** or selling a product in a retail or service establishment. |

As the Secretary explained, under this new paradigm, "the 'production versus staff' dichotomy should "only [be] determinative if the work 'falls *squarely* on the production side of the line.'" 69 Fed. Reg. at 22,141 (quoting *Bothell*, 299 F.3d at 1127) (emphasis added).

Despite this regulatory amendment, the relational analysis elevates the administrative-production dichotomy into being *the key question* in assessing the primary duty test—and in *every* case, not just those where the production-related nature of an

[7] 29 C.F.R. § 541.205(a) (2003) (emphasis added).

[8] 29 C.F.R. § 541.201(a) (emphasis added).

employee's tasks is overwhelmingly clear. App., *infra*, 33a ("[T]he First Circuit has recently clarified that * * * a 'relational' analysis *is required*.") (emphasis added); *Webb*, 110 F.4th at 397 (relational analysis compares the "employee's primary duty to the business purpose of the employer" to determine if the primary duty test is met) (quoting *Unitil Serv. Corp.*, 64 F.4th at 6-7); Bertagna, *"Miscellaneous Employee"*, *supra*, at 537 (explaining that the Second Circuit's similar focus on the employer's business purpose renders the administrative-production dichotomy dispositive) (citing *Davis*, 587 F.3d 529).

The First Circuit's analysis in this case is illustrative. While it disclaimed "having treated this dichotomy as dispositive" (App., *infra*, 11a n.3), its actual analysis of the relational test could not have been clearer. And that actual analysis amounts to a single paragraph: Because it found "the ISRs' primary duty" to be "directly related to Webb's business purpose of making wholesale sales of its products," it held that "[t]he ISRs are therefore ineligible for the exemption"—full stop. *Id.* at 11a; see also *id.* at 12a ("Webb is a wholesaler, and ISRs make those wholesales.").

The court therefore gave short shrift to the ISRs' administrative, consulting, and other non-sales duties—precisely the duties that make clear that "the work" does not "fall[] squarely on the production side of the line." 69 Fed. Reg. at 22,141. The court thus got it backwards: These non-production duties should have prevented the relational analysis from being dispositive; instead, the court treated the relational analysis as dispositive, and therefore disregarded the non-production duties.

**5.** Finally, the First Circuit's approach should be rejected because it produces an absurd result, in that

similar jobs at different companies will receive different classification. See*, e.g.*, *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

Specifically, if the relational analysis is allowed to stand, then two identical employees may face different classifications, not because of the work they perform, but because of their respective employers' business purposes. Under the First Circuit's relational analysis, if Webb *produced* the plumbing, heating, cooling, and industrial products it sold, then its business purpose may be *the production* of plumbing, heating, cooling, and industrial products. In such a case, ISRs—performing the exact same functions as they do now—would be administrative employees under the relational analysis, as they do not *produce* Webb's products. Thus, even though their duties would be *exactly the same*, the relational analysis creates a world where two different workers at different employers could face different FLSA classification.

This untoward discrepancy is not merely hypothetical. Another court of appeals applying a similar analytical approach has squarely held while that a *wholesaler*'s sales representatives "were engaged in the *only* production relevant to the employer's business" (*i.e.* production of sales) and were therefore non-exempt, a pharmaceutical *manufacturer*'s sales representatives perform work "distinct from" "the core function of the drug makers," which it characterized as "the development and production of pharmaceutical products." *Schaefer-LaRose*, 679 F.3d at 574 & n.22 (discussing *Martin* v. *Cooper Elec. Supply Co.*, 940 F.2d 896, 903 (3d Cir. 1991)).

To put it mildly, it is nonsensical that two employees performing the exact same function (sales) at two different companies should be classified differently—with one statutorily entitled to overtime and the other not—based solely on whether their respective employers obtain the widgets in question by manufacturing them or buying them elsewhere.

The Court should intervene to prevent this risk of inconsistent classifications—and to correct the First Circuit's grave misinterpretation of the governing statutory and regulatory text.

### C. This is a suitable vehicle to address the application of a critical federal statute.

The question presented is also critically important. Not only has the First Circuit engaged in impermissible "[a]textual judicial supplementation" (*Rotkiske*, 589 U.S. at 14) of an important federal statute, but the relevant statutory provision is frequently litigated, holds the potential for huge liability, and is widely viewed as vague and confusing, having never been authoritatively construed by this Court. The Court should grant certiorari to provide that much-needed guidance.

