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8 Attorney for Plaintiffs

9 UNITED STATES DISTRICT COURT  
10 WESTERN DISTRICT OF WASHINGTON  
11 AT TACOMA

12 DREW TRACY, DUANE SCHUMAN,  
13 RICK STEELE, CHRIS LINES, DANIEL  
14 KEVIN GRIFFEE, RICHARD HUFFMAN,  
15 LEE HAZELTON and SCOTT WILLIS,  
16 individually,

17 Plaintiffs,

18 v.

19 THE CITY OF VANCOUVER, a  
20 municipality

21 Defendant.

Case No. 3:17-cv-5414-RBL

**PLAINTIFFS' OBJECTIONS TO  
DRAFT JURY INSTRUCTIONS  
RECEIVED 1-11-19**

22 **I. INTRODUCTION**

23 The draft jury instructions received on 1-11-19 contain incorrect statements of law that are  
24 in clear error, when read separately and together. Further the instructions do not fairly construe the  
25 FLSA exemptions at issue in this case because they inappropriately remove elements from the  
26 exemptions Defendant is required to prove and they fail to qualify the exemptions at issue with the  
First Responder Rule. The Court's attempt to simplify the FLSA issues is understandable but has  
created statements of law that are incorrect and has fundamentally altered how the FLSA  
exemptions and definitions are to be analyzed. These instructions are not a fair rendering of the

1 FLSA exemptions and are therefore improper. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134  
 2 (2018).

3 “In evaluating jury instructions, prejudicial error results when, looking to the instructions  
 4 as a whole, the substance of the applicable law was [not] fairly and correctly covered.” *Dang v.*  
 5 *Cross*, 422 F.3d 800, quoting *Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir.2001); see  
 6 also *SEIU v. Nat’l Union of Healthcare Workers*, 718 F.3d 1036, 1047 (9<sup>th</sup> Cir. 2013)( A party is  
 7 entitled to an instruction on its theory of the case only if it is supported by law and has foundation  
 8 in the evidence.”). Adopting the current draft instructions in this case would be clear error because  
 9 they ignore the First Responder Rule altogether, they ignore how the First Responder Rule  
 10 qualifies the management definition and the two exemptions at issue, they remove instructions the  
 11 parties had agreed to in their joint instructions that will assist the jury in its role as fact-finder and  
 12 they adopt wholesale several of Defendant’s proposed instructions or in a modified form that are  
 13 inherently prejudicial to Plaintiffs and an incorrect statement of law.  
 14  
 15

16 **Summary of the 1-12-19 draft instructions’ clear errors**

- 17 • **Objection 1.** There is no instruction at all for the First Responder Rule, which contains  
 18 crucial information and examples of the kinds of tasks performed by first responders. The  
 19 exclusion of the First Responder Rule is clear error and is prejudicial to Plaintiffs. It also  
 20 creates an undue emphasis of “management” as the issue in this case, which is not correct.  
 21 If the jury finds that the Plaintiffs’ primary duty is as First Responders, then they cannot  
 22 be exempt under either the HCE Exemption or the Executive Exemption. In the 2004  
 23 preamble, the Department of Labor (“DOL”) noted that first responders, including fire  
 24 fighters, who do not qualify for the Part 541 exemptions under the other tests, \*’also cannot  
 25  
 26

1 qualify as exempt under the highly compensated test” because their primary duty—  
2 emergency response—is not office or non-manual work. 69 Fed. Reg. at 22,129; *see also*  
3 DOL Secretary’s *amicus* brief in *Morrison* at p. 26, Appendix A.

- 4
- 5 • **Objection 2.** The preamble to the instructions incorrectly states the question to the jury  
6 that the issue is “whether their primary duty is management of the Fire Department.” That  
7 is an incorrect statement of law and fails to acknowledge the First Responder Rule in any  
8 way. The deletion of any mention of the First Responder Rule is highly prejudicial to  
9 Plaintiffs and the collapsing of the “test” to be applied by the jury is in clear error. This  
10 case is about determining whether the primary duty of the Plaintiffs is as “first responders”  
11 or as “management” or “executives.” Many other Circuits have grappled with this question,  
12 including the Second Circuit and Fourth Circuit. The manner in which those circuits  
13 grappled with and resolved this question is the appropriate approach for the court to take  
14 in this case. *See Morrison v. County of Fairfax, VA*, 826 F.3d 758 (4th Cir. 2016) and  
15 *Mullins v. City of New York*, 653 F.3d 104 (2<sup>nd</sup> Cir. 2011). These two cases and the two  
16 *amicus* briefs of the Secretary of the Department of Labor that were filed in those cases  
17 should be looked to for guidance.<sup>1</sup>

- 18
- 19 • **Objection 3.** The Highly Compensated Employee exemption eliminates one of the  
20 required elements Defendant must prove for the exemption to apply. Further, it is not  
21 qualified by the First Responder Rule. The elimination of the element that the jury must  
22 find Plaintiffs’ “perform office work or non-manual labor” in order for the exemption to  
23

24

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25  
26 <sup>1</sup> Plaintiffs are including both the *Morrison* and *Mullins* *amicus* briefs are attached as Appendix A and Appendix B  
to this brief for ease of reference by the Court and opposing counsel.

1 apply is clear error. Further, the inclusion of “directing the work of two or more other  
2 employees,” is not applicable to any case relating to first responders who respond to  
3 emergencies. *See Mullins* at 116 (“*While ‘directing operations at crime, fire or accident*  
4 *scenes’ appears, at first blush, to be a type of management that sergeants undertake, when*  
5 *their supervisory activities are viewed within the context of the first responder regulation*  
6 *as interpreted by the Secretary, it becomes apparent that, because these activities form*  
7 *part of sergeants’ primary field law enforcement duties, such supervision is not to be*  
8 *deemed ‘management.’ See DOL Amicus Br. at 5”). In the context of first responders,*

9 whether the employee “directs the work of other employees” is not relevant.

- 10
- 11
- 12 • **Objection 4.** Eliminating the Executive Exemption is in clear error because the First  
13 Responder Rule qualifies that exemption, and the later definition in the draft instructions  
14 concerning “hiring and firing being given particular weight” excludes the last part of that  
15 definition collapsing it into an easier standard for defendant to meet. This is in clear error  
16 because the exemptions cannot be combined. Defendant must meet all of the components  
17 of the Executive Exemption or the HCE Exemption. Combining elements of the  
18 exemptions is clear error.
  - 19 • **Objection 5.** Listed tasks in the draft FLSA Management instruction promoted by  
20 Defendant now include tasks that have already been determined *not to be applicable to*  
21 *employees engaged in first responder work.* *See Mullins* at 116. The Secretary of Labor  
22 has explained that the Management definition is qualified by the First Responder Rule and  
23 that certain tasks must be excluded in the context of first responder work. *See e.g. Mullins*  
24 at 116, citing to Secretary’s DOL Amicus brief at page 5. The Secretary’s explanation of  
25  
26

1 how the FLSA’s Management definition is qualified by its First Responder Rule is entitled  
2 to *Chevron* deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *see also Oregon*  
3 *Restaurant and Lodging Ass’n v. Perez*, 816 F.3d 1080, 1089-90 (9<sup>th</sup> Cir. 2016).

- 4 • **Objection 6.** Listed tasks in the draft FLSA Management definition proposed by defendant  
5 have been eliminated which is an incorrect statement of law and gives the defendant an  
6 unfair advantage in its presentation to the jury. Again, the FLSA exemptions must be fairly  
7 construed and the court’s adoption of defendant’s proposed management instruction –  
8 which eliminates several high-level management tasks and adds other tasks – is an incorrect  
9 statement of law. It is error to include this instruction.
- 10 • **Objection 7.** The draft instructions fail to include instructions regarding the unique  
11 placement of “training” into a First Responder duty if that training relates to the employee’s  
12 own training and the training of others to be ready to respond to an emergency. The  
13 Secretary of Labor provided guidance that training oneself and other employees to respond  
14 to emergencies **is not** a management activity in the context of first responder work. See  
15 Department of Labor’s *Amicus Brief* to the Fourth Circuit Court of Appeals in *Morrison v.*  
16 *Fairfax County, VA* (November 23, 2015), position adopted by *Morrison v. County of*  
17 *Fairfax, VA*, 826 F.3d 758 (4th Cir. 2016); *see also* 69 Fed. Reg. at 22130 (2004). The  
18 Secretary’s qualification of the Management definition to exclude emergency response  
19 training is entitled to *Chevron* deference. *See Auer v. Robbins* at 461 and *Oregon*  
20 *Restaurant and Lodging Ass’n v. Perez*, 816 F.3d at 1089-90.
- 21 • **Objection 8.** Objection to the inclusion of the Defendant’s “Existence of Emergency”  
22 instruction in a case in which emergency responder duties are a key issue and are in  
23  
24  
25  
26

1 opposition to the First Responder Rule and how it has been interpreted by courts and the  
2 DOL; adoption of this instruction is reversible error. As noted by the Secretary of Labor  
3 and the Fourth Circuit in *Morrison*, emergencies are infrequent and take up little of a little  
4 of a first responder's actual on-duty time. *Morrison* at 770 (citing to *Barrows*). Including  
5 this definition which is not related to the First Responder Rule and is clearly intended to  
6 apply to factory settings will confuse the issues for the jury. It is clear error to include it.

## 8 **II. DISCUSSION**

### 9 **A. Objection 1 – Failure to include the First Responder Rule in the instructions.**

10 The outcome of this case likely turns on whether the jury determines that the primary duty  
11 of the Plaintiffs is “management” or acting as a “first responder. While the instructions include an  
12 instruction for “management,” they exclude any instruction at all for “first responder.” This is clear  
13 error and must be corrected. Both parties included a First Responder Rule instruction. The draft  
14 instructions received on 1/10/19 included a version of defendant's proposed instruction on this  
15 rule. However, that instruction was objectionable because it added an additional hurdle by stating  
16 “supervisors could only be considered first responders if they perform the same front-line activities  
17 as their subordinates on a daily basis” and other components. That sentence was to be stricken.

18  
19 However, the new instructions received on 1-11-19 contain no First Responder Rule at all.  
20 This is clear error because the First Responder Rule provides necessary guidance to the jurors in  
21 this case and is a fundamental issue. Core to that rule is the following language:

22  
23 Thus the FLSA exemptions do not apply to police officers, detectives,  
24 deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors,  
25 correctional officers, parole or probation officers, park rangers, fire fighters,  
26 paramedics, emergency medical technicians, ambulance personnel, rescue workers,  
hazardous materials workers and similar employees, regardless of rank or pay level,  
who perform work such as preventing, controlling or extinguishing fires of any

1 type; rescuing fire, crime or accident victims; preventing or detecting crimes;  
2 conducting investigations or inspections for violations of law; performing  
3 surveillance; pursuing, restraining and apprehending suspects; detaining or  
4 supervising suspected and convicted criminals, including those on probation or  
parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing  
investigative reports; or other similar work.

5 Such employees do not qualify as exempt executive employees or highly  
6 compensated employees because their primary duty is not management of the  
7 enterprise in which the employee is employed or a customarily recognized  
8 department or subdivision thereof. Thus, for example, a police officer or fire fighter  
9 whose primary duty is to investigate crimes or fight fires is not exempt under the  
FLSA merely because the police officer or fire fighter also directs the work of other  
employees in the conduct of an investigation or fighting a fire.

10 29 C.F.R. § 541.3(b); Pls' Instruction No. 8; Def's Instruction No. 10.

11 This FLSA rule includes important legal requirements that must be included in the final  
12 instructions including that if the jury finds the Plaintiffs' primary duty is that of first responders,  
13 they cannot be exempt employees, "regardless of rank or pay." Further, if the jury finds that the  
14 Plaintiffs' primary duty is that of first responders they cannot be exempt employees, even if they  
15 direct employees on an emergency scene.

16  
17 **B. Objection 2 - The preamble to the instructions incorrectly states the legal**  
18 **question to the jury that the issue is "whether their primary duty is**  
19 **management of the Fire Department."**

20 The issue to the jury must mention the First Responder Rule and should instead be defined  
21 as follows: "whether the primary duty of battalion chiefs is management of the Fire Department  
22 or emergency response." The First Responder Rule must be acknowledged at the outset because if  
23 the jury finds that the Plaintiffs' primary duty is that of first responders then neither the executive  
24 exemption nor the HCE exemption is applicable. *See e.g.* 29 C.F.R. § 541.3(b); 69 Fed. Reg. at  
25 22,129 discussing the application of the First Responder Rule.  
26

1 The Secretary for the Department of Labor has favorably cited to such instructions that  
2 delineate both “management” and “first responder” duties:

3 In *Watkins v. City of Montgomery, Alabama*, 775 F.3d 1280 (11th Cir. 2014), the  
4 Eleventh Circuit affirmed a jury verdict in which one of “the issues ... properly  
5 before [the jury]” was the primary duty of fire suppression lieutenants whose  
6 employer claimed the executive exemption. *Id.* at 1282, 1285, 1289. Notably, the  
7 jury’s verdict was based on instructions from the district court explaining that the  
8 parties disagreed about whether fire “lieutenants’ primary duty was the ‘prevention,  
9 control, or extinguishment of fires and the rescue of fire victims,’ on the one hand,  
10 or management, on the other.” *Id.* at 1291. The district court also—properly, in the  
11 Eleventh Circuit’s view—instructed the jury that “the determination of whether an  
12 individual qualifies as an executive must be made on a case-by-case basis,  
13 accounting for the factors set out in the definition of ‘primary duty,’” and that “[i]f  
14 you determine that the plaintiff’s primary duty is management, then the executive  
15 exemption applies to the plaintiffs ... [c]onversly, if you determine that the  
16 plaintiffs’ primary duty is to fight fires ... the executive exemption does not apply  
17 to the plaintiffs.” *Id.* at 1293.

18 Secretary of Labor’s *amicus* brief in *Morrison* at page 50. A similar instruction should be issued  
19 in this case.

20 **C. Objection 3 - Failure to include all of the elements required to prove the  
21 HCE exemption.**

22 The HCE exemption instruction fails to state that it is only applicable to employees whose  
23 primary duty includes performing office or non-manual work.

24 This exemption applies only to employees whose primary duty includes  
25 performing office or non-manual work. Thus, for example, non-management  
26 production-line workers and non-management employees in maintenance,  
27 construction and similar occupations such as carpenters, electricians, mechanics,  
28 plumbers, iron workers, craftsmen, operating engineers, longshoremen,  
29 construction workers, laborers and other employees who perform work involving  
30 repetitive operations with their hands, physical skill and energy are not exempt  
31 under this section no matter how highly paid they might be.

32 29 CFR §§ 541.601; 541.100; Pls’ Instruction No. 7; Def’s Instruction No. 4.

33 Plaintiffs have presented significant evidence as to the amount of time they spend engaged

1 in physical activities and in the field.<sup>2</sup> Such evidence includes maintaining and driving their  
 2 emergency response vehicles, engaging in the delivery, pickup and maintenance of emergency  
 3 equipment needed by other companies, engaging in physical fitness and physical training  
 4 activities, in addition to the time and energy they expend on emergency scenes as the Incident  
 5 Commander, Forward Supervisor or in another emergency responder role. Further, as the HCE  
 6 Exemption makes clear, it is inapplicable to industries that may – by virtue of limited number of  
 7 available workers with the specialized skills or by collective bargaining – be more highly paid than  
 8 other industries. The HCE Exemption is simply not intended to apply to employees engaged in  
 9 significant physical or field work, including driving. Consequently, failing to include the rest of  
 10 the HCE Exemption definition is clear error and is prejudicial to Plaintiffs.  
 11

12  
 13 **D. Objection 4 – Elimination of the Executive Exemption test and/or the failure**  
 14 **to include “given particular weight in the management definition instruction**  
 15 **is in clear error because it creates a lower bar for Defendant to meet its burden**  
 16 **of proof and is an incorrect statement of law.**

17 The 1-11-19 draft instructions improperly collapse the executive exemption into the HCE  
 18 exemption’s “management” test. This is an incorrect statement of law because it eliminates  
 19 elements that are required to be met by defendant in order for either exemption to apply.

20 As discussed above, the current instructions ignore the requirement that the HCE  
 21 exemption applies only to employees primarily engaged in office or non-manual tasks. Plaintiffs  
 22 have presented evidence about the significant physical nature of the work performed by Battalion  
 23 Chiefs at the Vancouver Fire Department, including not only responding to calls, but driving,  
 24

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25 <sup>2</sup> In defendant’s summary judgment motion, defendant asserted that the “office” that plaintiffs worked out of was  
 26 their BC emergency response vehicle and their BC office. Docket #28, page 6. The argument concerning the BC rigs  
 as mobile “offices” appears to no longer be part of defendant’s case as they presented no evidence on it at trial.

1 manually checking their vehicles every day, performing routine housekeeping and maintenance  
2 tasks, and performing physical fitness drills and training. The failure to include this part of the  
3 instruction is prejudicial to Plaintiffs and incorrectly states the law.

4  
5 Similarly, the Executive Exemption test includes language that recommendations must be  
6 “given particular weight” for it to count. There is significant evidence the jury will need to evaluate  
7 from both parties in order to make this determination. If this condition is not included, the bar for  
8 Defendant is improperly lowered by an incorrect statement of law and the Executive Exemption is  
9 not fairly construed.

10 The court should continue to include both the HCE Exemption and the Executive  
11 Exemption as stand-alone tests – it is incorrect to combine elements of the FLSA exemptions and  
12 it lowers the burden on Defendant. Defendant must be required to meet all elements of one  
13 exemption, or all elements of the other exemption.  
14

15 **E. Objection 5 - The Management definition included in the draft instructions**  
16 **is an incorrect statement of law, and is unfair and prejudicial to Plaintiffs.**

17 **i. Including certain bulleted items in the instructions is reversible**  
18 **error because it misstates the law and is likely to confuse the jury.**

19 The inclusion of the following bulleted points in the previously proposed draft First  
20 Responder Rule instruction (received 1-10-19) and the currently proposed Management instruction  
21 (received 1-11-10) is clear error. These bulleted points were adopted from Defendant’s Proposed  
22 Jury Instructions but are neither fair, nor a correct statement of the law. Consequently they must  
23 not be included in the final instructions.

