No. 15-16758

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs – Appellants,

v.

PROVIDENT SAVINGS BANK, FSB,
Defendant – Appellee.

BRIEF OF APPELLANTS

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INTRODUCTION

This case presents a question of first impression in the Ninth Circuit: whether mortgage underwriters qualify for the administrative exemption to the Fair Labor Standards Act ("FLSA").

Although the question is unsettled in this Court, its resolution involves only a straightforward application of long-settled principles defining and delimiting bona fide exempt administrative work. Administrative employees perform "work directly related to the management or general business operations" of their employer. 29 C.F.R. § 541.200(a). As this Court has explained, the administrative exemption draws its key distinction between "employee[s] engage[d] in 'running the business itself or determining its overall course or policies,'" and employees engaged "in the day-to-day carrying out of [the] business' affairs." *See Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1125 (9th Cir. 2002) (quoting *Bratt v. Cnty. of Los Angeles*, 912 F.2d 1066, 1068 (9th Cir. 1990)).

Mortgage underwriters do not administer banks, and the district court erred in concluding otherwise. Underwriters do not run the business or determine their employers' overall course or policies.

Instead, mortgage underwriters underwrite loans. They examine each and every loan transaction one-by-one, ensuring that every prospective loan meets the detailed lending criteria established by their employers, the government, and investors in the secondary market. Underwriters engage in "the day-to-day carrying out of [the] business' affairs." *Id.*

The district court's decision in this case is an outlier. The court misinterpreted the governing regulations and misapplied this Court's precedents. Principally, however, the district court disregarded the substantial body of authority holding that financial services employees who facilitate loan transactions one-by-one, on a customer-by-customer basis, do not qualify for the administrative exemption. *See infra* at 45–47. In particular, the district court erred in summarily rejecting the leading authorities explicitly holding that mortgage underwriters do not qualify for the administrative exemption, including the Second Circuit's decision in *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529, 534 (2d Cir. 2009), and the Western District of Washington's opinion in *Bollinger v. Residential Capital, LLC*, 863 F. Supp. 2d 1041, 1048 (W.D. Wash. May 30, 2012). Both *Davis* and *Bollinger* extensively discussed and correctly applied the principles laid down in *Bratt* and *Bothell*—this

Court's seminal opinions defining administrative work. The district court veered off course in rejecting these well-reasoned and persuasive authorities.

The district court compounded its error by concluding that underwriters' primary duty "includes the exercise of discretion and independent judgment with respect to matters of significance"—an independent element required to invoke the exemption. 29 C.F.R. § 541.201(a). Underwriters apply facts gathered by others to detailed criteria written by others still. Underwriters have no authority to change the lending criteria or substitute their own judgment for the criteria. As the regulations recognize, such work involves the "use of skill in applying well-established techniques, procedures or specific standards"—a paradigmatic non-administrative function. *See* 29 C.F.R. § 541.202(e).

Exemptions to the FLSA must be construed narrowly against the employer, and for good reason. Congress enacted the FLSA "to spread work in order to reduce unemployment" and to "discourage . . . a degree of overtime that might impair workers' health or safety." *See Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 510 (7th Cir. 2007); 29

U.S.C. § 202(a). These congressional objectives remain as vital today as they were when the FLSA was enacted. In today's evolving information economy, the great majority of workers who sit at a desk are not bona fide administrative employees directing the course of their employer's business or formulating corporate policy. Instead, these employees—including the underwriters here—perform work bearing on the very *goods and services* their employers offer in the marketplace. *See Bothell*, 299 F.3d at 1127 (citing *Bratt*, 912 F.2d at 1070). This Court must reject any attempt to transform the administrative exemption from a modest refuge for bona fide administrators into an amorphous and free-ranging exemption effectively swallowing the overtime rule and frustrating Congress' remedial design. For these reasons, the district court's judgment must be reversed.

STATEMENT OF JURISDICTION

The district court had federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331 because Appellants assert claims under the FLSA, 29 U.S.C. § 201 *et seq*. The district court entered an order granting Provident's motion for summary judgment on August 12, 2015 and entered final judgment the same day. Excerpts of Record ("ER") 1,

2–16. Appellants filed a notice of appeal on August 18, 2015. ER 27. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether Provident's mortgage underwriters' primary duty is the performance of work directly related to the management or general business operations of their employer or their employer's customers.