**1.a.** As noted above, the question presented is important not least because it confronts a judicially crafted analysis unsupported by the statutory or regulatory text. This anomalous result warrants the Court's intervention because, "[a]s Justice John Marshall Harlan warned in the 1960s, an invitation to judicial lawmaking results inevitably in 'a lessening, on the one hand, of judicial independence and, on the other, of legislative responsibility, thus polluting the bloodstream of our system of government." Scalia & Garner, *supra*, at 4.

The FLSA created the administrative exemption in 29 U.S.C. § 213(a)(1), and the Secretary defined the exemption in 29 C.F.R. §§ 200-204. As described above, nothing in the statute or governing regulations makes the administrative employee exemption hinge on an assessment of the employer's business purpose or output; to the contrary, every indication is that such an approach is inappropriate. See pages 14-18, *supra*. The First Circuit's effort "to add words to the law to produce what is thought to be a desirable result" (*Abercrombie & Fitch*, 575 U.S. at 774) calls out for correction.

**b.** More, although a dozen of this Court's cases have touched on Section 213(a)(1) in the 85 years since the FLSA's passage,[9] the Court has never assessed the administrative exemption's primary duty element. This lack of guidance from this Court has led certain circuits—including the First here—to stray from the text of the FLSA and the Secretary's regulations and make the employer's business purpose a dispositive factor in the administrative exemption. See, *e.g.*, App., *infra*, 11a; *Schaefer-LaRose*, 679 F.3d at 574 & n.22. Indeed, the First Circuit noted this lack of clarity in creating the relational analysis. *Unitil Serv. Corp.*, 64 F.4th at 6 (stating that its jurisprudence on the second

[9] See *Helix Energy*, 598 U.S. at 39; *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92 (2015); *Christopher* v. *Smithkline Beecham Corp.*, 567 U.S. 142 (2012); *Auer* v. *Robbins*, 519 U.S. 452 (1997); *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709 (1986); *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512 (1982) (Powell, J., dissenting); *Nat'l League of Cities* v. *Usery*, 426 U.S. 833 (1976); *Mitchell* v. *Lublin, McGaughy & Assocs.*, 358 U.S. 207 (1959); *Levinson* v. *Spector Motor Serv.*, 330 U.S. 649 (1947); *Borden Co.* v. *Borella*, 325 U.S. 679 (1945); *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564 (1943); *United States* v. *Am. Trucking Ass'ns*, 310 U.S. 534 (1940).

element was "limited" before announcing the relational analysis).

Others have similarly noted that the primary duty element is vague and unclear. *Verkuilen* v. *Media-Bank, LLC*, 646 F.3d 979, 981 (7th Cir. 2011) (Posner., J.) ("The regulation's 'primary duty' provisions, which we just quoted, are pretty vague, as is the further provision that 'to meet [the] requirement [that the employee's primary duty be directly related to management or general business operations], an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.'"); Bertagna, *"Miscellaneous Employee"*, *supra*, at 485 ("Judge Posner's observation is a gross understatement. Indeed, federal courts have been grappling with this exemption's meaning since its creation in 1938."); Marc Linder, *"Time And A Half's The American Way": A History Of The Exclusion Of White-Collar Workers From Overtime Regulation, 1868–2004* 880 (2004) (explaining that Labor Secretary Elaine Chao had called the pre-2004 rule—which used similar language— "absurdly complex"). The Court should grant this petition to prevent further confusion and deviation from the intent of Congress.

The need for this Court's attention is elevated given its 2018 decision in *Encino Motorcars, LLC* v. *Navarro*, 584 U.S. 79 (2018). There, the Court overturned the interpretative principle it had adopted in *Arnold* v. *Ben Kanowsky, Inc.*, which had provided that FLSA exemptions, including the administrative exemption, were to be "narrowly construed against the employers seeking to assert them." 361 U.S. 388, 392 (1960). In *Encino Motorcars* the Court disavowed that interpretative principle as unsupported by the

text of the FLSA. 584 U.S. at 88. In doing so, *Encino Motorcars* created a sea-change, rewriting the foundational principle upon which all courts had previously built their interpretations of the administrative exemption. This is yet another reason why the Court should address the administrative exemption's primary duty test now.