- 24 • Deciding how and where to allocate personnel;  
25  
26

- 1 • Directing operations at crime, fire or accident scenes, including deciding whether
- 2 additional personnel or equipment is needed;
- 3 • Evaluating personnel performance;
- 4 • Ensuring operational readiness through supervision and inspection of personnel,
- 5 equipment and quarters;
- 6 • Making recommendations as to hiring, promotion, discipline and termination;
- 7

8 **1. Bullet points 1 and 2 directly conflict with the First Responder**  
9 **Rule’s qualification of Management tasks, as discussed by the**  
10 **Second, Fourth and Tenth Circuits and by the Secretary of**  
11 **Labor.**

12 Deciding whether the first two bulleted points are to be deemed a management duty  
13 depends on whether the action occurs on an emergency scene. *Mullins* at 116. At the Vancouver  
14 Fire Department, if it is in the context of an emergency situation the decision is made by the  
15 Incident Commander, whether that person is a Captain or a Battalion Chief. As described by the  
16 Second Circuit in *Mullins* when it adopted the Secretary of Labor’s interpretation on the matter,  
17 whether such activities are managerial depends on whether they occur in the context of emergency  
18 response. This bullet points must be stricken, or else modified to exclude emergency deployments,  
19 for example: “deciding how and where to allocate personnel on a permanent or regular basis,  
20 outside of the context of emergency response.” *See Mullins v. City of New York*, 653 F.3d 104 (2<sup>nd</sup>  
21 Cir. 2011); *Morrison v. County of Fairfax, VA*, 826 F.3d 758 (4th Cir. 2016).

22 The Second Circuit described the City’s position in *Mullins* as follows and ultimately  
23 rejected it, as described below:  
24

25 ///  
26

1 Thus, according to the City, the first responder regulation does not classify as non-  
2 exempt supervisory activities that are performed “in the field” or “in conjunction  
3 with” law enforcement. *Id.* at 4. If the first responder regulation were designed to  
4 exempt “management” activities when done “in the field” or “in conjunction with”  
5 field law enforcement, the regulation, argues the City, would have included  
6 language referring to “any management activities listed in section 541.102 which  
7 are performed in conjunction with these activities.” *Id.* at 5. The City notes that the  
8 preamble, on which the Secretary relies, includes as managerial tasks “directing  
9 operations at crime, fire or accident scenes, including deciding whether additional  
10 personnel or equipment is needed.” *Id.* The City thus charges the Secretary with  
11 creating an overly “expansive and improper reading” of the first responder  
12 regulation, and, in so doing, in effect eliminating the primary duty test for first  
13 responders. *Id.* at 5, 7. As a result, according to the City, the Secretary improperly  
14 extends the example given in section 541.3(b)(2) to remove all direction in the field  
15 as a management activity. *Id.* at 6. First responders’ management activities are thus  
16 rendered “non-exempt” even when first responders perform management activities  
17 that would be exempt management under the standard primary duties test. *Id.* at 7.

18 *Mullins* at 112. The Second Circuit *rejected* this improperly narrow position and instead granted  
19 *Chevron* deference to the DOL’s interpretation of the First Responder Rule and its qualification of  
20 other FLSA definitions, including “Management.”

21 Deference to an agency’s interpretation is owed only when the regulation at issue  
22 is ambiguous. *See, e.g., Christensen v. Harris Cnty.*, 529 U.S. 576, 588, 120 S.Ct.  
23 1655, 146 L.Ed.2d 621 (2000). The meaning of the first responder regulation, when  
24 juxtaposed with the text of the bona fide executive exemption and, in particular,  
25 with the definition of “management” under 29 C.F.R. § 541.102, is at best  
26 ambiguous. The City’s own argument against the Secretary’s interpretation  
highlights the ambiguity. The City notes that among the list of managerial tasks that  
are mentioned in the preamble to the 2004 revisions are “directing operations at  
crime, fire or accident scenes, including deciding whether additional personnel or  
equipment is needed.” Def. Supp. Br. at 5 (quoting 69 Fed.Reg. at 22130). At the  
same time, the first responder regulation qualifies those types of activities and  
deems them not to be “management.” *See* 29 C.F.R. § 541.3(b)(1). Moreover,  
plaintiffs in this case engage in types of activities that correspond with management  
as defined in 29 C.F.R. § 541.102—such as “directing subordinates to canvas a  
certain area, positioning officers in the field for law enforcement operations, and  
guiding subordinates on proper police procedures,” *Mullins*, 523 F.Supp.2d at 358  
(footnote omitted)—and thus it is not entirely clear, for the purposes of the  
executive exemption, whether such activities should be considered exempt  
“management” tasks pursuant to section 541.102 or as “non-exempt” pursuant to  
section 541.3(b).

1  
2 Since the regulation is ambiguous, we turn to the Secretary’s interpretation of it in  
3 her *amicus* brief. The Secretary’s interpretation is entitled to controlling deference,  
4 even if articulated in an *amicus* brief, unless it is “ ‘plainly erroneous or inconsistent  
5 with the regulation[s]’ or there is any other ‘reason to suspect that the interpretation  
6 does not reflect the agency’s fair and considered judgment on the matter in  
7 question.’ ” See *Talk Am., Inc.*, 131 S.Ct. at 2261 (quoting *Chase Bank USA, N.A.*  
8 *v. McCoy*, 562 U.S. —, —, 131 S.Ct. 871, 880, 178 L.Ed.2d 716 (2011)); *Long*  
9 *Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171, 127 S.Ct. 2339, 168 L.Ed.2d  
54 (2007) (noting that where the DOL’s “interpretation of its own regulation  
reflects its considered views ... [,] we have accepted that interpretation as the  
agency’s own, even if the agency set those views forth in a legal brief”); *Auer v.*  
*Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (affording  
deference to the Secretary’s own interpretation of DOL regulation advanced in  
*amicus* brief).

10 *Mullins* at 113-114. The Second Circuit went on to explain the DOL’s interpretation of the  
11 interplay between the First Responder Rule and what would – *in other contexts* be a management  
12 activity – “directing operations at crime, fire or accident scenes” was appropriately qualified by  
13 the First Responder Rule. Consequently, *Mullins* determined that certain supervisory activities that  
14 would otherwise be “management” activities, do not cause an employee to lose their non-exempt  
15 status if these activities are performed in the context of an emergency incident response by a first  
16 responder.  
17 responder.

18 The Secretary does not, as a result, eliminate the primary duties test in her  
19 interpretation of the first responder regulation. ***While “directing operations at***  
20 ***crime, fire or accident scenes” appears, at first blush, to be a type of management***  
21 ***that sergeants undertake, when their supervisory activities are viewed within the***  
22 ***context of the first responder regulation as interpreted by the Secretary, it***  
23 ***becomes apparent that, because these activities form part of sergeants’ primary***  
24 ***field law enforcement duties, such supervision is not to be deemed***  
25 ***“management.”*** See DOL *Amicus* Br. at 5 (emphasis added).

26 *Mullins* at 116. In other words, “directing operations at crime, fire or accident scenes” and  
“directing the work of two or more other employees” which would otherwise be “management”

1 duties is qualified by the First Responder Rule and is not “management” when performed on an  
2 emergency scene. The Second Circuit went on to state:

3 The Secretary’s conclusion is also consistent with this Court’s decision in *Reich v.*  
4 *New York*, 3 F.3d 581 (2d Cir.1993), overruled by implication on other grounds by  
5 *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996),  
6 which the DOL cited approvingly in the preamble. *See* 69 Fed.Reg. at 22129. In  
7 *Reich*, this Court affirmed the lower court’s ruling that investigators who conducted  
8 criminal investigations and supervised state troopers’ investigations were not  
9 engaged in exempt administrative activity. 3 F.3d at 587–88. As the preamble  
10 acknowledged, this Court held that their primary duty was investigation, “not  
11 administering the affairs of the department itself.” 69 Fed.Reg. at 22129. Although  
the administrative exemption is not at issue in this case, the first responder  
regulation addressed the scope of the section 13(a)(1) exemptions generally, and  
thus *Reich* provides additional support for the claim that the Secretary has not  
departed in her current interpretation of the first responder regulation from previous  
agency interpretations.

12 *Id.* at 116-117. A close reading of the Tenth Circuit’s *Maestas* opinion also describes such  
13 activities as field supervision and direction as non-managerial when performed in the context of  
14 an emergency response:

15 Summary judgment was clearly improper as to plaintiff Maestas, a full-time field  
16 lieutenant. Like all plaintiffs, Maestas performs a mix of managerial duties, such as  
17 ensuring that his subordinates are well-prepared, and first responder duties, like  
18 patrolling his zone and responding to emergencies. He also has some administrative  
19 duties, like creating schedules. ***In an emergency he is expected to direct the work  
of his subordinates in the field—an activity the first responder regulation deems  
non-managerial.***

20 *Maestas v. Day, Zimmerman*, 664 F.3d 822, 830 (10<sup>th</sup> Cir. 2012) (emphasis added), discussed by  
21 the Secretary of Labor in its *amicus* brief to the Fourth Circuit in *Morrison*, at 49. More  
22 importantly, as the DOL clarified in its *amicus* brief in *Morrison*, this is simply not how the First  
23 Responder rule applies.  
24

25 The bullet point “Directing operations at crime, fire or accident scenes....” is erroneous for  
26 the same reason and is an incorrect statement of law. *See Mullins* at 116 (“While “directing

1 operations at crime, fire or accident scenes” appears . . . to be a type of management...when their  
2 supervisory activities are viewed within the context of the first responder regulation as interpreted  
3 by the Secretary, it becomes apparent that, because these activities form part of sergeants’ primary  
4 field law enforcement duties, such supervision is not to be deemed ‘management.’ *See* DOL  
5 *Amicus* Br. at 5.”). Fire Captains make these decisions when they act as the Incident Commander.  
6 Most of the time the Incident Commander on an emergency call in the Vancouver Fire Department  
7 will be a Fire Captain – even on routine medical calls. Adoption of the standard proposed in this  
8 instruction is clear error because it would tend to disqualify not only Battalion Chiefs but also Fire  
9 Captains, who have been considered non-exempt for decades even though they direct operations  
10 and personnel on emergency scenes.  
11

12 Washington state’s requirement that fire departments develop an Incident Command  
13 System consistent with the U.S. Department of Homeland Security National Incident Management  
14 System. WAC 296-305-05000. Among the many important components of the incident command  
15 system, there must be an Incident Commander on every emergency scene who supervises the  
16 personnel, acts as the safety officer, obtains resources and engages in other crucial first responder  
17 duties. *Id.* At the Vancouver Fire Department, this Incident Commander role is filled by either a  
18 Captain or a Battalion Chief. These employees have had training on efficiently and safely  
19 managing the emergency scene (the personnel and their activities) and are an essential and legally  
20 required component of every single emergency response. Among other duties, the Incident  
21 Commander will be “directing operations at fire or accident scenes.” Consequently, the inclusion  
22 of this bullet point is a patently incorrect statement of law and overly narrows the scope of the First  
23 Responder Rule in inappropriate ways that are clear error. It also ignores the legal requirement that  
24  
25  
26

1 every emergency response in the state of Washington must have an Incident Commander. This  
2 bullet point must therefore be rejected.

3 **2. Bullet points 3, 4 and 5 improperly lower the threshold for**  
4 **Defendant to meet in this case.**

5  
6 Including “evaluating personnel performance” without the additional information that is  
7 included in the original Management definition lowers the threshold for defendant to meet and is  
8 an incorrect statement of law. It is prejudicial. The full bulleted point should instead read,  
9 “appraising employees’ productivity and efficiency *for the purpose of recommending promotions*  
10 *or other changes in status.*” That language must be included, or it is in clear error.

11  
12 It is unclear where the language “ensuring operational readiness through supervision and  
13 inspection of personnel, equipment and quarters” comes from but it is not included in the FLSA’s  
14 definition of management and should not be included here.

15  
16 Defendant’s inclusion of the language, “Making recommendations as to hiring, promotion,  
17 discipline and termination;” is a partially correct statement from the Executive Exemption.  
18 However, it does not include the most important language from that exemption – that such  
19 recommendations must be given “particular weight” by the decision-maker. The inclusion of this  
20 language, without qualification is an incorrect statement of law and is in clear error. It is  
21 inappropriately included on this list without that qualification.

22 **F. Objection 6 - Excluding other bulleted items from the “management”**  
23 **definition is in error and is prejudicial to Plaintiffs.**

24  
25 Plaintiffs proposed jury instruction included most of the actual FLSA definition pertaining  
26 to management and is a correct statement of the law. See Plaintiffs’ Proposed Instruction No. 11.

1 Defendant's modification which is adopted in great part in these draft instructions, failed to  
2 correctly state the law by eliminating several bulleted points that would be helpful to the jury in  
3 determining whether the Plaintiffs are first responder supervisors or are managers. There is a  
4 significant difference in treatment under the FLSA for higher level management functions, which  
5 is why these higher-level management functions must be included in the jury instruction. Plaintiffs  
6 included the following bulleted points in their proposed instruction:  
7

- 8 • interviewing and selecting;
- 9 • setting and adjusting their rates of pay and hours of work;
- 10 • directing the work of employees;<sup>3</sup>
- 11 • maintaining production or sales records for use in supervision or control;
- 12 • appraising employees' productivity and efficiency for the purpose of recommending  
13 promotions or other changes in status;
- 14 • handling employee complaints and grievances;
- 15 • disciplining employees; planning the work;
- 16 • determining the techniques to be used;
- 17 • apportioning the work among the employees;<sup>4</sup>
- 18 • determining the type of materials, supplies, machinery, equipment or tools to be used  
19 or merchandise to be bought, stocked and sold;
- 20 • controlling the flow and distribution of materials or merchandise and supplies;
- 21
- 22
- 23

24 \_\_\_\_\_  
25 <sup>3</sup> Plaintiffs believed that their version of the First Responder Rule would qualify this Management definition, but the  
26 language should simply be stricken because Plaintiff's version of the rule has not been adopted.

<sup>4</sup> Plaintiffs believed that their version of the First Responder Rule would qualify this Management definition, but the  
language should simply be stricken because Plaintiff's version of the rule has not been adopted.

- 1 • providing for the safety and security of the employees or the property;
- 2 • planning and controlling the budget;
- 3 • and monitoring or implementing legal compliance measures.

4 Removing these high-level management activities from the bulleted points is prejudicial to  
5 Plaintiffs and makes it far easier for the Defendant to meet its burden of proof. The draft instruction  
6 is in clear error because it misstates the law by creating different activities that the Defendant (but  
7 not the Department of Labor) have identified as “management” activities that they want the jury  
8 to consider and eliminating those that they do not want the jury to consider.  
9

10  
11 **G. Objection 7 – Failure to include Plaintiff’s Instruction No. 10 and any**  
12 **language instructing the jury that training is a fundamental and inextricable**  
13 **part of emergency response work.**

14 While Plaintiff appreciates the court’s removal of “training” as general language in the  
15 management instruction, there is no additional language in any instruction that discusses the  
16 critical relationship between training and emergency responder duties. In Plaintiffs’ Proposed  
17 Instruction No. 10, Plaintiffs proposed an instruction on training that is related to first responder  
18 duties. That instruction should be adopted so that the jury understands that training for emergencies  
19 is a first responder duty as opposed to a management duty. This is in line with *Morrison* and the  
20 DOL’s position in its *amicus* brief to the Fourth Circuit in that case.

21 Nor can the gap be filled with the approximately four hours per day the Captains  
22 devote to a combination of emergency response and physical fitness training. The  
23 Captains undergo the same training as all of the other firefighters at the station so  
24 that they, along with their crews, are able to fulfill their first responder obligations.  
25 That so much time is devoted to this process only underscores the importance of  
26 those direct response duties. And like other efforts to “assur[e] a constant state of  
preparedness,” such training “relate[s] directly to [a fire captain’s] regular front line  
firefighting duties,” and is therefore non-managerial and non-exempt under the first  
responder regulation. Barrows, 944 F.Supp.2d at 604 (citing Mullins and finding

1 fire captains non-exempt under first responder regulation and primary duty  
2 standard).

3 *Morrison* at 772; see also DOL *Morrison amicus* brief at 37-38. For fire fighter employees  
4 “training” to ensure first responder readiness is not a managerial activity. *Morrison* at 772; see  
5 also DOL *Morrison amicus* brief at 37-38. The case law and DOL’s position is clear that, for fire  
6 service employees, training to be “response ready” is a first responder activity. Such training is not  
7 a management activity even if the employee is participating in the training in a lead role or is  
8 assisting in the training. See e.g. DOL *Morrison amicus* brief at 37-38. This needs to be clarified  
9 in some manner for the jury in an instruction. It could, for example, be included as a sentence in  
10 the First Responder Rule instruction, stating “training to be ‘response ready’ is a first responder  
11 activity, even if the employee is participating in the training in a lead role or is assisting in the  
12 training.”  
13  
14

15 Both parties clearly believed “training” would be an issue of importance in this case and  
16 presented evidence about all of the training that firefighters in the Vancouver Fire Department do.  
17 Failing to include information about training in a separate instruction, as proposed by Plaintiff, or  
18 as part of the First Responder Rule instruction is in error – particularly when the court’s current  
19 “Primary Duty” instruction includes guidance about the amount of time the employee spends on  
20 various duties as being a helpful guide.  
21

22 **H. Objection 8 – The use of the “Existence of Emergency” instruction in a case in**  
23 **which First Responder Duties are a Key Issue and are in Opposition to**  
24 **the First Responder Rule and How it Has Been Interpreted by Courts and the**  
25 **DOL; Adoption of this Instruction is Reversible Error.**  
26

1 In the emergency response setting, many fire departments do not respond to emergencies  
2 on a daily basis. Some fire departments respond weekly or a few times a week – even at the  
3 firefighter level, about which the Court has received testimony. The inclusion of this instruction  
4 will confuse the issues in front of the jury and create an improper bar for the jurors to find that any  
5 one of the Plaintiffs is a “first responder.” The nature of emergency response work and first  
6 responder duties generally is that they occur only when there is an emergency. *See Morrison* at  
7 770. Depending on the size of the service area, that dispatch may be daily, but it may occur only  
8 weekly – if the service area is less busy with, for example, a smaller population. As the Fourth  
9 Circuit explained in *Morrison*,

11 ... [A] fire captain’s direct firefighting duties do not consume the majority of his  
12 or her time is simply the nature of first response work: “[T]he nature of the job of  
13 every front-line fire fighter[ ] is generally to wait. Any given day for a fire fighter  
14 may consist of extended periods of boredom, punctuated by periods of urgency and  
15 moments of terror.” *Barrows*, 944 F.Supp.2d at 604–05. And it would be illogical  
16 to give much weight to how much time a Captain devotes to answering emergency  
17 calls; that time presumably would vary from year to year, based on how many  
18 emergencies arise, without changing the “character of the employee’s job as a  
19 whole,” 29 C.F.R. § 541.700.

20 *Morrison* at 770 (citing to *Barrows*). Most troubling, is that this jury instruction undoes decades  
21 of precedence both before and after the First Responder Rule was issued in 2004. Fire Captains  
22 who supervise Firefighters on a fire call or EMS call are first responders and have been considered  
23 so for decades. That is well-settled case law which would now be in question if this instruction  
24 were applied to such well-settled first responders.

