Nos. 14-2111, 14-2114

United States Court of Appeals
for the
Fourth Circuit

SAMUEL CALDERON, *et al.*,

Plaintiffs-Appellees-Cross-Appellants,

v.

GEICO GENERAL INSURANCE CO., *et al.*,

Defendants-Appellants-Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(No. 8:10-cv-01958-RWT)
(Honorable Roger W. Titus, Senior District Judge)

BRIEF ON BEHALF OF *AMICI CURIAE*
THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA AND
NATIONAL FEDERATION OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER
IN SUPPORT OF GEICO GENERAL INSURANCE CO., ET AL.

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (the "Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent company, and no publicly held company has ten percent or greater ownership in the Chamber.

The National Federation of Independent Business (the "NFIB") has no parent company, and no publicly held company holds more than a ten percent interest in the NFIB.

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region in the country. The Chamber regularly files *amicus curiae* briefs in cases which raise issues of concern to the nation's business community. The NFIB is the nation's leading small business association, representing approximately 325,000 members across the country. To fulfill its role as the voice for small business, the NFIB frequently files *amicus curiae* briefs in cases that will impact small businesses. The businesses represented by *amici* employ tens of millions of people, many of whom are classified as "exempt" from overtime pay under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq*. Accordingly, *amici* have a substantial interest in the proper and clear interpretation of the administrative exemption under the FLSA.

ARGUMENT

As discussed in GEICO's Petition for Panel Rehearing and Rehearing En Banc (the "Petition"), the panel's decision creates a square conflict regarding the

[1] Counsel of record received timely notice of the intention to file this brief, and all parties have consented to the filing of this brief. As required by Fed. R. App. P. 29(c)(5), *amici* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

exempt status of claims investigators and adopts a novel and legally flawed standard for applying the administrative exemption. *Amici* submit this brief to highlight (1) the importance of en banc review given the variety of contexts in which the panel's decision conflicts with settled law and (2) the costly uncertainty created by the panel's flawed standard.

I. The Panel's Approach Conflicts with Settled Law Regarding the Administrative Exemption in a Host of Contexts.

The panel concluded that because the investigators at issue in this case have "no supervisory responsibility," their work was "too far removed from their employer's management or general business operations" to count as administrative work. Pet. 9 (quoting Add. 24). This conclusion conflicts with settled law as recognized by numerous other circuits and the Department of Labor ("DOL") and with the settled expectations of employers and employees throughout the nation.

Numerous cases make clear that one need not be a supervisor or manager (*i.e.*, a policy-maker) for the administrative exemption to apply. For example, in *Schaefer-Larose v. Eli Lilly & Co.*, 679 F.3d 560 (7th Cir. 2012), the Seventh Circuit concluded that the administrative exemption applied to pharmaceutical sales representatives. The plaintiffs argued that the exemption was designed for "employees who possessed greater authority with respect to strategic design, proposal writing, *supervision* or similar significant responsibilities." *Id.* at 574 (emphasis added). The Court rejected that view, noting the sales representatives

were "servicing" the business rather than directly involved in the development and production of pharmaceutical products. *Id.* Whether the plaintiffs were supervisors or not was not the point. *See also Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 868, 871-72 (7th Cir. 2008) (holding that the administrative exemption applied to automobile damage appraisers who investigated automobile accidents in the field, interviewed witnesses, physically inspected damage, and estimated repair costs using software). Numerous other circuits have taken the same approach. *See, e.g., Heffelfinger v. Elec. Data Sys. Corp.*, 492 F. App'x 710, 713 (9th Cir. 2012) (holding that administrative exemption applied to IT worker who "maintain[ed] and manag[ed] the [Department of Defense's] personnel records management database" and "provided solutions to technical issues, which included leading and coordinating operational support and implementation activities for the DOD's database administration"); *Viola v. Comprehensive Health Mgmt., Inc.*, 441 F. App'x 660, 661-64 (11th Cir. 2011) (holding that administrative exemption applied to Senior Community Outreach Associate whose duties involved marketing and promotion of her employer through networking with local organizations, organizing community events, and developing a marketing strategy for enrollment events) (since she was the only employee promoting the Medicare side of her employer in her area, no mention of supervisory duties); *Hines v. State Room, Inc.*, 665 F.3d 235, 242-44 (1st Cir. 2011) (holding employees who secured and planned

events for a banquet hall qualified for the administrative exemption despite "their lack of supervisory authority and their lack of policy-making authority"); *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 10 (1st Cir. 1997) ("However, the interpretations make it clear that the exemption is not to be limited solely to so-called 'management' personnel.").

Department of Labor regulations likewise recognize that a supervisory or managerial role is not required for the administrative exemption to apply. These regulations explain that the administrative exemption would apply to "[a]n executive assistant or administrative assistant to a business owner or senior executive of a large business . . . if [she or he], without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance." 29 C.F.R. § 541.203(d). Likewise, the regulations state that insurance claims adjusters and financial advisors generally meet the duties requirement for the administrative exemption if their duties require independent judgment without suggesting in any way that supervisory or managerial authority is also required. *Id.* §§ 541.203(a), (b). Given this uniform authority, employers around the country have long ordered their conduct on the premise that employees who perform administrative work calling for the exercise of discretion and independent judgment may be classified as exempt regardless of supervisory or

managerial authority. That the panel departed from this extensive authority and these settled expectations is a strong basis for en banc review.