**c.** The question presented is also important given that it concerns the proper scope a widely litigated statute with grave consequences for non-compliance. About 6,000 FLSA cases are filed in court each year. Seyfarth Shaw LLP, *2023 FLSA Litigation Metrics & Trends* at 4, https://www.seyfarth.com/dir_docs/documents/flipbooks/2023_FLSA_Litigation_Metrics_Trends.pdf. The Wage and Hour Division of the Department of Labor, on its own, closes anywhere from 23,000 to 30,000 FLSA cases a year. United States Government Accountability Office, *Fair Labor Standards Act; Tracking Additional Complaint Data Could Improve DOL's Enforcement*, at 10 (Dec. 2020), https://www.gao.gov/assets/gao-21-13.pdf.

Specific to the question presented here, available data suggests that the administrative exemption is relied upon frequently. In 1988, the General Accounting Office estimated that between 20 and 27 percent of the full-time U.S. work force—which constituted 19 to 26 million workers—most likely qualified for either the executive, administrative, or professional exemption. United States General Accounting Office, *Fair Labor Standards Act: White-Collar Exemptions in the Modern Workplace* 2 (Sept. 1999), https://www.gao.gov/assets/hehs-99-164.pdf. In 1999, the GAO reported that this number was increasing. *Id.* This trend continued into the 21st century, as a survey of federal court opinions found that, between 2004 and 2011, a merits decision was reached in nearly *three hundred* federal

court cases on the administrative exemption. Bertagna, *"Miscellaneous Employee"*, *supra*, at 541. Given this data, the survey's author called the exemption "probably the most litigated of the Act's many exemptions." *Id.* at 485.

Given the prevalence of the administrative exemption, the question presented is an important and recurring issue. The question affects an entire spectrum of workers across the country—such as employees who perform "tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities." 29 C.F.R. § 541.201(b). This Court's attention is required to prevent the outgrowth of the First Circuit's atextual approach.[10]

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[10] The significance of the question presented is what separates this case from another administrative exemption case that this Court passed on—*Novartis Pharms. Corp.* v. *Lopes*, No. 10-460. In *Novartis*, the petitioners asked the Court to assess whether pharmaceutical sales representatives were exempt under either the administrative exemption or the outside sales exemption. Pet. at i, *Novartis*, No. 10-460. The petition here presents a question with significantly broader reach: the proper framework for applying the administrative exemption's primary duty test in the first place. The resolution of that issue impacts far more than just one type of job—and such wide-reaching ramifications weigh in favor of granting the petition. See *E.M.D. Sales, Inc.* v. *Carrera*, 144 S. Ct. 2656 (2024) (granting certiorari to decide the burden of proof for demonstrating FLSA exemptions).

**2.** Finally, this case is a suitable vehicle for the Court to clarify the application of the administrative employee exemption's primary duty element.

**a.** First, the issue presented is refined and dispositive. There is no dispute that the first and third elements of the administrative employee exemption is satisfied, leaving only the second in play. App., *infra*, 8a. Furthermore, Webb did not argue in the district court or in the appellate court that the ISRs' primary duty directly relates to the management or general business operations of Webb's *customers*, as opposed to Webb itself. *Id.* at 10a. Thus, this Court can answer the question presented without being sidetracked by the complex issues posed by the alternative, customer-focused understanding of the primary duty test.

Indeed, the narrowness and refined nature of the question presented here distinguishes this case from other petitions involving the administrative exemption. This one-issue appeal is starkly different from the last three administrative exemption cases petitioned to the Court. Pet., *Novartis Pharm. Corp.* v. *Lopes*, No. 10-460 (raising two different exemptions and a question of *Auer* deference); Pet., *Nigg* v. *United States Postal Service,* No. 13-1224 (presenting issues on deference and the exemptions to the administrative exemptions); Pet., *Mock* v. *Fed. Home Loan Mortg. Corp.*, No. 14-1379 (arguing up to five errors, including the computer professional exemption to the FLSA).

**b.** The issue presented is also outcome dispositive. Since the parties are not in dispute regarding the first and third elements of the administrative employee exemption, deciding the interpretation and application of the second element will decide whether awarding summary judgment for the Secretary was proper or

whether the case should proceed to a jury trial to determine if the ISRs are administratively exempt. And, as discussed above, the First Circuit's dispositive application of its relational analysis caused the court to give short shrift to evidence tending to demonstrate that—under a proper inquiry—the ISRs are in fact exempt. Once again, certiorari is warranted.

**CONCLUSION**

The Court should grant the petition.

Respectfully submitted.

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