No. 15-1346

In The
Supreme Court of the United States

GEICO GENERAL INSURANCE CO. AND GOVERNMENT EMPLOYEES INSURANCE CO.,

Petitioners,

v.

SAMUEL CALDERON, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

Eric Hemmendinger
SHAWE & ROSENTHAL, LLP
One South Street
Suite 1800
Baltimore, M.D. 21202
(410) 843-3457

Pratik A. Shah
Counsel of Record
Z.W. Julius Chen
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000
pshah@akingump.com

Counsel for Petitioners

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Try as they might, Respondents cannot duck the important and recurring circuit conflicts arising from the Fourth Circuit's interpretation of the Fair Labor Standard Act's (FLSA) administrative exemption from overtime.

First, Respondents dispute the existence of any circuit conflict over the exemption's application to insurance fraud investigators. But it is readily apparent that the Fourth Circuit and the Sixth Circuit reached opposite conclusions despite "essentially identical" facts. No amount of hairsplitting over the phrase "essentially identical" or cherry-picking from the summary judgment record

can elide that reality. Under Respondents' view, no conflict regarding the exempt status of a category of workers would ever warrant this Court's review because every individual worker's case turns on its facts. But such treatment of conflicting appellate precedents as *sui generis* would deprive employers of essential guidance. Obviously, this Court has not followed any such certiorari-proof standard in FLSA cases.

Second, Respondents attempt to collapse the Fourth Circuit's imposition on employers of the outlier "clear-and-convincing" burden into the dubious "narrow-construction" rule for FLSA exemptions. But the Fourth Circuit is the *only* court of appeals to impose that combination of heightened standards—all the more significant in this "very close" case.

In light of the conflicting treatment of the administrative exemption by the courts of appeals, this Court's intervention is necessary to provide clarity to employers and employees alike, as well as to prevent the Fourth Circuit from becoming a forum-shopping magnet for FLSA collective actions. This case cleanly presents two questions that, as *amici* confirm, are of exceptional importance to not only insurance companies but a broad cross-section of employers.

I. THE CIRCUIT CONFLICT OVER THE EXEMPT STATUS OF INSURANCE INVESTIGATORS IS MANIFEST

A. Respondents Cannot Avoid The Acknowledged Conflict

1. In denying the FLSA's administrative exemption to GEICO's investigators, the Fourth Circuit acknowledged that "the Sixth Circuit in *Foster v. Nationwide Insurance Company*, faced with facts essentially identical to ours, concluded that the exemption applied." Pet. App. 39a (citing 710 F.3d 640, 644-650 (6th Cir. 2013)). That is about as square a circuit conflict as the Court will see.

Respondents' convoluted parsing of the Fourth Circuit's language—suggesting that "'*essentially* identical' facts" means "salient differences," BIO 12 (emphasis added)—rebuts itself. Courts use the phrase "essentially identical" to convey that cases are for all legal purposes indistinguishable, not that they are different.[1]

2. Respondents are also wrong to suggest (BIO 13) that investigators for Nationwide and GEICO share merely "facial similarities at a high level of abstraction." There is no daylight between their duties in any respect.

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[1] That the Fourth Circuit's observation about *Foster* appears in a discussion of whether GEICO willfully classified insurance fraud investigators as non-exempt does not help Respondents (BIO 14-15). The Fourth Circuit cited *Foster* as evidence that GEICO acted reasonably because it is on all fours.

Nationwide (*Foster*)	GEICO (*Calderon*)
"[P]rimary duty of Nationwide's SIs is to conduct investigations into suspicious claims with the purpose or goal of resolving indicators of fraud[.]" 710 F.3d at 643.	"[P]rimary duty consists of conducting investigations to resolve *** whether particular claims submitted to GEICO were fraudulent." Pet. App. 25a.
Investigators "gather[] information, tak[e] statements, interview[] witnesses, *** and recommend[] and [sometimes] conduct[] [Examinations Under Oath (EUOs)]." *Id.* at 643 (some alterations in original).	"[I]nvestigation might entail steps such as interviewing witnesses, taking photographs, and reviewing property damage," as well as "face-to-face questioning wherein the witness is under oath." *Id.* at 8a.
Investigator "decid[es] when to refer claims to law enforcement and the [National Insurance Crime Bureau]." *Id.*	"Investigator *** has discretion to refer the claim to the National Insurance Crime Bureau or other state agencies[.]" *Id.* at 10a.
"SIs' work [is subject] to guidelines and extensive quality control and auditing standards[.]" *Id.* at 646.	"GEICO has procedures that govern an Investigator's handling of a claim[.]" *Id.* at 7a.

