No. 10-10-745

In The
Supreme Court of the United States

BRENDA URNIKIS-NEGRO,

Petitioner,

v.

AMERICAN FAMILY PROPERTY SERVICES, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 207(a)(2) of the Fair Labor Standards Act requires that a covered employee who works more than forty hours in a week be paid at a rate no less than one and one-half times the "regular rate" at which the worker is employed. The question presented is:

May the regular rate for an employee be calculated on a fluctuating workweek basis when the employer fails to satisfy the standards in the applicable fluctuating workweek regulation, 28 C.F.R. § 778.114?

PARTIES

The petitioner is Brenda Urnikis-Negro. The respondents are American Family Property Services, Inc., Nicole Lash and Todd Lash.

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Petitioner Brenda Urnikis-Negro respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on August 4, 2010.

OPINIONS BELOW

The August 4, 2010, opinion of the Court of Appeals, which is reported at 616 F.3d 665 (7th Cir. 2010), is set out at pp. 1a-47a of the Appendix. The July 21, 2008 order of the District Court, which is unofficially reported at 2008 WL 5539823 (N.D.Ill. July 21, 2008), is set out at pp. 48a-77a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on August 4, 2010. On October 22, 2010, Justice Kagan extended the time for filing a petition for writ of certiorari until December 2, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

Section 207(a)(2) of the Fair Labor Standards Act, 29 U.S.C. § 207(a)(2), provides in pertinent part:

> No employer shall employ any of his employees ... –

> (A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,
>
> (B) for a workweek longer than forty-two hours during the second year from such date, or
>
> (C) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> 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.

Section 778.108 of 29 C.F.R. provides in pertinent part:

> The "regular rate" of pay under the Act cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract (*Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446). The Supreme court has described it as the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed – an "actual fact" (*Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419)....

Section 778.113 of 29 C.F.R. provides in pertinent part:

> *Salaried employees – general.* (a) Weekly salary. If the employee is employed solely on a weekly salary basis, his regular rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If the employee is hired at a salary of $182.70 and if it is understood that this salary is compensation for a regular workweek of 35 hours, the employee's regular rate of pay is $182.70 divided by 35 hours, or $5.22 an hour, and when he works overtime he is entitled to receive $5.22 for each of the first 40 hours and $7.83 (one and one-half times $5.22) for each hour thereafter. If an employee is hired at a salary of $220.80 for a 40-hour week his regular rate is $5.52 an hour.

Section 778.114 of 29 C.F.R. provides:

> *Fixed Salary for fluctuating hours.* (a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours

worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of these principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his

compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as

adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

STATEMENT OF THE CASE

The Fair Labor Standards Act provides that a covered employee who works more than 40 hours in a given week must be paid at a rate one and one-half times her "regular rate." For hourly employees the regular rate is the wage per hour they are paid for non-overtime work. When an employee is paid a salary, rather than being compensated based on an hourly rate, regulations issued by the Department of Labor establish standards for determining the "regular rate" to be used in calculating the overtime rate. In this case the court of appeals, declining to apply the controlling regulations, created a new overtime calculation system that results in overtime wages

that are a small fraction of what would normally be required. The decision below throws into disarray the overtime standards for salaried workers under the FLSA.

The plaintiff worked for the defendants in a largely clerical capacity from mid-2004 until the end of 2005. She earned a salary of $52,000 a year. Although plaintiff routinely worked more than 40 hours a week, in some periods as many as 66.5 hours in a single week, she was never paid any overtime. Plaintiff filed suit under the FLSA in 2006, seeking to recover the unlawfully withheld overtime payments plus an equal amount of liquidated damages.

The defendants contended that plaintiff held an administrative position and was therefore not covered by the FLSA. Following a bench trial, the district judge rejected that defense. (Pet. App. 12a). The judge found that the plaintiff had worked a total of 1490.5 hours of overtime for which she had never received additional overtime pay. (Pet. App. 10a). The court also concluded that the defendants had "recklessly disregarded their obligations under [the FLSA]," and thus were liable for liquidated damages. (Pet. App. 14a).