2. Whether Provident's mortgage underwriters' primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

STATEMENT OF THE CASE

I. FACTS.

A. The Parties.

Provident is a bank in the business of selling mortgage loans to consumers who wish to purchase or refinance a home, then re-selling the funded loans on the secondary market. ER 538–39, 942–43. Appellants were employed by Provident as mortgage underwriters. Provident's underwriters' primary job duty is reviewing mortgage loan applications against lending criteria established by Provident and investors in the secondary market. ER 646–49, 847–53, 941.

B. Underwriters Are Responsible for One Distinct Step in the Production of Salable Loans.

The underwriter's job covers only one stage in the life of a loan file. To understand Provident's business—and underwriters' role in carrying out the business' affairs—some additional context is important. As explained here, underwriters are one class of employees who work in the chain of production on each and every loan file.

A loan transaction begins for Provident when a loan officer or loan broker[1] works with the borrower to select a particular loan product. ER 565–66, 568, 642, 744, 774, 822, 942. The broker or loan officer, in consultation with the borrower, selects the loan amount, the repayment period, and the interest rate, among other terms. Once the product is selected, the loan processor or the broker works with the borrower to gather information related to income and assets and to complete a loan application. ER 565–66, 568, 642, 744, 774, 822, 942. The loan officer or broker enters the information into an Automated Underwriting System ("AUS"). ER 565–66, 568, 642, 744, 774, 822, 942. The AUS applies

[1] In the industry, "loan officer" refers to an internal bank employee who sells his employer's mortgage products to borrowers. "Loan broker" refers to an independent agent who typically sells the loan products of many different companies.

certain lending guidelines to a prospective borrower's information and returns a preliminary decision on whether Provident might originate a loan. ER 566–68, 942. When an underwriter first encounters the loan file, the application has already been completed, and the AUS should have already been run. ER 565–70, 573, 642, 744, 774, 822, 942.

At this point in the process, the underwriter's work begins. The underwriter's first job is to make sure that the loan officer or broker input the correct information (for example, the borrower's name, the property address, and the loan amount) into the AUS. ER 568–70, 573, 942. Automated tools such as the AUS rely on the "accuracy of the input." ER 568–70, 573, 942. The underwriter's principal job, however, is to compare the borrower's information against a series of rules governing which loan products are available and under what circumstances.

These rules are set out in detailed documents called "guidelines." ER 854–80. The guidelines set out various criteria related to the borrower himself, the loan documentation, and the subject property. ER 854–80. Guidelines cover a vast array of topics, ranging from what earnings an underwriter can include as income to when termite

inspections are required. ER 854–80. Underwriters are expected to know and correctly apply the appropriate guidelines. ER 632, 812, 847–53, 944. In other words, underwriters must ensure that a loan conforms with the applicable guidelines in order to approve it. ER 632, 812, 847–53, 944. Provident underwriters print out a current version of the relevant guidelines to include with the loan file for every loan they underwrite. ER 739–40, 786–87, 944.

Once an underwriter has received all of the supporting documentation needed to approve a loan, and compared the information received against all applicable criteria, her job is complete. The loan is sent to other Provident employees to prepare loan documents for the borrower to sign and to finalize funding the loan. ER 576–77, 949. Whether or not a loan is actually funded after being underwritten depends on many factors that are beyond the underwriter's control. ER 713–16, 944.

C. Provident's Business Model Depends on Selling Loans in the Secondary Market.

Provident sells completed loans on the secondary market. ER 538–39, 942–43. Accordingly, Provident employs a distinct group (appropriately called "Secondary Marketing") that is responsible for

selling funded loans in the secondary market. ER 539–40, 943. Secondary Marketing also determines what interest rates are charged to borrowers. ER 537–39, 943. Underwriters do not work in Secondary Marketing. ER 539–40, 943.

Provident's business practice of selling loans on the secondary market means that underwriters must satisfy the standards of Provident's customers in the secondary market in addition to Provident's internal requirements. Indeed, many of the guidelines underwriters must follow come directly from the investors who purchase loans from Provident. ER 613–14, 617, 947. Provident sells funded loans to both private investors and government agencies such as Fannie Mae. ER 538–39, 717–18, 784, 942–43. By selling the loans, Provident transfers the risk of default, and the costs associated with collecting payment, to the third-party investor. ER 554, 602–03, 943. Once a loan is sold, Provident does not track whether the loan is paid back. ER 602–03, 743, 781, 944. Assuming a loan was correctly underwritten, Provident may never learn if that loan defaults. ER 602–03, 743, 781, 944.