"Nationwide's policy documents [require] that SIs provide only factual information and not opinions in claims logs and in oral discussions[.] *** However, *** terms such as 'factual findings,' 'relevant,' 'pertinent,' and 'resolve'" "suggest just the opposite." *Id.* at 648.	"GEICO does not permit speculation in its reports and it requires that Investigators substantiate any conclusions in their reports with facts and evidence" when "reporting their findings." *Id.* at 9a-10a.
"SIs' *** mak[e] findings that bear directly on the [claims adjusters'] decisions to pay or deny a claim." *Id.* at 646.	"Claims Adjusters *** generally base their decisions regarding whether to pay claims on *** reports that the Investigators provide to them." *Id.* at 9a.

Respondents characterize (BIO 12-13) GEICO investigators as mere fact-gatherers who have no hand in resolving fraud indicators. But much like the Sixth Circuit did when Respondents' counsel (on behalf of Nationwide investigators) advanced the same pinched characterization, *Foster*, 710 F.3d at 647, the Fourth Circuit found otherwise: "the record reveals" that GEICO's investigators convey their "findings regarding the suspected insurance fraud *and* the basis for their findings," Pet. App. 6a, 8a (emphasis added); *accord id.* at 55a ("conclusions" and "recommendations").

B. Respondents Cannot Minimize The Broader Implications Of The Fourth Circuit's Decision

Central to its reasoning, the Fourth Circuit tied the administrative exemption to policy-setting or supervisory responsibility—thereby creating an unprecedented prerequisite to exempt status that affects many other job categories. Pet. 17-21. At least one court within the Fourth Circuit, in a case involving a "truck dispatcher," has since explained (citing the decision below): "Our court of appeals has clarified that supervisory work or direct contribution to a business's policies and strategies is generally required to fulfill the 'management or general business operations' element." *Gordon v. Rush Trucking Corp.*, No. 2:14-cv-25502, 2016 WL 1047084, at *1, *4 (S.D. W. Va. Mar. 10, 2016); *see also id.* at *10, *12 n.7.

Respondents strain (BIO 15-16) to bring the decision below into line with the Department's administrative-exemption regulation by suggesting that the Fourth Circuit did not add additional requirements. But the court's language proves otherwise: "Investigators have 'no supervisory responsibility and do not develop, review, evaluate, or recommend [GEICO's] business polices or strategies with regard to the' claims they investigated." Pet. App. 25a (alteration in original); *see id.* at 29a (investigators' "actual work duties" do not "relate to business policy or overall operational management"). The Fourth Circuit's citation to cases in which first responders were declared exempt because they "shaped the police department's policy," *Shockley v. City of Newport News*, 997 F.2d 18, 28 (4th Cir.

1993), or "designed, implemented, and ran training programs," BIO 16 (citing *West v. Anne Arundel Cty.*, 137 F.3d 752, 764 (4th Cir. 1998)), only reinforces its incorrect insistence on policy-making.

Respondents' effort to explain away the Fourth Circuit's adoption of a blanket non-exempt rule for investigators of all types, based on its reading of the first-responder regulation, fares no better. Pet. 21-24. That regulation is a codification of the rule that first responders are their public agency's production workers. By contrast, private insurance investigators are aligned with insurance adjusters, who are expressly considered administrative workers. 29 C.F.R. § 541.203(a). And the court's citation to *Shockley* does not "disprove[]" (BIO 16-17) a one-size-fits-all view of investigative work; as noted, the investigator there was exempt primarily because she shaped policy.

In the end, Respondents, like the Fourth Circuit, rely on a generic conception of investigators without regard to the business context in which investigators work. *See* BIO 32-33 ("[N]othing turns on whether the employee works in the private or public sector."). That is precisely the kind of "categorical" reasoning "based on job title" Respondents elsewhere (correctly) decry. BIO 1, 9.

C. Respondents' Merits Arguments Are Unpersuasive

Respondents' defense of the decision below on the merits is unavailing. At bottom, it hinges on the supposition that GEICO investigators stop short of resolving fraud indicators. As explained above (pp. 3-5, *supra*), the summary judgment record compels the

opposite conclusion. The Fourth Circuit recognized as much in describing GEICO fraud investigators' "primary duty" as "conducting investigations to resolve *** whether particular claims submitted to GEICO were fraudulent." Pet. App. 25a.

Given the Fourth and Sixth Circuits' shared understanding of the primary duty of insurance fraud investigators, *Foster*'s correct reasoning applies equally here. Yet Respondents do not mention, let alone engage, *Foster*'s point-by-point rejection of their arguments (which Respondents' counsel made when representing the Nationwide plaintiffs). *Compare* BIO 32-35, *with* 710 F.3d at 644-646. Nor do they engage GEICO's independent merits arguments. Pet. 16-24.

