No. 17-____

In the Supreme Court of the United States

PROVIDENT SAVINGS BANK, FSB,

Petitioner,

v.

GINA MCKEEN-CHAPLIN, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, AND ON BEHALF OF THE GENERAL PUBLIC,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Labor Standards Act (FLSA) exempts from its overtime requirements "any employee employed in a bona fide executive, *administrative*, or professional capacity." 29 U.S.C. § 213(a)(1) (emphasis added). The Department of Labor, which is authorized to enforce the FLSA, has issued regulations clarifying the scope of that exemption, including for employees in the financial services industry.

One class of employees that has been the subject of frequent litigation under the FLSA's exemption for "administrative" employees is mortgage underwriters, who analyze loan applications, determine borrower creditworthiness, and ultimately decide whether banks should make loans. Tens of thousands of mortgage underwriters work at banks across the country, and evaluate the millions of residential loan applications submitted each year. In this case, the Ninth Circuit held that the "administrative" exemption does not apply to such underwriters. In so holding, the Ninth Circuit expressly disagreed with the position of the Sixth Circuit (which has held that mortgage underwriters *are* exempt) and instead sided with the Second Circuit (which has held that mortgage underwriters are *not* exempt). App. 8a-10a.

The question presented is whether mortgage underwriters qualify as "administrative" employees under the FLSA, 29 U.S.C. § 213(a)(1).

RULE 29.6 STATEMENT

Provident Savings Bank, FSB is a wholly-owned subsidiary of Provident Financial Holdings, Inc., a publicly-traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Provident Savings Bank, FSB respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.1a-16a) is available at 862 F.3d 847. The opinion of the district court (*id.* at 17a-32a) is unreported, but available at 2015 WL 48763160 (E.D. Cal. Aug. 12, 2015).

JURISDICTION

The court of appeals entered its opinion on July 5, 2017. This petition is filed within 90 days of that opinion. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Fair Labor Standards Act (FLSA) and the Department of Labor's regulations are reproduced in an appendix to this petition. App. 33a-50a.

INTRODUCTION

This FLSA case presents a frequently-litigated question of enormous importance to a critical sector of the financial services industry: Whether mortgage underwriters qualify as "administrative" employees under a longstanding exemption from the FLSA's overtime pay requirements. 29 U.S.C. §§ 207(a)(1), 213(a)(1). The question has generated much confusion among the lower courts, resulting in an acknowledged circuit split now dividing the Second and Ninth

Circuits from the Sixth Circuit. The issue impacts thousands of banks, and tens of thousands of employees, nationwide. This Court should grant the petition and ensure that there is uniform law on this issue.

There are more than 7,000 banks and other financial institutions in the mortgage lending business in this country. Every year, those banks and other institutions receive more than 12 million mortgage loan applications from individuals, families, and businesses seeking money to purchase, refinance, or improve homes or other property. To process those applications, the banks and other institutions employ tens of thousands of mortgage underwriters nationwide. Underwriters assess the potential borrower's income, assets, and credit history and decide whether their respective institutions should risk its own financial capital by making the loan. Underwriters exercise significant independent judgment and authority in determining whether each loan application should be approved or denied. In doing so, they play a crucial role in managing their institution's overall exposure to risk and promoting its overall financial success.

The question in this case is whether the FLSA requires banks to compensate such mortgage underwriters with overtime pay—to the tune of one and one-half times their regular hourly rate—whenever an underwriter works more than 40 hours in a given week. The FLSA mandates such overtime pay as a general matter, but it contains an exception for employees who are "employed in a bona fide executive, *administrative*, or professional capacity." 29 U.S.C. §§ 207(a)(1), 213(a)(1) (emphasis added); *see also* 29

C.F.R. §§ 541.200-541.204. The issue here is whether mortgage underwriters qualify as "administrative" employees under that exemption.

The FLSA status of mortgage underwriters has been the subject of extensive litigation in the federal courts. In recent years, such underwriters have repeatedly filed FLSA collective actions alleging that they were unlawfully deprived of overtime pay by their employers. That litigation has generated a square and acknowledged circuit split. The Sixth Circuit has held that such underwriters qualify as "administrative" employees who are exempt from the FLSA overtime requirements. *Lutz v. Huntington Bancshares, Inc.*, 815 F.3d 988, 995 (6th Cir.), *cert. denied*, 137 S. Ct. 96 (2016). By contrast, the Second Circuit has held that underwriters are *not* "administrative" employees and thus are *not* exempt. *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529, 535 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2416 (2010). In this case, the Ninth Circuit expressly acknowledged that circuit split, and then deepened it by siding with the Second Circuit—and expressly disagreeing with the Sixth Circuit. App. 8a-10a.

That circuit split on an issue of undeniable national importance alone warrants certiorari. But the need for certiorari is even stronger because the position of the Ninth and Second Circuits position is plainly mistaken. The Department of Labor (DOL) has issued binding regulations providing that the "administrative" exemption applies to employees who "assist[] with the running or servicing of the business"—including "[e]mployees in the financial services industry" who "servic[e] . . . the employer's financial products" and "credit manager[s] who make[] and administer[] the

credit policy of the employer." 29 C.F.R. §§ 541.201(a), 541.203(b), 541.703(b)(7). Mortgage underwriters fit that regulatory definition to a tee. And, indeed, when DOL promulgated the relevant regulations in 2004, it issued a regulatory impact notice making clear its view that "underwriters" *do* generally qualify as exempt "administrative" employees.[1]

This case is both a timely and ideal vehicle for resolving the acknowledged circuit conflict on this issue and holding that mortgage underwriters are not subject to the FLSA's overtime requirement. The petition for certiorari should be granted.

STATEMENT OF THE CASE

A. The FLSA Overtime Requirements And DOL's Implementing Regulations

1. Congress enacted the FLSA in 1938 to "protect all covered workers from substandard wages and oppressive working hours." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2121 (2016) (citation omitted). Among other things, the FLSA generally requires employers to pay all employees a minimum wage and to provide overtime compensation to any employees who work more than 40 hours in any particular week. 29 U.S.C. §§ 206, 207(a). Such overtime compensation must be "not less than one and one-half times the regular rate" of the employee's pay. *Id.* § 207(a)(1).

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[1] *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule*, 69 Fed. Reg. 22,122, 22,198-200, 22,240-48 (Apr. 23, 2004); *see also infra* at 9.

Congress's basic purpose in enacting the FLSA was to mitigate harsh "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). But Congress recognized that such conditions do not affect all workers, and it accordingly exempted certain categories of employees from the wage and overtime requirements.

As relevant here, the FLSA provides that those requirements do not apply to "any employee employed in a bona fide *executive*, *administrative*, or *professional* capacity." 29 U.S.C. § 213(a)(1) (emphasis added). DOL has explained that this exception—sometimes referred to as the "white-collar" exception—reflects Congress's belief that such white-collar employees "typically earn[] salaries well above the minimum wage" and "enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay." *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule*, 69 Fed. Reg. 22,122, 22,123-24 (Apr. 23, 2004) (2004 Final Rule) (discussing FLSA's legislative history).

2. Congress did not define what it means for an employee to work in an "executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Instead, Congress granted DOL the authority to "define[] and delimit[]" those key terms "from time to time by regulations." *Id.*; *see also, e.g.*, *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

Different versions of DOL's regulations have been in effect since the late 1930s. In general, they have limited the white-collar exemption to employees who (1) receive a predetermined and fixed salary that is above a specified amount, and (2) primarily perform certain specified kinds of managerial, administrative, or professional tasks. *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule*, 68 Fed. Reg. 15,560, 15,560-62 (Mar. 31, 2003) (2003 Proposed Rule). In 2003 and 2004, DOL promulgated a new version of its regulations clarifying the scope of the white-collar exemption. *See generally* 2004 Final Rule, 69 Fed. Reg. at 22,122-74; 2003 Proposed Rule, 68 Fed. Reg. at 15,560-97.

3. The issue in this case is whether the FLSA's exemption for "administrative" employees covers mortgage underwriters. The 2004 Final Rule sheds light on that issue by (1) setting forth a three-prong definition of the term "administrative"; (2) giving examples of categories of exempt employees; and (3) incorporating a regulatory impact analysis that directly addresses how particular occupations—including "underwriters"—will be treated under the regulations.

a. The 2004 Final Rule states that an employee is subject to the "administrative" exemption when three conditions—known as the "salary test" and the "duties tests"—are satisfied. *See* 29 C.F.R. § 541.200(a)(1), (2).

First, under the salary test, the employee must be compensated "on a salary or fee basis of not less than

$455 per week," not including "board, lodging or other facilities." *Id.* § 541.200(a)(1).[2]

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) (emphasis added). An employee's work qualifies under that standard when it is "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." *Id.* § 541.201(a) (emphasis added); *id.* § 541.201(b) (also providing illustrative examples of such work, including tax, finance, accounting, auditing, quality control, purchasing, marketing, legal and regulatory compliance, "and similar activities").

Third, the employee's "primary duty" must also "include[] the exercise of discretion and independent judgment with respect to matters of significance." *Id.* § 541.200(a)(3). The regulations explain that "[i]n general, the exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." *Id.* § 541.202(a); *see also id.* § 541.202(b) (identifying factors relevant to this requirement); *id.* § 541.202(c) (clarifying that the exercise of discretion

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[2] In 2016, the Department of Labor promulgated a regulation to modify the salary test effective December 1, 2016, *see* 81 Fed. Reg. 32,391, 32,549 (May 23, 2016), but that regulation has recently been set aside as unlawful. *Nevada v. United States Dep't of Labor*, No. 4:16-CV-731, 2017 WL 3837230, at *9 (E.D. Tex. Aug. 31, 2017).

and independent judgment encompasses "recommendations for action" that are "reviewed at a higher level").

b. The 2004 Final Rule then gives particular examples of employees who qualify as exempt "administrative" employees. For example, the regulations provide:

> *Employees in the financial services industry* generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products.

Id. § 541.203(b) (emphasis added).

The regulations indicate that the FLSA "administrative" exemption also applies to "[p]urchasing agents with authority to bind the company on significant purchases," *id.* § 541.203(f), as well as to "credit manager[s] who make[] and administer[] the credit policy of the employer, establish[] credit limits for customers, authorize[] the shipment of orders on credit, and make[] decisions on whether to exceed credit limits," *id.* § 541.703(b)(7).

c. DOL's 2004 Final Rule also includes a regulatory impact analysis measuring the effect of the regulations on the economy. *See* 69 Fed. Reg. at 22,191-233. As part of that analysis, "experienced" personnel from DOL's Wage and Hour Division reviewed nearly 500 generic job categories and exercised their "expert judgment" to estimate the likelihood that employees within those categories would fall within the FLSA's white-collar exemption. *Id.* at 22,198-200, 22,240-48.

Notably, DOL staff classified "underwriters" as having a "High Probability of Exemption"—*i.e.*, a probability between 90% and 100%. *Id.* at 22,200, 22,244. Taking into account that classification and various other factors, DOL ultimately estimated that 94% of salaried underwriters would qualify as exempt from the FLSA's overtime requirement. *Id.* at 22,248.[3]

B. Mortgage Underwriters And Provident's Mortgage Business

Residential mortgages are not only critical to the housing industry and home ownership in the United States generally, but key to the financial services

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[3] DOL's regulatory impact analysis refers to "underwriters" generally, and does not distinguish among loan underwriters and insurance underwriters. But both types of underwriters perform the same basic function—analyzing a potential customer's risk under established guidelines and determining whether their employers should assume that risk—and courts have recognized that the same analysis applies to both occupations. *See*, *e.g.*, *Hanis v. Metropolitan Life Ins. Co.*, No. 14-1107-CV-W-FJG, 2016 WL 5660344, at *8 (W.D. Mo. Sept. 29, 2016) (holding that insurance underwriters are FLSA-exempt "administrative" employees based on Sixth Circuit's analysis of mortgage underwriters in *Lutz*); *infra* at 26 n.9.

sector in this country. According to the Federal Reserve, there are close to 7,000 banks and other financial institutions (collectively, banks) that issue residential loans in the United States. Neil Bhutta & Daniel R. Ringo, *Residential Mortgage Lending from 2004 to 2015: Evidence from the Home Mortgage Disclosure Act Data*, Vol. 102 No. 6, at 21 (Nov. 2016) (*Residential Mortgage Lending*), https://www.federalreserve.gov/pubs/bulletin/2016/pdf/2015_HMDA.pdf. Each year, such banks receive more than 12 million residential mortgage loan applications. *Id.* at 4.