The remaining issue was the amount of overtime wages that plaintiff was owed for the 1490.5 hours of overtime. Plaintiff contended that her regular rate of pay was $25 an hour (the figure arrived at by dividing her $1000 weekly salary by 40 hours) and that she was therefore entitled to be paid $37.50 per hour for the overtime work ($25 multiplied by one and

one-half). The district judge, however, held that the overtime award should instead be based on the special "fluctuating workweek" standard set-out in section 778.114 of the Department of Labor FLSA regulations, which provides in certain circumstances for a significantly lower overtime premium. 29 C.F.R. § 778.114. (Pet. App. 15a). The difference between these two methods of determining the unpaid overtime wages was substantial. If plaintiff had been awarded $37.50 per hour, her total recovery (including liquidated damages) would have been $111,787.50. Under the fluctuating workweek method used by the trial judge, however, plaintiff was awarded only $24,266, an average of $8.31 in overtime payment per overtime hour worked. (Pet. App. 17a).

The fluctuating workweek method, if applicable, reduces in two distinct ways the amount of overtime which an employer must pay. First, the "regular rate" for a plaintiff is determined, not by dividing the plaintiff's weekly salary by her regular nonovertime hours, but by dividing that weekly salary by the total hours worked in each week. Under this computation the regular rate can vary from week to week, and is smaller the more hours an employee works. For example, in a week during which a plaintiff earning $1000 a week worked 50 hours, her fluctuating workweek regular rate would be $20 an hour; if she worked 60 hours, her regular rate would fall to $16.67 per hour. Second, under this methodology a worker's salary for the week is deemed to already include straight time pay (i.e. pay at the regular rate)

for each of the overtime hours worked. Thus the additional overtime wage owed is only one-half of the regular rate, rather than the normal calculation of one and one-half times the regular rate. (See Pet. App. 14a-18a).

The issue on appeal was "a legal question" as to whether the fluctuating workweek method could be applied to plaintiff. (Pet. App. 4a). The court of appeals concluded that the district court had erred in holding that section 778.114 of the regulations could be relied on to justify a reduced overtime award. The Seventh Circuit reasoned, correctly, that the defendants had failed to satisfy the specific prerequisites spelled out in section 778.114 as conditions for using the fluctuating workweek method. (Pet. App. 3a, 26a-34a).

However, even though the defendants had not met the section 778.114 requirements for invoking the fluctuating workweek method, the court of appeals nonetheless held that application of that standard was proper. It reasoned that this Court's decision in *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942), compelled utilization of the fluctuating workweek method even when an employer has failed to meet the specific prerequisites established by section 778.114. (Pet. App. 3a, 21a-26a, 35a-36a, 38a).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Decided An Important Question of Law Regarding The FLSA Which Has Not Been, But Should Be, Settled by This Court

The overtime provision of the FLSA covers salaried workers as well as those paid on an hourly basis; applicability of the FLSA turns on the type of work an employee does, not on the manner in which he or she is paid.[1] For more than four decades the amount of overtime owed to salaried workers has been governed by detailed regulations issued by the Secretary of Labor in 1965. In the instant case the Seventh Circuit has established a dramatically different standard governing overtime for salaried workers. This new standard drastically reduces the amount of overtime pay due to such employees – in plaintiff's case slashing her overtime award by more than 78% – and that judicially fashioned standard would apply to most salaried employees. Certiorari should be granted to restore the longstanding regulatory scheme as the standard governing the overtime owed to salaried workers.

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[1] Section 213 of the FLSA exempts a number of categories of workers, such as those who are employed "in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

A. The Labor Department Regulations Establish A Carefully Structured Scheme Governing Overtime for Salaried Workers

Section 207(a)(2) provides that any employee who works more than 40 hours in a week must be paid overtime at a rate no less than one and one-half times "the regular rate at which he is employed." 29 U.S.C. § 207(a)(2). The statute itself does not define "regular rate." Workers are compensated under a wide variety of methods. The Department of Labor has issued detailed regulations delineating the appropriate standard for determining the "regular rate" that is the basis for calculating overtime payments. 29 C.F.R. §§ 778.107 et seq. Since 1965 the regulations have dealt specifically with the regular rate of salaried workers, setting out a carefully structured scheme for determining that rate.

