No. 24-626

In the Supreme Court of the United States

F.W. WEBB COMPANY,

Petitioner,

v.

VINCENT N. MICONE, III, ACTING SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

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

REPLY BRIEF FOR PETITIONER

PAUL W. HUGHES
Counsel of Record
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

HENRY LEAMAN
McDermott Will & Emery LLP
444 W. Lake Street
Ste. 4000
Chicago, IL 60606
(312) 372-2000

JAMES M. NICHOLAS
McDermott Will & Emery LLP
200 Clarendon Street
Boston, MA 02116
(617) 535-4000

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

As explained in the petition, the decision below breaks both with other courts of appeals and with the governing regulations to establish an extra-textual, dispositive test for the FLSA's frequently invoked administrative exemption: If an employee's "primary duty * * * is directly related to [the employer's] business purpose," then the employee is "ineligible for the exemption," period. Pet. App. 11a.

As we have described, however, the governing regulations say nothing of the sort. Instead, the question posed by the regulations is whether the employee performs "management" or "general business operations" functions—that is, whether the work is "directly related to assisting with the running or servicing of the business" as a business—which does not turn on an examination of the employer's business purpose, much less dispositively. 29 C.F.R. § 541.201(a). The First Circuit's dispositive business-purpose test is therefore contrary to the regulations, and it conflicts with other courts of appeals that apply similar considerations only as one of many non-dispositive factors.

In response, the government largely attempts to recast this as a fact-bound dispute, but it cannot deny the serious legal problems created by the First Circuit's approach—not least of which is the absurd result that employees performing the *exact same duties* at two different companies will be classified differently depending on how the court chooses to characterize their respective employers' business purposes. The government has no meaningful response.

The Court should take this case to clarify the meaning of this critically important, frequently

litigated, yet "pretty vague"[1] and "absurdly complex"[2] regulatory text.

1. To start, the government's quibbles with the circuit conflict we have described (BIO 12-13) fall flat. Yes, the First Circuit uttered the words "not dispositive" in a footnote—as it must, since the regulation requires that treatment (see Pet. 19)—but it then went on to apply the test in an obviously dispositive manner: "[T]he ISRs' primary duty is to help sell Webb's products' by delivering discrete customer sales, and * * * this duty is directly related to Webb's business purpose of making wholesale sales of its products. *The ISRs are therefore ineligible for the exemption*." Pet. App. 11a (emphasis added; quotation marks omitted); see also *ibid.* (concluding its affirmative reasoning with this single statement, then turning to rejecting counterarguments). And obviously, "recit[ing] the [correct doctrinal] test" is not sufficient if the court's actual "analysis cannot be squared" with governing law. *eBay Inc.* v. *MercExchange, LLC*, 547 U.S. 388, 393 (2006); cf., *e.g.*, *Cigar Ass'n of Am.* v. *FDA*, 964 F.3d 56, 61 (D.C. Cir. 2020) ("[S]tating that a factor was considered—or found—is not a substitute for considering or finding it.").

The same is true for the Seventh Circuit's decision in *Schaefer-LaRose*: The court quoted (in a footnote) the Department of Labor's correct statement of the law, but then explained its own rule of decision in purely categorical terms: "[W]hen an employee is

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[1] *Verkuilen* v. *MediaBank, LLC*, 646 F.3d 979, 981 (7th Cir. 2011) (Posner., J.)

[2] 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) (attributing this quotation to Labor Secretary Elaine Chao).

engaged in the core function of a business, his or her task is not properly categorized as administrative." *Shaefer-LaRose* v. *Eli Lilly & Co.*, 679 F.3d 560, 574 & n.22 (7th Cir. 2012). And similarly in *Davis*, the Second Circuit found that application of its own "important distinction between employees directly *producing* the good or service that is *the primary output of the business*" and those "performing general administrative work" led inexorably to non-exempt status: "Accordingly"—that is, according to its focus on the business's purpose—"we hold that Whalen did not perform work directly related to management policies or general business operations." *Davis* v. *J.P. Morgan Chase & Co.*, 587 F.3d 529, 535-537 (2d Cir. 2009) (emphases added). Compare, *e.g.*, *Bothell* v. *Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002) (rejecting "a formalistic parsing of the company's 'primary' business purpose.").

In other words, at best for the government, multiple courts of appeals applying the FLSA's administrative exemption are saying one thing but doing something quite different—a situation that itself demands correction.