The banks employ tens of thousands of individuals—mortgage underwriters—who are responsible for evaluating those applications. Such underwriters exercise discretion when deciding whether to approve or deny loans under their own individual authority, recommend approvals to more senior bank officials, and, relatedly, decide whether the banks should place any particular conditions on the loans. Mortgage underwriters are also responsible for ensuring that banks comply with various regulations designed to protect borrowers and avoid systemic risks to the financial system through large-scale defaults. *See, e.g.*, 12 C.F.R. pt. 1026 (Truth in Lending Act—Regulation Z). Ultimately, banks issue more than seven million home loans every year in this country. *Residential Mortgage Lending* at 4.

Petitioner Provident Savings Bank, FSB (Provident) is an independent community bank headquartered in Riverside, California. Provident has been in the financial services business for more than 60 years, and it has branches across California. Its principal business entails making mortgage loans to

consumers who wish to purchase or refinance their homes. App. 2a. Provident then resells funded loans on the secondary loan market to third-party investors. *Id.* at 2a-3a, 19a-21a.

Provident's mortgage loan transactions typically begin when a potential borrower confers with a Provident loan officer or outside broker and identifies a particular loan product that may be of interest. *Id.* at 2a-3a. The potential borrower submits a loan application and related documentation, both of which are sent to a Provident loan processor. *Id.* at 3a. The processor runs a credit check, assembles a loan file, and inputs the borrower's information into an automated underwriting system, which generates a preliminary decision on whether the borrower is approved or denied for the loan. *Id.*

The borrower's file is then passed on to a Provident mortgage underwriter. The underwriter is charged with "ultimately decid[ing] whether Provident will accept the requested loan." *Id.* To make that decision, the underwriter "verifies the information put into the automated system" and "compares the borrower's information" to guidelines established for each type of loan by Provident and outside investors in the secondary market such as Fannie Mae, Freddie Mac, and the Fair Housing Administration. *Id.* at 2a-3a. The underwriter is "responsible" for "thoroughly analyzing complex customer loan applications," "determining borrower creditworthiness," *id.* at 3a, and assessing "'whether the particular loan [to the particular borrower] falls within the level of risk Provident is willing to accept,'" *id.* at 20a (citation omitted). In doing so, the underwriter conducts a detailed review of "the borrower's income, assets,

debts and investments." *Id.* at 20a (emphasis added) (citation omitted).

At the end of this analysis, the underwriter has several options. If the proposed loan satisfies the applicable guidelines, the underwriter can either approve the loan or—if she is nonetheless concerned about aspects of the borrower's qualifications—she can impose "additional conditions beyond those the guidelines require." *Id.*; *see also id.* at 3a, 28a-29a. In the latter case, the underwriter can "refuse to approve the loan until the borrower satisfies those conditions." *Id.* at 3a. Either way, it is undisputed that Provident's underwriters have the authority to bind Provident to make loans "with a single signature"—"staff" underwriters can do so with "loans of up to $500,000," and "senior" underwriters "can approve loans of up to $650,000." Pls.' Statement of Undisputed Facts (SUF) 4, Dist. Ct. ECF No. 76-1.

If the loan at issue does *not* satisfy the applicable guidelines, the underwriter also has options. She can reject the borrower's application outright or, alternatively, suggest a "counteroffer"—to be communicated through the loan officer or broker—proposing a different type of loan for which the borrower *is* qualified. App. 3a. In addition, the underwriter can choose to "request that Provident make exceptions . . . by approving a loan that does not satisfy the guidelines." *Id.* at 3a, 20a-21a.

C. Respondent's Complaint And The District Court's Decision

Respondent Gina McKeen-Chaplin briefly worked as a mortgage underwriter at Provident from May to October 2012. SER 295. Consistent with its then-

current practice for all such underwriters, Provident treated respondent as an "administrative" employee exempt from the FLSA's overtime requirements. Respondent was paid an annual salary of $84,000 (with the potential for an additional bonus), but she did not receive extra overtime pay when she worked more than 40 hours in a given week. *See id.* at 13-14.

In December 2012, respondent filed this FLSA collective action against Provident, asserting claims on behalf of herself and a class of other current and former mortgage underwriters. *Id.* at 294-309. In August 2013, the district court preliminarily certified her proposed class. The only real dispute in the case was whether the underwriters qualified as "administrative" employees for purposes of the FLSA's exemption. After discovery, the parties filed cross-motions for summary judgment addressing that issue. App. 4a.

In August 2015, the district court granted Provident's motion for summary judgment. App. 17a-32a. After setting out the "Uncontroverted Facts" surrounding the duties performed by Provident's mortgage underwriters (as summarized above, *supra* at 10-12), the court concluded that the underwriters are exempt "administrative" employees. App. 19a-29a.

First, the district court noted that it was undisputed that Provident's underwriters satisfied the salary test for "administrative" employees set forth in DOL's regulations. *Id.* at 22a.

Second, the district court held that the underwriters' work in "determining whether a particular loan falls within the level of risk Provident is willing to accept" is "directly related to Provident's general business operations." *Id.* at 26a. In reaching that conclusion, the court analogized the underwriters'

duties to the work performed by "quality control" employees specifically addressed by 29 C.F.R. § 541.201(b). *Id.*

Third, the district court held that the underwriters' primary duties include the exercise of discretion and independent judgment in deciding whether or not to approve, deny, condition, or make a counter-offer with respect to loan applications. *Id.* at 27a-29a. In particular, the district court emphasized the "uncontroverted fact[]" that "underwriters could place 'conditions' on a loan application that [already] satisfied Provident's guidelines, and could decline to approve a loan unless or until the borrower satisfied those conditions." *Id.* at 28a. It also highlighted the undisputed point that underwriters could request that Provident make exceptions and approve loans for borrowers who did not satisfy the guidelines. *Id.* at 29a. The court explained that "[p]erformance of these duties required the exercise of discretion and independent judgment" because (1) "they 'involved the comparison and the evaluation of possible courses of conduct,'" and (2) they "concerned matters of significance since they could influence whether Provident would approve a loan." *Id.* (quoting 29 C.F.R. § 541.202).

D. The Ninth Circuit's Decision

The Ninth Circuit reversed. The court held that mortgage underwriters are *not* exempt "administrative" employees, and it therefore remanded the case with instructions to enter judgment in favor of respondent and her fellow underwriters. App. 15a-16a.

The Ninth Circuit rested its decision on the "administrative/production dichotomy," an analytical

framework that courts and DOL sometimes use when assessing whether an employee's work "directly relate[s] to assisting with the running or servicing of the business" for purposes of 29 C.F.R. § 541.201(a). *Id.* at 7a. The court explained that the dichotomy is dispositive—and an employee is plainly not an exempt administrative employee—if his duties "fall[] squarely on the production side of the line." *Id.* at 8a (citation omitted). The court held that an employee counts as a non-exempt production employee when his duties "go to the heart of [the employer's] marketplace offerings" instead of "to the internal administration of [the employer's] business." *Id.* at 7a; *see also id.* at 16a (noting that applicability of exemption turns on whether "[the employee's] primary duty goes to the heart of internal administration—rather than marketplace offerings").

The Ninth Circuit acknowledged that "in the last decade, two of our sister Circuits have assessed whether mortgage underwriters qualify for FLSA's administrative exemption and have come to opposite conclusions." *Id.* at 8a. It explained that in *Davis*, the Second Circuit held that "the job of underwriter . . . falls under the category of *production* [. . .] work." *Id.* at 8a-9a (emphasis added) (quoting *Davis*, 687 F.3d at 535). The Ninth Circuit contrasted that holding with the Sixth Circuit's decision in *Lutz*, which held that underwriters "are exempt *administrators*" because they "'perform work that services the Bank's business, something ancillary to [the Bank's] principal production activity.'" *Id.* at 9a (alteration in original) (emphasis added) (quoting *Lutz*, 815 F.3d at 995).

The Ninth Circuit expressly embraced the Second Circuit's analysis in *Davis*. *Id.* at 8a-9a. It explained that far from "assessing or determining Provident's business interests," mortgage underwriters merely "assess whether, given the guidelines provided to them from above, the particular loan at issue falls within the range of risk Provident has determined it is willing to take." *Id.* at 9a. The court ultimately concluded that because Provident's underwriters "are most accurately considered employees responsible for production, not administrators who manage, guide, and administer the business," they do not qualify for the FLSA's "administrative" exemption. *Id.* at 13a.

The Ninth Circuit bolstered its ruling by citing a 2010 DOL letter stating that mortgage loan officers responsible for selling loans to borrowers are not subject to the FLSA's "administrative" exemption. *Id.* at 12a-13a (discussing U.S. Dep't of Labor Wage & Hour Div., Opinion Letter (Mar. 24, 2010), 2010 WL 1822423 (2010 DOL Letter), which reversed a 2006 DOL letter concluding that loan officers *are* exempt, *see Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204-05 (2015). The court acknowledged that mortgage underwriters "are distinct from mortgage loan officers" in various ways, "most significantly" because their "primary duty is not making sales" on behalf of the bank. App. 13a. But it nonetheless held that underwriters "are not so distinct [from loan officers] as to be lifted from the production side into the ranks of administrators." *Id.*

The Ninth Circuit also rejected Provident's arguments that mortgage underwriters are exempt in light of the DOL regulations expressly identifying "financial-services industry" employees and employees

performing "quality control" functions as exempt. *Id.* at 10a-14a (discussing 29 C.F.R. §§ 541.201(b) and 541.203(b)). And throughout its opinion, the court repeatedly declared that "the law requires that we construe the administrative exemption narrowly against the employer." *Id.* at 15a; *see also id.* at 5a.

REASONS FOR GRANTING THE WRIT

This case is an ideal candidate for certiorari. The Ninth Circuit acknowledged that its decision deepens an existing circuit conflict over whether mortgage underwriters qualify as "administrative" employees exempt from the FLSA's overtime requirements. That issue is frequently litigated and has enormous practical and financial consequences for thousands of banks and tens of thousands of underwriters across the country. Moreover, the Ninth Circuit's decision is wrong: It conflicts with both the text of DOL's regulations and DOL's contemporaneous view that underwriters are indeed exempt. The petition for certiorari should be granted.

A. The Decision Below Deepens An Acknowledged Circuit Conflict

This case implicates a clear circuit conflict. In the decision below, the Ninth Circuit directly acknowledged that the Second and Sixth Circuits have recently "assessed whether mortgage underwriters qualify for FLSA's administrative exemption and have come to opposite conclusions." App. at 8a (emphasis added). The Ninth Circuit adopted the reasoning and conclusion of the Second Circuit's decision in *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2416 (2010), and it rejected the Sixth Circuit's analysis in *Lutz v. Huntington*

Bancshares, Inc., 815 F.3d 988 (6th Cir.), *cert. denied*, 137 S. Ct. 96 (2016). App. 8a-10a. Certiorari is warranted to resolve that conflict and ensure that the FLSA is applied the same way across the country.