A loan that meets investor guidelines and standards is described as "salable." ER 554–58, 717, 759, 790–93, 813, 943. Certain documentation—and often specific forms—are necessary for loans to be sold. ER 759, 790–93, 943. If a loan that is sold fails to meet investor guidelines, the investor can contractually force Provident to repurchase the loan. ER 554–58, 813, 943. Repurchasing loans can be very costly to Provident. ER 555–56, 943. Investors may request that Provident repurchase a loan if the purchasing entity determines it was not correctly underwritten. ER 602–03, 943–44.

A repurchase request indicates a potential underwriter performance issue. ER 778–78, 840–41, 944. If an underwriter makes an error that affects a loan's salability—for example, entering a borrower's income incorrectly—that underwriter may receive a formal written warning. ER 599–600, 796, 944. However, an underwriting error that does not affect salability is treated as trivial, but could lead to a write-up if it is habitual. ER 599–600, 796, 944.

D. Underwriters Must Follow Strict Criteria in Reviewing Loan Applications.

In performing their day-to-day duties, underwriters strictly apply established rules to the facts of each and every unique borrower and property.

To determine whether a loan satisfies the applicable guidelines, underwriters must ensure data was entered correctly into the AUS, confirm that certain formulas were applied correctly, and ensure that the borrower and property met specific criteria. Provident provides checklists that mortgage underwriters use to make sure required documents are included in the file, ER 469–73 (FHA Loan Quality Checklist), and forms that calculate certain values when underwriters plug in specific inputs, ER 425–46 (rental income calculation worksheet). The point of these tools is to remove any subjectivity from the underwriting process: "Provident had a very narrow set of guidelines that you had to follow. They were extremely conservative, and they didn't really allow you to use your own judgment." ER 400.

Underwriting involves the application of objective, concrete rules. Put another way, a particular application of a guideline to a fact is either correct or incorrect. For example, an underwriter might make a mistake by calculating the wrong income, failing to request the

appropriate supporting documents, or approving a higher loan value than was available. ER 620–22, 944–45.

The guidelines themselves, which are in the record, demonstrate the objective nature of the lending criteria. For example, Provident's FHA guidelines are full of charts and objective requirements for loan approval. *See*, *e.g.,* ER 443 (property restrictions for condominiums); ER 444–45 (credit score and ratio requirements for manual underwrites); ER 446 (list of required documentation and forms; list of credit score restrictions); ER 447 (borrower eligibility requirements); ER 449–50 (requirements for employment verification and income type); ER 453–54 (list of downpayment [sic] criteria). Provident's own guidelines outline specific loan to value ratios, maximum loan amounts, minimum FICO scores, and maximum debt to income ratios for loan products. *See*, *e.g.*, ER 467–68. The record is replete with checklists and forms aimed at ensuring that underwriters comply with all applicable guidelines. *See*, *e.g.*, ER 425–46 (Rental Income Calculation Worksheet); ER 469–73 (FHA Loan Quality Checklist); ER 474–77 (Back to Work—Extenuating Circumstances Submission Worksheet); ER 478–79 (Underwriter Appraisal Checklist); ER 480–523 (USDA Rural Development

Underwriting and Loan Closing Documentation Matrix). Provident uses a "Document Matrix" to ensure that underwriters review and complete all required forms. *See* ER 480–523.

Testimony in the record establishes that the guidelines must be followed. The underwriter's job in applying the guidelines is to determine the "correct response" to each loan application. As one appellant testified, underwriters performed their job "according to what the guidelines expected." ER 209. The guidelines are "specific" regarding standard underwriting procedures, such as calculating income. ER 212. Another appellant explained, "[w]e underwrote loans to Fannie Mae, Freddie Mac guidelines, FHA, VA guidelines and then to Provident overlay guidelines and then to whatever investor we were selling them to; so in the process of underwriting a file, I needed to make sure that I met all the guideline requirements." ER 235.

Other testimony in the record confirms that the guidelines are mandatory. ER 168 ("I always had to make sure that I was following guidelines for agency or FHA or VA. It wasn't just something that I could say oh, you're fine with that. No, I had guidelines that I had to follow . . . ."); ER 173, 176–77 ("It had to follow certain guidelines. Say,

for instance, a borrower who's self-employed, I had to have their tax returns. For a borrower who's not self-employed, I had to have at least 30 days of pay stubs current and their W-2s in order—this is what our agency guidelines require."); ER 265, 259.