25 The court’s potential inclusion of another proposed instruction by defendants is also hugely  
26 problematic because that “definition” is simply not applicable to emergency responders and liable  
to be misinterpreted and misapplied by the jury. It is clear error to include it. At every emergency

1 response that is a larger than routine EMS call – for example a motor vehicle accident – the  
2 emergency “threatens the safety of employees.” In such scenarios, traffic is blocked or redirected  
3 to ensure the safety of all personnel on scene. Fires also “threaten the safety of employees.”  
4 Consequently, adopting this rule could lead to reversible error if the jury decides that it applies –  
5 for example – to preclude consideration of first responder actions at all responses to emergencies  
6 in which there is a threat to the safety of employees.  
7

8 There is already an express rule that is applicable to first responders who “respond” to  
9 emergencies (the First Responder Rule). This draft jury instruction, to the contrary, is derived from  
10 a different part of the CFRs – one related to manufacturing -- that is wholly inapplicable to this  
11 case and is, instead, the kind of provision that one would look at for a lumber mill, an auto plant,  
12 or another type of manufacturing operation. The inclusion of this instruction will be extremely  
13 confusing to jurors, is a misstatement of the law as it applies to first responder employees and is  
14 prejudicial to Plaintiffs. It is clear error to include it.  
15

16 **I. Objection 9 - Failing to Include “Customarily and Regularly and “Particular**  
17 **Weight” in the Instructions is Erroneous.**

18 Because the court’s draft instructions remove the Executive Exemption instruction  
19 altogether, the court does not include “particular weight.” That is a critical issue in this case and  
20 the parties agreed upon an instruction relating to that definition. See Joint Instruction No. 24.  
21 Additionally, the HCE Exemption uses the language “customarily and regularly” which is why the  
22 parties agreed to include Joint Instruction No. 25 which defines that term of art. Both instructions  
23 are a correct statement of the law as to FLSA claims and they will aid the jury to evaluate and  
24 weigh the evidence that they have received. The failure to include these instructions, is clear error.  
25  
26

1 **III. CONCLUSION**

2 While Plaintiffs appreciate the court's attempt to simplify the jury instructions based upon  
3 somewhat clunky FLSA language and some confusion as to how the exemptions and the  
4 definitions relate to each other, the current instructions are in clear error because they ignore the  
5 significant guidance on this subject that the DOL has provided in the form of amicus briefs filed  
6 in Mullins and Morrison, respectively. Moreover, Plaintiffs believe the jury is entitled to a full  
7 rendering of the First Responder Rule's language and the other definitional language and  
8 exemptions so that a fair and reasoned decision can be reached.

9  
10 Plaintiffs include as Appendices the following: (1) the Secretary's *Morrison amicus* brief;  
11 (2) Secretary's *Mullins amicus* brief. Plaintiff is also attaching as an Exhibit alternative proposed  
12 instructions which will also be sent in Word version documents to opposing counsel and the  
13 courtroom deputy.  
14

15 DATED this 12<sup>th</sup> day of January, 2019.

16 TEDESCO LAW GROUP

17 s/Katelyn S. Oldham

18 

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Katelyn S. Oldham, WSB No. 35266

19 Attorney for Plaintiffs  
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21  
22  
23  
24  
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26

## APPENDIX 1

# BRIEF OF THE SECRETARY OF THE DEPARTMENT OF LABOR TO THE FOURTH CIRCUIT IN *MORRISON*

No. 14-2308

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

GERARD MORRISON, et al.,  
Plaintiffs-Appellants,

v.

COUNTY OF FAIRFAX, VIRGINIA,  
Defendants-Appellees.

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On Appeal from the United States District Court for the  
Eastern District of Virginia

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE*  
IN SUPPORT OF REVERSAL OF THE DISTRICT COURT'S  
GRANT OF SUMMARY JUDGMENT

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**INTEREST OF THE SECRETARY**

Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor (“Secretary”) submits this brief as *amicus curiae* in response to this Court’s request for the Government’s view of this case. Upon review of the issues raised in this case and based on evidence presented by the Plaintiffs-Appellants, the Secretary recommends reversal of the district court’s opinion and remand for further proceedings to determine the Plaintiffs’ primary duty, an outcome the

Secretary acknowledges is different than that sought by either of the parties on appeal.

The Secretary has a substantial interest in the proper judicial interpretation of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. 201 *et seq.*, because he administers and enforces the Act. *See* 29 U.S.C. 204, 211(a), 216(c), 217. In particular, the Secretary has a strong interest in ensuring that courts correctly interpret and apply the first responder regulation, 29 C.F.R. 541.3(b), which is among the regulations that “define and delimit” the executive and administrative exemptions from FLSA protections pursuant to Congress’s direction in 29 U.S.C. 213(a)(1).

### **ISSUE PRESENTED**

Whether the district court erred by granting summary judgment to the County of Fairfax, Virginia (“County”) based on a determination that the County properly treats certain categories of its Fire Department employees as exempt from the overtime requirement of the FLSA pursuant to the executive exemption despite evidence in the record raising a genuine dispute as to whether the primary duty of those employees is emergency response.

## STATEMENT

### A. Factual Background

The Fairfax County Fire Department employs, among other categories of workers, Shift Commanders, Station Commanders, Safety Officers, and EMS Supervisors (collectively “Captains”). Joint Appendix (“JA”) 4517. The Captains are ranked below top Fire Department managers, including the Fire Chief, Assistant Chiefs, Deputy Chiefs, and Battalion Chiefs, and above other categories of employees, including Lieutenants, Technicians, and Firefighters. JA 1694 (Fire Department-issued document detailing the chain of command). Station Commanders and EMS Supervisors earn a base salary of between \$77,798.86 and \$126,722.96 annually; Shift Commanders and Safety Officers earn a base salary of between \$70,894.51 and \$115,480.35 annually; and Lieutenants, by contrast, earn a base salary of between \$61,380.80 and \$99,983.94 annually. JA 2153-54 (Fire Department salary chart).<sup>1</sup> None of the Captains receive overtime compensation from the County. County Br. at 5; Captains Br. at 5.

*Shift Commanders.* According to the County’s position description, or “class specification,” Shift Commanders “serve[] as the officer-in-charge on a

---

<sup>1</sup> The Fire Department’s salary chart does not list position titles. Station Commanders and EMS Supervisors “are paid at the F-27 grade,” Shift Commanders and Safety Officers “are paid at the F-25 grade,” and Lieutenants “are paid at the F-22 grade.” JA 2148 (County’s 30(b)(6) deposition).

24-hour shift in a fire and rescue station.” JA 2005. They have “all related administrative, managerial, and operational responsibilities” associated with supervising a shift, including “[s]upervis[ing], plan[ning], organiz[ing], coordinat[ing] and evaluat[ing] the work of assigned staff,” “[i]nspect[ing] the work location and all equipment for compliance with county, station and federal safety regulations,” “[s]chedul[ing] in-station training for shift personnel,” and “[p]lann[ing] and participat[ing] in public relations programs.” *Id.*

But Shift Commanders indicated in deposition testimony that their management role is not as significant as the class specification suggests. They testified that their power to supervise subordinates and to manage the fire station is limited: they do not have authority to “assign overtime to off-duty fire personnel,” “approve leave,” “set minimum staffing levels,” or make purchases or order supplies for the station. *See, e.g.*, JA 246, 573, 934, 1100, 1139-40, 1168, 1215, 1220-21. Although Shift Commanders administer discipline to their subordinates, they cannot do so without approval from their own supervisors. *See, e.g.*, JA 215, 574, 1103, 1131-33 (stating that “discipline comes from above me” and describing an incident in which the Shift Commander disagreed with the disciplinary action but nevertheless administered it), 1142, 1221. They are in daily phone and email communication with the Battalion Chief to whom they report. JA 2518

(declaration of Battalion Chief). One Shift Commander said he is “just an officer to execute the policies of the department.” JA 1097.

According to the class specification, Shift Commanders also “perform[] fire suppression ... duties,” including “[s]iz[ing] up fire ... emergencies and determin[ing] the necessity for additional firefighting companies ... as well as the proper course of action to effectively abate the emergency,” “[a]ssum[ing] command at the scene until relieved by a higher-ranking officer,” “respond[ing] to emergency incidents, direct[ing] the activities of the crews, and participat[ing] in firefighting.” JA 2005-06. Shift Commanders explained that they always went on emergency calls with their subordinates, *see, e.g.*, JA 251, 1107-08, 1416, and that their roles at an emergency scene included firefighting tasks such as “making sure the hoses are pulled, pulling the hoses, ventilating, forcing entry, searching, and extinguishing and confining the fire,” as well as emergency medical response. JA 1104, 199-200 (the Shift Commander provides “hands-on care” as needed, even if there are other medics at the scene); *see* JA 197 (the Shift Commander wears his protective gear during training, just as his subordinates do, because “in a real fire I’m going to pull the hose and I’m going to be right in there with them”), 204 (whoever rides in a fire engine in the supervisor’s role is “going to pull hose, they’re going to search, they’re going to hook ceiling, they’re going to do whatever type of suppression activities that any suppression piece would do”), 250 (at a

house fire, the Shift Commander “would engage in hands-on firefighting activities as far as maybe forcing a door open ... and then advancing a hose line, looking for victims, pulling victims out of the building if we find them, ventilating as we go, looking for other hazards”), 575-76 (the Shift Commander’s activities at an emergency response scene could include “taking a blood pressure,” “bandaging somebody,” or “doing CPR on a patient”), 1142-43, 1219 (the Shift Commander’s “hands-on firefighting” includes “anything [from] breaking stuff to pulling hose to – whatever needs to be done”), 1417 (the Shift Commander’s activities at an emergency scene could include “giving people direction, getting involved in patient care, putting out a fire, throwing a ladder, pulling hose lines”). A study of records of emergency vehicle dispatch time over a period of three years showed that Shift Commanders spend an average of one and a half hours (ranging from a low of essentially no time to a high of 15 and a half hours) per 24-hour shift responding to emergency calls. JA 1696-97, 1700.

Furthermore, the class specification provides that Shift Commanders “[p]articipate[] in the physical fitness program” as well as “all required training ... to ensure operational readiness at all times.” JA 2005. In depositions, Shift Commanders explained that they engage in the same physical fitness and other training as all employees at the station, which if not interrupted by responding to calls occupies two to three hours in each 24-hour shift, because they need to be

prepared to participate in emergency response. JA 1101-02; *see* JA 247, 801-02, 1137-38, 1170, 1171-73, 1192-93. Shift Commanders can run training sessions, but their subordinates can do so as well. JA 387-88 (deposition of Assistant Chief).

Significantly, in addition to explaining that responding to an emergency call takes precedence over any other duty, JA 252, 576-77, 1108-09 (“Nothing trumps our primary role of responding to the fires and emergency incidents.”), 1145-46, 1208-09, 1213-15, several Shift Commanders said that their most important job duty is emergency response, 250 (most important job duty is “[r]esponding to emergency incidents”), 938-39 (most important job duty is “[r]esponding to incident calls”), 1104 (most important job duty is “[t]o respond to emergency incidents, fight fire, help people”), 1142 (top priority is “running emergency calls”), 1189 (most important job “is to save lives and protect property”).

*Station Commanders.* The relevant class specification explains that Station Commanders have “overall responsibility for station management and assigned resources.” JA 1984. Specifically, their duties include “manag[ing] the fire and rescue station’s resources and maintenance needs,” “[p]repar[ing] the budget for the fire and rescue station,” “[r]equisition[ing] and receiv[ing] equipment and supplies,” “[p]lan[ning] and execut[ing] the work assignments of a specific shift,”

and “[d]evelop[ing] and maintain[ing] policy and procedures for an assigned station.” JA 1985.

But according to the Station Commanders’ deposition testimony, like the Shift Commanders below them, Station Commanders do not have the management authority that the class specification suggests. For example, they cannot assign overtime, approve leave, or set minimum staffing levels. JA 534-35, 646-47, 961-62. Station Commanders can only issue discipline that is approved, or in some cases ordered despite being inconsistent with the Station Commander’s recommendation, by a supervisor. JA 260-61, 957, 1444-47; *see* JA 659-60 (Station Commander explaining that he “was simply the delivery boy” of a disciplinary action that came from the Deputy Chief). They are in daily phone and email communication with the Battalion Chief to whom they report. JA 2518 (declaration of Battalion Chief). Additionally, Station Commanders “really do not do any budgetary tasks at the station.... I don’t have an amount of money I can use.... What we get is all up to the higher ups in the department to decide.” JA 313; *see* JA 657 (Station Commander stating he has no purchasing authority), 1004-05 (Station Commander explaining that he doesn’t “really budget,” but rather generates a “request for resources” or “wish list”). Station Commanders also testified that particular management tasks occupied only a very small fraction of their work time. For example, one said that he spends “no more than three or four

hours max ... [f]or the whole year” creating a list of desired station purchases.

JA 1013. He also testified that reviewing and updating station policies takes four or five hours in the first year as a Station Commander and “an hour a year” in subsequent years on the job. JA 1014. Similarly, another Station Commander testified that he spent “[t]wo to four hours, six max” over the course of a full year writing performance appraisals for his supervisees. JA 647; *see* JA 962 (estimating five to six hours writing performance appraisals, an hour and a half to two hours writing a wish list, and two hours updating station policies annually).

According to the class specification, Station Commanders also “[p]articipate[] in fire suppression and rescue activities,” including by “[a]ssum[ing] command at the scene of an incident until relieved by a higher-ranking officer,” “[s]iz[ing] up fire, EMS, or rescue emergencies and determin[ing] the necessity for additional firefighting companies, EMS units, or specialized rescue units ... as well as the proper course of action to effectively abate the emergency,” and “[m]ak[ing] decisions and direct[ing] subordinates as to the best method for combating fires and coping with other emergency situations.”

JA 1985. In depositions, Station Commanders explained that they go on all calls with their subordinates, leaving behind any other tasks they might be doing when the call arises. JA 286, 327-28, 537, 656, 965-66, 1466-67. On the scene, they “[p]articipate with the mitigation of the emergency, whatever ... it may be”; their

activities at the scene could include “[m]aking a size-up, presenting that information on the radio,” “[f]orcing entry to allow the hose line to advance,” “[a]ssisting with the advancement of the hose line, potentially the raising ladders.” JA 1466; *see* JA 538-40 (a Station Commander might “throw a ladder,” “help to pick up a fan,” “help to ... stand in the corner and extend a hose line,” or “force entry on a door,” and considers it his “job to go into a burning building”); JA 965 (a Station Commander might “deploy[] a hose line, utiliz[e] forcible entry [tools], deploy[] ground ladders”). In a medical emergency, a Station Commander might “have to put ... hands on the patient.” JA 333. Station Commanders spend an average of one hour and 23 minutes (ranging from a low of essentially no time to a high of just over 11 hours) per 24-hour shift responding to emergency calls. JA 1700.

Station Commanders also “[p]articipate[] in the physical fitness program” and “[p]articipate[] in all required training and maintain[] all professional certifications to ensure operational readiness at all times.” JA 1984. Station Commanders’ descriptions of their participation in physical fitness and other training matched those of Shift Commanders—i.e., they did the same training as all fire fighters—because Station Commanders “need to be physically fit so that we can go out and respond to emergencies.” JA 283-84; *see* JA 648, 963, 1460-61.

Station Commanders can run training sessions, but their subordinates can do so as well. JA 387-88 (deposition of Assistant Chief).

One Station Commander testified that the “most important job duty” of a Station Commander is “[r]unning emergency incidents.” JA 1466. Another stated that “[o]ur number one priority is to run emergency calls.” JA 330. A third agreed that “running a call is the primary task, the most important task that you have.” JA 534.

Safety Officers. The class specification describing the role of Safety Officers explains that they “serve[] as the agency’s primary contact for matters dealing with employee safety,” including “[i]nvestigat[ing] all injuries, significant emergency incidents and department vehicle accidents occurring during the shift,” “[i]nspect[ing] fire station work and living quarters for code compliance and safety hazards,” “[i]nspect[ing] personal protective clothing,” and “[p]repar[ing] and deliver[ing] safety instruction to shift officers and subordinates for station activities, physical fitness training, vehicle operation and emergency incident procedures.” JA 2006.

The class specification also indicates that Safety Officers perform duties at emergency scenes. Specifically, they “perform[] ... advanced life support duties,” “[r]espond[] to emergency incidents as a member of the Incident Command staff, advise[] the Incident Commander of unsafe conditions or acts, recommend[]

alternative tactics,” and “[t]est[] and monitor[] atmosphere at emergency incidents to assist in determining the appropriate level of personal protective equipment.”

JA 2005-06. In deposition testimony, Safety Officers discussed responding to emergencies and providing advice regarding the safety of the fire fighters at the scene. *See* JA 666, 1429. In particular, one explained that his role at an emergency scene is to “look[] out for the safety and well-being of everybody on the fire ground” and gave the examples of preventing fire fighters from being too close to dangerous wires or from being inside a building where they were not safe. JA 1312-13, 1322. At the scene of an accident or injury, a Safety Officer would perform “EMT functions,” such as “start CPR.” JA 722. When dispatched to a call, Safety Officers are required to abandon any other task in order to respond. JA 1328-29. Safety Officers spend an average of 58 minutes (ranging from a low of essentially no time to a high of 9 hours, 42 minutes) per 24-hour shift responding to emergency calls. JA 1700.

Like Shift Commanders and Station Commanders, Safety Officers must “[p]articipate[] in the physical fitness program” as well as “all required training,” and they must “maintain[] all professional certifications to ensure operational readiness at all times.” JA 2005; *see* JA 714, 1327, 1431 (deposition testimony confirming that Safety Officers engage in daily physical fitness training).

Safety Officers testified that they see their role in emergency response as the most important part of their jobs. One Safety Officer said his most important job duty was “ensuring the safety of our members and the citizens.” JA 1328.

Another said his most important job duty was “[b]eing the advocate for health and safety on emergency incidents,” by which he meant “going around the scene, just making sure everybody is safe, making sure everybody is wearing the right gear,” or “get[ting] them out” if “conditions change.” JA 717.

EMS Supervisors. The relevant class specification explains that EMS Supervisors “supervise[] and coordinate[] the emergency medical services (EMS) in a battalion (comprised of fire and rescue stations located in one region of the county).” JA 1984. Related EMS Supervisor duties include “[r]eview[ing] incident reports for completeness and accuracy,” “[e]valuat[ing] initial field training provided to EMS interns” as well as “remedial training,” “[c]onduct[ing] investigative review boards for non-compliance of protocols,” “[e]nsur[ing] that quality medical care is provided by systematically inspecting personnel and apparatus in his/her assigned battalion,” and “[s]chedul[ing] and critiqu[ing] provider training and/or drills that test the ability of emergency medical services personnel and equipment to meet agency standards and goals.” JA 1985-86.