1. In *Davis*, the Second Circuit addressed the same issue presented here—whether mortgage underwriters qualify as FLSA-exempt "administrative" employees. 587 F.3d at 530. As in this case, the *Davis* underwriters "evaluated whether to issue loans to individual loan applicants" by considering the applicant's income, credit history, and other characteristics in light of a "detailed set of guidelines" prescribed by the bank. *Id.* The underwriters were expected to approve loans that satisfied the guidelines, but they had "some ability to make exceptions or variances to implement appropriate compensating factors" if the guidelines were not satisfied. *Id.* at 531.

The Second Circuit held that mortgage underwriters are *not* exempt "administrative" employees. *Id.* at 531-37. It explained that DOL regulations and relevant precedent recognize the importance of the "administrative/production dichotomy" to determining whether the employee's work is "directly related to management policies or general business operations" under the operative DOL regulation. *Id.* at 532. It noted that "[e]mployment may thus be classified as belonging in the administrative category, which falls squarely within the administrative exception, or as production/sales work, which does not." *Id.* at 531-32. It reasoned that underwriters' core job function involves "the 'production' of loans—the fundamental services provided by the bank." *Id.* at 534. And it concluded

that "the job of underwriter . . . falls under the category of production rather than of administrative work." *Id.* at 535.

In the Ninth Circuit, respondent argued that *Davis* "provides compelling legal analysis of nearly identical facts," and she invited the court to "adopt *Davis*'s holding and analysis." CA9 Resp't Br. 43; *see also id.* at 2, 25, 41-45, 60 (further endorsing *Davis*); CA9 Resp't Reply Br. 2, 7, 11 n.4 (same). The Ninth Circuit accepted that invitation wholeheartedly. The court agreed "that the Second Circuit's analysis in *Davis* should apply," and it quoted from—and embraced—*Davis*'s explanation of why underwriters do not qualify as "administrative" employees. App. 9a-10a.

2. Unlike the Second and Ninth Circuits, the Sixth Circuit has expressly held that mortgage underwriters *are* FLSA-exempt "administrative" employees. *See Lutz*, 815 F.3d at 990-98.

In *Lutz*, the Sixth Circuit addressed mortgage underwriters who—like those in *Davis* and in this case—evaluated loan applications in light of established guidelines and decided whether the bank should ultimately make each loan. *Id.* at 990-91. The court noted the administrative/production dichotomy, but it explained that the underwriters' work is properly classified as "administrative" because they "assist in the running and servicing of the Bank's business by making decisions about when [the Bank] should take on certain kinds of credit risk, something that is ancillary to the Bank's principal production activity of selling loans." *Id.* at 993 (applying 29 C.F.R. § 541.201(a); *see also id.* at 994 ("[T]he underwriter services the Bank by advising [the Bank] on whether it should accept the credit risk posed by a customer."). The Sixth Circuit's

conclusion that underwriters fall on the administrative side of the dichotomy—and are thus FLSA-exempt—squarely conflicts with the contrary holdings of the Second and Ninth Circuits. *See* App. 8a-10a; *Davis*, 587 F.3d at 535.

The Sixth Circuit's analysis in *Lutz* also diverges from those circuits in other ways. For one thing, the Sixth Circuit relied on the fact that the work performed by mortgage underwriters "resemble[s] those duties of administratively exempt employees in the financial-services industry"—a category expressly identified as exempt in DOL's regulations. *Lutz*, 815 F.3d at 994-95; *see* 29 C.F.R. § 541.203(b). By contrast, the Ninth Circuit expressly rejected Provident's argument that the financial-services regulation supports treating underwriters as exempt. App. 13a-14a.

Moreover, although the Sixth Circuit acknowledged DOL's 2010 letter treating mortgage *loan officers* as non-exempt, it explained that the letter "does not offer meaningful guidance" with respect to mortgage *underwriters*, who perform very different functions. *Lutz*, 815 F.3d at 994 n.2. By contrast, the Ninth Circuit's decision relied on the 2010 DOL letter and dismissed the significance of any difference in job duties between loan officers and underwriters. App. 13a.

Finally, *Lutz* expressly confronted—and rejected—the Second Circuit's analysis in *Davis*. 815 F.3d at 995-96. The Sixth Circuit explained that although "*Davis* is factually similar," the Second Circuit's holding there is "inconsistent with the precedent of this circuit." *Id.* at 995. The Sixth Circuit explained that "[i]n this circuit, the focus is on whether an employee helps run or

service a business—not whether that employee's duties merely touch on a production activity." *Id.* The Ninth Circuit's decision in this case expressly acknowledged *Lutz*'s "disagree[ment] with the Second Circuit." App. 9a. And at respondent's urging, the court rejected *Lutz* in favor of *Davis*. *Id.* at 9a-10a; CA9 Resp't Reply Br. 14-15.[4]

3. The circuit split over whether mortgage underwriters qualify for the FLSA's "administrative" exemption is thus undeniable. Indeed, commentators, practitioners, and news outlets have repeatedly noted the square conflict between the Sixth Circuit (on the one hand) and the Second and Ninth Circuits (on the other).[5] As one set of observers has noted, the Ninth

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[4] Numerous district courts have independently reached the same basic conclusion in cases involving the same or similar facts. *See, e.g.*, App. 21a-29a; *Lutz v. Huntington Bancshares Inc.*, No. 2:12-cv-01091, 2014 WL 2890170, at *6-*20 (S.D. Ohio June 25, 2014); *Whalen v. J.P. Morgan Chase & Co.*, 569 F. Supp. 2d 327, 330-33 (W.D.N.Y. 2008) (later reversed in *Davis*); *Havey v. Homebound Mortg., Inc.*, No. 2:03-CV-313, 2005 WL 1719061, at *2-*7 (D. Vt. July 21, 2005); *see also Maddox v. Continental Cas. Co.*, No. CV 11-2451-JFW (PLAx), 2011 WL 6825483, at *4-*7 (C.D. Cal. Dec. 22, 2011) (insurance underwriter); *Edwards v. Audubon Ins. Grp., Inc.*, No. 3:02-CV-1618-WS, 2004 WL 3119911, at *3-*7 (S.D. Miss. Aug. 31, 2004) (insurance underwriter).

[5] *See, e.g.*, Practical Law Litigation Speedread, *FLSA's Administrative Exemption: Ninth Circuit* (Aug. 1, 2017); 3 *Emp. Coord. Compensation* §§ 3:38, 3:86 (Aug. 2017, Westlaw); Freeland Cooper, *Mortgage Loan Underwriters Aren't Exempt 'Administrative' Employees*, 27 No. 20 Cal. Emp. L. Letter 11 (2017); Practical Law Labor & Employment, *FLSA's Administrative Exemption Does Not Apply to Mortgage Underwriters: Ninth Circuit* (July 11, 2017); Daniel Wiessner, *9th Circuit deepens split on OT pay for mortgage underwriters*, Reuters Legal (July 5, 2017); Ronald Miller, *Mortgage underwriters not exempt from overtime under administrative*

Circuit's decision in this case deepens the preexisting split of authority, "creates more questions than answers for employers seeking to classify their workforce," and thus "calls out for Supreme Court review."[6] The only way to ensure that the FLSA is applied fairly and evenhandedly across the country is thus for this Court to grant review and resolve the confusion itself.

B. The Question Presented Is Important And This Case Is An Excellent Vehicle

The clear and deepening split of authority over the FLSA status of mortgage underwriters is more than sufficient to justify certiorari. But here the case for review is bolstered by the undeniable importance of the question presented to banks and underwriters alike. That question is frequently litigated in FLSA collective actions, especially in recent years. And this case offers a clean vehicle in which to settle the issue.

1. Whether the FLSA entitles mortgage underwriters to overtime pay has practical and economic significance in the daily lives of tens of thousands of underwriters—and in the operations of thousands of banks—across the country. The issue is especially significant for banks with branches in multiple States, insofar as the circuit conflict now

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employee exemption, Wolters Kluwer Employment Law Daily (July 7, 2017), http://www.employmentlawdaily.com/index.php/news/mortgage-underwriters-not-exempt-from-overtime-under-administrative-exemption/; Gerald E. Rosen *et al.*, *Rutter Group Practice Guide: Federal Employment Litigation*, ch. 6-B, § 6:255 (June 2017 update).

[6] John Giovannone *et al.*, *Making A Mountain Of The Administrative/Production Dichotomy* (July 31, 2017), http://www.wagehourlitigation.com.

subjects their identically-situated employees to different rules.

As noted, there are close to 7,000 banks and other financial institutions currently issuing residential mortgage loans in the United States. *Residential Mortgage Lending* at 21; *see supra* at 9-10. Each year, such banks receive more than 12 million residential mortgage loan applications and—under the guidance of mortgage underwriters—they ultimately issue more than 7 million home loans. *Residential Mortgage Lending* at 4. Assuming that each underwriter processes roughly 10 residential applications each week, *see* ER 587-90, that means there are tens of thousands of underwriters working on such mortgages throughout the United States. Those numbers do not account for the work performed by thousands of additional underwriters who evaluate applications for non-residential mortgages.

It is obviously important for all of these underwriters and their employers to know—with certainty—whether or not they are entitled to overtime pay under the FLSA. It is unfair and inefficient to expect them to bargain over salary and benefits without also knowing whether the FLSA requires overtime pay. After all, underwriters can sometimes work long hours, and overtime pay is potentially a significant component of their overall compensation. And employers must know whether to factor mandatory overtime pay into their expected labor costs. Employers also need to know whether they must establish the cumbersome policies and procedures necessary to keep accurate records of every hour each underwriter works each week. *See* 29 C.F.R.

§ 516.2 (setting forth FLSA recordkeeping requirements).

Over the years, DOL has emphasized the importance of clarity with respect to the scope of the FLSA's white-collar exemption. In 2003, DOL lamented that the exemption had "engendered considerable confusion over the years regarding who is, and who is not, exempt." 2003 Proposed Rule, 68 Fed. Reg. at 15,560. When DOL issued revised regulations the following year, it explained that the changes were necessary because the "[t]he existing regulations are very difficult for the average worker or small business owner to understand." 2004 Final Rule, 69 Fed. Reg. at 22,122. Indeed, DOL confessed that the existing rules were "so confusing, complex and outdated that often employment lawyers and even [DOL] Wage and Hour Division investigators, ha[d] difficulty determining whether employees qualify for the exemption." *Id.*

But despite DOL's best efforts, the uncertainty has persisted. *See supra* at 17-22. A recent report by the Government Accountability Office noted that even after the 2004 regulations, "there is still significant confusion among employers about which workers should be classified as exempt." U.S. Gov't Accountability Office, *Fair Labor Standards Act: The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance* 11-12 (2013) (*GAO Report*). The GAO recognized the harm caused by such uncertainty, and its principal recommendation was thus for DOL to "develop a systematic approach for identifying areas of confusion" about the FLSA and "improv[e] the guidance it provides to employers and workers." *Id.* at 23.

The DOL and GAO are right: Clarity over the FLSA's scope is essential. That is especially true with respect to the specific question presented in this case, which directly and tangibly affects so many banks and mortgage underwriters nationwide.

2. Given the stakes, it is unsurprising that the FLSA's application to mortgage underwriters has been an especially hot topic of litigation, especially in recent years. The past quarter century has seen a general explosion in FLSA litigation, with total FLSA filings rising 583% between 1991 and 2016.[7] A recent GAO study found that 95% of FLSA cases involve allegations that the employer failed to pay overtime, and 16% involve allegations that the employee was improperly classified as FLSA-exempt. *GAO Report* 14-16. Indeed, in 2013 respondent's counsel boasted that their law firm had *itself* already "litigated *ten* FLSA cases on behalf of mortgage underwriters." *Latham v. Branch Banking & Tr. Co.*, No. 1:12-cv-00007, 2014 WL 464236, at *1 (M.D.N.C. Jan. 14, 2014) (emphasis added).