Corporate documents, including emails from corporate management, confirm that Provident's underwriters must apply underwriting guidelines uniformly to reach the correct response. One manager wrote, in an email to all underwriters,

> [I]t is extremely important to make sure income, assets, ratios etc. have been calculated and applied correctly from the beginning. Because we want to make sure we are all of the same understanding when it comes to the appropriate calculations we will be scheduling face to face trainings will [sic] all underwriters over the next few weeks. . . . The worst thing you can do is guess, let's make sure we are all on the same page.

ER 122–24. Several other emails from the same manager carry a similar message. *See*, *e.g.*, ER 125–29 (outlining guidelines regarding expiration dates for FHA loans and reminding underwriters to "make sure you are clearly reading the DU's[2] and guidelines when underwriting your loan files. Non-insurable or non-salable loans are

[2] "DU" refers to "Desktop Underwriter," the Automated Underwriting System provided by Fannie Mae.

results of these oversights."); ER 130–31 (because of poor audit results, all Patriot Act forms must be reviewed by corporate "until we can see that everyone understands how to accurately complete the forms"); ER 132–33 (proving clear direction to resolve "confusion" over the proper treatment of "multiple financed properties"); ER 429–31 (noting that loans with certain characteristics can only be sold to specific investors); ER 134–37 (email from Provident's "Policy/Procedure Guideline Writer," providing updates to Fannie Mae HomePath Guidelines).

Underwriters enjoy no discretion to approve a loan that fails to meet the guidelines, even if their own judgment counsels otherwise. As one plaintiff testified, "I could not make a decision on doing a loan just because I felt somebody may pay it back, no. I underwrote to guidelines. . . . I had to decline loans where I knew that they would pay back." ER 238. Underwriters testified to situations where, for example, "borrowers [had] millions of dollars in the bank but had no actual documentable income, lived off of asset distributions, and I could not approve them because they did not meet guidelines." *Id.*

E. If a Loan Cannot Be Immediately Approved, Underwriters May Attach Conditions, Make Counteroffers, and Ask Management to Override the Guidelines.

Provident, and the district court, attributed legal significance to three tasks that underwriters are sometimes called upon to perform: (1) attaching conditions to loans, (2) making counteroffers, and (3) asking management to override the guidelines. With respect to these duties, the record reflects as follows:

(1) Attaching conditions.

If a loan was missing important information or documents, underwriters would approve the loan "subject to conditions," or suspend the application until certain conditions were met. However, evidence in the record shows that these conditions—and the "decision" whether to attach them—were controlled principally by the applicable guidelines. As one underwriter testified:

Q. Did the AUS return, after you got all the information in it, the 'approval' or a 'decline'?
A. It would—Yes.
. . .
Q. Anything else it would do?
A. Well, they had their minimum conditions for this loan file that you had to submit.
. . .
Q. You could do more.
A. Well, you had to do more.
Q. How did you decide how many more to do?
A. Well, because you have to follow the guidelines from FHA or VA; And then Provident, you know, you had your overlay. So, AUS is

just to document that lists their minimum, but you had to go above and beyond to get to what your decisioning would be and what documents you needed.

ER 285–86. As described by another underwriter, "[t]here were standard conditions that Provident had, that we had a list that we would use. And then, we also made sure that the AUS conditions were on the decision as well." ER 307. It is certainly true that underwriters add conditions in addition to those identified by the automated underwriting system. However, those conditions are typically required by investor guidelines or by Provident.

(2) Making counteroffers.

If a given loan does not satisfy the relevant guidelines, underwriters are required to decline the loan. ER 739–40, 786–87, 944. However, there is a risk to Provident that loan brokers will take their business elsewhere if they perceive that Provident is less likely to approve loans compared to other lenders. ER 582, 730–31, 737, 946. Accordingly, if the borrower does not qualify for the loan product selected, but might qualify for a different loan, the underwriter may suggest a "counteroffer." ER 581–82, 776, 946. In that case, the underwriter would suggest an alternative loan product (a loan with a

lower principal, a longer term, or higher interest rate, for example) to the loan officer or the broker. ER 581–82, 776, 946. Underwriters do not have authority to independently negotiate loan rates or terms. ER 537–39; 581–82; 635–36; 776; 946–47. Instead, underwriters have a list of available products, and they may suggest that while the prospective borrower does not qualify for Loan A, she might qualify for Loan B. ER 537–39; 635–36; 947.