(1) The regular rate for many salaried workers is governed by section 778.113(a). Under that provision the regular rate is computed "by dividing the salary by the number of hours which the salary is intended to compensate." The employer and employee might understand that in return for her salary the employee was required each week to be at work (as is commonly the case) for 40 hours, or for a smaller or greater number of hours. In the instant case the plaintiff testified "that she expected to work a 40-hour week," and the co-owner of the firm testified "that all of the firm's employees were paid on the basis of a 40-hour week." (Pet. App. 37a).

In determining the divisor in the section 778.113 calculation, the touchstone is the intent of the parties, usually their intent when "an employee is hired," regarding the minimum number of hours the employee would be required to work. For many salaried workers, of course, how long they will work in a given week is governed by two distinct obligations, a requirement that they work a minimum number of hours (e.g., they must be at the office 40 hours a week) and a requirement that they complete certain tasks (e.g., they must type a given number of documents each week). In some instances the completion of the minimum tasks will keep them on the job for a period longer than the minimum hour requirement. But the standard for the regular rate under section 778.113 turns on the minimum hours that must be worked, not how many hours might be needed in any given week to complete the required tasks.

Two features of section 778.113 are of importance to its meaning and administrability. First, the regular rate does not depend on how fast a particular worker is able to complete the assigned tasks. If two secretaries are hired to do the same job at the same salary, their regular rate is the same even if one needs 50 hours a week to do all the assigned typing, while the other is able to finish in 45 hours. Second, the regular rate under section 778.113 does not vary with the ebb and flow of work that will often be common. Unlike other regulations, such as that governing the regular

rate for piecework, 29 C.F.R. § 778.111(a),[2] under section 778.113 the weekly salary is not divided by the often variable number of hours that were worked in any given week, but by a fixed number of hours based on the understanding of the parties as to when the employee must be at work.

(2) In the absence of any understanding between the employer and employee regarding the minimum hour requirement for the salaried position in question, the regular rate is governed by the default rule in section 778.108. That regular rate is based on the amount "actually paid the employee for the normal, nonovertime workweek." Thus if an employee usually works 35 hours in a week, the regular hourly rate would be calculated by dividing the weekly salary by 35. But if the employee normally works 45 or 50 hours, the salary is divided by 40, because that is the length of the "nonovertime workweek."

(3) Section 778.114 provides a special "fluctuating workweek" standard for determining the "regular rate" in certain narrowly defined circumstances. Where the specified prerequisites are met, an employer can choose to use a salary arrangement under which the salary is deemed payment at the regular

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[2] For piecework the regular rate is calculated by dividing "total earning for the workweek from piece rates" by "the number of hours worked in the week for which such compensation was paid."

rate for however many hours were worked in a given week. Under this arrangement the regular rate would be calculated separately for each week: the more hours the employee worked, the smaller the resulting regular rate for the week. This system allocates part of the worker's salary to the overtime hours as well as to the nonovertime hours. Thus in order to meet the required time and one-half overtime rate, an employer need pay only an additional half-time amount for each overtime hour.

Because utilization of the fluctuating workweek method substantially reduces overtime pay, the regulations impose stringent limitations on its use. An employer may rely on this method only if five conditions are met. First, there must be a "clear understanding" between the employee and employer that the salary constitutes "straight-time compensation" for the entire period worked, and that it is "apart from overtime premiums." 29 C.F.R. § 778.114(a) and (b). Second, the worker must contemporaneously "receive extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay." 29 C.F.R. § 778.114(a). Third, there must be an understanding that the salary will be paid even in a workweek when a full schedule of hours is not worked. 29 C.F.R. § 778.114(c). Fourth, the worker's hours must "fluctuate from week to week." 29 C.F.R. § 778.114(c). Fifth, the salary must be great enough to be no less than the minimum wage rate for those workweeks in which the hours worked are the highest. *Id.*

Section 778.114 is particularly emphatic that the fluctuating workweek method may not be used if an employer fails to contemporaneously pay the employee the additional half-time premium.