EMS Supervisors also have emergency response duties. They “[r]espond[] to EMS emergencies with assigned battalion to evaluate and monitor medical

treatment.” JA 1985. Like Station Commanders, they “[a]ssume[] command at the scene of an incident until relieved by a higher-ranking officer,” “[s]ize[] up fire, EMS, or rescue emergencies and determine[] the necessity for additional firefighting companies, EMS units, or specialized rescue units ... as well as the proper course of action to effectively abate the emergency.” *Id.* Like the other Captains, EMS Supervisors have no discretion about responding to a call if dispatched, JA 859, 1017; one EMS Supervisor testified at his deposition that because he can be called to an array of scenes, he “run[s] more calls than” Lieutenants. JA 644. At those calls, he “will initiate patient care ... if it’s a working cardiac arrest, I’ll initiate CPR; I’ll get the automatic [defibrillator] ... placed on the patient ... [o]r interviewing, getting the vital signs”; because he “carr[ies] all medical tools,” he “can start IV lines, take vital signs, give medications.” JA 653-54; *see* JA 862-63. Another EMS Supervisor explained that at a fire scene he is part of a medical unit that provides “immediate care to [any] firefighter in need.” JA 861. EMS Supervisors spend an average of one hour and 11 minutes (ranging from a low of essentially no time to a high of 12 hours, 18 minutes) per 24-hour shift responding to emergency calls. JA 1700.

Additionally, EMS Supervisors “[p]articipate[] in the physical fitness program” and “[p]articipate[] in all required training and maintain[] all professional certifications to ensure operational readiness at all times.” JA 1984.

EMS Supervisors explained that they, like the other Captains, try to spend two hours a day engaging in physical fitness activities, but it is not always possible to meet that goal because of interruptions to respond to emergency calls. JA 649, 856.

Finally, the EMS Supervisors believe their most significant duty to be emergency response. One stated at his deposition that his “primary responsibility is to respond, assist, fit in where I can, assure ... that we do the right thing, that the guys come home; we do it safely.” JA 652. Another explained that his most important job duty was “[p]erforming patient care, delivering medications, treating patients, and providing ... support in any fire task that may be needed.”

JA 858-59. A third said his most important job duty is “[r]esponding to calls [and] providing care to the injured civilians and visitors of Fairfax County.” JA 1064.

## **B. Procedural History**

In January 2014, 176 Captains filed suit against the County in the U.S. District Court for the Eastern District of Virginia for violations of the FLSA’s overtime compensation requirement. JA 1-20, 48. In August 2014, the parties filed cross-motions for summary judgment. JA 31-32. The County argued that all of the Captains were exempt from the FLSA’s overtime requirement because they are “highly compensated employees” under 29 C.F.R. 541.601. JA 2093. The County argued in the alternative that the FLSA’s executive exemption, 29 C.F.R.

541.100, applies to Shift Commanders and Station Commanders because those employees are supervisors and spend nearly all of their time “ensuring the operational readiness of their subordinates, their station, and their apparatuses,” and that the FLSA’s administrative exemption, 29 C.F.R. 541.200, applies to Safety Officers and EMS Supervisors because those employees’ “primary duties are non-manual work related to the overall management and services of the [Fire Department] and the community it serves” and they “exercise judgment and discretion in the performance of their jobs.” *Id.* The Captains argued that because they are all “first-line public safety supervisors who engage in fire fighting and emergency response,” they are not exempt from the FLSA’s overtime requirement under 29 C.F.R. 541.3(b). JA 110-11.

On November 3, 2014, the district court granted summary judgment in favor of the County. JA 4516-25. The court’s opinion briefly described the management duties of each category of Captain: Shift Commanders and Station Commanders “lead four-person fire engine crews in addition to performing a litany of administrative tasks” and “are in charge of either a specific shift or an entire station”; Safety Officers “respond to fire scenes” to “monitor emergency operations and recognize hazards” as well as perform “management functions includ[ing] formulating safety policy, service on accident review boards, and ensuring training compliance”; and EMS Supervisors “oversee the provision of

medical care at incidents involving accidents with injuries, people trapped, cardiac arrest, overdose, and hazardous materials” and “perform managerial and supervisory functions such as participating in Quality Management, reviewing electronic Patient Care Reports, and evaluating compliance with government standards and established medical protocols.” JA 4517-18. The court noted that all these employees “spend the vast majority of their working hours managing station personnel and ensuring operational readiness,” further explaining that “[a]lthough they participate in emergency response, the bulk of their time is spent performing the various tasks required to operate a fire station, such as: evaluating personnel; providing correction, guidance, and counsel to their subordinates; recommending and administering discipline; identifying training needs and requisitioning supplies; and physical fitness training.” JA 4518.

After summarizing the relevant statutory and regulatory provisions, the district court briefly described two cases regarding the application of the executive exemption to fire fighters in which it issued opinions in 1989. JA 4521-22. In both *Hartman v. Arlington County, Virginia*, 720 F. Supp. 1227 (E.D. Va. 1989), and *International Ass’n of Firefighters v. City of Alexandria, Virginia*, 720 F. Supp. 1230 (E.D. Va. 1989), the court reached the conclusion that shift commanders and engine captains were exempt from the FLSA’s overtime requirement. JA 4521-22. This Court affirmed those decisions. *See Hartman v.*

*Arlington Cnty., Va.*, 903 F.2d 290 (4th Cir. 1990); *Alexandria Comm. of Police v. City of Alexandria*, 912 F.2d 463 (Table) (4th Cir. 1990), 1990 WL 122044 (unpublished). *Id.* The district court also noted that in *West v. Anne Arundel County, Maryland*, 137 F.3d 752 (4th Cir. 1998), this Court applied the executive exemption to EMS captains. JA 4522. On the basis of these cases, the court reasoned that “the exempt status of fire captains and EMS captains in the Fourth Circuit is well-established.” JA 4522.

The district court explained its view that 29 C.F.R. 541.3(b), the first responder regulation promulgated in 2004, does not change the import of this pre-2004 caselaw. JA 4522. According to the court, the Captains had taken the position that the first responder regulation provides that all fire department employees who “perform *any* hands-on firefighting work” are non-exempt “regardless of rank or pay level.” JA 4522-24 (quoting 29 C.F.R. 541.3(b)(1)). The court rejected that reading, reasoning that when the first responder regulation is read in context with 29 C.F.R. 541.3(a), which provides that “‘blue collar’ workers” are not exempt, the first responder regulation “plainly applies to ‘blue collar’ firefighters.” JA 4523-24. The notion that the regulation applies to any fire department employee who performs any firefighting work, the district court explained, “has no limiting principle” and would allow even the fire chief to be non-exempt. JA 4524.

Finally, the district court addressed the elements of the executive exemption in a single paragraph, concluding that the exemption applies because the Captains “are compensated on a salary basis at a rate of not less than \$455 per week; their primary duty is management of the enterprise; they customarily and regularly direct the work of two or more other employees; and their suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.” JA 4524-25.

The Captains appealed to this Court seeking reversal of the district court’s opinion and an order for the grant of summary judgment in their favor.

## **ARGUMENT**

### **I. THE EXECUTIVE AND ADMINISTRATIVE EXEMPTIONS ARE NOT APPLICABLE TO FIRE FIGHTERS WHOSE PRIMARY DUTY IS EMERGENCY RESPONSE**

The FLSA generally requires a covered employer to pay an employee in compliance with its minimum wage and overtime requirements. *See* 29 U.S.C. 206, 207. It creates an exemption from those requirements, however, for “any employee employed in a bona fide executive[ or] administrative ... capacity ... (as such terms are defined and delimited from time to time by regulations of the Secretary).” 29 U.S.C. 213(a)(1). Like all FLSA exemptions, the executive and administrative exemptions “are to be ‘narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly

and unmistakably within [the exemptions’] terms and spirit.” *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688, 692 (4th Cir. 2009) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)) (alteration in original); *see Purdham v. Fairfax County Sch. Bd.*, 637 F.3d 421, 427 (4th Cir. 2011) (“The Act is ‘remedial and humanitarian in purpose,’ and is meant to protect ‘the rights of those who toil[’].... The FLSA should be broadly interpreted and applied to effectuate its goals.” (quoting *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944); citing *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 296 (1985))). Furthermore, the employer “b[ears] the burden of proving, by clear and convincing evidence, ... that the [employees’] jobs fell within the [FLSA] exemption.” *Desmond*, 564 F.3d at 691-92 & n.3 (citing *Shockley v. City of Newport News*, 997 F.2d 18, 21 (4th Cir. 1993); *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190 (1966); *Clark v. J.M. Benson Co.*, 789 F.2d 282, 286 (4th Cir. 1986)).

*Executive and administrative exemptions.* The Department updated the regulations that implement the executive and administrative exemptions—contained in Part 541 of Title 29 of the Code of Federal Regulations—in 2004. *See* U.S. Dep’t of Labor, Wage & Hour Div., *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122 (Apr. 23, 2004). Under the revised

Part 541 regulations, an employer may properly claim the executive exemption as to an employee if, among other requirements, that employee's "primary duty" is "management." 29 C.F.R. 541.100(a).<sup>2</sup> The regulations further explain the meaning of the term "management":

Generally, "management" includes activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

29 C.F.R. 541.102.

An employer may properly claim the administrative exemption if an employee's "primary duty" is "the performance of office or non-manual work directly related to the management or general business operations of the employer

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<sup>2</sup> To properly claim the executive exemption, an employer must also show that the employee is paid a weekly salary of at least \$455; regularly supervises two or more employees; and has the authority to hire or fire or makes recommendations as to tangible employment actions affecting others that are given particular weight. *See* 29 C.F.R. 541.100(a).

or the employer's customers." 29 C.F.R. 541.200(a).<sup>3</sup> 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." 29 C.F.R. 541.201(a).

Primary Duty. The regulations provide that 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). They further explain:

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.

*Id.* Although "[t]he amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee[,] ... [t]ime alone ... is not the sole test." 29 C.F.R. 541.700(b).

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<sup>3</sup> To properly claim the administrative exemption, an employer must also show that the employee is paid a weekly salary of at least \$455 and exercises discretion and independent judgment with respect to matters of significance in performing her primary duty. *See* 29 C.F.R. 541.200(a).

*First responder regulation.* As part of the 2004 final rule, the Department added new regulatory text explaining how the Part 541 exemptions apply with respect to fire fighters and other emergency responders. *See* 69 Fed. Reg. at 22,260-61 (codified at 29 C.F.R. 541.3(b)). This “first responder regulation” provides that the Part 541 exemptions “do not apply to ... fire fighters ..., regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire ... or accident victims; ... or other similar work.” 29 C.F.R. 541.3(b)(1). The regulation then makes explicit that this conclusion is grounded in first responders’ primary duty. Specifically, it goes on to explain that “[s]uch employees do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed.” 29 C.F.R. 541.3(b)(2). “Thus, for example, a ... fire fighter whose primary duty is to ... fight fires is not exempt ... merely because the ... fire fighter also directs the work of other employees in ... fighting a fire.” *Id.* Additionally, “[s]uch employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer.” 29 C.F.R. 541.3(b)(3). Therefore, the first responder regulation clarifies that employees whose primary duty is emergency response are non-exempt. It does not

affect the significance of the primary duty analysis in determining whether a particular employee of a fire department must receive overtime.

The 2004 preamble includes a discussion of the purpose of the first responder regulation. *See* 69 Fed. Reg. at 22,128-30. The new provision was being added, it explained, in response to concerns about the application of the Part 541 exemptions to first responders, because “th[e] silence in the current regulations [as to that issue] has resulted in significant federal court litigation.” 69 Fed. Reg. at 22,129. The Department went on to explain that “[m]ost of the courts facing [the issue of whether first responders qualify for the Part 541 exemptions] have held that police officers, fire fighters, paramedics and EMTs and similar employees are not exempt because they usually cannot meet the requirements for exemption as executive or administrative employees.” *Id.* It proceeded to describe several such cases; with regard to fire fighters, it summarized *Department of Labor v. City of Sapulpa, Oklahoma*, 30 F.3d 1285 (10th Cir. 1994), in which “the court held that fire department captains were not exempt executives because they were not in charge of most fire scenes; had no authority to call additional personnel to a fire scene; did not set work schedules; participated in all the routine manual station duties such as sweeping and mopping floors, washing dishes and cleaning bathrooms; and did not earn much more than the employees they allegedly supervised.” 69 Fed. Reg. at 22,129 (citing *City of Sapulpa*, 30 F.3d at 1288).

The purpose of the new regulation was not to “depart[] from this established case law” but rather “to make clear ... that such ... fire fighters ... and other first responders are entitled to overtime pay.” *Id.* In particular, “[p]olice sergeants, for example, are entitled to overtime pay even if they direct the work of other police officers because their primary duty is not management or directly related to management or general business operations.” *Id.*

The preamble went on to explain that the executive or administrative exemptions do apply if, “in addition to satisfying the other pertinent requirements, ... [fire officials’] primary duty is performing managerial tasks.” 69 Fed. Reg. at 22,130. In this context, managerial tasks include:

evaluating personnel performance; enforcing and imposing penalties for violations of the rules and regulations; making recommendations as to hiring, promotion, discipline or termination; coordinating and implementing training programs; maintaining company payroll and personnel records; handling community complaints, including determining whether to refer such complaints to internal affairs for further investigation; preparing budgets and controlling expenditures; ensuring operational readiness through supervision and inspection of personnel, equipment and quarters; deciding how and where to allocate personnel; managing the distribution of equipment; maintaining inventory of property and supplies; and directing operations at ... fire or accident scenes, including deciding whether additional personnel or equipment is needed.

*Id.* The preamble cited several cases in which courts had concluded, because fire department employees had management as their primary duty, that such employees were exempt. *Id.* (citing *West v. Anne Arundel Cnty., Md.*, 137 F.3d 752 (4th Cir. 1998); *Smith v. City of Jackson, Miss.*, 954 F.2d 296 (5th Cir. 1992); *Masters v.*

*City of Huntington*, 800 F. Supp. 363 (S.D. W.Va. 1992); *Simmons v. City of Fort Worth, Tex.*, 805 F. Supp. 419 (N.D. Tex. 1992); *Keller v. City of Columbus, Ind.*, 778 F. Supp. 1480 (S.D. Ind. 1991)). It further noted that “[a]nother important fact considered in at least one case is that exempt police and fire executives generally are not dispatched to calls, but rather have discretion to determine whether and where their assistance is needed.” *Id.* (citing *Anderson v. City of Cleveland, Tenn.*, 90 F. Supp. 2d 906, 909 (E.D. Tenn. 2000)).

*Highly compensated employee exemption.* The Part 541 regulations also provide that “[h]ighly compensated employees,” meaning employees who earn at least \$100,000 per year, are exempt from the FLSA’s minimum wage and overtime protections if they “customarily and regularly perform[] any one or more of the exempt duties or responsibilities of an executive [or] administrative employee.” 29 C.F.R. 541.601(a). Importantly, the highly compensated employee exemption “applies only to employees whose primary duty includes performing office or non-manual work.” 29 C.F.R. 541.601(d). In discussing the first responder regulation in the 2004 preamble, the Department noted that first responders, including fire fighters, who do not qualify for the Part 541 exemptions under the other tests “also cannot qualify as exempt under the highly compensated test” because their primary duty—emergency response—is not office or non-manual work. 69 Fed. Reg. at 22,129.

## **II. THE DISTRICT COURT OPINION REFLECTS MISUNDERSTANDINGS OF IMPORTANT ASPECTS OF THE UNDERLYING LAW**

As a threshold matter, the district court misconstrues the import of the first responder regulation. Contrary to the district court's suggestion, JA 4522, the executive exemption does not apply categorically to all fire and EMS captains. Rather, the first responder regulation codifies the principle that fire fighters and other first responders whose primary duty is emergency response are not exempt from FLSA protections under either the executive or administrative exemption. *See* 29 C.F.R. 541.3(b); 69 Fed. Reg. at 22,129. The preamble explained that the insertion of the new regulation did not reflect an intent to “depart[] from” the “established case law” discussed in the preamble finding emergency responders to be non-exempt but rather an intent “to make clear” that fire fighters whose primary duty is not management are entitled to overtime pay. 69 Fed. Reg. at 22,129. It explained that certain “high-level ... fire officials” would be exempt in part because their primary duty was management, highlighting the types of tasks that, if the employees' primary duty, constituted management. *See* 69 Fed. Reg. at 22,130 (noting that such employees must also meet the other requirements for the executive exemption in order to be exempt).

Therefore, subsequent to the promulgation of the first responder regulation, there is neither a categorical rule making all fire captains exempt, as the district

court believed, nor an unlimited principle making all employees who go to fire scenes non-exempt, as the court suggested the Captains believed. *See* JA 4522-24. The regulation’s focus on primary duty calls for the consideration of the particular facts of an employee’s job. *See City of Sapulpa*, 30 F.3d at 1288 (responding to employer’s citation to cases finding fire captains to be exempt by explaining that “[t]he common thread in each of these cases is that a title as ‘captain’ provides no guidance on whether the administrative exemption applies; rather, a fact-sensitive inquiry like that the district court conducted here is required”); *see also* 29 C.F.R. 541.2 (“A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee’s salary and duties meet the requirements of the regulations in this part.”); *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446, 453 (4th Cir. 2004) (“[C]ourts must focus on the actual activities of the employee in order [to] determine whether or not he is exempt from FLSA’s overtime regulations.” (quoting *Ale v. Tenn. Valley Auth.*, 269 F.3d 680, 688-89 (6th Cir. 2001)) (alteration in original)).<sup>4</sup> This focus on primary duty supplies the

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<sup>4</sup> For this reason, the cases the district court cited—and on which the County places significant emphasis, *see* County Br. at 34-39—are not determinative of the outcome of this case. *Hartman v. Arlington County, Virginia*, 720 F. Supp. 1227 (E.D. Va. 1989), *International Ass’n of Firefighters v. City of Alexandria, Virginia*, 720 F. Supp. 1230 (E.D. Va. 1989), and *West v. Anne Arundel County, Maryland*, 137 F.3d 752 (4th Cir. 1998), do not address, and cannot replace an analysis of, the

limiting principle that the district court believed was absent from the Captains' theory.