The Ninth Circuit's ruling here will only accelerate the trend. Mortgage underwriters within the Ninth Circuit—and there are many of them[8]—will likely

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[7] *See* Federal Judicial Caseload Statistics Table C-2 (2016), http://www.uscourts.gov/sites/default/files/data_tables/fjcs_c2_0331.2016.pdf (noting 9,063 FLSA filings in 2016); *GAO Report* 7 (noting 1,327 FLSA filings in 1991).

[8] *See* Consumer Financial Protection Bureau, *The Home Mortgage Disclosure Act: Mortgage volume*, https://www.consumerfinance.gov/data-research/hmda/ (last accessed Aug. 25, 2017) (providing 2015 state-by-state data for residential mortgage origination volume showing that nearly one-quarter of all residential mortgage loans are originated within the Ninth Circuit).

jump to file claims under the newly-favorable circuit precedent. And underwriters elsewhere will try to piggyback on the Ninth Circuit's analysis and establish similar precedent in their own jurisdictions.

By granting certiorari, this Court can stem the rising tide in FLSA mortgage-underwriter cases and avoid unnecessary litigation—regardless of how the Court ultimately decides the merits. If Provident (and the Sixth Circuit) are proven right that underwriters are exempt from the FLSA, then the flood of cases will dry up entirely. And if respondent (and the Second and Ninth Circuits) prevail, then underwriters and employers across the country can understand their legal rights and obligations and bargain over the terms of employment with the benefit of that knowledge. Either way, clarifying the rules of the road will help unclog the judicial system and avoid millions of dollars in legal expenses.[9]

3. This case presents an ideal vehicle for resolving the question presented and clarifying the

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[9] This case focuses on the FLSA status of *mortgage* underwriters. But the resolution of that question will also shed light on the FLSA status of *insurance* underwriters. Such employees "[r]eview individual applications for insurance to evaluate degree of risk involved and determine acceptance of applications," and they therefore perform essentially the same risk-management functions for insurance companies that mortgage underwriters perform for banks. O*NET OnLine, *Summary Report for: 13-2053.00—Insurance Underwriters* (2016), https://www.onetonline.org/link/summary/13-2053.00. DOL's Bureau of Labor Statistics reports that there are more than 90,000 insurance underwriters now working in the United States. *See* Bureau of Labor Statistics, *Occupational Employment and Wages, May 2016: 13-2053 Insurance Underwriters*, https://www.bls.gov/oes/current/oes132053.htm#nat (last updated Mar. 31, 2017).

FLSA status of mortgage underwriters. The key facts relating to the underwriters' duties are either undisputed or were resolved the same way by both lower courts. *See* App. 2a-3a, 19a-21a. And the duties of the underwriters here are customary within the mortgage industry as a whole. The core disagreement over whether underwriters qualify as FLSA-exempt "administrative" employees is cleanly presented; indeed, that legal issue was the *only* issue contested below. Moreover, resolution of that question—in either direction—would entirely dispose of respondent's claims. The Court can use this case to settle that important issue once and for all.

C. The Decision Below Is Wrong

Certiorari is also warranted because the Ninth Circuit's decision is mistaken. Mortgage underwriters assist with the "running" and "servicing" of their bank's business by assessing whether the bank should risk its own money by making loans to particular borrowers, and they therefore plainly qualify as exempt "administrative" employees under the FLSA and DOL's regulations. 29 C.F.R. § 541.201(a). The Ninth Circuit's contrary conclusion rests on multiple legal errors and should not stand.

1. Mortgage Underwriters Unambiguously Qualify As Exempt Under DOL's Regulations

a. Because the FLSA does not define "administrative," courts have looked to DOL's regulations in determining the scope of the exemption for "administrative" employees. *See* 29 U.S.C. § 213(a)(1) (authorizing DOL to "define[]" the key terms of the white-collar exemption). DOL's

regulations state that to qualify as an FLSA-exempt "administrative" employee, an employee must (1) earn at least $455 per week, (2) primarily perform "office or non-manual work directly related to the management or general business operations of the employer or the employer's customers," and (3) have a primary duty that includes "the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a) (effective until Dec. 1, 2016). The first requirement is not at issue here, as respondent earned a salary of $7,000 per month—well in excess of the threshold. *See* App. 6a; SER 13-14.

As to the second requirement, DOL's regulations state that an exempt employee "must perform work directly related to assisting with the running or servicing of the business." 29 C.F.R. § 541.201(a). The regulations distinguish those functions from "working on a manufacturing product line or selling a product in a retail or service establishment." *Id.*

Mortgage underwriters plainly satisfy DOL's second requirement for "administrative" employees. As explained above, the underwriters' core function is to facilitate the bank's determination whether to assume the risk of making loans to particular customers. *See supra* at 10-12. In most cases, underwriters themselves make the ultimate decision to accept or reject a particular loan application, and in some cases they make recommendations subject to further review. Either way, their work is "directly related" to a core business decision that the bank must make—whether or not to assume the risk by approving a given loan product to a given customer at a given time. 29 C.F.R. § 541.201(a). Their work therefore

directly "assist[s] with the running or servicing of the business." *Id.*; *see Lutz*, 815 F.3d at 993 ("[T]he underwriters exist primarily to service the Bank by advising whether it should accept the credit risk posed by its customers.").

Mortgage underwriters also satisfy DOL's third requirement for the "administrative" employee exemption: They exercise "discretion and independent judgment" with respect to "matters of significance." 29 C.F.R. § 541.200(a)(3). Among other things, as the district court explained, underwriters are responsible for deciding whether and when to seek exceptions from the guidelines by imposing additional conditions on an otherwise acceptable loan, making counteroffers, or advising the bank to issue loans that might otherwise not qualify. App. 27a-29a; *see Lutz*, 815 F.3d at 996-98. And it should go without saying that the decision to extend hundreds of thousands of dollars of credit to a potential borrower constitutes a "matter[] of significance." 29 C.F.R. § 541.200(a)(3).

b. For those reasons, mortgage underwriters qualify as FLSA-exempt "administrative" employees under a straightforward application of DOL's three-prong test. Other aspects of DOL's 2004 regulations reinforce that conclusion.

In particular, underwriters qualify as exempt under DOL's regulation specifically addressing "[e]mployees in the financial services industry." 29 C.F.R. § 541.203(b). Banks unambiguously offer "financial services," and mortgage underwriters perform the identified duties of (1) "collecting and analyzing information regarding [a] customer's income, assets, investments or debts"; (2) "determining which financial products best meet the customer's needs and financial

circumstances"; and (3) "servicing . . . the employer's financial products." *Id.*; *see also Lutz*, 815 F.3d at 994-96 (relying on financial-services provision in holding that mortgage underwriters are FLSA-exempt).

Any doubt about that is resolved by DOL's regulatory impact analysis—which was issued as part of the 2004 Final Rule. The impact analysis directly addressed "underwriters" and concluded that they overwhelmingly are exempt. *See supra* at 9. As noted above, that determination was made by "experienced" DOL Wage & Hour Division personnel who considered the generic duties associated with each function and exercised "expert judgment" in assessing the probability of exemption. 2004 Final Rule, 69 Fed. Reg. at 22,198. Using that method, DOL treated "underwriters" as having a "High Probability of Exemption"—between 90 and 100%. *Id.* at 22,200, 22,244, 22,248. That conclusion makes sense only because DOL recognized—consistent with analysis above—that as a general matter underwriters satisfy the regulatory definition of "administrative" employee.

The duties of mortgage underwriters are also comparable to those performed by FLSA-exempt "credit manager[s]." *See* 29 C.F.R. § 541.703(b)(7). Just like credit managers, underwriters "administer[] the credit policy of the employer" by assessing the credit risks associated with particular customers and deciding whether the employer should assume those risks by agreeing to particular transactions. *Id.* Here, it is undisputed that Provident's underwriters have the authority to bind Provident to make loans of hundreds of thousands of dollars "with a single signature." Pls. SUF 4. DOL's regulations unambiguously state that credit managers are exempt from the FLSA due to the

nature of their work. *See* 29 C.F.R. § 541.703(b)(7). The same conclusion follows for underwriters, who perform essentially the same function. *See generally Whalen v. J.P. Morgan Chase & Co.*, 569 F. Supp. 2d 327, 330 (W.D.N.Y. 2008).[10]

2. The Ninth Circuit Misinterpreted And Misapplied The Regulations

The Ninth Circuit erred in holding that mortgage underwriters are *not* FLSA-exempt "administrative" employees because their duties "go to the heart of [the employer's] marketplace offerings." App. 7a; *see also id.* at 16a. Three features of that court's analysis are especially problematic.

a. Most fundamentally, the Ninth Circuit mistakenly applied the so-called "administrative-production dichotomy." *See id. at* 7a-10a. Rather than simply applying the regulatory definition governing who counts as an "*administrative*" employee, the court appeared to believe that any employee whose "duties go to the heart [of the employer's] marketplace offerings" necessarily qualify as *production* employees who are therefore not exempt. *Id.* at 7a. The court

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[10] In evaluating loans for *resale* to private lenders on the secondary market, Provident's underwriters also perform an important quality control function. *See supra* at 13-14. They also serve as a sort of purchasing agent, insofar as they make decisions about whether the bank should "purchase" particular IOUs from borrowers for purposes of eventual re-sale. DOL's regulations are explicit that employees who perform "quality control," engage in "purchasing," and serve as "[p]urchasing agents" qualify as exempt "administrative" employees. 29 C.F.R. §§ 541.201(b), 541.203(f). Those regulations confirm that Provident's underwriters are not subject to the FLSA's overtime requirements.

held that underwriters are non-administrative production employees because the loans within their purview constitute the marketplace offerings of the bank and thus "relate[] to the production side of the enterprise." *Id.* at 16a. That conclusion is flawed several times over.

For one thing, the "administrative/production dichotomy" is not a hard-and-fast rule. DOL's regulations note that the dichotomy is useful in making clear that employees who "work[] on a *manufacturing* production line" are not exempt from the FLSA. 29 C.F.R. § 541.201(a) (emphasis added). But it is far less useful when the employee at issue is a white-collar employee who does not "produc[e]" a product or service in any traditional sense. *Id.*; *see, e.g.*, *Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 872 (7th Cir. 2008) (noting limited utility of "the so-called production/administrative dichotomy—a concept that has an industrial age genesis"—in the modern economy).

For that reason, DOL has explained that it does not "believe that the dichotomy has ever been or should be a dispositive test for exemption." 2004 Final Rule, 69 Fed. Reg. at 22,141. On the contrary, DOL's view is that the dichotomy is generally "illustrative—but not dispositive," and that it is "only determinative if the work 'falls squarely on the production side of the line.'" *Id.* The Ninth Circuit paid lip service to that understanding, App. 8a, but it nonetheless applied the dichotomy as a rigid either/or rule when analyzing mortgage underwriters, *id.* at 7a-10a.

Here, of course, underwriters do *not* "squarely" fall on the production—as opposed to administrative—side of the line. As explained above, underwriters are

plainly covered by DOL's regulatory definition of "administrative." *See supra* at 27-31. Moreover, underwriters do not *produce* anything. Their core function is to assess the credit risks associated with borrowers and to decide whether the bank should approve or deny a particular loan. Even with respect to those loans, their role is to help the bank make and execute core business decisions about whether to make a given loan to a given borrower; they do not *produce* the loan in any meaningful sense.