2. On the merits, we explained that these courts' dispositive focus on the nature of the employer's business departs from the regulatory text, which simply asks whether the employee performs "general business operations" functions "related to assisting with the running or servicing of the business" (29 C.F.R. § 541.201(a)), not hinting at an inquiry that disqualifies employees if their tasks are deemed too related to the business's purpose or product. Pet. 14-18. And indeed, the 2004 amendments expressly directed courts *not* to apply "the so-called 'production-versus-staff' dichotomy" as "a dispositive test," contrary to the First Circuit's approach below. *Defining & Delimiting the*

Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,140 (Apr. 23, 2004); see Pet. 18-21. The government has little to say, other than to deny that the First Circuit's plainly dispositive analysis is actually dispositive. BIO 11-12; cf. Pet. App. 12a (exemption unavailable because "Webb is a wholesaler, and ISRs make those wholesales.").

We also highlighted the absurd result that flows from treating the employer's (judicially determined) business purpose as the sole deciding factor as to an employee's exempt status: Employees performing the *exact same role* will be classified differently depending on how the court characterizes their respective employers' business purpose—and this despite the regulation's insistence that "*the type of work performed by the employee*" should determine his or her exempt status. 29 C.F.R. § 541.201(a) (emphasis added); Pet. 21-23; see *Schaefer-LaRose*, 679 F.3d at 574 & n.22 (acknowledging that under this approach, "sales representatives at a *wholesaler*" are non-exempt because they "are engaged in the only production [that is, sales] relevant to the employer's business," but sales staff at "drug *makers*" are exempt because their "work * * * is distinct from" "the development and production of pharmaceutical products") (emphasis altered).

Tellingly, the government responds only to a straw-man version of this argument. *Of course* it makes sense to treat "[a]n underwriter at Chase" differently from "a clothing store accountant" (BIO 10)—they can hardly be said to be doing the same job. What does *not* make any sense, as we have described (Pet. 23), is deeming wholesalers' sales staff categorically non-exempt while the sales staff of manufacturers are categorically exempt. The two employees do the exact same job, and are of the exact same importance to

their respective employers (which make money only through the efforts of the sales force). Yet under the First Circuit's dispositive analysis, one is entitled to overtime pay, and the other is not.

It is axiomatic that "[g]overnment is at its most arbitrary when it treats similarly situated people differently." *Etelson* v. *Office of Personnel Mgmt.*, 684 F.2d 918, 926 (D.C. Cir. 1982). To this, the government has no response.

3. Finally, the government makes a passing vehicle objection (BIO 14-15), but its point is not well taken. As we have already explained (Pet. 21, 29), the First Circuit discounted the ISRs' substantial non-sales roles and responsibilities—including providing consulting and concierge services to customers, advising Webb's Outside Sales staff on technical matters, and developing market intelligence and formulating strategy with management (*id.* at 5-6)—precisely because it incorrectly viewed the correspondence between the ISRs' "duty * * * to help sell Webb's products" and "Webb's business purpose of making wholesale sales" as dispositive of the administrative exemption. Pet. App. 11a. There is therefore every reason to expect that the court of appeals could reach a different result on remand, once disabused of the notion that the employer's business purpose is necessarily determinative.

Indeed, as we have described, other courts of appeals have held similar sales-plus roles—that is, sales jobs that also involve substantial additional responsibilities like customer relationship management—to satisfy the administrative exemption, notwithstanding the government's simplistic observation that "selling a product" is a "paradigmatic example[]" of non-exempt work. BIO 15. Compare, *e.g.*, *Burton* v.

Appriss, Inc., 682 F. App'x 423, 428 (6th Cir. 2017) (job that "entailed * * * the selling of [employer's] products" held exempt because sales were subsumed within the "duty * * * to manage relations with, support, service, and be a liaison to, existing clients regarding their computer software needs"), with C.A. J.A. 504 (ISRs "provid[e] advice and consultation" "to [Webb's] building professional customers * * * [to] best enable them to meet their [own] customers' needs"; and "promote and preserve customer relationships" through "frequent contact with Webb's customer base," in order to "maintain[] the pipeline of transactions in the future" "even if" individual "interactions [do not] lead to a sale."). See also Pet. 12-13 & n.6 (collecting additional cases). And the government can distinguish these cases (see BIO 14) only by disregarding the ISRs' substantial advisory and strategic non-sales functions—just as did the court of appeals.

The Court should thus grant certiorari to bring clarity to an area of the law that is significantly muddled, both in doctrinal approach and substantive outcomes. The vehicle certainly poses no barrier to reaching the weighty legal issues presented here.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

HENRY LEAMAN
McDermott Will & Emery LLP
444 W. Lake Street
Ste. 4000
Chicago, IL 60606
(312) 372-2000

JAMES M. NICHOLAS
McDermott Will & Emery LLP
200 Clarendon Street
Boston, MA 02116
(617) 535-4000

PAUL W. HUGHES
Counsel of Record
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Counsel for Petitioner

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