(3) Asking management to override the guidelines.

Underwriters have no independent authority to deviate from Provident's guidelines. The only way underwriters could "deviate" from the guidelines was by requesting an exception from corporate. ER 585. Corporate reviewed each and every exception request and independently determined whether to proceed with the loan. *Id.*

F. Underwriters Are Not Responsible for the Litany of Tasks that Make Up Provident's General Business Operations.

The job duties of Provident's mortgage underwriters, described above, make up a small part of the work that must occur for Provident to produce salable loans. Underwriters' work has nothing to do with the kinds of work that any business needs performed in order to operate.

Specifically, Provident's underwriters are not responsible for the following tasks:

- Selling loans to investors on the secondary market and dealing with investors; ER 539–40, 947 (responsibility of Secondary Marketing);

- Pricing loans and determining the interest rates for a given loan product; ER 537–39, 635–36, 947;

- Making decisions about which loans to offer to the public; ER 546–47, 947;

- Marketing, promoting, or advertising Provident's products; ER 743–44, 777, 824, 947;

- Tracking updates to investor guidelines or notifying underwriters of such changes; ER 550–51, 613–14, 617, 947–48;

- Creating Provident's guidelines; ER 550–51, 613–14, 617, 947–48;

- Determining whether Provident's guidelines will precisely follow investor guidelines or depart from them; or, adding additional guidelines, thereby balancing Provident's risk; ER 613–14, 617, 947;

- Determining compensation, including incentive compensation, for underwriters; ER 628–29, 948;

- Quality control. Provident uses an outside company to perform quality control reviews before loans close; Provident's loan servicing department, which is separate from the mortgage division, performs post-closing quality control; Provident's internal audit department reviews the process and procedure for underwriting; ER 558–62, 598, 625, 948;

- Advising borrowers about various loan products; ER 578–82, 642–43, 744, 774, 776, 821–23, 946, 948–49; and

- Performing duties related to human resources or IT; ER 681–83; 949.

G. Underwriters Are Production Workers, Expected To "Work Through as Many Loans as They Possibly Could."

Provident evaluates and compensates underwriters based on their production—the volume of loans and loan applications completed. ER 710, 949.

(1) Provident's production expectations.

Provident sets quotas and production goals for the number of loans underwriters must review. Underwriters are generally expected to review two to three loans per day. ER 585–86, 708, 765–66, 816, 838–39, 945. Underwriters' production is sometimes addressed in underwriter performance reviews. ER 881–86 ("[F]or the amount of time Anna [Neal] is putting in, her production numbers don't reflect it"); ER 887–93 ("She is willing to put in the extra hours needed to get the job done. Karen [Honour] does the most production in the government group . . . ."). Provident managers are able to review "underwriting

reports" that indicate the number of loans reviewed by each underwriter per month. ER 587–90, 894–902, 945.

Ultimately, according one Provident manager, "the underwriters would have their goals of trying to work through as many loans as they possibly could . . . ." ER 708, 765–66, 816, 838–39, 945.

(2) Provident's turn time expectations.

Closely related to the expectation that underwriters underwrite a certain number of files is the expectation that underwriters underwrite at a certain pace. ER 591–93, 595–96, 724, 730, 945–46. Meeting "turn times," which measure how long it takes for Provident to respond to brokers, is an important component of underwriter performance. ER 724, 730, 945. Provident risks losing business if the company does not process loan applications quickly. ER 719, 722–23, 945–46. Supervisors carefully track underwriters' turn times. ER 590, 607, 946. Some supervisors use contests to encourage underwriters to improve their turn times. ER 798, 946. Supervisors also send emails encouraging increased production and decreased turn times. ER 733, 925–29, 946 (October 10, 2010: "We need to show our brokers we can perform and turn their loans. All the underwriters need to be putting [in] the extra

time at this point – it is critical"; April 22, 2011: "We are not receiving loans due to slow turn times. I need to request whatever extra you can give in working on files at night/ weekends. We HAVE to improve our turn times"; September 2, 2011: "We must get these loans in the pipeline closed so we don't lose them to competitors. Underwriters—This will take your continued efforts of night and weekend underwriting.").

(3) Provident's incentive payments.