In classifying the underwriters as production employees, the Ninth Circuit asserted that "Provident's mortgage underwriters do not decide if Provident *should* take on risk, but instead assess whether, given the guidelines provided to them from above, the particular loan at issue falls within the range of risk Provident has determined it is willing to take." App. 9a. Even if that characterization were fair, it would not support treating the underwriters' work as analogous to production, as opposed to administration. The fact that underwriters make loan decisions on a customer-by-customer basis does not detract from their key role in carrying out (and advising on) the bank's business operations.

In any event, the Ninth Circuit's characterization overlooks the undisputed ways in which Provident's underwriters in fact exercise significant judgment and discretion. And DOL has made clear that an employee who executes employer policies and relies on technical manuals or guidelines can nonetheless qualify for "administrative" status. *See* 2004 Final Rule, 69 Fed. Reg. at 22,141 (explaining that employees with "policy-executing responsibilities" are covered (quotation marks omitted)); *see also* 29 C.F.R. § 541.704.

Finally, the Ninth Circuit was wrong to conclude that an employee's duties "relate[] to the production side of the enterprise"—and thus entitle him to FLSA overtime pay—whenever they "go[]," in some general sense, "to the heart [of the employer's] marketplace offerings." App. 16a. Indeed, DOL's regulations themselves make clear that *many* exempt "administrative" employees perform tasks that are directly related to their company's "marketplace offerings."[11] The Ninth Circuit's vague test is inconsistent with those regulations and dramatically shrinks the scope of the "administrative" exemption in a way that neither Congress nor DOL intended.

b. The Ninth Circuit's analysis of various aspects of DOL's regulations and interpretive guidance was also flawed. The court did not address—let alone attempt to explain—how underwriters can be deemed non-exempt despite DOL's clear conclusion in the 2004 Final Rule's regulatory impact analysis that "underwriters" *are* exempt. *See supra* at 9, 30. And although the court *did* address the DOL regulation expressly applying the exemption to certain financial-services employees, it mistakenly concluded that

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[11] *See, e.g.*, 29 C.F.R. § 541.201(b) (employees involved in "quality control," "purchasing," "procurement," "advertising," "marketing," "research," "legal and regulatory compliance"); *id.* § 541.203(a) (insurance claims adjusters); *id.* § 541.203(c) (employee who leads a team "negotiating a real estate transaction"); *id.* § 541.203(f) (purchasing agent); *id.* § 541.203(i) (retail buyer "who evaluates . . . reports on competitor prices [and] set[s] the employer's prices"); *id.* § 541.703(b)(7) (credit manager who is responsible for deciding whether to extend credit to particular customers for particular transactions and/or "check[s] the status of accounts to determine whether [a customer's] credit limit would be exceeded by the shipment of a new order").

mortgage underwriters cannot qualify for that exemption simply because they do not "advis[e]" a bank's customers or "promot[e]" the bank's financial products. App. 5a (quoting 29 C.F.R. § 541.203(b)). The fact that underwriters do not perform such duties does not change the fact that their core responsibilities fall squarely within the terms of DOL's financial-services provision. *See supra* at 29-30.

The Ninth Circuit also invoked DOL's 2010 letter deeming mortgage loan officers non-exempt. App. 13a. Even if that letter reflected a valid interpretation of DOL's regulations, it cannot seriously be disputed that the letter's analysis was driven almost entirely by DOL's conclusion that loan officers have a "primary duty of *making sales for their employer*." 2010 DOL Letter 9; *see generally id.* at 3-9. But this case involves mortgage underwriters (not loan officers), and it is undisputed that those underwriters do *not* engage in selling. App. 13a. If anything, the 2010 DOL letter's emphasis on the loan officers' selling responsibilities shows that DOL does not agree with the Ninth Circuit's view that an employee is a non-exempt production worker simply because his duties implicate the employer's "marketplace offerings" in some more general sense. *See id.* at 16a.

c. Finally, the Ninth Circuit erred by resting its entire analysis on its mistaken view that "the law requires that we construe the administrative exemption narrowly against the employer." *Id.* at 15a; *see also id.* at 5a. That principle flows directly from the discredited notion that courts must interpret "remedial" statutes broadly. This Court has rightly described that narrow-construction canon as the "last redoubt of losing causes." *Director, Office of Workers'*

Comp. Programs v. Newport News Shipbuilding, 514 U.S. 122, 135-36 (1995); *see generally* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 364-66 (2012) (describing canon as "incomprehensible," "superfluous," and "false").

Nothing in the FLSA's text or purpose justifies interpreting the "administrative" exemption with a heavy thumb on the scale against the employer. Perhaps for that reason, this Court has pointedly refused to apply the canon in recent FLSA cases. *See Sandifer v. United States Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 164 n.21 (2012); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2131 (2016) (Thomas, J. dissenting) (describing canon as "made-up"). The Ninth Circuit was wrong to allow the canon to infect its analysis here.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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September 7, 2017

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GINA MCKEEN-CHAPLIN, individually, on behalf of others similarly situated, and on behalf of the general public, *Plaintiff-Appellant*, v. PROVIDENT SAVINGS BANK, FSB, *Defendant-Appellee.*	No.: 15-16758 D.C. No. 2:12-cv-03035-GEB-AC OPINION

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, Jr., District Judge, Presiding

Argued and Submitted April 21, 2017
San Francisco, California

Filed July 5, 2017

Before: Sidney R. Thomas, Chief Judge,
Mary H. Murguia, Circuit Judge, and
Michael M. Baylson,* District Judge.

Opinion by Chief Judge Thomas

862 F.3d 847

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* The Honorable Michael M. Baylson, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

OPINION

THOMAS, Chief Judge.

This appeal presents the question of whether a class of mortgage underwriters are entitled to overtime compensation under the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. § 201 *et seq.*, for hours worked in excess of forty per week. We conclude that, because the mortgage underwriters' primary job duty does not relate to the bank's management or general business operations, the administrative employee exemption under 29 U.S.C. § 213(a)(1) and 29 C.F.R. § 541.200(a) does not apply,[1] and the underwriters are entitled to overtime compensation.

I

Provident Savings Bank ("Provident" or "the Bank") sells mortgage loans to consumers purchasing or refinancing homes and then resells those funded loans on the secondary market. Mortgage underwriters at Provident review mortgage loan applications using guidelines established by Provident and investors in the secondary market, including Fannie Mae, Freddie Mac, and the Fair Housing Administration.

Loan transactions begin with a loan officer or broker who works with a borrower to select a

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[1] The mortgage underwriters also argue that they do not exercise discretion and independent judgment with respect to matters of significance, but we need not reach this argument because the test to qualify for the administrative exemption under FLSA is conjunctive, not disjunctive, *see Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1125 (9th Cir. 2002), and Provident bears the burden of proving the employees in question satisfy each of the administrative exemption requirements, *id.* at 1124.

particular loan product. A loan processor then runs a credit check, gathers further documentation, assembles the file for the underwriter, and runs the loan through an automated underwriting system. The automated system applies certain guidelines based on the information input and then returns a preliminary decision. From there, the file goes to a mortgage underwriter, who verifies the information put into the automated system and compares the borrower's information against the applicable guidelines, which are specific to each loan product.

Mortgage underwriters are responsible for thoroughly analyzing complex customer loan applications and determining borrower creditworthiness in order to ultimately decide whether Provident will accept the requested loan. They may impose conditions on a loan application and refuse to approve the loan until the borrower satisfies those conditions. The decision as to whether to impose conditions is ordinarily controlled by the applicable guidelines, but the underwriters can include additional conditions. They can also suggest a "counteroffer"—which would be communicated through the loan officer—in cases where a borrower does not qualify for the loan product selected, but might qualify for a different loan. Underwriters may also request that Provident make exceptions in certain cases by approving a loan that does not satisfy the guidelines.

After a mortgage underwriter approves a loan, it is sent to other Provident employees who finalize the loan funding. Underwriters say that whether a loan is funded ultimately depends on factors beyond the underwriter's control. Another group of Provident employees sells funded loans in the secondary market.

On behalf of herself and a class of mortgage underwriters, Gina McKeen-Chaplin brought this action seeking overtime compensation under FSLA. The district court conditionally certified an opt-in class of current and former mortgage underwriters at Provident. Initially, the district court denied cross motions for summary judgment and set the case for trial. But later, on the parties' joint motion for reconsideration, the court concluded that the underwriters qualify for the administrative exemption, based on finding that their primary duty included "quality control" or similar activities directly related to Provident's general business operations, and thus the district court granted summary judgment in favor of Provident. This timely appeal followed.

Whether an employee's primary duties exclude her from FLSA overtime benefits is a question of law to be reviewed de novo. *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1124 (9th Cir. 2002); *Bratt v. Cty. of L.A.*, 912 F.2d 1066, 1068 (9th Cir. 1990). And we "must give deference to DOL's [the Department of Labor's] regulations interpreting the FLSA." *Webster v. Pub. Sch. Emps. of Wash., Inc.*, 247 F.3d 910, 914 (9th Cir. 2001) (citing *Auer v. Robbins*, 519 U.S. 452, 457 (1997)).

We review a district court's grant of summary judgment de novo. *Swoger v. Rare Coin Wholesalers*, 803 F.3d 1045, 1047 (9th Cir. 2015). Summary judgment is appropriate where "no genuine dispute as to any material fact" exists such that "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c). Though a denial of summary judgment is ordinarily unappealable because it is not a final order, where it is "coupled with a grant of summary judgment to the opposing party," both orders are reviewable de

novo. *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1124 (9th Cir. 2002).

II.

Ordinarily, FLSA provisions require employers to pay employees time and a half for overtime work—that is, work in excess of forty hours per week. 29 U.S.C. § 207(a)(1). But employees who are "employed in a bona fide executive, administrative, or professional capacity" are exempt from those provisions. 29 U.S.C. § 213(a)(1). Employers who claim the so-called administrative exemption under FLSA bear the burden of proving its applicability to the employees in question. *Bothell*, 299 F.3d at 1124. Exemptions are to be construed narrowly. *Id.* at 1125. The overtime requirements have long been intended to financially pressure employers to "spread employment" and to assure workers "additional pay to compensate them for the burden of a workweek beyond the hours fixed in the [A]ct." *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 577–78 (1942), *superseded by statute*, Portal-to-Portal Act, 61 Stat. 86–87 (authorizing courts to deny or limit liquidated damages awarded for FLSA violations), *as recognized in Trans World Airlines v. Thurston*, 469 U.S. 111, 128 n.22 (1985). Thus, FLSA "is to be liberally construed to apply to the furthest reaches consistent with Congressional direction" and exemptions "are to be withheld except as to persons plainly and unmistakably within their terms and spirit." *Bothell*, 299 F.3d at 1124–25 (quoting *Klem v. Cty. of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000)).

A

To determine whether employees qualify for the administrative exemption, the Secretary of Labor has formulated a "short duties test." *Bothell*, 299 F.3d at 1126.[2] A qualifying employee must (1) be compensated not less than $455 per week; (2) perform as her primary duty "office or non-manual work related to the management or general business operations of the employer or the employer's customers;" and (3) have as her primary duty "the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a). An employee's primary duty is "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). These three conditions "are explicit prerequisites to exemption, not merely suggested guidelines." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

Accordingly, Provident must prove that the mortgage underwriters meet all three duty requirements. *See Bothell*, 299 F.3d at 1125 (citing *Mitchell v. Williams*, 420 F.2d 67, 69 (8th Cir. 1969) ("The criteria provided by regulations are absolute and the employer must prove that any particular employee meets every requirement before the employee will be

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[2] We have explained previously that the Secretary's new regulations issued in 2004 do "not represent a change in the law." *In re Farmers Ins. Exch.*, 481 F.3d 1119, 1128 (9th Cir. 2007); *see also Roe-Midgett v. CC Services, Inc.*, 512 F.3d 865, 870–71 (7th Cir. 2008) (noting that the new "general rule . . . merely restates the short test's two 'duties' requirements" and that the "Secretary has characterized the promulgation of the new rules as an effort to 'consolidate and streamline' the dense and unwieldy regulatory text of the old regulations").

deprived of the protection of [FLSA]."); *Bratt*, 912 F.2d at 1069. It is undisputed that the salary requirement is satisfied. But because the underwriters' duties go to the heart of Provident's marketplace offerings, not to the internal administration of Provident's business, *see Bothell*, 299 F.3d at 1126, Provident cannot prove that the mortgage underwriters qualify for the administrative exemption.