Moreover, the district court's statement that "the First Responder Regulation ensures the Executive Exemption does not apply to 'blue collar' fire fighters, regardless of rank or pay level, regardless of the work they do at the fire scene,"

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particular facts at issue here. In *Hartman*, the fire shift commanders' "own admissions establish[ed] that their primary duty [was] the management of their fire station," and the district court therefore found that "[t]here was no dispute that their primary duty consists of managing in their department." *Hartman*, 720 F. Supp. at 1229; *see also Hartman*, 903 F.2d at 292 (affirming the district court's opinion with an abbreviated analysis noting that "there are no material facts in dispute"). In *International Ass'n of Firefighters*, the analysis of whether the executive exemption applies to "engine company captains" was limited to a few sentences stating without reference to specific facts that those employees are similar to the fire shift commanders in *Hartman* and concluding, again without description of the engine company captains' particular duties, that the employees' primary duty was management. *See Int'l Ass'n of Firefighters*, 720 F. Supp. at 1233; *see also Alexandria Committee of Police v. City of Alexandria*, Nos. 89-2495 to 89-2496, 1990 WL 122044, at \*1 (unpublished opinion affirming the application of the executive exemption on grounds unrelated to the primary duty analysis). In *West*, this Court's discussion of the primary duty of the relevant captains did not indicate that those employees spent any time responding to emergency calls or that any evidence suggested that their position descriptions, which described management responsibilities, gave anything other than a complete, accurate picture of their duties. *See West*, 137 F.3d at 763. This Court's discussion of field lieutenants did not indicate that those employees perform emergency response themselves (as opposed to solely "supervis[ing] EMS operations") or that evidence in the record called into question the significance of the employees' management duties. *See id.* Similarly, with regard to EMS training lieutenants, this Court did not address any argument by the employees that their primary duty—or any part of their duties at all—was emergency response. *See id.* at 764. These cases with distinguishable facts cannot stand in for a primary duty analysis on the basis of the record in this case and do not lead to the conclusion that summary judgment was appropriate here.

JA 4523, reflects a misguided focus on the reference in 29 C.F.R. 541.3(a) to “‘blue collar’ workers.” That provision articulates the general principle that the Part 541 exemptions “do not apply to manual laborers or other ‘blue collar’ workers who perform work involving repetitive operations with their hands, physical skill and energy” because their skills are not the type that qualify under the professional exemption described in 29 C.F.R. 541.300. 29 C.F.R. 541.3(a). Its purpose when added to Part 541 in 2004 was to “respond[] to comments revealing a fundamental misunderstanding of the scope and application of the Part 541 regulations” to manual laborers. 69 Fed. Reg. at 22,128. Although the provision immediately precedes the first responder regulation, there is no basis for reading the provision as altering the plain and distinct meaning of 29 C.F.R. 541.3(b) or as otherwise detracting from the importance of the primary duty inquiry.

The district court’s explanation of why the executive exemption applies to the Captains, including its description of the facts relevant to that determination, also reflects a misapplication of the law. As the parties have noted, the district court considered whether the executive exemption applied to all of the Captains even though the County had claimed only the administrative exemption as to the Safety Officers and EMS Supervisors. JA 4524-25; County Br. at 58; Captains Reply Br. at 24. The court therefore failed to address the question whether the

primary duty of those employees was emergency response or instead “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.”

29 C.F.R. 541.200(a).

Furthermore, the court’s discussion of the Captains’ duties placed inappropriate emphasis on the amount of time they spent performing managerial tasks. In its sparse description of the facts that supported its conclusion that the Captains’ “primary duty is management of the enterprise,” JA 4524, the court stated that “[a]lthough [the Captains] participate in emergency response, *the bulk of their time* is spent performing the various tasks required to operate a fire station,” JA 4518 (emphasis added). But the amount of time spent on management tasks is, as a legal matter, not determinative of the Captains’ primary duty. The regulation defining “primary duty” explicitly provides that although “[t]he amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee[,] ... [t]ime alone ... is not the sole test.” 29 C.F.R. 541.700(b). Rather, “[t]he term ‘primary duty’ means the principal, main, major or most important duty that the employee performs,” regardless of whether it is the duty that occupies most of the employee’s time. 29 C.F.R. 541.700(a); *see Henry v. Quicken Loans, Inc.*, 698 F.3d 897, 899 (6th Cir. 2012) (“‘[P]rimary duty’ does not mean the most time-consuming duty; it instead

connotes the “principal” or “chief”—meaning the most important—duty performed by the employee.” (quoting *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 504 (6th Cir. 2007))).

### **III. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT TO THE COUNTY BECAUSE THE CAPTAINS PRESENTED EVIDENCE THAT CREATES A GENUINE DISPUTE AS TO WHETHER THEIR PRIMARY DUTY IS EMERGENCY RESPONSE**

#### **A. In a case regarding the application of Part 541 exemptions, an employee’s primary duty is a material fact.**

The district court failed to recognize the genuine dispute of material fact regarding what constituted the Captains’ primary duty. Summary judgment is only appropriate if “there is no genuine issue as to any material fact.” Fed. R. Civ. P. 56(c); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A “material” fact is one “that might affect the outcome of the suit under the governing law.” *Liberty Lobby*, 477 U.S. at 248. A dispute of fact is “genuine” “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* Such a dispute cannot be based only on “a scintilla of evidence,” *id.* at 252, but in considering the record the court is to believe all evidence, and draw all justifiable inferences, in the non-movant’s favor, *id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

At the summary judgement stage, “the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether

there is a genuine issue for trial.” *Liberty Lobby*, 477 U.S. at 249; *see Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., Md.*, 721 F.3d 264, 283 (4th Cir. 2013) (“The court’s role in deciding a motion for summary judgment is to identify factual issues, not to resolve them.” (quoting *Redd v. N.Y. State Div. of Parole*, 678 F.3d 166, 174 (2d Cir. 2012))); *Mercantile Peninsula Bank v. French (In re French)*, 499 F.3d 345, 352 (4th Cir. 2007) (“In [considering the evidence at summary judgment], a court is not entitled to either weigh the evidence or make credibility determinations.” (citing *Liberty Lobby*, 477 U.S. at 255)).

The Captains’ primary duty is a material fact in this case. As explained above, identifying an employee’s primary duty is crucial to determining whether the executive or administrative exemption applies to that employee. *See* 29 C.F.R. 541.100(a) (listing as an element of the executive exemption test whether the employee’s “primary duty” is “management”); 29 C.F.R. 541.200(a) (listing as an element of the administrative exemption test whether the employee’s “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”). Under the first responder regulation, that general principle remains true for employees of fire departments. *See* 29 C.F.R. 541.3(b). And the identification of an employee’s primary duty is a question of fact. *See Shockley*, 997 F.2d at 26 (“[T]he amount of time devoted to managerial duties, and the

significance of those duties, present factual questions.” (citing Fed. R. Civ. P. 52(a); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Clark*, 789 F.2d at 286 n.2)); *Watkins v. City of Montgomery, Ala.*, 775 F.3d 1280, 1291 (11th Cir. 2014) (“[T]he ‘primary duty’ determination ... was a question of fact for the jury to decide.” (citing *Icicle Seafoods*, 475 U.S. at 714)); *see also Quicken Loans*, 698 F.3d at 901 (“The [employees] and [employer] presented conflicting evidence in the form of documents and testimony about the [employees’] primary job responsibilities. On this record, ‘it must be left to a trier of fact to weigh the credibility’ of the parties’ contradictory ‘characterization[s] of [the employees’] day-to-day duties.” (quoting *Schaefer v. Ind. Mich. Power Co.*, 358 F.3d 394, 407 (6th Cir. 2004))).

Importantly, an employee’s primary duty is a question of fact even if there is no dispute about what tasks an employee performs. *See Maestas v. Day & Zimmerman, LLC*, 664 F.3d 822, 827 (10th Cir. 2012) (“The plaintiffs do not materially contest any of the employer’s factual claims about the employees’ job duties, some of which are managerial and some of which relate to first response. However, the parties sharply dispute which of plaintiffs’ duties are primary under FLSA.... We conclude that such a dispute is a factual one that, if genuine and material, precludes summary judgment.”); *see also Quicken Loans*, 698 F.3d at 901 (naming as “fact disputes [that] fall within the jury’s domain” whether employees’

daily activities “involved management-like responsibilities, discretion and independent judgment”).<sup>5</sup>

**B. A reasonable jury could find that the Captains’ primary duty was emergency response, which precludes a grant of summary judgment as to any of the exemptions the County claims.**

Shift Commanders and Station Commanders. A reasonable jury could find that the Shift Commanders’ and Station Commanders’ primary duty is emergency response. The County has presented evidence that the Shift Commanders and Station Commanders had management duties. For example, their position descriptions indicate that they direct, train, and discipline employees, *see* JA 1984, 2005, tasks that are part of management under the Department’s regulatory explanation of the term, *see* 29 C.F.R. 541.102 (listing as management activities “directing the work of employees,” “training of employees,” and “disciplining employees”); 69 Fed. Reg. at 22,130 (listing as management activities of exempt fire department employees “directing operations at ... fire or accident scenes, including deciding whether additional personnel or equipment is needed,”

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<sup>5</sup> The ultimate question whether a Part 541 exemption applies, however, is a legal issue. *See Shockley*, 997 F.2d at 26 (“Whether a particular duty is administrative or managerial presents a legal question ‘governed by the pertinent regulations promulgated by the Wage and Hour Administrator.’” (quoting *Icicle Seafoods*, 475 U.S. at 714)). For example, if a factfinder determines that an employee’s primary duty is management, the executive exemption will (provided the other requirements for the exemption are also met) apply, but if a factfinder determines that the employee’s primary duty is emergency response, it will not. *See* 29 C.F.R. 541.100(a), 541.3(b).

“coordinating and implementing training programs,” and “enforcing and imposing penalties for violations of the rules and regulations”). The County asserts that these tasks are the Shift Commanders’ and Station Commanders’ primary duty. County Br. at 50-53. But the Captains have presented evidence showing that Shift Commanders and Station Commanders respond to emergency calls and perform emergency response, such as fighting fires and providing medical care, *see* JA 197, 199-200, 204, 250, 333, 538-40, 575-76, 965, 1104, 1142-43, 1219, 1417, 1466, work that they argue constitutes those employees’ primary duty, Captains Br. at 39-41. Consideration of the factors listed in the regulatory provision defining “primary duty,” 29 C.F.R. 541.700(a), while viewing the evidence in the light most favorable to the Captains, could support a jury’s finding that the Shift Commanders’ and Station Commanders’ primary duty is emergency response.

The first regulatory factor is “the relative importance of the exempt duties compared with other types of duties.” 29 C.F.R. 541.700(a). The Captains call into question the significance of the Shift Commanders’ and Station Commanders’ management responsibilities. They have presented evidence that there are a host of responsibilities crucial to the management of a shift or station that Shift Commanders and Station Commanders do not perform, such as setting employee schedules, approving leave and overtime, and controlling budgets. *See* JA 246, 534-35, 573, 646-47, 800-01, 934, 961-62, 1100, 1139-40, 1168, 1215, 1220-21;

29 C.F.R. 541.102 (listing as management activities “setting and adjusting [employees’] rates of pay and hours of work” and “planning and controlling the budget”); 69 Fed. Reg. at 22,130 (listing as management activities of exempt fire department employees “deciding how and where to allocate personnel,” “maintaining company payroll and personnel records,” and “preparing budgets and controlling expenditures”). Moreover, deposition testimony from the Captains as well as one of the County’s witnesses indicates that Shift Commanders and Station Commanders participate in as much training as their subordinates, and not always as the instructor, *see* JA 247, 283-84, 648, 801-02, 957, 963, 1137-38, 1170, 1171-73, 1192-93, 1460-61; JA 387-88, which could suggest both that the purpose of the training—being prepared to participate in emergency response—is as central to Shift Commanders’ and Station Commanders’ jobs as it is to those who have no management role, and that training employees, a management task, is not a focus of their jobs. Shift Commanders and Station Commanders also testified that their administration of discipline constitutes compliance with instructions from their own supervisors rather than the exercise of discretion or meaningful authority, *see* JA 215, 260-61, 574, 659-60, 957, 1097, 1103, 1131-33, 1142, 1221, 1443-47, which could indicate that that management task is a routine function. Most significantly, Shift Commanders and Station Commanders leave behind any other task in progress when an emergency call comes in, *see* JA 251, 286, 327-28, 537,

656, 965-66, 1107-08, 1416, 1466-67, and the employees testified that they consider emergency response to be their most important job duty, *see* JA 250, 717, 938-39, 1104, 1142, 1189, 1328.<sup>6</sup> This evidence could support a reasonable jury's finding that the Shift Commanders' and Station Commanders' emergency response duties are more important than their management duties.

The second primary duty factor is "the amount of time spent performing exempt work." 29 C.F.R. 541.700(a). Although the County emphasizes that the Captains spend only an average of less than an hour and a half of each 24-hour shift away from the station on emergency response calls, *see* County Br. at 6-7; JA 1700, that fact does not mean that this factor weighs in favor of a conclusion that management is the Shift Commanders' and Station Commanders' primary duty. As explained above, the law is plain that time is not determinative.

*See* 29 C.F.R. 541.700(b) ("Time alone ... is not the sole test."). Indeed, the

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<sup>6</sup> Although the County has not focused on the Captains' management role while responding to emergency calls, the Department notes that it takes the position, to which the Second Circuit has deferred, that if first responders "direct the work of [their] subordinate officers while performing the types of [first response] duties enumerated in section 541.3(b)(1), such supervision does not constitute management that, in applying the primary duties test, would satisfy the second prong of [the] executive exemption." *Mullins v. City of New York*, 653 F.3d 104, 110, 115 (2d Cir. 2011) (citing Sec'y of Labor's Amicus Curiae Letter Br. in that case (No. 09-3435) (filed Mar. 18, 2011)); *see* 29 C.F.R. 541.3(b)(2) ("[A] ... fire fighter whose primary duty is to... fight fires is not exempt ... merely because the ... fire fighter also directs the work of other employees in ... fighting a fire.").

County's point about time is more revealing of the nature of firefighting than of the significance of the Captains' duty to respond to calls. As a practical matter, fire department employees must be available and prepared to respond to emergency calls around the clock but only respond to such calls as frequently as they arise; the Captains spend as much time performing emergency response as do their subordinates. *See* JA 251, 286, 327-28, 534, 656, 965-66, 1107-08, 1416, 1466-67 (an emergency vehicle to which a Captain is assigned does not leave the station without the Captain); JA 156, 160, 1697 (County's evidence explaining that its time study was based on movement of the emergency vehicles rather than of a particular person). Additionally, the Captains presented evidence that Shift Commanders and Station Commanders spend several hours per shift participating in physical fitness and other training, just as the fire fighters they supervise do, because those tasks prepare them for emergency response. *See* JA 247, 283-84, 648, 801-02, 963, 1137-38, 1101-02, 1170, 1171-73, 1192-93, 1460-61. Finally, the Captains presented evidence showing that certain management tasks took less time over the course of a year than they spent on training over the course of only a small number of shifts; in particular, Station Commanders testified that they spend less than six hours over an entire year writing performance evaluations, *see* JA 647, 962, no more than three or four hours in a year creating "wish lists" of new purchases for the station, *see* JA 1013, and only an hour each year reviewing

station policies (after spending four or five hours on such review in the first year in the position), *see* JA 1014. Viewing this evidence in the light most favorable to the Captains, a reasonable jury could find that the way the Shift Commanders and Station Commanders spent their time suggests that emergency response was a more important duty than management.

The third factor to consider in a primary duty analysis is “the employee’s relative freedom from direct supervision.” 29 C.F.R. 541.700(a). Although the County notes that Shift Commanders’ and Station Commanders’ superiors are not present at the fire stations frequently, *see* County Br. at 9 (asserting that the Battalion Chief visits the station only once a week), the County’s own declarant explained that communication between those employees and the Battalion Chiefs to whom they report occurs daily, *see* JA 2518, and the Shift Commanders’ and Station Commanders’ deposition testimony explains that they spoke to or emailed with higher-ranking officers about all discipline, and many believed themselves to be giving effect to the orders of such officers rather than exercising their own discretion. *See* JA 194 (“Any good captain will tell you he doesn’t have an opinion about anything. He has whatever opinion the fire chief tells him it is.... [W]e are told what to do and, by and large, we do it.”), 215, 260-61, 574, 659-60, 957, 1097, 1103, 1131-33, 1221, 1443-47. This evidence of close supervision

could support a reasonable finding that management was not the Shift Commanders' or Station Commanders' most significant responsibility.

The final primary duty factor is “the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.” 29 C.F.R. 541.700(a). Although the Captains are assigned to a higher pay grade than the employees they supervise, the County’s pay scale shows that Lieutenants can earn as much or more than a Captain’s salary, even before taking into account the overtime compensation Lieutenants receive for working long hours. *See* JA 2153-54; *see also* JA 577-78 (Shift Commander testimony that he postponed seeking a promotion from the Lieutenant position because losing overtime compensation constituted “a considerable drop in pay”); JA 947-48 (Shift Commander testimony that he waited to seek a promotion from Lieutenant until reaching the top end of the pay scale because becoming a Shift Commander would mean “losing money”). Crediting the evidence that some Shift Commanders and Station Commanders received salaries below the pay of the Lieutenants they supervised could reasonably contribute to a finding that the non-exempt duties Shift Commanders and Station Commanders have in common with Lieutenants—emergency response—were more important than their exempt duties.

In sum, if the evidence is viewed in the light most favorable to the Captains, a reasonable jury could find that the County has not met its burden to show that the

Shift Commanders' and Station Commanders' primary duty is management. *See Desmond*, 564 F.3d at 691-92 (noting that exempt status is an issue as to which the employer has the burden of proof). A jury could find that because the Shift Commanders and Station Commanders perform emergency response, believe that duty to be the most important part of their jobs, spend as much time on emergency calls as lower-ranked fire fighters, have limited management responsibilities, are closely supervised, and are not paid significantly, if at all, more than some lower-ranked fire fighters, the facts as a whole indicate that their "main, major or most important duty" is emergency response. 29 C.F.R. 541.700(a). Therefore, there is a genuine dispute as to the Shift Commanders' and Station Commanders' primary duty. *See Liberty Lobby*, 477 U.S. at 252, 255 (explaining that for purposes of determining whether an issue of material fact is genuine, a court must credit anything more than a "scintilla" of evidence); *see also Maestas*, 664 F.3d at 830 (noting that statements by employees "that their primary duty is to protect [the location for which they were hired to provide security]" were among the evidence in the record creating a genuine dispute of material fact with regard to the application of the executive exemption). Discrediting the Captains' evidence, including their deposition testimony, is not permitted at the summary judgment stage. *See French*, 499 F.3d at 353-54 (overturning a bankruptcy court's grant of summary judgment because the court disbelieved statements made by a party and a

witness rather than drawing inferences in the non-moving party's favor). Because a grant of summary judgment to the County would require overlooking or rejecting the Captains' evidence, it is not the correct result.