> [W]here all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on *any* application of the fluctuating workweek overtime formula.

29 C.F.R. § 778.114(c) (emphasis added). An employer who pays an employee only his or her regular salary, and no more, when the employee works overtime is expressly forbidden to calculate the overtime premium due based on the fluctuating workweek method.

Under the overall regulatory scheme, unless an employer has satisfied the requirements of section 778.114, the regular rate for a salaried employee must be computed under either section 778.113 or section 778.108.

B. The Court of Appeals Has Vitiated The Applicable Regulatory Scheme

The decision of the court of appeals lays waste to this entire regulatory scheme. Without regard to the regulations which define the regular rate of a salaried employee, an employer in almost any case may invoke the fluctuating workweek standard to severely reduce the amount of back wages awarded for overtime. Save

in exceptional circumstances, a salaried worker can no longer obtain traditional time and one-half overtime in the Seventh Circuit.

The court of appeals correctly held that the employer in this case had failed to meet the requirements of section 778.114. First, the employer did not pay the requisite half-time premium in the period when the plaintiff worked overtime. "[Section 778.114] plainly envisions the employee's contemporaneous receipt of a premium ... for any overtime work he has performed." (Pet. App. 32a). "Plainly the employee has not received such extra compensation ... [I]n this case, her employer ... has never separately paid her for overtime." (Pet. App. 33a). Second, there was no understanding that the plaintiff's salary constituted straight time wages for her regular and overtime hours, to be supplemented by overtime premiums. To the contrary, as the court of appeals repeatedly noted, both the plaintiff and the employer understood that her salary was all she would ever be paid; under their understanding the salary was not merely straight time pay and there were never to be any additional payments for her hundreds of overtime hours.

Having correctly concluded that section 778.114 did not authorize use of the fluctuating workweek method, the court of appeals, "[s]etting the Department of Labor's rule aside" (Pet. App. 34a), proceeded to hold that the fluctuating workweek method was nonetheless controlling. That standard for determining the regular rate and amount of overtime premium

owed, it held, was "dictate[d]" by the simple fact that plaintiff's wage was intended as the sole compensation "for any and *all* hours that she worked in a given week." (Pet. App. 38a) (emphasis in original). As the Seventh Circuit made clear, the employer-friendly fluctuating workweek rule is to be applied in any case in which there is "no additional payment for overtime hours." (Pet. App. 39a (quoting *Zoltek v. Safelite Glass Corp.*, 884 F.Supp. 283, 287 (N.D.Ill. 1995)); see Pet. App. 39a (fluctuating workweek standard applies because of the agreement was that workers were not "entitled to overtime pay")).

Thus under the Seventh Circuit standard the very act of refusing to pay any overtime automatically triggers application of the fluctuating workweek method. This straightforward legal rule sweeps aside the entire regulatory scheme. It is ordinarily the case that a worker's salary is understood by the employer and employee alike to be the only compensation that will be paid, regardless of how many hours the employee may work. By refusing to pay any overtime an employer falls under the special fluctuating workweek standard, and need only pay an additional half-time for hours worked in excess of forty. The only employers which must pay time and one-half for overtime work are those that have chosen to pay some overtime. An employer that pays a single cent in overtime is subject to the requirement of overtime at the time and one-half rate, but an employer which pays no overtime at all is subject to the much lower fluctuating workweek overtime rate.