B

To satisfy the second requirement, an employee's primary duty must involve office or "non-manual work directly related to the *management policies* or *general* business operations" of Provident or Provident's customers. *Bothell*, 299 F.3d at 1125 (emphasis in original) (quoting 29 C.F.R. § 541.200). Said otherwise, "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." 29 C.F.R. § 541.201(a). Courts of appeal commonly refer to this framework for understanding whether employees satisfy the second requirement as the "administrative-production dichotomy." Its purpose is "to distinguish 'between work related to the goods and services which constitute the business' marketplace offerings and work which contributes to 'running the business itself.'" DOL Wage & Hour Div. Op. Ltr., 2010 WL 1822423, *3 (Mar. 24, 2010) (quoting *Bothell*, 299 F.3d at 1127 (quoting *Bratt*, 912 F.2d at 1070)). In our own words, "[t]his requirement is met if the employee engages in 'running the business itself or determining its overall course or policies,' not just in the day-to-day

carrying out of the business' affairs." *Bothell*, 299 F.3d at 1125 (quoting *Bratt*, 912 F.2d at 1070); *see also Dalheim v. KDFW-TV*, 918 F.2d 1220, 1230 (5th Cir. 1990) (describing the dichotomy as distinguishing between "employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market").

But the dichotomy "is only determinative if the work 'falls squarely on the production side of the line.'" 69 Fed. Reg. 22122, 22141 (Apr. 23, 2004) (quoting *Bothell*, 299 F.3d at 1127).[3] And this means the analysis can be complicated. In fact, in the last decade, two of our sister Circuits have assessed whether mortgage underwriters qualify for FLSA's administrative exemption and have come to opposite conclusions. The Second Circuit held in *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009), that "the job of underwriter . . . falls under the category of

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[3] *See, e.g.*, *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529, 532 (2d Cir. 2009) ("The line between administrative and production jobs is not a clear one, particularly given that the item being produced—such as 'criminal investigations'—is often an intangible service rather than a material good."); *Desmond v. PNGI Charles Town Gaming, LLC*, 564 F.3d 688, 694 (4th Cir. 2009) ("Although the administrativeproduction dichotomy is an imperfect analytical tool in a service-oriented employment context, it is still a useful construct."); *Martin v. Indiana Michigan Power Co.*, 381 F.3d 574, 582 (6th Cir. 2004) (pointing out that the administrative-production dichotomy is not absolute); *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 9 (1st Cir. 1997) ("[A]pplying the administrative-production dichotomy is not as simple as drawing the line between white-collar and blue-collar workers.").

production rather than of administrative work." *Id.* at 535.

In contrast, the Sixth Circuit held recently that mortgage underwriters are exempt administrators, explaining that they "perform work that services the Bank's business, something ancillary to [the Bank's] principal production activity." *Lutz v. Huntington Bancshares, Inc.*, 815 F.3d 988, 995 (6th Cir. 2016). In disagreeing with the Second Circuit, the Sixth Circuit understood mortgage underwriters to perform "administrative work because they assist in the running and servicing of the Bank's business by making decisions about when [the Bank] should take on certain kinds of credit risk, something that is ancillary to the Bank's principal production activity of selling loans." *Id.* at 993; *see also id.* at 995 (explaining that Sixth Circuit precedent focuses "on whether an employee helps run or service a business—not whether that employee's duties merely touch on a production activity").[4]

Given the undisputed facts presented in this case, we conclude that the Second Circuit's analysis in *Davis* should apply. Provident's mortgage underwriters do not decide if Provident *should* take on risk, but instead assess whether, given the guidelines provided to them from above, the particular loan at issue falls within the range of risk Provident has determined it is willing to take. Assessing the loan's riskiness according to relevant guidelines is quite distinct from assessing or

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[4] The *Lutz* court did not cite this Circuit's case law applying the administrative exemption—which has been endorsed by DOL in several documents. *See, e.g.*, 69 Fed. Reg. at 22141 (quoting *Bothell*, 299 F.3d at 1127); DOL Wage & Hour Div. Op. Ltr., at *3 (Mar. 24, 2010) (citing *Bothell*, 299 F.3d at 1127).

determining Provident's business interests. Mortgage underwriters are *told* what is in Provident's best interest, and then asked to ensure that the product being sold fits within criteria set by others. In *Davis*, the Second Circuit came to a similar conclusion:

> Underwriters . . . performed work that was primarily functional rather than conceptual. They were not at the heart of the company's business operations. They had no involvement in determining the future strategy or direction of the business, nor did they perform any other function that in any way related to the business's overall efficiency or mode of operation. It is undisputed that the underwriters played no role in the establishment of [the Bank's] credit policy.

587 F.3d at 535. We agree.

C

DOL's codified examples of exempt administrative employees, including especially the descriptions of insurance claims adjusters and employees in the financial services industry, buttress our conclusion. 29 C.F.R. § 541.203(a), (b). Recently, in *In re Farmers Ins. Exch.*, 481 F.3d 1119 (9th Cir. 2007), we considered whether claims adjusters of many varieties are exempt from FLSA's overtime provisions. *Id.* at 1124. We relied heavily on DOL's regulations and also on several DOL Opinion Letters that discussed claims adjusters. *Id.* at 1128–29. As we explained then, "the fact that the adjusters 'are not merely pursuing a standardized format for resolving claims, but rather are using their own judgment about what the facts show, who is liable, what a claim is worth, and how to handle the

negotiations with either a policyholder or a third-party'" was "[e]ssential to the DOL's opinion." *Id.* at 1128 (quoting at DOL Wage & Hour Div. Op. Ltr., at 4–5 (Nov. 19, 2002)).

Specifically, the example describes duties such as "interviewing," "inspecting property damage," "reviewing factual information," "evaluating and making recommendations regarding coverage of claims," "determining liability," "negotiating settlements," and "making recommendations regarding litigation."[5] 29 C.F.R. § 541.203(a). These duties differ from the duties of Provident's mortgage underwriters. The underwriters do not interview or inspect property, negotiate settlements or make litigation recommendations. They do review factual information and evaluate the loan product and consumer information and, in a sense, they assess liability in the form of risk, although that assessment is subject to guidelines that they do not formulate. *See* DOL Wage & Hour Div. Op. Ltr., at *2 (Oct. 29, 1985) (distinguishing appraisers from claims adjusters by pointing out that appraisers "merely inspect damaged vehicles to estimate the cost of labor and materials and to reach an agreed price for repairs . . . are guided

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[5] In full, the example reads: "Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation." 29 C.F.R. § 541.203(a).

primarily by their skill and experience and by written manuals of established labor and material costs").

The financial-services industry example also includes descriptors that do not correspond with the underwriters' primary duty, which aims more at producing a reliable loan than at "advising" customers or "promoting" Provident's financial products. *See* 29 C.F.R. § 541.203(b). Although mortgage underwriters do "collect[] and analyz[e] information regarding the customer's income, assets, investments or debts," and do sometimes "determin[e] which financial products best meet the customer's needs and financial circumstances," they do not "advis[e]" customers at all, nor do they "market[], servic[e] or promot[e] the employer's financial products."[6] As the Department of Labor has noted, "[w]ork does not qualify as administrative simply because it does not fall squarely on the production side of the line." DOL Wage & Hour Div. Op. Ltr., at *3 (Mar. 24, 2010).

Moreover, the financial-services-industry example does not "create[] an alternative standard for the administrative exemption for employees in the financial services industry" and it "is not an alternative

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[6] In full, the regulation states: "Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exception." 29 C.F.R. § 541.203(b).

test, and its guidance cannot result in the 'swallowing' of the requirements of 29 C.F.R. § 541.200." *Id.* at *8; *see also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1205, 1206–07 (2015) (holding that DOL's decision to withdraw its 2006 opinion letter in its 2010 letter did not require notice-and-comment procedures because both were interpretive rules).

DOL has also specifically analyzed mortgage loan officers and made clear that they "do not qualify as bona fide administrative employees" because they "have a primary duty of making sales for their employers." DOL Wage & Hour Div. Op. Ltr., at *9 (Mar. 24, 2010). Mortgage underwriters are distinct from mortgage loan officers in the mortgage production process—most significantly because their primary duty is not making sales on Provident's behalf. But they are not so distinct as to be lifted from the production side into the ranks of administrators.

Thus, we conclude that where a bank sells mortgage loans and resells the funded loans on the secondary market as a primary font of business, mortgage underwriters who implement guidelines designed by corporate management, and who must ask permission when deviating from protocol, are most accurately considered employees responsible for production, not administrators who manage, guide, and administer the business. *See Davis*, 587 F.3d at 353 ("[W]e have drawn an important distinction between employees directly producing the good or service that is the primary output of a business and employees performing general administrative work applicable to the running of any business."); DOL Wage & Hour Div. Op. Ltr., at *3 (Mar. 24, 2010) (quoting *Davis*, 587 F.3d at 353); *see also In re Farmers Ins.*, 481 F.3d at 1129

("We must give deference to the DOL's interpretation of its own regulations.").

D

The district court concluded that Provident underwriters performed work that related to "quality control," such that it constituted "[w]ork directly related to management or general business operations," within the meaning of 29 C.F.R. § 541.201(b). But this was a legal conclusion as to the underwriters' quality control function that was not supported by the record evidence.

The underwriters' statement of undisputed facts outlined several significant aspects of Provident's quality control process. First, prior to closing, Provident used an outside company to perform quality control functions, primarily assessing for material deficiencies that affect salability. That quality control check pulls approximately five per cent of loans, and completely re-underwrites them. Second, a preclosing quality control process generates reports that are provided to underwriters, and sends a monthly report to Provident's Vice President of Mortgage Operations. Third, the loan servicing department performs post-closing quality control and completely underwrites ten per cent of loans. That department is not staffed by mortgage underwriters. Fourth, the internal audit department reviews the loan process annually.

In recounting the undisputed facts, the district court's opinion does not mention quality control, yet it made the legal conclusion that Provident's underwriters qualify for the administrative exemption primarily because of their quality control duties. The district court mentioned that "Provident uses an outside company to perform quality control functions,"

and "has an internal Corporate Loan Committee that completely re-underwrites 10% of the loans." Without discussing the significance of those facts, however, the district court then stated that because the "underwriters 'must apply Provident's guidelines or lending criteria as well as agency guidelines . . . to determine whether [a] particular loan falls within the level of risk Provident is willing to accept . . . Provident has shown Plaintiffs' primary duty included 'quality control,'" such that they are entitled to the administrative exemption.

The record does not support this conclusion. And the district court made no finding as to the legal significance of the quality control functions that the record establishes are in place at Provident.

Provident contends that because the underwriters do not work on a manufacturing production line and do not sell, they cannot fall on the production side of the administrative-production dichotomy. This assertion fails to take into account the mortgage underwriters' role within Provident. Indeed, to permit the administrative exemption of an assembly line worker who checks whether a particular part was assembled properly—simply because that role bears a resemblance to quality control—would run counter to the essence of FLSA. But even if mortgage underwriters could not be cast by analogy as workers in an assembly line, the administrative-production dichotomy is not a perfectly determinative one, and the law requires that we construe the administrative exemption narrowly against the employer.