*Safety Officers and EMS Supervisors*. A reasonable jury could also find that the Safety Officers' and EMS Supervisors' primary duty is emergency response. Because the County claims the administrative exemption as to the Safety Officers and EMS Supervisors, it must show that the primary duties of those employees are "office or non-manual work directly related to the management or general business operations of the employer." 29 C.F.R. 541.200(a). The County emphasizes the role of Safety Officers and EMS Supervisors in investigating injuries and accidents and overseeing the provision of medical services, respectively, arguing that these duties are primary and "are non-manual or office work." County Br. at 60. But Safety Officers and EMS Supervisors explained in deposition testimony that they contribute to the Fire Department's response at emergency scenes: the Safety Officers explained that they ensure that Fire Department employees do not attempt to control a fire in a manner that jeopardizes their safety, *see* JA 666, 1312-13, 1322, 1429, and EMS Supervisors explained that they provide medical services to accident or fire victims, *see* JA 653, 861-63; *see also* JA 654 (testimony that EMS Supervisors travel with medical supplies so that they can provide such services). The Captains assert that these emergency response tasks are the employees'

primary duty. Captains Br. at 39, 42-44; Captains Reply Br. at 24-26. Evidence in the record could support a reasonable jury's finding that, considering the Safety Officers' and EMS Supervisors' jobs as a whole, their emergency response duties were "principal, main, major or most important." 29 C.F.R. 541.700(a); *see Liberty Lobby*, 477 U.S. at 248.

Consideration of the primary duty factors, 29 C.F.R. 541.700(a), leads to this result. As to the relative importance of their emergency response duties, Safety Officers and EMS Supervisors testified that they believed their emergency response duties were their most important tasks. *See* JA 652, 717, 858-59, 1064, 1328. Neither Safety Officers nor EMS Supervisors have discretion not to go to accident scenes when dispatched to them. *See* JA 859, 1017, 1328-29; *see* 69 Fed. Reg. at 22,130 (noting as an "important fact" in finding fire department employees exempt that they "generally are not dispatched to calls, but rather have discretion to determine whether and where their assistance is needed" (citing *Anderson*, 90 F. Supp. 2d at 909)). They must leave behind any other task in order to respond to calls. *See* JA 859, 1328-29. This evidence could contribute to a reasonable jury's finding that the Safety Officers' and EMS Supervisors' primary duty is emergency response.

Safety Officers and EMS Supervisors do not spend all or most of their work time performing emergency response, but that fact is not determinative. As

explained above, time is not the sole factor in a primary duty inquiry. 29 C.F.R. 541.700(b). Furthermore, if viewed in the light most favorable to the Captains, the context here suggests that the amount of time Safety Officers and EMS Supervisors spend responding to calls does not undercut the Captains' position that that responsibility is important: the time Safety Officers and EMS Supervisors spend out on calls reflects the number of emergencies that arise rather than the significance of the work; they spend similar amounts of time responding to calls as lower-ranked fire fighters, *see* JA 156, 160, 1697, 1700; and they spend other time during each shift training to prepare for emergency response tasks, *see* JA 649, 714, 856, 1327, 1431.

Finally, the Safety Officers' and EMS Supervisors' salaries compare to those of Lieutenants just as Shift Commanders' and Station Commanders' do; they are assigned a higher pay grade but do not always make more money than Lieutenants, either because of where they fall on the range of salaries within the grade or because the Lieutenants are paid overtime compensation. *See* JA 2153-54. This evidence could be understood to suggest that the most important duties of Safety Officers and EMS Supervisors are the types of tasks they have in common with Lieutenants, i.e., emergency response.

If viewed in the light most favorable to the Captains, this evidence—the Safety Officers and EMS Supervisors believe emergency response to be their most

important duty, they prioritize response calls above all other tasks, they spend about as much time at emergency response and training in preparation for emergency response as lower-ranked fire fighters, and they do not always earn more pay than such fire fighters—could support a reasonable jury’s finding that the Safety Officers’ and EMS Supervisors’ primary duties were their activities at emergency scenes. To conclude otherwise would require improperly weighing evidence and assessing the credibility of the Captains’ deposition testimony. *See Liberty Lobby*, 477 U.S. at 255 (“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.”).

*Highly compensated employee exemption.* A grant of summary judgment to the County based on the highly compensated employee exemption would also be error. The parties do not dispute that the Captains meet the salary threshold set by that exemption. *See* County Br. at 5; Captains Reply Br. at 29-30 (presenting no argument about whether the Captains earn more than \$100,000 per year). But the question whether the employees’ primary duty is emergency response is as central to the application of the highly compensated exemption as it is to the executive and administrative exemptions; an employer cannot properly claim the highly compensated exemption unless the employee’s primary duty “includes performing office or non-manual work.” *See* 29 C.F.R. 541.601(d). Therefore, there is a

genuine issue of material fact as to each category of Captain with respect to this exemption as well, and the issue cannot be resolved at the summary judgment stage. *See Liberty Lobby*, 477 U.S. at 255.

**C. Caselaw cited in the 2004 preamble and recent opinions from other circuits support this conclusion.**

This analysis of the applicability of the Part 541 exemptions to the Captains is consistent with the case law that informed the development of the first responder regulation, as discussed in the 2004 preamble. The opinion cited in the preamble to demonstrate that many courts had found fire fighters to be non-exempt employees, *City of Sapulpa*, 30 F.3d 1285, affirmed a district court’s conclusion that certain captains’ primary duty was not management based on factual findings including that the captains “do not set work schedules for other employees” and “do not earn much more than the employees they allegedly supervise.” *Id.* at 1288. *City of Sapulpa* also distinguished several cases finding other fire captains to be exempt because they had different facts such as that the employees “perform limited manual fire fighting,” “have authority to assign firemen to particular jobs,” or “rarely participate in actual firefighting.” *Id.* (citing *Atlanta Prof. Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991); *Masters*, 800 F. Supp. at 365-66; *Harkins v. City of Chesapeake*, No. 88-254, 1988 WL 235927 (E.D. Va. Dec. 2, 1988); *Smith*, 954 F.2d at 297-99).

The cases cited in the preamble to demonstrate the circumstances under which high-level fire officials are properly held to be exempt involved facts distinguishable from those presented here, as is evident from the preamble text immediately preceding the discussion of the cases. *See* 69 Fed. Reg. at 22,130 (noting that managerial tasks were the employees' primary duty and listing as examples of such tasks "preparing budgets and controlling expenditures," "deciding how and where to allocate personnel," and "managing the distribution of equipment"). In *West v. Anne Arundel County, Maryland*, 137 F.3d 752 (4th Cir. 1998), for instance, the Fourth Circuit concluded that the executive exemption applied to emergency medical technicians ("EMTs") who served as captains and field lieutenants, and that the administrative exemption applied to EMTs who served as EMS training lieutenants, in the absence of any suggestion that the employees' primary duty was emergency response. *Id.* at 757, 763-64; *see also supra* note 4. In *Smith v. City of Jackson, Mississippi*, 954 F.2d 296 (5th Cir. 1992), the exempt employees were district chiefs or battalion chiefs who supervised captains, responded to only some types of calls, and rarely performed "hands on" firefighting. *Id.* at 297, 299. In *Masters v. City of Huntington*, 800 F. Supp. 363 (S.D. W.Va. 1992), captains were found to be exempt after a trial at which the court was apparently not asked to consider whether emergency response was their primary duty. *Id.* at 365-67.

Furthermore, the conclusion that summary judgment is inappropriate as to the Captains is consistent with recent decisions from other circuits considering similar scenarios. In *Maestas v. Day & Zimmerman, LLC*, 664 F.3d 822 (10th Cir. 2012), the Tenth Circuit addressed the application of the executive exemption to a private security officer who “performs a mix of managerial duties, such as ensuring that his subordinates are well-prepared, and first responder duties, like patrolling his zone and responding to emergencies.” *Id.* at 829-30. The court discussed the factors described in the primary duty regulation, noting that “[t]he relative importance of [the employee’s] managerial, administrative, and first responder duties is debatable”; “the strict hierarchical structure of the security force also suggests that [this category of employees] do not enjoy significant freedom from supervision”; and “[these employees] appear to receive only ten percent more in salary than their non-exempt subordinates.” *Id.* at 830. It also found significant that “the record contains numerous statements from plaintiffs that their primary duty is to protect the laboratory [where the private security force works].” *Id.* Because “a dispute [about primary duty] presents a question of fact rather than an issue of law,” and “[a] rational factfinder could ... find that [the employee’s] primary duty is patrolling,” the Tenth Circuit concluded that the district court’s grant of summary judgment to the employer on this issue was improper. *Id.* at 824, 829-30. Similar reasoning, and the same result, should apply here.

In *Watkins v. City of Montgomery, Alabama*, 775 F.3d 1280 (11th Cir. 2014), the Eleventh Circuit affirmed a jury verdict in which one of “the issues ... properly before [the jury]” was the primary duty of fire suppression lieutenants whose employer claimed the executive exemption. *Id.* at 1282, 1285, 1289. Notably, the jury’s verdict was based on instructions from the district court explaining that the parties disagreed about whether fire “lieutenants’ primary duty was the ‘prevention, control, or extinguishment of fires and the rescue of fire victims,’ on the one hand, or management, on the other.” *Id.* at 1291. The district court also—properly, in the Eleventh Circuit’s view—instructed the jury that “the determination of whether an individual qualifies as an executive must be made on a case-by-case basis, accounting for the factors set out in the definition of ‘primary duty,’” and that “[i]f you determine that the plaintiff’s primary duty is management, then the executive exemption applies to the plaintiffs ... [c]onversly, if you determine that the plaintiffs’ primary duty is to fight fires ... the executive exemption does not apply to the plaintiffs.” *Id.* at 1293. This is just the kind of determination that should be left to a jury in this case.

## CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment to the County and remand for further proceedings.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and (d), and 32(a)(7)(C), I certify the following with respect to the foregoing Brief for the Secretary of Labor as *Amicus Curiae*:

This brief complies with the length limitation permitted in this Court's order of November 13, 2015 in accordance with Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,943 words (excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii)).

This brief also complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 32(a)(5) because this brief was prepared with Microsoft Office Word, using Times New Roman, 14-point font.

s/ Sarah Marcus  
\_\_\_\_\_  
SARAH KAY MARCUS  
Senior Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that on November 23, 2015, I electronically filed the foregoing Brief for the Secretary of Labor as Amicus Curiae with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Sarah Marcus  
SARAH KAY MARCUS  
Senior Attorney

# United States Department of Labor

## Office of the Solicitor

### **Mullins *Amicus* Letter, response**

March 17, 2011

*BY E-MAIL AND OVERNIGHT DELIVERY*

Catherine O'Hagan Wolfe  
Clerk of Court  
U.S. Court of Appeals for the Second Circuit  
Thurgood Marshall United States Courthouse  
40 Foley Square  
New York, NY 10007

**Re: Mullins, et al. v. City of New York, No. 09-3435-cv**

Dear Ms. O'Hagan Wolfe:

In a letter dated November 30, 2010, this Court requested that the Department of Labor ("Department") submit a letter brief addressing whether the Plaintiffs-Appellants, a group of police sergeants with the New York City Police Department, satisfy the executive exemption from the overtime requirements of the Fair Labor Standards Act ("FLSA" or "Act"). This Court specifically asked whether the sergeants satisfy two particular elements of the FLSA's executive exemption: (1) whether, pursuant to 29 C.F.R. Part 541 and the 2004 preamble to those regulations, the primary duty of the sergeants is "management" ; and (2) whether, if the sergeants' primary duty is management, the evidence presented at trial was sufficient to show that they make recommendations as to tangible employment actions affecting others that are given "particular weight" . On behalf of the Department, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae*.

The Department's position is that the district court erred by ruling that the primary duty of the sergeants is management and by granting summary judgment in favor of the City of New York on that element of the executive exemption. Specifically, the district court erred by expressly disregarding 29 C.F.R. 541.3(b), which plainly applies to the sergeants in this case and is entitled to controlling deference. It provides, when determining whether a police officer's primary duty is management, that field law enforcement work by the police officer (i.e., front-line law enforcement) is not management. See 29 C.F.R. 541.3(b)(1), (2). It further provides that, if a police officer's primary duty is field law enforcement work, then his or her primary duty is not management even if he or she directs other officers in the course of performing the field law enforcement work. See 29 C.F.R. 541.3(b)(2). Section 541.3(b) must be applied along with 29 C.F.R. 541.700 and the other pertinent regulations in 29 C.F.R. Part 541 when analyzing whether the sergeants are exempt. Applying those regulations to the district court's factual findings, the primary duty of the sergeants is law enforcement in the field, and thus not management. Because the Department's position is that the sergeants' primary duty is not management and because the sergeants must satisfy each element of the executive exemption to be exempt, see 29 C.F.R. 541.100(a), this brief does not address the other element of the executive exemption about which the Court inquired (whether the sergeants make recommendations as to tangible employment actions affecting others that are given particular weight). <sup>[1]</sup>

#### **1. The FLSA's Executive Exemption and 29 C.F.R. 541.3(b)**

An employee satisfies the executive exemption if he or she: (1) is paid a weekly salary of at least \$455; (2) has management as his or her primary duty ("management" is discussed in 29 C.F.R. 541.102, and "primary duty" is discussed in 29 C.F.R. 541.700); (3) regularly supervises two or more employees; and (4) has the authority to hire or fire or makes recommendations as to tangible employment actions affecting others that are given particular weight. See 29 C.F.R. 541.100(a). An employee must satisfy all four elements for the exemption to apply. See id. This version of the executive exemption has been in place since August 23, 2004 – the effective date of the Department's 2004 revisions to

29 C.F.R. Part 541. See 69 Fed. Reg. 22,122 (Apr. 23, 2004). Only the second element (primary duty is management) and the fourth element (making recommendations as to tangible employment actions affecting others that are given particular weight) are disputed. See Mullins v. City of New York, 523 F. Supp.2d 339, 355-60 (S.D.N.Y. 2007). [2]

Significantly, as part of the 2004 revisions to 29 C.F.R. Part 541, the Department added 29 C.F.R. 541.3(b). See 69 Fed. Reg. at 22,128-29. Section 541.3(b) addresses how the "primary duty is management" element of the executive exemption applies to police officers and other first responders:

- (1) The section 13(a)(1) exemptions and the regulations in this part also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.
- (2) Such employees do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof as required under § 541.100. Thus, for example, a police officer or fire fighter whose primary duty is to investigate crimes or fight fires is not exempt under section 13(a)(1) of the Act merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire.

29 C.F.R. 541.3(b)(1), (2). The Secretary explained the importance of 29 C.F.R. 541.3(b) in her amicus brief to the district court: "The new Part 541 regulations also include, for the first time, provisions that explicitly address the application of the overtime exemptions to police officers and other first responders". District Court Amicus Brief, 4.

## **2. 29 C.F.R. 541.3(b) Applies to Police Officers, such as the Sergeants in this Case, who Perform Field Law Enforcement Work**

As noted *supra*, section 541.3(b) applies to any exemption analysis involving police officers who, "regardless of rank or pay level", "perform work such as . . . preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work". 29 C.F.R. 541.3(b)(1). It must therefore be part of any exemption analysis when the employees at issue are police officers who perform law enforcement work in the field.

The district court's factual findings leave no doubt that the sergeants perform the field law enforcement work necessary for 29 C.F.R. 541.3(b) to apply. For example, sergeants in the Housing Bureau prevent and detect crimes by patrolling public housing properties (inside buildings and the streets around them) to suppress criminal activity such as the sale of narcotics. See Mullins, 523 F. Supp.2d at 345-46. Likewise, sergeants in the Transportation Bureau patrol the highways and dense pedestrian areas such as beaches, public parks, and tourist areas. See id. at 347. Sergeants conduct investigations or inspections for violations of law and interview witnesses and interrogate suspects by "conducting interviews of witnesses, suspects, and victims" (id. at 342, 357), verifying whether probable cause to arrest a suspect exists, verifying the target location for search warrants and determining whether a warrant is appropriate, and securing and determining the size and scope of a crime scene (see id. at 342). They prepare investigative reports, such as reports on unusual occurrences and car chases, and they review and verify complaint reports, stop-and-frisk reports, and arrest reports. See id. at 343. Sergeants in Anti-Crime units perform surveillance by acting as observation posts in the field, relaying information to team members who then apprehend and arrest individuals observed selling narcotics. See id. at 346. Sergeants pursue, restrain, apprehend, and arrest suspects; transport prisoners; capture persons subject to warrants; and detain and supervise suspected and convicted criminals. See id. at 342, 357. One sergeant "participated in and verified" at least 164 arrests in a 17-month period, and another "participated in and verified" at least 114 arrests, transported prisoners at least 55 times, and captured persons subject to warrants in a five-month

period. Id. at 346. In addition, sergeants take emotionally disturbed individuals into custody and may use tasers, water cannons, and restraining tape when handling suspects. See id. at 342. Thus, the district court properly found that the sergeants perform extensive field law enforcement work.

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### 3. **29 C.F.R. 541.3(b) Provides that Field Law Enforcement Work Is Not Management**

Prior to the addition of 29 C.F.R. 541.3(b) as part of the 2004 revisions to 29 C.F.R. Part 541, the regulations did "not explicitly address" the exempt status of police officers and other first responders. 69 Fed. Reg. at 22,129. The preamble to those revisions notes: "Most of the courts facing this issue have held that police officers, fire fighters, paramedics and EMTs and similar employees are not exempt because they usually cannot meet the requirements for exemption as executive or administrative employees". Id. The preamble cites eight court decisions, all of which concluded that the employees at issue were not exempt. See id. For example, the preamble states that this Court held that "police investigators whose duties included investigating crime scenes, gathering evidence, interviewing witnesses, interrogating and fingerprinting suspects, making arrests, conducting surveillance, obtaining search warrants, and testifying in court" do not satisfy the administrative exemption "because their primary duty is conducting investigations, not administering the affairs of the department itself". Id. (citing Reich v. State of New York, 3 F.3d 581, 585-87 (2d Cir. 1993)). The preamble further cites a district court decision from this Circuit, which held that "investigators of environmental crimes who carry firearms, patrol a sector of the state and conduct covert surveillance, and rangers who prevent and suppress forest fires, are not exempt administrative employees". Id. (citing Mulverhill v. State of New York, 1994 WL 263594 (N.D.N.Y. 1994)). The officers in these cases performed field law enforcement work. Immediately following the discussion of the eight cases, the preamble states:

The Department has no intention of departing from this established case law. Rather, for the first time, the Department intends to make clear in these revisions to the Part 541 regulations that such police officers, fire fighters, paramedics, EMTs and other first responders are entitled to overtime pay.