The Seventh Circuit decision is clearly inconsistent with the terms of section 778.114. First, section 778.114(c) expressly states that if an employer has failed to contemporaneously pay an additional half-time premium, "compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula." The Seventh Circuit standard thus mandates utilization of that formula in the precise circumstance in which that use is expressly forbidden by section 778.114(c). Second, section 778.114 itself requires that an employer pay the additional half-time premium at the time when the employee does the work; under the Seventh Circuit standard, on the other hand, "courts fill in that piece of the [fluctuating workweek] formula by making the premium part of the damages award." (Pet. App. 32a).[3] Third, the Seventh Circuit requires use of the fluctuating workweek standard if an employee understands that her salary will be her sole compensation and that she is not to receive any form of overtime payment. But that is precisely the sort of understanding that would bar use of the fluctuating workweek standard under section 778.114, because it would preclude a showing of the understanding required by the regulation itself, an understanding that the salary was only straight time, to be supplemented

[3] Pet. App. 36a ("The overtime premium can and will be awarded by the court retroactively"), 44a ("the employer receives the benefit of [section 778.114] without having ever paid the employee contemporaneously for her overtime work").

with an overtime payment of at least an additional half-time.

The Seventh Circuit decision is inconsistent as well with section 778.113. The section 778.113 standard for computing a regular rate could only be applied, the court of appeals held, if an employee (whatever her understanding when hired as to the minimum hours she was required to work) actually worked only "a set number of hours." (Pet. App. 21a; see *id.* (section 778.113 can be applied if an employee "routinely work[s]" the same number of hours every day)). At the least that means that section 778.113 cannot be used if an employee works overtime hours more than infrequently.

The Seventh Circuit's presumptive use of the fluctuating workweek method in any case in which an employer pays no overtime to salaried workers unquestionably defeats a central purpose of the statute. A key goal of the FLSA requirement of time and one-half overtime wages is to make use of overtime *more* expensive than straight time, and thus to create a financial incentive for employers to hire a larger number of workers rather than require their existing workforce to work longer hours. "[B]y increasing the employer's labor costs by 50% at the end of the 40-hour week and by giving the employees a 50% premium for all excess hours, Section 7(a) achieves its dual purpose of inducing the employer to reduce the hours of work and to employ more men and of compensating the employees for the burden of

a long workweek." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 423-24 (1945).

As the court of appeals frankly conceded, however, use of the fluctuating workweek method for salaried employees who receive no overtime will create

> exactly the opposite incentive, for as the workweek lengthens, the employer is paying [the worker] less per hour in straight-time pay and owes [the worker] a correspondingly smaller overtime premium for each hour of work over 40. In short, the hourly cost of labor ... decreases the longer the employee is required to work.

(Pet. App. 45a). As the table in the appendix makes clear, under the Seventh Circuit rule paying existing employees to work overtime is always less expensive than hiring new workers at straight time rates. If the defendants in this case had required the plaintiff to work 80 hours a week, it would have cost them only an additional $250 a week in premium pay. Hiring a new employee (at straight time rates) to do that same additional 40 hours of work, on the other hand, would have cost $1000 a week.

The effect of the decision below is thus to exempt most employers in the Seventh Circuit from the requirement that they pay ordinary time and one-half overtime to salaried employees, and to encourage employers in that circuit to increase the use of overtime rather than hire additional employees. The

small fluctuating workweek overtime premium is so small that, even if doubled by the addition of liquidated damages, the resulting cost per hour is *still* less than hiring a new worker. Thus today in the Seventh Circuit it often makes sense for an employer to pay no overtime at all to salaried workers, in knowing violation of the FLSA. Even if the violation is detected, paying the resulting damage award will be cheaper than having hired a new worker. This is a far cry from the regime envisioned by the framers of the FLSA. Were overtime computed in the usual manner at the time and one-half rate, unpaid overtime and liquidated damages would be three times the hourly cost of hiring a new worker, a powerful deterrent to violations of the law.

The court of appeals' adoption of this perverse legal standard occurs at the worst possible point in the nation's economic history, at a time when the country remains in the throes of the most serious recession since the Depression era. This is an issue of pivotal importance to the Fair Labor Standards Act, and one that should be addressed by this Court.