Mortgage underwriters are essential to Provident's business, as are loan officers and many others who do not qualify for FLSA's administrative exemption. *See*

Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 903 (3d Cir. 1991) ("[I]t is important to consider the nature of the employer's business when deciding whether an employee is an administrative or production worker."). However, the question is not whether an employee is essential to the business, but rather whether her primary duty goes to the heart of internal administration—rather than marketplace offerings. *See Bothell*, 299 F.3d at 1126. Mortgage underwriters at Provident are not administrators or corporate executives; their tasks are related to the production side of the enterprise.

E

For these reasons, we must reverse the district court's grant of summary judgment in favor of Provident and remand with instructions to enter summary judgment in favor of Gina McKeen-Chaplin and the mortgage underwriters.

REVERSED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GINA MCKEEN-CHAPLIN, individually, on behalf of others similarly situated, and on behalf of the general public, Plaintiffs, v. PROVIDENT SAVINGS BANK, FSB, Defendant.	No. 2:12-CV-03035-GEB-AC **ORDER DENYING PLAINTIFFS' SUMMARY JUDGMENT MOTION AND GRANTING DEFENDANT'S SUMMARY JUDGMENT MOTION**

On March 17, 2015 an order issued concerning summary judgment motions filed by Plaintiffs and Defendant Provident Savings Bank, FSB ("Provident"). (ECF No. 85.) The parties moved for reconsideration of that order and requested leave to file supplemental briefing, arguing under Federal Rule of Civil Procedure 1 that supplemental briefing would conserve resources in light of their recent stipulation to a bench trial. (ECF No. 94.) The request for supplemental briefing was granted, (ECF No. 95), and after consideration of that briefing, the March 17 order is vacated and superseded by the instant order.

Each party seeks summary judgment on Provident's affirmative defense, in which Provident asserts it was justified in not paying Plaintiffs overtime wages prescribed in the federal Fair Labor Standards Act ("FLSA"). Provident also moves for summary judgment on its affirmative defense in which it asserts

it was justified in not paying Plaintiff McKeen-Chaplin overtime wages prescribed in the California Labor Code. Provident argues that the FLSA Plaintiffs, who are former Provident mortgage underwriters, were "administratively exempt" from the overtime requirement in the FLSA, and that Plaintiff McKeen-Chaplin was "administratively exempt" from the overtime requirement in the California Labor Code.

Both federal and California law provide overtime provisions for employees who work in excess of forty hours per week. 29 U.S.C. § 207(a)(1); Cal. Labor Code § 510(a). However, neither the FLSA nor the California Labor Code overtime provisions apply to "any employee employed in a bona fide ... administrative ... capacity." 29 U.S.C. § 213(a)(1); 8 Cal. Code Regs. § 11040(1) (stating that California's overtime requirements do "not apply to persons employed in administrative ... capacities."). Under both federal and California law, the employer bears the burden of proving that the administrative exemption applies to its employees. Bothell v. Phase Metrics, Inc., 299 F.3d 1120, 1124 (9th Cir. 2002) ("An 'employer who claims an exemption from the FLSA has the burden of showing that the exemption applies.'") (quoting Donovan v Nekton, Inc., 703 F.2d 1148, 1151 (9th Cir. 1983)); Ramirez v. Yosemite Water Co., Inc., 20 Cal.4th 785, 794-95 (1999) ("[T]he assertion of an exemption from [California's] overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption."). This exemption is "to be narrowly construed against [an] employer[]" asserting it. Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960) (referencing the FLSA); Eicher v. Advanced Bus. Integrators, Inc.,

151 Cal. App. 4th 1363, 1370 (2007) ("[U]nder California law, exemptions from statutory mandatory overtime provisions are narrowly construed.").

II. UNCONTROVERTED FACTS[1]

The following facts concern the motions and are either admitted or are "deemed" uncontroverted since they have not been controverted with specific facts as required by Local Rule 260(b).[2]

Provident "is in the business of selling mortgage loans" and "employs . . . mortgage underwriters . . . whose primary duty is to underwrite home mortgage loan[] applications for one- to four-family residential units." (Def. SUF ¶ 1, ECF No. 76-1; Pl. SUF ¶ 1, ECF No. 77-1.)

To initiate a mortgage, Provident "loan officers[,] [who are not underwriters,] . . . discuss the loan products with [the] borrower." (Pl. SUF ¶ 51.) "A loan processor then runs a credit check, gathers further

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[1] Provident requests judicial notice be taken of documents Plaintiffs filed in state court. The request is denied since Provident does not explain in the request the relevance these documents have to its motion.

[2] LR 260(b) prescribes:

> Any party opposing a motion for summary judgment . . . [must] reproduce the itemized facts in the [moving party's] Statement of Undisputed Facts and admit those facts that are undisputed and deny those that are disputed, including with each denial a citation to the particular portions of any . . . document relied upon in support of that denial.

If the non-movant does not "specifically . . . [controvert duly supported] facts identified in the [movant's] statement of undisputed facts," the nonmovant "is deemed to have admitted the validity of the facts contained in the [movant's] statement." Beard v. Banks, 548 U.S. 521, 527 (2006).

documentation, assembles the file for the underwriter, and runs the loan through an automated underwriting system [("AUS")]." (Pl. SUF ¶ 4.) The AUS "applies certain guidelines to a loan and returns a preliminary decision (approval, refer, or ineligible.)" (Pl. SUF ¶ 5.) "The loan . . . goes to the underwriter after this processing is finished." (Pl. SUF ¶ 4.)

An "underwriter has to make sure that the [loan] processor put the correct information into the AUS and . . . that the AUS is applying the correct rules to the facts of a particular loan." (Pl. SUF ¶ 6.) The underwriter does this by applying "Provident's guidelines or lending criteria as well as agency guidelines that are specific to each loan product to determine whether the particular loan falls within the level of risk Provident is willing to accept." (Def. SUF ¶ 11.) A Provident underwriter's job includes consideration of "the borrower's income, assets, debts and investments . . . . This comprises most of the Plaintiffs' job duties." (Def. SUF ¶ 10) (emphasis added.)

In reviewing a loan application, underwriters may impose "conditions" on a loan application and refuse to approve the loan until the borrower satisfies those conditions. (Def. SUF ¶¶ 14, 16, 19.) The referenced conditions include "items and/or documentation that an underwriter requires" the loan will be approved. (Def. SUF ¶ 13.) While some "conditions" are required by the guidelines, underwriters can include additional conditions beyond those the guidelines require. (Def. SUF ¶ 16.) Further, "[i]n certain circumstances, [Provident underwriters] can request that Provident make an exception to the guidelines" and approve a

loan that does not satisfy the guidelines. (Def. SUF ¶ 24.)

When a Provident underwriter approves a loan, the loan is "transferred to other [Provident] employees . . . to finalize loan funding." (Pl. SUF ¶ 55.) Provident sells approved mortgage loans to third-party investors. (Pl. SUF ¶ 12.)

III. DISCUSSION

A. FLSA Claim

"The FLSA delegates to the Secretary of Labor broad authority to 'define [ ] and delimit[ ]' the scope of the administrative exemption. In accordance with that authority, the Secretary has formulated a test, known as the 'short duties test,' to determine whether employees . . . qualify for the administrative exemption." In re Farmers Ins. Exch., 481 F.3d 1119, 1127 (9th Cir. 2006). Federal courts "must give deference to [Department of Labor's] regulations interpreting the FLSA." Webster v. Public Sch. Emp. of Wash, Inc., 247 F.3d 910, 914 (9th Cir. 2001). The "short duties test" states:

> The term "employee employed in a bona fide administrative capacity" . . . shall mean any employee:
>
> (1) Compensated on a salary or fee basis at a rate of not less than $455 per week . . . exclusive of board, lodging or other facilities;
>
> (2) Whose primary duty is 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; and

> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200(a) (emphasis added).

It is undisputed that the salary requirement is satisfied. Provident seeks summary judgment on the second and third requirements and Plaintiffs cross move on the second requirement.

1. Work Directly Related to Provident's General Operations

Plaintiffs argue Provident cannot satisfy the second requirement of the administrative exemption, which involves determination of whether Plaintiffs' "primary duty is[,] [or was,] the performance of office or non-manual work directly related to the management or general business operations of [Provident] or [Provident's] customers." 29 C.F.R. § 541.200(a)(2).

The uncontroverted facts establish that each Plaintiff's primary duty was "to underwrite home mortgage loan applications for one- to four-family residential units," and that this duty constitutes "office work" referenced in 29 C.F.R. § 541.200(a)(2). (Pl. SUF ¶ 1; see also Def. SUF ¶ 10.) However, Plaintiffs argue this mortgage loan underwriting duty did not constitute work directly related to Provident's general business operations.

> 29 C.F.R. § 541.201(a) defines the phrase "directly related to management or general business operations" as it is used in the administrative exemption in pertinent part as follows:
>
> The phrase "directly related to . . . 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.

(emphasis added).

> The distinction between "running or servicing of the business" and "working on a manufacturing production line or selling a product in a retail or service establishment," has given rise to what many courts refer to as the "administrative/production dichotomy." Under the dichotomy, "production employees (whose job it is to generate the product or service the business offers to the public) will not qualify for the exemption." Stated differently, if a court determines that an employee generates, or "produces" the product/service that the employer offers to the public, then that employee is a "production" employee who cannot qualify for the administrative exemption. If, on the other hand, the employee does not "produce" the employer's product or service, the court must undertake an additional analysis to determine whether the employee performs an "administrative" function within the meaning of 29 C.F.R. § 541.201.

Lutz v. Huntington Bankcshares, No. 2:12-cv-01091, 2014 WL 2890170, at *8 (S.D. Ohio June 25, 2014).

> [T]he administration/production dichotomy [is] . . . one piece of the larger inquiry, recognizing that a court must "construe[] the statutes and

> applicable regulations as a whole." Indeed, some cases analyze the primary duty test without referencing the . . . dichotomy at all. This approach is sometimes appropriate because . . . the dichotomy is but one analytical tool, to be used only to the extent it clarifies the analysis. Only when work falls "squarely on the 'production' side of the line," has the administration/production dichotomy been determinative.

Bothell, 299 F.3d at 1127 (third alteration in original, quotations omitted).

Plaintiffs argue they were part of Provident's production line since they produced loans that Provident sold to third-party investors, and rely on the Second Circuit's opinion in Davis v. J.P. Morgan Chase & Co., 587 F.3d 529 (2d Cir. 2009) as support for this argument. Provident counters Plaintiffs "d[id] not 'sell' mortgage loans;" "[r]ather the underwriters service[d] Provident's mortgage selling business by assessing the risk associated with loan applications and deciding whether to approve them." (Def. Mot. 1:21-25.)

Davis concluded that on the facts before it, an underwriter's job fell "under the category of production rather than of administrative work," concluding:

> [the] Underwriters . . . performed work that was primarily functional rather than conceptual. They were not at the heart of the company's business operations. They had no involvement in determining the future strategy or direction of the business, nor did they perform any other function that in any way related to the business's

> overall efficiency or mode of operation. [They] played no role in the establishment of [their employer's] credit policy. Rather, they were trained only to apply the credit policy as they found it, as it was articulated to them through the detailed Credit Guide.

Id. at 536.