Id. (emphases added). By referring to "this established case law", the Secretary unmistakably approved of these court decisions that had found police officers and other first responders, based on their duties, to be non-exempt. Id.

Thus, police officers' field law enforcement work is not exempt management work. See 29 C.F.R. 541.3(b)(1), (2). As the Secretary stated in her amicus brief to the district court, she "added section 541.3(b) to clarify that front line police officers, regardless of rank, whose primary duty is law enforcement in the field are not exempt from the FLSA's overtime requirements". District Court Amicus Brief, 5. Section 541.3(b) is consistent with the Secretary's longstanding focus on an employee's duties as determining his or her exempt status. See 29 C.F.R. 541.2 (job title alone is insufficient to determine whether an employee is exempt; employee's exempt status is determined by his or her duties); District Court Amicus Brief, 6 ("[T]he new regulations do not depart from the 'established case law' in which application of the duties test determines whether a given employee is exempt"). [3]

Section 541.3(b) further provides that field law enforcement work does not become management simply because the police officer "directs the work of other employees" while performing such work. 29 C.F.R. 541.3(b)(2) ("Thus, for example, a police officer . . . whose primary duty is to investigate crimes . . . is not exempt . . . merely because the police officer . . . also directs the work of other employees in the conduct of an investigation . . ."). As the Secretary stated in her amicus brief to the district court:

The preamble cites police sergeants as an example of a first responder who typically is nonexempt: when police sergeants' primary duty consists of front line law enforcement, they "are entitled to overtime pay even if [in the course of such front line law enforcement] they direct the work of other police officers because their primary duty is not management or directly related to management or general business operations".

District Court Amicus Brief, 6 (quoting 69 Fed. Reg. at 22,129) (bracketed language added by Secretary in District Court Amicus Brief).

Section 541.3(b), however, does not purport to make all police officers non-exempt; the determining factor remains their primary duty. See 29 C.F.R. 541.700(a). Indeed, the preamble notes that "[f]ederal courts have found high-level police and fire officials to be exempt executive or administrative employees only if, in addition to satisfying the other pertinent requirements, . . . their primary duty is performing managerial tasks . . .". 69 Fed. Reg. at 22,130. The preamble specifically lists tasks that those courts found to be managerial, including "directing operations at crime, fire or accident scenes, including deciding whether additional personnel or equipment is needed". Id. [4] The cases identified in the preamble (all decided prior to 2004) involved the high-level direction of operations by fire chiefs and fire captains who generally did not engage in any front-line firefighting. For example, in Smith v. City of Jackson, 954 F.2d 296, 297 (5th Cir. 1992), the district chiefs and battalion chiefs responded only to substantial fires, assumed control of the scene and directed firefighting and lifesaving operations when they responded, decided whether additional equipment or personnel were needed and when personnel could withdraw from the scene, and "participate[d] 'hands on' in the firefighting operation" only on "infrequent occasions". In Masters v. City of Huntington, 800 F. Supp. 363, 365-66 (S.D. W.Va. 1992), the deputy chiefs oversaw six fire stations, did not respond to every fire, and took command of operations when they did respond. The captains oversaw one fire station, took command of operations at fires if the deputy chief was not present, and directed operations in a particular area of a fire scene when the deputy chief was present. See id. Moreover, the court held, with respect to lieutenants in the fire department, that neither their usual duties nor the fact that they occasionally assumed captains' responsibilities were sufficient to make them exempt. See id. at 368-69. In West v. Anne Arundel County, 137 F.3d 752, 763 (4th Cir. 1998), the captains' duties did not include any front-line first responding; instead, the captains "spent almost all of their time managing personnel, evaluating personnel performance, attending management meetings, performing administrative tasks in regard to management, handling sick leave, managing the distribution of equipment, and instructing subordinates". And the field lieutenants spent only a minority of their time supervising EMS operations in the field and spent a majority of their time performing management duties such as coordinating and implementing training, maintaining personnel records, ensuring operational readiness, evaluating and testing subordinates, and reporting and making recommendations on equipment and procedures. See id. at 763-64. [5] As the Secretary stated in her brief to the district court:

[T]he types of managerial duties performed by some high-ranking police officers . . . [b]y way of contrast, . . . reinforce the Secretary's position that front-line law enforcement, such as patrolling, firing teaser guns, serving warrants, participating in and making arrests, investigating crimes, interviewing and interrogating witnesses, and securing crime scenes are front-line law enforcement activities that are not management tasks under section 541.3(b).

District Court Amicus Brief, 11 (emphases added).

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#### 4. 29 C.F.R. 541.3(b) Is Entitled to Controlling Deference

The FLSA delegates to the Secretary the authority to define through regulations the scope of the executive, administrative, professional, and outside salesman exemptions from the Act's overtime requirements. See 29 U.S.C. 213(a)(1). The Part 541 regulations were promulgated pursuant to that express statutory grant of rulemaking authority after notice and comment. See 69 Fed. Reg. at 22,123-24 (citing 29 U.S.C. 213(a)(1)). Those regulations, including 29 C.F.R. 541.3(b), are therefore entitled to controlling deference. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."); see also Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 165-68, 171-74 (2007). Furthermore, courts must give controlling deference to the Secretary's interpretation of her own regulations unless it is plainly erroneous or inconsistent with the regulation. See Auer v. Robbins, 519 U.S. 452, 461 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it [in an amicus brief] is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation.") (internal quotation marks omitted); see also Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 881-82 (2011) (relying on Auer and deferring to agency's amicus brief); Fed. Express Corp. v. Holowecki, 552 U.S. 389, 397 (2008) (under Auer, courts accept an agency's reasonable interpretation of its regulations set forth in an amicus brief); Coke, 551 U.S. at 171 (where the Secretary's interpretation of her own regulation reflects her fair and considered judgment on matter in question, her interpretation is controlling).

This principle holds true whether the Secretary's interpretation of her own regulations is articulated in a legal brief, in the preamble to the regulations, or in other interpretive materials. See Coke, 551 U.S. at 171 (internal advisory memorandum); Auer, 519 U.S. at 462-63 (amicus brief); Rucker v. Lee Holding Co., 471 F.3d 6, 12-13 (1st Cir. 2006) (regulatory preamble). The Secretary's interpretation of 29 C.F.R. Part 541 reflects the Department's careful and considered analysis of the FLSA's executive exemption as it applies to police officers. As such, the Secretary's interpretation, as set forth in the 2004 preamble to the revisions to 29 C.F.R. Part 541 and in this brief, is dispositive.

##### **5. The District Court Erred by Disregarding 29 C.F.R. 541.3(b)**

In setting forth the applicable legal standards for analyzing the sergeants' primary duty, the district court referred to 29 C.F.R. 541.3(b) and stated:

This carve-out for first responders is justified on the grounds that "[s]uch employees" do not have management as their primary duty, and cannot therefore be properly considered exempt executives. "Thus, for example, a police officer . . . whose primary duty is to investigate crimes . . . is not exempt . . . merely because the police officer . . . also directs the work of other employees in the conduct of an investigation . . .".

See Mullins, 523 F. Supp.2d at 353 (quoting 29 C.F.R. 541.3(b)(2)) (brackets and ellipses added by district court). As the district court turned to applying the legal standards to its factual findings, however, it disregarded 29 C.F.R. 541.3(b) as not having any relevant part in the analysis. See id. at 354. After quoting the discussion of 29 C.F.R. 541.3(b) in the preamble to the 2004 revisions to 29 C.F.R. Part 541 that police sergeants whose primary duty is field law enforcement work would still be "entitled to overtime pay even if they direct the work of other police officers because their primary duty is not management," see id. (quoting 69 Fed. Reg. at 22,129), the district court stated: "The Department of Labor, however, also makes clear that it has 'no intention of departing from [ ] established case law.'" Id. (quoting 69 Fed. Reg. at 22,129) (brackets added by district court). The district court further stated:

Indeed, in its brief submitted as amicus curiae, the Secretary of Labor reiterates that, with regard to the inquiry into whether an employee's primary duty is management, "the new regulations do not depart from the 'established case law' in which application of the duties test determines whether a given employee is exempt".

Id. (quoting District Court Amicus Brief, 6). Yet, the pertinent regulation at 29 C.F.R. 541.3(b) played no part in the court's determination that the sergeants' primary duty is management. Because 29 C.F.R. 541.3(b) applies to the sergeants and is entitled to controlling deference, the district court erred by not considering it when analyzing whether the sergeants' primary duty is management. The district court's reasons for disregarding 29 C.F.R. 541.3(b) are without merit.

First, the district court misreads the preamble by asserting that the Department "makes clear" in it that "it has 'no intention of departing from [ ] established case law,'" Mullins, 523 F. Supp.2d at 354 (quoting 69 Fed. Reg. at 22,129) (brackets added by district court), thereby indicating, according to the court, that 29 C.F.R. 541.3(b) has no effect. As explained *supra*, the preamble discusses eight court decisions that concluded that the first responder employees at issue were non-exempt. See 69 Fed. Reg. at 22,129. Immediately following the discussion of those eight court decisions, the preamble states:

The Department has no intention of departing from this established case law. Rather, for the first time, the Department intends to make clear in these revisions to the Part 541 regulations that such police officers, fire fighters, paramedics, EMTs and other first responders are entitled to overtime pay.

Id. (emphasis added). The district court's deletion of the "this" that precedes "established case law", and replacing it with brackets, is not an accurate characterization of the preamble's language and alters its intended meaning. A fuller quotation of the relevant preamble language demonstrates that the Department approved of the specific case law that held that police officers whose primary duty is law enforcement in the field do not satisfy the FLSA's exemptions. Id.

Second, the district court asserted that the Secretary stated in her amicus brief to that court that, when analyzing whether an employee's primary duty is management, "the new regulations do not depart from the 'established case law' in which application of the duties test determines whether a given employee is exempt", Mullins, 523 F. Supp.2d at 354

(quoting District Court Amicus Brief, 6), thereby again attempting to show that the addition of 29 C.F.R. 541.3(b) is without force. The Secretary's prior brief, however, explained the meaning of 29 C.F.R. 541.3(b) and did not invite the district court to disregard it:

The preamble cites police sergeants as an example of a first responder who typically is nonexempt: when police sergeants' primary duty consists of front line law enforcement, they "are entitled to overtime pay even if [in the course of such front line law enforcement] they direct the work of other police officers because their primary duty is not management or directly related to management or general business operations". 69 Fed. Reg. at 22,129. In this regard, the new regulations do not depart from the "established case law" in which application of the duties test determines whether a given employee is exempt. *Id.* Rather, section 541.3(b) explains that any police officer whose primary duty consists of such law enforcement activities as "preventing or detecting crimes" and "conducting investigations", 29 C.F.R. 541.3(b)(1), even as they are concurrently "direct[ing] the work of other employees in the conduct of an investigation", are not exempt because their primary duty is not "management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof". 29 C.F.R. 541.3(b)(2); *see* 29 C.F.R. 541.106 (concurrent duties).

District Court Amicus Brief, 5-6 (bracketed language added by Secretary in District Court Amicus Brief). The Secretary was simply making the point that 29 C.F.R. 541.3(b) does not suggest that all police officers are exempt or non-exempt, but instead focuses on their duties as determinative, which she unremarkably noted was consistent with "established case law". *Id.* [6] The suggestion by the district court that the Secretary was inviting the court to ignore the very regulation that she was explaining and interpreting in her brief defies logic. Section 541.3(b) is entitled to controlling deference and should have been considered by the district court.

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## **6. Application of 29 C.F.R. 541.3(b) Shows that the District Court's Analysis Constituted Legal Error and Application of the Part 541 Regulations as a Whole Shows that the Sergeants' Primary Duty Is Not Management**

a. The district court concluded that the sergeants' primary duty is management because they are "front-line supervisors of subordinate police officers", they exercise a great deal of management and discretion over "the officers they accompany in the field" and perform additional duties that are separate and distinct from those they "share with their subordinates", and they are paid more than police officers. *Mullins*, 523 F. Supp.2d at 357-59. [7] The district court's reliance on these factors is contrary to 29 C.F.R. 541.3(b) and does not support a conclusion that the sergeants' primary duty is management.

First, the district court's findings that the sergeants are "front-line supervisors", have responsibility over the police officers with whom they work alongside, and are looked to by police officers for guidance and direction, *Mullins*, 523 F. Supp.2d at 357-59, do not support its conclusion that the sergeants' primary duty is management. As the district court's findings make evident, the sergeants' direction of police officers is done in conjunction with their performance of field law enforcement work. [8] Section 541.3(b) addresses this very circumstance and provides that "for example, a police officer . . . whose primary duty is to investigate crimes . . . is not exempt . . . merely because the police officer . . . also directs the work of other employees in the conduct of an investigation . . .". 29 C.F.R. 541.3(b)(2). In other words, the fact that the sergeants direct police officers while they perform field law enforcement activities does not transform the field law enforcement into management. *See id.*

Second, the district court's reliance on the sergeants' discretion and additional duties, *see Mullins*, 523 F. Supp.2d at 358-59, is misplaced. As an initial matter, exercising discretion is not one of the elements of the executive exemption. *See* 29 C.F.R. 541.100(a). In any event, the sergeants' discretion and additional duties almost entirely relate to their performance of field law enforcement work. *See Mullins*, 523 F. Supp.2d at 358 (sergeants "exercise discretion and make significant decisions based on their judgment while in the field" and exercise management and discretion over "the officers they accompany in the field") (emphases added). The sergeants' additional duties involving discretion identified by the district court comprise more sophisticated, but nonetheless non-exempt, aspects of field law enforcement work: "verifying whether probable cause to arrest a suspect exists, determining whether a show-up identification procedure is justified, making tactical decisions such as when to retreat from a crime scene, directing

subordinates to canvas a certain area, positioning officers in the field for law enforcement operations, and guiding subordinates on proper police procedures". *Id.* Moreover, the additional duties identified by the district court that the sergeants perform beyond a police officer's duties (*see id.* at 342-43) are almost entirely field law enforcement work. [9]

Third, the district court cited "the difference in the rate of pay between a sergeant and a police officer [to] bolster[] the Court's conclusion". *Mullins*, 523 F. Supp.2d at 359. However, 29 C.F.R. 541.3(b) provides that police officers' front-line law enforcement is not management "regardless of [their] rank or pay level". 29 C.F.R. 541.3(b)(1). Moreover, any enhanced rate of pay presumably is based on the sergeants' additional law enforcement duties as referenced in the preceding paragraph. Accordingly, the district court erred by considering the sergeants' additional pay as compared to police officers.

b. Section 541.3(b) is consistent with, and necessarily informs, the "primary duty" regulation at 29 C.F.R. 541.700 and, when applied together to the district court's factual findings on summary judgment, the conclusion must necessarily be that the sergeants' primary duty is not management. Section 541.700(a) defines "primary duty" as "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". The district court found that the sergeants "perform law enforcement duties alongside patrol officers in the field", "generally spend much of their time in the field with their subordinates", and "spend most of their shifts working alongside their subordinates and performing many of the same law enforcement tasks". *Mullins*, 523 F. Supp.2d at 357. In light of these specific findings and the district court's factual findings as a whole, the sergeants' primary duty is field law enforcement, which is not management according to 29 C.F.R. 541.3(b). The regulations do identify certain non-exclusive factors for determining an employee's primary duty, including the amount of time spent performing exempt work, "the relative importance of the exempt duties", "the employee's relative freedom from direct supervision", and the employee's salary as compared to others, *see* 29 C.F.R. 541.700(a); the regulations also provide that an employee can spend a minority of time performing exempt work, i.e., management, and still be exempt if such "other factors support such a conclusion", *see* 29 C.F.R. 541.700(b). The district court did rely on such other factors – the sergeants' role as "front-line supervisors", their responsibility and discretion in the field, and their higher pay, *Mullins*, 523 F. Supp.2d at 357-59 – to conclude that the sergeants' primary duty is management. However, as discussed *supra*, 29 C.F.R. 541.3(b) provides that, for police officers such as these sergeants, giving direction and exercising discretion while performing field law enforcement work do not transform their non-management primary duty into a management primary duty, regardless of the police officer's rank or pay. *See* 29 C.F.R. 541.3(b)(1), (2).

c. The Secretary's definition of "management" confirms this result. The sergeants perform very few of the 15 management activities identified in 29 C.F.R. 541.102. Sergeants do "direct[] the work of employees" (a management activity identified in 29 C.F.R. 541.102), but as discussed *supra*, such direction largely occurs as the sergeants perform field law enforcement work with police officers and is therefore not management. *See* 29 C.F.R. 541.3(b)(2). Sergeants arguably appraise employees' productivity and efficiency – another identified management activity (29 C.F.R. 541.102). However, the appraisals occupy a small amount of the sergeants' time and are not recommendations for promotion as 29 C.F.R. 541.102 requires in order for the appraisals to be a management activity; instead, promotion is governed by a civil service exam and process.

d. Finally, the Secretary's discussion of concurrent duties further supports this result. Employees who concurrently perform exempt and non-exempt work can be exempt but generally only if they "make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work". 29 C.F.R. 541.106(a). [10] This does not describe the sergeants' duties. Sergeant is the second lowest rank in the police department out of ten ranks. [11] Sergeants generally cannot decide when to perform field law enforcement; they receive their daily assignments from lieutenants or higher-ranking officers. *Mullins*, 523 F. Supp.2d at 344. Sergeants are "required to be out in the field on patrol with their unit throughout each shift" (*id.* at 345), are assigned a pre-determined geographic area that they and their officers patrol (*id.* at 347), are dispatched to all arrests in their unit and must respond when directly dispatched (*id.* at 342), and are "dispatched and required to respond when situations involving emotionally disturbed individuals arise" (*id.*). In addition, the concurrent duties regulations provide that "an employee whose primary duty is to work as an electrician is not an exempt executive even if the employee also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor". 29 C.F.R. 541.106(c). This is akin to the

sergeants' work and their direction of others. Thus, the basis for the district court's decision is flawed, and when applying the applicable regulations at 29 C.F.R. Part 541, including 29 C.F.R. 541.3(b), to the facts as found by the court, the conclusion must be that the sergeants' primary duty is law enforcement in the field and therefore not management.