II. The Decision of The Court of Appeals Is Clearly Incorrect

The Seventh Circuit reasoned that even in cases where utilization of the fluctuating workweek method is not authorized (or is even forbidden) by section 778.114, that method is still required by *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572 (1942). (Pet. App. 38a). The court of appeals read *Missel* to

hold that whenever a salaried worker is denied overtime, the fluctuating workweek method must be used. The worker's regular rate is to be determined by dividing her salary by the total of all hours worked, straight time and overtime. Once the regular rate is determined in that manner, the court below reasoned, *Missel* dictates that the amount of overtime due is only a half-time payment, since straight time wages for the overtime hours were already included in the salary. (Pet. App. 24a-25a).

But this Court's decisions in the years since *Missel* have not adhered to this approach. To the contrary, only two years after *Missel* this Court announced a different general rule for determining a worker's regular rate. "While the words 'regular rate' are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek." *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 38, 40 (1944). The Court reiterated the *Helmerich* standard in a series of subsequent opinions. *United States v. Rosenwasser*, 323 U.S. 360, 363-64 (1945) (quoting *Helmerich*); *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945) ("the regular rate refers to the hourly rate actually paid the employee for the normal, non-overtime workweek"); *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 204 (1947) (quoting *Helmerich*); *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 461 (1948) (quoting *Helmerich*).

The standard in *Helmerich* and its progeny is obviously different than the standard utilized earlier

in *Missel*. Under the *Helmerich* definition of regular rate, the regular hourly rate of the plaintiff in this case would be $25, because in a nonovertime workweek, plaintiff would have been paid a weekly salary of $1000, and would have worked 40 hours.

The Labor Department regulations represent a sensible method of reconciling *Helmerich* and *Missel*. Section 778.108 sets out the general nonovertime workweek standard in *Helmerich*. Section 778.113 recognizes that an employer and employee may agree on a particular minimum number of hours that the employee is required to work to earn her salary, even though in any given week the press of business might necessitate longer hours; where such an agreement exists, section 778.113 directs use of that stipulated minimum period of hours as the basis of the regular rate calculation. Section 778.114 delineates a narrow category of cases in which an employer can use the sort of fluctuating workweek method that was described by *Missel* but that would be inconsistent with *Helmerich* and its progeny. Section 778.114 provides a degree of flexibility to employers whose employees work irregular schedules, without permitting such a broad use of the fluctuating workweek method as to emasculate sections 778.108 and 778.113 and to leave little or no room for application of the general rule in *Helmerich*.

The court of appeals also argued that the limitations in section 778.114 should be irrelevant here because the issue in the instant case is not whether there is a current violation (or there would be a current violation if plaintiff still worked for the

defendants), but only what remedy should be provided for a past violation. On this reasoning, although a half-time overtime payment for current work would be too small to *comply* with the FLSA, a damage award in that amount is nonetheless a sufficient *remedy* for that very violation. That simply makes no sense. The applicable regulation establishing how much overtime should have been paid when plaintiff worked for the defendants must also control the amount of unpaid overtime that plaintiff is now due. The district court found that plaintiff was owed overtime wages for the period when she worked for the defendants. Because section 778.114 did not apply to plaintiff during that period of employment, the applicable overtime rate must be determined under either section 778.113 or 778.108. Under either regulation plaintiff's regular rate was $25 an hour, and the time and one-half overtime rate was thus $37.50. The proper remedy for failing to pay $37.50 per hour in overtime cannot be damages calculated at a far lower rate, averaging in the instant case only $8.31 per hour.

CONCLUSION

Having acknowledged, with considerable understatement, that its analysis "[s]et[ ] the Department of Labor's rule aside," the Seventh Circuit's opinion closes with a surprising assertion that the court has merely construed the FLSA "as ... the Department of Labor ha[s] interpreted it." (Pet. App. 46a). If the resulting construction tends to defeat the purpose of

the statute, the appellate court admonished, that was an objection "better addressed to Congress and the Secretary of Labor." *Id.* But the plain language of the Department's regulations – particularly section 778.114(c) – is clearly contrary to the decision of the court of appeals.

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit. In the alternative, the Solicitor General should be invited to submit a brief expressing the views of the United States.

Respectfully submitted,

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