Plaintiffs work as Provident underwriters was not similar to "work on a manufacturing production line or selling a product in the retail or service establishment," 29 C.F.R. § 541.201(a), since Plaintiffs' did not "produc[e] anything in the literal sense." Bollinger v. Residential Capital, LLC, 863 F. Supp. 2d 1041, 1047 (W.D. Wash. 2012). "To place them [on the production side because they 'produce[d]' loans that [were] sold to third-party investors] would elevate form . . . over substance." In re Farmers Ins. Exch., 481 F.3d at 1132. Therefore, the administrative/production dichotomy does not resolve the question of whether Provident satisfies the second prong of the administrative exemption.

Provident argues Plaintiffs' primary duty was related to Provident's general business operations since Plaintiffs role was analogous to work in quality control prescribed in 29 C.F.R. §541.201(b), which states in relevant part: "[w]ork directly related to . . . general business operations includes . . . control . . . and similar activities."

Plaintiffs counter they did not perform quality control work since "Provident has at least three quality control programs . . . . [that are] distinct from Plaintiffs' underwriting work." (Pl. Opp'n 6:27-7:6.) Plaintiffs contend their work should not be characterized as quality control because while "all [Provident]

employees are responsible for 'quality,'" it is the "Corporate Loan Committee" that performs "a quality control function by reviewing errors identified in quality control audits and addressing performance issues causing those errors[;]" and "an underwriter who denies a loan for not meeting guidelines is not transformed into a quality control worker any more than a carpenter who refuses to use an unsafe saw becomes a safety inspector." (Pl. Supp'l Mem. Cross Mot. Summ. J., 4:2-3; 4:20-22; 4:27-28, ECF No. 96.)

The uncontroverted facts establish that "Provident uses an outside company to perform quality control functions" and that Provident has an internal Corporate Loan Committee that "completely re-underwrite 10% of loans." (Pl. SUF ¶¶ 47, 49.) The uncontroverted facts also establish that Provident underwriters "must apply Provident's guidelines or lending criteria as well as agency guidelines . . . to determine whether [a] particular loan falls within the level of risk Provident is willing to accept," and this review comprises most of Plaintiffs' job duties. (Def. SUF ¶¶ 10-11.) This evidence evinces that the work tasks in which an underwriter engages for the purpose of determining whether a particular loan falls within the level of risk Provident is willing to accept "makes [the underwriter's] duties analogous to a quality control employee who prevents a defective product from being sold" notwithstanding Provident's use of other quality controls. Lutz, No. 2:12-cv-01091, 2014 WL 2890170, at *13. Since Provident has shown Plaintiffs' primary duty included "quality control . . . [or] other similar activities," Plaintiffs' work was directly related to Provident's general business operations. 29 C.F.R. §541.201(b)

Therefore, Provident's motion on this requirement is granted and Plaintiffs' motion denied.

2. Primary Duty Includes the Exercise of Discretion and Independent Judgment With Respect to Matters of Significance

Provident argues it should prevail on its motion concerning the third administrative requirement because each Plaintiff's "primary duty include[d] the exercise of discretion and independent judgment with respect to matters of significance," that is prescribed in 29 C.F.R. § 541.200(a)(3); specifically, Provident argues the mortgage loan underwriters could "'waiv[e] or deviat[e] from [the guidelines] without prior approval' by declining to approve a loan that met lending criteria and/or request[] exceptions in order to approve a loan that d[id] not [meet the lending criteria]." (Def. Mot. 21:5-10.)

Plaintiffs counter that there is a question of fact regarding how often Plaintiffs performed these duties. Plaintiffs cite in support of their position deposition testimony evincing that underwriters rarely requested exceptions. Plaintiff Clayton testified she requested exemptions "maybe once a month," Ludwig Decl. Ex. 7 ("Clayton Dep. Tr.") 109:11-15, ECF 73-5), and Provident's Vice President of Mortgage Operations testified that she "wouldn't say [exceptions] happen[] often." (Ludwig Decl. Ex. 10 ("Baker April 2013 Dep. Tr." 73:14-16, ECF No. 73-6.)

Provident responds:

> [Plaintiffs' position] d[oes] not take into account that Plaintiffs' discretion and independent judgment was manifested not only when they chose to act, but also in each circumstance where

> they chose not to act. . . . Plaintiffs exercise[d] discretion and independent judgment every time they underwr[o]te a loan file and decide[d] not only to request an exception to the guidelines, but also when they decide[d] not to request an exception.

(Def. Supp'l Br. ISO Mot. Summ. J., 4:8-13, ECF No. 97.)

Plaintiffs reply that deciding not to request an exception to the guidelines cannot be considered part of a Provident underwriter's primary duty since "there [was] no 'decision' about requesting an exception from the guidelines when the loan satisfie[d] the guidelines." (Pls.' Supp'l Reply 3:19-23, ECF No. 98.)

29 C.F.R. § 541.202 states in pertinent part, "the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct. . . . [T]he term 'matters of significance' refers to the level of importance or consequence of the work performed." 29 C.F.R. § 541.700 prescribes:

> The term 'primary duty' means the principal, main, major or most important duty that the employee performs. Determination of any employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

The uncontroverted facts establish that underwriters could place "conditions" on a loan application that satisfied Provident's guidelines, and could decline to approve a loan unless or until the borrower satisfied those conditions. (Def. SUF ¶¶ 16,

19.) It is also uncontroverted that Plaintiffs could "request that Provident make an exception to the guidelines" so that an underwriter could "make a loan that d[id] not . . . [satisfy the] guidelines." (Def. SUF ¶ 24.) Performance of these duties required the exercise of discretion and independent judgment since they "involved the comparison and the evaluation of possible courses of conduct," and concerned matters of significance since they could influence whether Provident would approve a loan. 29 C.F.R. § 541.202. Further, Provident has shown Plaintiffs' duty to make decisions about when—and when not—to decline to approve a loan that met the lending criteria, and when to request an exception to the lending criteria, were part of Plaintiffs' primary duty in performance of their underwriting function, since the responsibilities were "the . . . most important duty . . . [Provident underwriters] perform." 29 C.F.R. § 541.700; see (Def. SUF ¶¶ 10-11 (setting out an underwriter's role in Provident's loan business as consideration of a borrower's income, assets, debts, and investments in order to determine if the loan falls within the level of risk Provident is willing to accept); see also Webster's II New College Dictionary (1995) (defining duty as "an act or a course of action required of one by position, custom, law, or religion"); Mtoched v. Lynch, 786 F.3d 1210, 1217 (9th Cir. 2015) (applying Webster's dictionary to define a statutory term)). Therefore, Provident's motion is granted.

B. State Law Claims

Provident argues McKeen-Chaplin was administratively exempt from California's overtime laws and seeks summary judgment on this affirmative defense to her state law overtime claims.

The California Labor Code, which imposes overtime compensation requirements on employers, authorizes California's Industrial Welfare Commission to establish exemptions from the requirements for administrative employees. The phrases "primarily engaged in duties that meet the test of the exemption" and "discretion and independent judgment" are "construed in [the state administrative exemption] in the same manner as such terms are construed in" the FLSA's administrative exemption. 8 Cal. ADC § 11040(1)(A)(2). (emphasis added). The Industrial Welfare Commission's exemption defines an administrative employee as one:

> (a) Whose duties and responsibilities involve . . . The performance of non-manual work directly related to management policies or general business operations of his/her employer or his employee's customers . . . and
>
> (b) Who customarily and regularly exercises discretion and independent judgment; . . . .
>
> and
>
> (d) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; . . . . and
>
> (f) Who is primarily engaged in duties that meet the test of the exemption. . . .
>
> (g) Such employees must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment.

Cal. Code. Regs. § 11040 ("Wage Order 4"). Satisfaction of the wage requirement concerning this exemption is undisputed.

Provident argues McKeen-Chaplin is administratively exempt since her work as an underwriter satisfies the FLSA's administrative exemption and she "primary engaged in duties that met the [California law exemption]" because she testified at her deposition that she spent most of her time reviewing loan applications. (Ludwig Decl. Ex. 1 ("McKeen-Chaplin Dep. Tr.") 113:19-115:15, ECF No. 73-4.)

McKeen-Chaplin argues summary judgment is inappropriate since there is a genuine issue of material fact regarding whether she was administratively exempt under the FLSA. This conclusory assertion is McKeen-Chaplin's only argument in opposition to Provident's motion on her state claims.

Provident made a factual showing under the applicable state law standard that McKeen-Chaplin was administratively exempt and McKeen-Chaplin has not presented facts from which a reasonable inference can be drawn that she is not administratively exempt. Therefore, Provident's motion on this issue is granted.

IV. CONCLUSION

For the stated reasons, each Plaintiff's summary judgment is DENIED and Provident's motion is GRANTED. Judgment shall be entered in favor of Defendant.

Dated: August 12, 2015

s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
Senior United States District Judge

29 U.S.C. § 207(a)(1)

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

29 U.S.C. § 213(a)

§ 213. Exemptions

(a) Minimum wage and maximum hour requirements.

The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 207 shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5 except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub.L. 101–157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar

year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub.L. 101–157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agriculture labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest

laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempt by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub.L. 93–259, § 23(a)(1), Apr. 8, 1974, 88 Stat. 69.

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub.L. 93–259, § 10(a), Apr. 8, 1974, 88 Stat. 63.

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub.L. 93–259, §§ 9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69.

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of title 5; or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is—

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $ 27.63 an hour; or

(18) any employee who is a border patrol agent, as defined in section 5550(a) of Title 5.

* * *

29 C.F.R. § 541.200

§ 541.200 General rule for administrative employees.

(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;*

(2) Whose primary duty is 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; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(b) The term "salary basis" is defined at § 541.602; "fee basis" is defined at § 541.605; "board, lodging or other facilities" is defined at § 541.606; and "primary duty" is defined at § 541.700.

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* In 2016, the Department of Labor promulgated a regulation to modify the salary test effective December 1, 2016, *see* 81 Fed. Reg. 32,391, 32,549 (May 23, 2016), but that regulation has recently been set aside as unlawful. *Nevada v. United States Dep't of Labor*, No. 4:16-CV-731, 2017 WL 3837230, at *9 (E.D. Tex. Aug. 31, 2017).

29 C.F.R. § 541.201

§ 541.201 Directly related to management or general business operations.

(a) To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers. 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.

(b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as 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. Some of these activities may be performed by employees who also would qualify for another exemption.

(c) An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees

acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

29 C.F.R. § 541.202

§ 541.202 Discretion and independent judgment.

(a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

(b) The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on

significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.

(d) An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. *See also* § 541.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

(f) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

29 C.F.R. § 541.203

§ 541.203 Administrative exemption examples.

(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

(b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

(c) An employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties

requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(d) An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(e) Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption. However, personnel clerks who "screen" applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption. Such personnel clerks typically will reject all applicants who do not meet minimum standards for the particular job or for employment by the company. The minimum standards are usually set by the exempt human resources manager or other company officials, and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or other company officials. Thus, when the interviewing and screening functions are performed by the human resources manager or personnel manager who makes the hiring decision or makes recommendations for hiring from the pool of qualified applicants, such duties constitute exempt work, even though routine, because this work

is directly and closely related to the employee's exempt functions.

(f) Purchasing agents with authority to bind the company on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.

(g) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

(h) Employees usually called examiners or graders, such as employees that grade lumber, generally do not meet the duties requirements for the administrative exemption. Such employees usually perform work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for a manual of standards does not convert the character of the work performed to exempt work requiring the exercise of discretion and independent judgment.

(i) Comparison shopping performed by an employee of a retail store who merely reports to the buyer the

prices at a competitor's store does not qualify for the administrative exemption. However, the buyer who evaluates such reports on competitor prices to set the employer's prices generally meets the duties requirements for the administrative exemption.

(j) Public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.

29 C.F.R. § 541.700

§ 541.700 Primary duty.

(a) To qualify for exemption under this part, an employee's "primary duty" must be the performance of exempt work. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.