II. NO OTHER CIRCUIT IMPOSES ON EMPLOYERS TWO MUTUALLY REINFORCING HEIGHTENED STANDARDS

Nothing in Respondents' opposition changes the fact that the Fourth Circuit stands alone among the courts of appeals in imposing a "clear-and-convincing" burden on top of the "narrow-construction" rule for FLSA exemptions, as invoked in this case.

Respondents first contend (BIO 17-19) that this Court "could not be clearer" about the continuing relevance of the narrow-construction rule in FLSA exemption cases. But the cited authorities for that

proposition are over half a century old.[2] The Court's more recent FLSA precedents (*e.g.*, *Sandifer v. United States Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n.21 (2012)) reveal failed invocations of the narrow-construction rule. Pet. 24-25. Indeed, since the filing of the petition in this case, two members of the Court have cited those precedents as part of a plea to discard the narrow-construction rule as "'res[ting] on an elemental misunderstanding of the legislative process,' viz., 'that Congress intend[s] statutes to extend as far as possible in service of a singular objective.'" *Encino Motorcars, LLC v. Navarro*, No. 15-415, slip op. at 5 (U.S. June 20, 2016) (Thomas, J., dissenting, joined by Alito, J.) (second alteration in original) (citation omitted). This Court—not Congress—is the proper body to release lower courts from that "made-up canon" of statutory interpretation. *Id.*

As fraught as the narrow-construction rule may be, it becomes doubly so when coupled with the Fourth Circuit's clear-and-convincing standard. Despite the Fourth Circuit's recognition that "other jurisdictions" do not share its view of the "burden of proof," *Desmond v. PNGI Charles Town Gaming, LLC*, 564 F.3d 688, 691 n.3 (4th Cir. 2009), Respondents insist (BIO 22) that other circuits are in

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[2] *Holly Farms Corp. v. NLRB*, did not contain a "directive" (BIO 17) to construe FLSA exemptions narrowly; two half-century-old FLSA cases were "cf." cited in connection with a statement that "exemptions from [National Labor Relations Act] coverage" should not be given an unduly "expansive[]" construction. 517 U.S. 392, 399 (1996).

accord—pointing to the Sixth and Tenth Circuits and ignoring the other six circuits identified in the petition (at 25-26). In the Sixth Circuit, however, Respondents overlook superseding precedent "clarify[ing]" that the phrase "preponderance of the clear and affirmative evidence" should be reduced to just "preponderance of the evidence." *Renfro v. Indiana Mich. Power Co.*, 497 F.3d 573, 576 (6th Cir. 2007). And in the Tenth Circuit, Respondents mistakenly read *Lederman v. Frontier Fire Protection, Inc.*, as endorsing the "plainly and unmistakably" language, when in fact the court rejected its use (along with "clear and affirmative"). 685 F.3d 1151, 1158-1159 (10th Cir. 2012).

Respondents further contend (BIO 20)—for the first time—that, given the absence of any evidentiary dispute, the clear-and-convincing standard is not "implicate[d]." But it is Respondents (not GEICO) that have insisted on the standard's application here. Respondents, for example, have consistently argued (until now) that GEICO should "bear the burden of proving each element of an FLSA exemption defense by clear and convincing evidence," even though the parties' disagreement over "the requirements of the administrative exemption" is a "question of law." C.A. Br. 20. Having persuaded the Fourth Circuit to impose a clear-and-convincing burden on GEICO, Respondents cannot disclaim it.

In any event, Respondents *agree* that the narrow-construction rule and the clear-and-convincing standard are closely intertwined. *See* BIO 21-22 (arguing that "clear and convincing" and "plainly and unmistakably" are "linguistic variations on the principle of narrow construction"). As such,

there can be no dispute that the Fourth Circuit applied those heightened standards here in resolving a "very close legal question": "[W]e conclude that GEICO has not shown that the Investigators' primary duty is, *plainly and unmistakably*, directly related to GEICO's management or general business operations." Pet. App. 37a (emphasis added); *see id.* at 15a-16a.

III. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RESOLVING IMPORTANT QUESTIONS OF LAW

This case constitutes an ideal vehicle to resolve the questions presented and harmonize FLSA jurisprudence for a wide range of employers and investigators (among other employees) nationwide.

1. Respondents' bid to downplay the importance of this case fails.

First, insurance fraud investigators earn more than the $47,476 annual salary threshold now required by the administrative exemption's first prong. *See* 81 Fed. Reg. 32,391 (May 23, 2016).[3] As the Sixth Circuit noted in 2013, insurance fraud investigators "are well compensated with an average annual salary of $75,000." *Foster*, 710 F.3d at 642. That figure comports with GEICO's current records; indeed, the salary of *every* GEICO fraud investigator exceeds the threshold. Respondents' conjecture (BIO

[3] Critically, the new Department of Labor rule left unchanged the exemption's second and third prongs. *See* 81 Fed. Reg. at 32,391 ("[T]he Department has not made any changes in this Final Rule to the duties tests[.]"). Those are the only disputed prongs in this case. Pet. App. 18a-19a.