II. The Panel's Decision Will Impose Significant Costs on Employers and Employees Alike.

If left to stand, the panel's decision will create uncertainty for employers, which will undermine the benefits of exempt status to employers and employees alike and also invite costly litigation. By diverging from the settled standard for applying the administrative exemption, the panel's decision undermines the ability of employers operating in multiple circuits to predict how their employees may be classified. Yet employers must know *in advance* how to classify employees. They cannot simply wait for litigation and risk incurring extensive overtime pay obligations they would not otherwise have allowed to be incurred, not to mention the costs of litigation. Accordingly, the uncertainty created by the panel's decision will likely push employers to err on the side of treating employees as non-exempt. That approach is highly inefficient, and contrary to Congress's intent.

When Congress passed the FLSA in 1938, it believed that in exchange for not being eligible for overtime, exempt employees earned salaries well above the minimum wage, were provided above-average benefits, and had better opportunities for advancement.[2] This remains the case today. Exempt white collar

[2] Chamber of Commerce of the United States, Comments on RIN 1235-AA11, Proposed Rule, *Defining and Delimiting the Exemptions for Executive,*

employees enjoy more generous paid leave benefits and also earn bonuses, commissions, profit-sharing, stock options, and other incentive pay at greater rates than non-exempt employees. *Id.* Employees see the move from a non-exempt to an exempt position as moving up the promotional ladder. *Id.*[3]

Moreover, exempt employees enjoy the stability and certainty of a guaranteed salary: they are not paid less if, for some reason, they work less than 40 hours in a week. *See* 29 C.F.R. § 541.602(a). *Amici*'s members with vast experience managing private sector businesses know that limiting an employee's work hours also limits opportunities for advancement. Exempt employees know this as well, and view reclassification to non-exempt as a demotion, which has negative effects on morale. *See* Chamber Comments at 3.

Pressuring employers to steer clear of the administrative exemption also creates great inefficiency. Once employers are required to pay overtime, they must limit and police the hours of non-exempt employees. That is costly in its own right,

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Administrative, Professional, Outside Sales and Computer Employees, 80 FR 38516 (July 6, 2015) ("Chamber Comments") at 2.

[3] *See also* Bruce R. Millman, *What Should Employers Do To Prepare for Coming White Collar Pay Change?*, N.Y. BUS. J., Aug. 26, 2015, *available at* http://www.bizjournals.com/newyork/news/2015/08/26/bruce-millman-dol-exempt-worker-overtime-proposal.html.

and also reduces the flexibility that can be afforded to exempt employees.[4] And where an employee is making above minimum wage, these costs are unlikely to have countervailing benefits for the employee, as the rational employer will reduce base compensation in order to account for any needed overtime.[5]

Finally, the ambiguity and uncertainty resulting from the panel's decision will invite litigation across a host of contexts. The exempt status of employees has been subject to growing litigation over the last decade, with FLSA cases in 2015 soaring to their highest level in more than two decades.[6] By creating a newly-heightened standard for the administrative exemption in this circuit, the panel's decision invites a further increase in litigation targeting any employers who do not avoid the exemption in the future, or who have previously classified employees as exempt in reliance on (until now) settled law.

The panel's decision is particularly troubling for employers who operate

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[4] *See, e.g.*, Secretary of Labor Thomas E. Perez, *The Most Important Family Value*, HUFFINGTON POST, May 27, 2014, *available at* http://www.huffingtonpost.com/thomas-e-perez/the-most-important-family_b_5397442.html) (discussing importance of workplace flexibility).

[5] *See* James Sherk, *Salaried Overtime Requirements: Employers Will Offset Them with Lower Pay*, THE HERITAGE FOUNDATION BACKGROUNDER, July 2, 2015, *available at* http://www.heritage.org/research/reports/2015/07/salaried-overtime-requirements-employers-will-offset-them-with-lower-pay.

[6] *See* Ben James, *FLSA, FMLA Lawsuits Soaring, New Statistics Show*, LAW360, March 11, 2015, *available at* http://www.law360.com/articles/630168/flsa-fmla-lawsuits-soaring-new-statistics-show.

nationally. Such employers may find it difficult or impossible to have the same position classified as exempt in one state and non-exempt in another. Moreover, even where employers may be able to adjust exempt status on a state-by-state basis, plaintiffs' lawyers would still have the ability and the incentive to engage in forum shopping and bring a nationwide class action in the Fourth Circuit. This, too, could result in the panel's outlier standard applying nationwide.

CONCLUSION

For the foregoing reasons, this Court should grant GEICO's Petition for Panel Rehearing and for Rehearing En Banc.

Respectfully submitted,

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Certificate of Compliance
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1. This *amici curiae* brief complies with the page limitation of Fed. R. App. P. 29(d) because its text is one-half the maximum length authorized by Fed. R. App. P. 35(b)(2) and Fed. R. App. P. 40(b) for a Petition for Panel Rehearing and Rehearing En Banc, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Professional Edition 2010 in 14 point Times New Roman font.

/s/ Collin O'Connor Udell
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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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/s/ Collin O'Connor Udell
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