In conclusion, applying the pertinent regulations from 29 C.F.R. Part 541 to the district court's factual findings, the sergeants' primary duty is field law enforcement, not management. Accordingly, the sergeants do not satisfy the executive exemption. [\[12\]](#)

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this brief as *amicus curiae* of the Secretary of Labor was served on each of the following on this 17<sup>th</sup> day of March, 2011, via electronic mail and overnight delivery:

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Counsel for Appellee

\_\_\_\_signed\_\_\_\_\_  
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### **Footnotes**

[\[1\]](#) As this Court is aware, the Secretary filed an amicus brief dated July 20, 2007 with the district court during the summary judgment briefing. See Brief of the Secretary of Labor as Amicus in the Disposition of Plaintiffs' Motion for Summary Judgment ("District Court Amicus Brief"). In that prior brief, the Secretary discussed the current version of the executive exemption, explained the meanings of "primary duty" and "management", and discussed the addition of 29 C.F.R. 541.3(b) to the regulations and its meaning. See id. at 3-6, 8-13. The Secretary, however, did not apply the

"primary duty is management" analysis to the facts regarding the sergeants' duties, and did not express a position as to whether summary judgment should have been granted for or against the sergeants on that element of the executive exemption.

**[2]** The sergeants seek overtime compensation dating back to 2001. See Mullins, 523 F. Supp.2d at 340. However, this Court's questions indicate that it seeks the Department's position on whether the sergeants satisfy the current version of the executive exemption (effective as of August 23, 2004). Moreover, the Secretary did not address in her amicus brief to the district court whether the sergeants satisfy the pre-August 23, 2004 version of the exemption. See District Court Amicus Brief, 3 n.1. Therefore, this brief addresses whether the sergeants satisfy the executive exemption only under the current version of the exemption.

**[3]** Defining field law enforcement work to be non-exempt work and not management is also consistent with the Secretary's general determination that manual labor and "blue collar" work cannot be exempt. See 29 C.F.R. 541.3(a).

**[4]** This Court cited this quotation from the preamble in its questions to the Department.

**[5]** In Simmons v. City of Fort Worth, 805 F. Supp. 419, 421 (N.D. Tex. 1992), the deputy chiefs oversaw between 15 and 186 employees; were responsible for planning, organizing, directing, and evaluating the work of an entire division within the department (including developing fire department policies, training staff, and preparing budgets); and directed firefighting operations when necessary. The fire district chiefs oversaw between 9 and 37 employees; were responsible for planning, organizing, and directing their assigned fire companies; scheduled and supervised training; were responsible for readiness; completed reports; evaluated personnel performance; and assisted in preparing budgets and establishing goals and objectives. See id. At fire scenes, they generally evaluated conditions and requested assistance if warranted. See id. In Keller v. City of Columbus, 778 F. Supp. 1480, 1482-83 (S.D. Ind. 1991), the captains and lieutenants were each responsible for one of the city's fire stations; were responsible for ensuring the readiness of the station's equipment, property and personnel; maintained personnel records; commanded and directed operations at a fire or emergency scene; and led firefighters "in actual fire suppression activities" only when relieved of overall command by a higher ranking officer.

**[6]** The Secretary's reiteration that 29 C.F.R. 541.3(b) focuses on the employee's duties is also consistent with pre-2004 versions of 29 C.F.R. Part 541, as well as with 29 C.F.R. 541.2 (employee's salary and duties, as opposed to job title, determine whether he or she is exempt).

**[7]** The district court concluded that the sergeants' "principal value" to the police department is their service as immediate supervisors in the chain of command to whom police officers look for guidance and direction, "particularly while in the field", but it does not cite any evidence from the record to support its conclusion. Mullins, 523 F. Supp.2d at 358-59.

**[8]** Sergeants "perform law enforcement duties alongside patrol officers in the field" (Mullins, 523 F. Supp.2d at 357); "generally spend much of their time in the field with their subordinates" (id.); exercise a great deal of management and discretion over "the officers they accompany in the field" (id. at 358); and are looked to by police officers for guidance and direction, "particularly while in the field" (id. at 358-59). Further, sergeants are "making tactical decisions such as when to retreat from a crime scene" (id. at 358); "directing subordinates to canvas a certain area" (id.); "positioning officers in the field for law enforcement operations" (id.); "utiliz[ing] hand signals to position officers on bicycles in the field for law enforcement operations" while on bike patrols (id. at 345-46); "act[ing] as observation posts [and] relaying information to team members who then apprehend and arrest individuals observed selling narcotics" (id. at 346); assigning police officers on their team specific duties during operations, selecting target locations for a particular tour and the order in which to address each target, and "direct[ing] the team's law enforcement activities" during actual operations (id.); "direct[ing] the positioning of the unit's police officers for purposes of setting up crowd control formations" (id. at 347); "direct[ing] police officers to resume patrol when their services are no longer needed" at a crime scene (id. at 343); "direct[ing] patrol officers to make arrests, remove contraband from suspects or prisoners, and conduct searches" (id.); and "taking charge of a crime scene if they are the highest ranking officer present [and] directing other officers and ensuring that they are performing their jobs" (id. at 344).

[9] Sergeants' duties in addition to those that they share with their subordinates include handling unusual or serious incidents, "instances where a firearm has been discharged, felonies, towing incidents, and calls that have occupied officers for more than thirty minutes. Sergeants are dispatched and required to respond when situations involving emotionally disturbed individuals arise, as police officers are not permitted to take such people into custody. In handling suspects, sergeants are authorized to use certain restraining devices that are not available to police officers [including] tasers, water cannons, and restraining tape". Mullins, 523 F. Supp.2d at 342. In addition, sergeants: may initiate "Level One" mobilizations (rapidly mobilizing police personnel to the scene) in unusual or emergency situations; determine when to retreat from a crime scene; direct police officers to resume patrol when their services are no longer needed; decide to direct a line-up change or reallocate and reassign police officers depending on the circumstances of the tour; complete unusual occurrence reports and reports of car chases; review evidence vouchers; and review and verify complaint reports, stop-and-frisk reports, and arrest reports. Id. at 343.

[10] The employee's primary duty is still the benchmark. See 29 C.F.R. 541.106(a) (cross-referencing 29 C.F.R. 541.100).

[11] See Joint Appendix, Volume III, A-290.

[12] Because the sergeants' primary duty is not management, they cannot satisfy the executive exemption even if they make recommendations as to tangible employment actions affecting others that are given particular weight (the fourth element of the executive exemption); accordingly, this brief does not address the exemption's fourth element. Indeed, the phrasing of this Court's second question to the Department recognized that it need not address that element if it were to conclude that the sergeants' primary duty is not management.

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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing PLAINTIFF’S OBJECTIONS TO PROPOSED DRAFT JURY INSTRUCTIONS RECEIVED 1-11-19 on:

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by mailing to said attorney(s) a full and correct copy thereof, contained in a sealed envelope, with postage paid, addressed to said attorney(s) as stated above and deposited in the United States Post Office at Portland, Oregon on the date set forth below.

by electronic means through the Court’s Case Management/Electronic Case File system on the date set forth below.

by e-mailing to said attorney(s) a full and correct copy thereof, addressed to said attorney(s) as stated above on the date set forth below.

by hand delivering to said attorney(s) a true copy thereof on the date set forth below.

by faxing to said attorney (s) a true copy thereof on the date set forth below.

by concurrently electronically mailing this documents in Word format to each attorney’s last-known e-mail address on the date set forth below.

DATED this 12<sup>th</sup> day of January, 2019.

TEDESCO LAW GROUP

s/Katelyn S. Oldham

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8 Attorney for Plaintiffs

9 Hon. Ronald B. Leighton

10 UNITED STATES DISTRICT COURT  
11 WESTERN DISTRICT OF WASHINGTON  
12 AT TACOMA

13 DREW TRACY, DUANE SCHUMAN,  
14 RICK STEELE, CHRIS LINES, DANIEL  
15 KEVIN GRIFFEE, RICHARD HUFFMAN,  
16 LEE HAZELTON and SCOTT WILLIS,  
17 individually,

18 Plaintiffs,

19 v.

20 THE CITY OF VANCOUVER, a  
21 municipality

22 Defendant.

Case No. 3:17-cv-05414-RBL

**PLAINTIFFS ALTERNATIVE JURY  
INSTRUCTIONS**

23 Plaintiff proposes the following alternative Jury Instructions.

24 DATED this 12<sup>th</sup> day of January, 2018.

25 TEDESCO LAW GROUP  
26 s/Katelyn S. Oldham

\_\_\_\_\_  
Katelyn S. Oldham, WSB No. 35266  
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katelyn@miketlaw.com  
Attorney for Plaintiffs

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3	FLSA – First Responder Rule	29 C.F.R. § 541.3(b); Brief for the Sec. of Labor as <i>Amicus Curiae</i> , <i>Morrison v. County of Fairfax</i> ,” 4 <sup>th</sup> Cir., “DOL <i>Morrison</i> Amicus Brief,” at pp. 25-26, <i>citing to</i> 69 Fed. Reg. at 22,129 <i>citing to</i> <i>Anderson v. City of Cleveland, Tenn.</i> , 90 F.Supp. 2d 906 (E.D. Tenn. 2000) and see Fed. Reg. at 22,130; <i>Carson</i> 2016 WL 7647681 at *2; <i>Morrison</i> at 769-70, <i>citing to</i> <i>Barrows v. City of Chattanooga</i> , 944 F.Supp.2d 596 (E.D. Tenn. 2013).		Plaintiff
4	FLSA – Training Related to First Responder Duties	29 CFR § 541.102. Modified by <i>Morrison v. County of Fairfax, VA</i> , 826 F.3d 758 (4th Cir. 2016) <i>see also</i> Department of Labor’s <i>Amicus Brief</i> to the Fourth Circuit Court of Appeals in <i>Morrison v. Fairfax County, VA</i> (November 23, 2015); <i>see also</i> 69 Fed. Reg. at 22130 (2004).		Plaintiff
5	FLSA – Management	29 CFR § 541.102. Modified by <i>Morrison v. County of Fairfax, VA</i> , 826 F.3d 758 (4th Cir. 2016) <i>see also</i> Department of Labor’s		Plaintiff

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		<i>Amicus Brief</i> to the Fourth Circuit Court of Appeals in <i>Morrison v. Fairfax County, VA</i> (November 23, 2015); <i>see also</i> 69 Fed. Reg. at 22130 (2004).		
6	FLSA – Customarily and Regularly	29 C.F.R. § 541.701		Both
7	FLSA – Particular Weight	29 C.F.R. § 541.105		Both

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**INSTRUCTION NO. 1**

**FLSA – Executive Employee Exemption**

An employee is exempt under the Act if the following elements are met:

(1) The employee is compensated on a salary basis at a rate of not less than \$913 per week;

(2) Whose primary duty is management of the City of Vancouver or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees outside the context of emergency response duties; and

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

The parties agree that the first and third elements are established. The parties disagree as to whether the second and fourth elements are established.

If you find that Defendant has proven that one or more of the Plaintiffs meet all four of the elements of the Executive Employee Exemption or that one or more of the Plaintiffs' primary duty is not that of first responders, your verdict should be for Defendant on each Plaintiff you find exempt.

Source: 29 C.F.R. §§ 541.100, 541.600(a).

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**INSTRUCTION NO. 2**

**FLSA – Highly Compensated Employee Exemption**

An employee shall be exempt under the FLSA if:

(1) The employee receives total annual compensation of at least the annualized earnings amount of the 90th percentile of full-time non-hourly workers nationally; and

(2) The employee customarily and regularly performs any one or more of the exempt duties or responsibilities described in the executive exemption. Those duties are: (a) management of the City of Vancouver or of a customarily recognized department or subdivision thereof; (b) customarily and regularly directing the work of two or more other employees outside the context of emergency response duties; (c) hiring or firing other employees or making suggestions and recommendations that are given particular weight as to the hiring, firing, advancement, promotion or any other change of status of other employees.

(3) This exemption applies only to employees whose primary duty includes performing office or non-manual work. Thus, for example, non-management production-line workers and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt under this section no matter how highly paid they might be.

The parties agree that the first element, relating to annualized earnings, is proven. The parties disagree as to the second and third elements.

If you find that Defendant has proven one or more of the Plaintiffs meet all of the elements

1 of the Highly Compensated Employee Exemption and that Plaintiffs' primary duty is not that of  
2 First Responders, your verdict should be for Defendant for each Plaintiff that meets all of the  
3 elements of the Highly Compensated Employee Exemption.  
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25 Source: 29 CFR §§ 541.601; 541.100  
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1 **INSTRUCTION NO. 3**

2 **FLSA -- First Responder Rule**

3 The “Executive Employee Exemption” (Instruction No. 6), and the “Highly Compensated  
4 Employee Exemption” (Instruction No. 7), do not apply to employees whose primary duty is  
5 determined to be that of a First Responder.  
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7 Thus the FLSA exemptions do not apply to police officers, detectives, deputy sheriffs, state  
8 troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or  
9 probation officers, park rangers, fire fighters, paramedics, emergency medical technicians,  
10 ambulance personnel, rescue workers, hazardous materials workers and similar employees,  
11 regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing  
12 fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes;  
13 conducting investigations or inspections for violations of law; performing surveillance; pursuing,  
14 restraining and apprehending suspects; detaining or supervising suspected and convicted  
15 criminals, including those on probation or parole; interviewing witnesses; interrogating and  
16 fingerprinting suspects; preparing investigative reports; or other similar work.  
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18 Such employees do not qualify as exempt executive employees or highly compensated  
19 employees because their primary duty is not management of the enterprise in which the employee  
20 is employed or a customarily recognized department or subdivision thereof. Thus, for example, a  
21 police officer or fire fighter whose primary duty is to investigate crimes or fight fires is not exempt  
22 under the FLSA merely because the police officer or fire fighter also directs the work of other  
23 employees in the conduct of an investigation or fighting a fire. Training  
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25 If you find that one or more of the Plaintiffs’ primary duty is that of a First Responder  
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1 under this rule, your verdict should be for each Plaintiff for which you make that finding.  
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23 Source: 29 C.F.R. § 541.3(b); Brief for the Sec. of Labor as *Amicus Curiae*, *Morrison v. County*  
24 *of Fairfax*,” 4<sup>th</sup> Cir., “DOL *Morrison* Amicus Brief,” at pp. 25-26, *citing to* 69 Fed. Reg.at  
25 22,129 *citing to* *Anderson v. City of Cleveland, Tenn.*, 90 F.Supp. 2d 906 (E.D. Tenn. 2000);  
26 *Carson* 2016 WL 7647681 at \*2; *Morrison* at 769-70, *citing to* *Barrows v. City of Chattanooga*,  
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**INSTRUCTION NO. 4**

**FLSA – Training Related to First Responder Duties**

The Department of Labor is the agency empowered to enforce the Fair Labor Standards Act. The Department of Labor has determined that, for fire service employees such as plaintiffs, when assessing their primary duty, the time spent training related to first responder duties, should be counted toward their first responder duties and not toward management or other exempt duties. “Training” means activities in which the Plaintiff is being trained as well as activities in which the Plaintiff is training other employees or participating in training with other employees.

For example, both the Plaintiffs’ time engaged in medical protocol training to maintain the Plaintiffs’ medical certifications and the Plaintiffs’ participation in a training to extract passengers safely from a damaged vehicle would be counted as activities related to first responder duties. These activities would not be counted as related to the Plaintiffs’ exempt management duties.

Source: 29 C.F.R. § 541.700; *see also* Department of Labor’s *Amicus Brief* to the Fourth Circuit Court of Appeals in *Morrison v. Fairfax County, VA* (November 23, 2015), position adopted by *Morrison v. County of Fairfax, VA*, 826 F.3d 758 (4th Cir. 2016); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *see also* 69 Fed. Reg. at 22130 (2004).

1 **INSTRUCTION NO. 5**

2 **FLSA - Management**

3 Generally, under the FLSA “management” includes, but is not limited to, activities such

4 as:

- 5
- 6 • interviewing and selecting;
  - 7 • setting and adjusting their rates of pay and hours of work;
  - 8 • directing the work of employees outside of the context of an emergency scene;
  - 9 • maintaining production or sales records for use in supervision or control;
  - 10 • appraising employees’ productivity and efficiency for the purpose of
  - 11 recommending promotions or other changes in status;
  - 12 • handling employee complaints and grievances; disciplining employees;
  - 13 • planning the work;
  - 14 • determining the techniques to be used;
  - 15 • apportioning the work among the employees;
  - 16 • determining the type of materials, supplies, machinery, equipment or tools to be
  - 17 used or merchandise to be bought, stocked and sold;
  - 18 • controlling the flow and distribution of materials or merchandise and supplies;
  - 19 • providing for the safety and security of the employees or the property;
  - 20 • planning and controlling the budget; and
  - 21 • monitoring or implementing legal compliance measures.
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25 Source: 29 CFR § 541.102. Modified by *Morrison v. County of Fairfax, VA*, 826 F.3d 758 (4th  
26 Cir. 2016) *see also* Department of Labor’s *Amicus Brief* to the Fourth Circuit Court of Appeals  
in *Morrison v. Fairfax County, VA* (November 23, 2015); *see also* 69 Fed. Reg. at 22130 (2004).

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**INSTRUCTION NO. 6**

**FLSA - Customarily and Regularly**

As used in these instructions, the term “customarily and regularly” means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed “customarily and regularly” includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

29 C.F.R. § 541.701

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**INSTRUCTION NO. 7**

**Fair Labor Standards Act Claim—“Particular Weight”**

To determine whether an employee’s suggestions and recommendations are given “particular weight,” as that term is used in these instructions, factors to be considered include, but are not limited to:

- whether it is part of the employee’s job duties to make such suggestions and recommendations;
- the frequency with which such suggestions and recommendations are made or requested; and
- the frequency with which the employee’s suggestions and recommendations are relied upon.

Generally, the suggestions and recommendations must pertain to employees whom that individual customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An individual’s suggestions and recommendations may still be deemed to have “particular weight” even if a higher level manager’s recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee’s change in status.

29 C.F.R. § 541.105.

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing Plaintiffs' Proposed Jury Instructions 1-12-19 on:

Dan Lloyd and  
Sara Baynard  
City Attorney's Office  
City of Vancouver  
PO Box 1995  
Vancouver, WA 98668-1995

by mailing to said attorney(s) a full and correct copy thereof, contained in a sealed envelope, with postage paid, addressed to said attorney(s) as stated above and deposited in the United States Post Office at Portland, Oregon on the date set forth below.

by electronic means through the Court's Case Management/Electronic Case File system on the date set forth below.

by e-mailing to said attorney(s) a full and correct copy thereof, addressed to said attorney(s) as stated above on the date set forth below.

by hand delivering to said attorney(s) a true copy thereof on the date set forth below.

by faxing to said attorney (s) a true copy thereof on the date set forth below.

by concurrently electronically mailing this documents in Word format to each attorney's last-known e-mail address on the date set forth below.

DATED this 12<sup>th</sup> day of January, 2019.

TEDESCO LAW GROUP

s/Katelyn S. Oldham

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Katelyn S. Oldham, WSB No. 35266

Attorney for Plaintiffs