23) that "GEICO investigators may not even satisfy the first prong of the administrative exemption," or that the same might be true of investigators more broadly, is thus flatly wrong.

Second, according to Respondents (BIO 24), this case does not create competitive disadvantages because GEICO can absorb the $3 million judgment and avoid FLSA violations by giving investigators "more responsibilities and discretion." But that underscores exactly what is wrong with the Fourth Circuit's decision. The Fourth Circuit did not decide that investigators were non-exempt because they exercised insufficient discretion and independent judgment (*i.e.*, the third prong of the administrative exemption). Instead, the court found that the investigative function is non-administrative in nature (*i.e.*, the second prong of the administrative exemption). There is little GEICO can do to change investigators' basic functional role within the company.

Third, Respondents' back-of-the-napkin calculations (BIO 24-25) cannot winnow the impact of this case to 250+ GEICO employees or "5,000 insurance fraud investigators" nationwide. Like other employers, GEICO contracts with third-party investigators. And Respondents offer no answer to the natural conclusion that this case will impact the growing number of private-sector investigators across industries, Pet. 2, 22-23, or to the informed perspective of the U.S. Chamber of Commerce and the National Federation of Independent Business that the questions presented are "exceptionally important to the business community" as a whole, *Amici* Br. 2.

Fourth, Respondents' contention (BIO 26-27) that plaintiffs would be indifferent to suing a nationwide employer in the Fourth Circuit, as opposed to any other circuit, blinks reality. Only the Fourth Circuit demands that employees exercise policy-setting or supervisory responsibility, and applies two interpretive canons that place a heavy thumb on the scale against employers. FLSA collective actions are frequently filed with multiple named plaintiffs from different areas, giving plaintiffs' counsel the ability to choose a lead plaintiff from a favored venue. Employees who work in other circuits then often opt-in to the action—just as happened in this case. (One of the opt-in plaintiffs then brought a New York state-law class claim. Pet. App. 12a.)

2. Respondents further posit (BIO 10) that the factual component of the exemption analysis inherently limits the impact of this case, and accuse GEICO of "short-circuit[ing]" the inquiry based on "assum[ptions]" about investigators. Not so. As Respondents argued below, and elsewhere recognize in their brief to this Court, the current dispute (decided on summary judgment) is a purely legal one. *See* p. 10, *supra*; *accord Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) ("The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law[.]"). The circuit split arises because the Fourth Circuit reached a different conclusion than the Sixth Circuit, based on identical facts. And as noted above (pp. 6-7, *supra*), the Fourth Circuit's policy-setting and supervisory legal test has already been applied to

employees other than investigators. Accordingly, this case is anything but "factbound." BIO 10.

This case is very much like ones this Court has taken to eliminate confusion over the exempt status of a specific class of employees within an industry. Pet. 29; *see, e.g.*, *Christopher*, 132 S. Ct. at 2161 ("decid[ing] whether the term 'outside salesman,' as defined by Department of Labor *** regulations, encompasses pharmaceutical sales representatives" with a particular "primary duty"); *Encino Motorcars*, slip op. at 1 ("This case addresses whether a federal statute requires payment of increased compensation to certain automobile dealership employees for overtime work."). The Court may take different paths to answer that question, variously invoking different administrative law and other legal principles, but that does not diminish the importance to companies and their employees of resolving whether an FLSA exemption applies on a uniform national basis.

3. The Fourth Circuit's decision not to address the third prong of the administrative exemption—"the exercise of discretion and independent judgment with respect to matters of significance," 29 C.F.R. § 541.200(a)(3)—raises no barrier to this Court's review. *Contra* BIO 28-29. This Court routinely decides discrete legal questions and remands for consideration of additional issues (including possible alternative grounds of affirmance) not adjudicated by the appeals court. On the merits, although Respondents perceive (BIO 29-31) "no serious argument" that GEICO could satisfy the third prong, Respondents all but ignore *Foster*, which fully supports GEICO's position (as briefed to the Fourth

Circuit) on *both* the second and third prongs. Pet. 14-15.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

Eric Hemmendinger
SHAWE & ROSENTHAL, LLP

Pratik A. Shah
Counsel of Record
Z.W. Julius Chen
AKIN GUMP STRAUSS HAUER & FELD LLP

Counsel for Petitioners

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