Provident pays incentive payments based on the number of loans underwriters review. ER 590, 607, 946. Depending on the office, Provident offers incentives for each file that an underwriter handles, or special incentives for files completed outside of the underwriter's "regular hours." ER 606, 769–70, 819, 946–47. Provident has also offered an incentive program called "Share the Success," which considers the value of loans funded and number of loans funded. ER 590, 607, 946.

II. PROCEDURAL HISTORY.

Named Plaintiff Gina McKeen-Chaplin filed this case in the United States District Court for the Eastern District of California. ER

951. The district court conditionally certified an opt-in class of current and former Provident employees who worked as underwriters. ER 952. Eight additional underwriters ultimately joined and remain in this action. After the close of discovery, the parties cross-moved for summary judgment. ER 955.

On April 20, 2015, the district court issued a short order denying both parties' motions and setting the case for trial. ER 17–26. Addressing the administrative exemption's second element, the court found that Provident could prove that underwriters' primary duty was work "directly related to the management or general business operations." ER 25 (citing 29 C.F.R. § 541.201(a)). The Court reasoned that underwriters' "role is analogous to work in quality control," which the court described as an administrative function. ER 25 (citing 29 C.F.R. § 541.201(b)). Addressing the administrative exemption's third element, the district court found that Provident could prove that underwriters' primary duty "includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a)(3). The district court cited two facts in support of its conclusion: first, that underwriters may place conditions on loan

applications; and second, that underwriters may ask their supervisors to deviate from Provident's underwriting criteria. ER 26.

The district court did not identify any disputed issues of material fact for trial. Accordingly, the parties jointly moved the district court to reconsider its order denying the parties' cross-motions for summary judgment, or, in the alternative, identify the issues of fact to be presented at trial. ER 957. The district court issued a second order on August 12, 2015. *Id.* With reasoning closely tracking its original order, the court this time concluded that underwriters qualify for the administrative exemption. ER 14–16. The court accordingly entered summary judgment in Provident's favor. ER 957.

This appeal followed.

SUMMARY OF ARGUMENT

Provident's mortgage underwriters do not plainly and unmistakably qualify for the administrative exemption.

Underwriters' primary duty is not "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). In underwriting loans one file at a time in

accordance with Provident's guidelines, underwriters engage in "the day-to-day carrying out of [the] business' affairs." *Bothell*, 299 F.3d at 1125 (quoting *Bratt*, 912 F.2d at 1068). They do not "engage[] in 'running the business itself or determining its overall course or policies.'" *Id.*

As the Second Circuit correctly concluded in *Davis*, "[u]nderwriters . . . perform[] work that [i]s primarily functional rather than conceptual." *Davis*, 587 F.3d at 535. Underwriters "[a]re not at the heart of the company's business operations." *Id.* Rather, underwriters "apply the credit policy as they f[ind] it, as it [i]s articulated to them through the detailed [guidelines]." *Id.* Underwriting goes to the heart of carrying out the business' day-to-day affairs: underwriters "directly engage[] in creating the 'goods'—loans and other financial services—produced and sold by [their employer]." *Id.* Underwriters' production incentives only underscore the production character of the job. "Paying production incentives to underwriters shows that [their employer] believe[s] that the work of underwriters [can] be quantified in a way that the work of administrative employees generally cannot." *Id.*

Underwriters perform one discrete step on each of the nearly 10 million mortgages originated each year in the United States. Consistent with *Davis*, courts have rejected employers' attempts to classify other front-line workers in the mortgage industry—including loan officers, appraisers, and escrow officers—as exempt administrators. *See infra* at 45–47. These employees share one key common attribute: they facilitate loan transactions one-by-one, on a customer-by-customer basis. As numerous courts have correctly concluded, such employees engage in "the day-to-day carrying out of [the] business' affairs." *Bothell*, 299 F.3d at 1125 (quoting *Bratt*, 912 F.2d at 1068).

Moreover, underwriters do not perform the sorts of activities that the governing regulations recognize as administrative work. The regulations "distinguish[] between work that any employer needs performed—such as accounting, human resources, and regulatory compliance—and work that is particular to an employer's industry." *See Bollinger*, 863 F. Supp. 2d at 1048 (citing *Bratt,* 912 F.2d at 1070). While the "former is part and parcel of running a business and therefore exempt administrative work[,] [t]he latter is not." *Id.* Indeed, underwriters perform none of the tasks identified by the regulations as

exempt administrative work. *See* 29 C.F.R. § 541.201(b).

The district court erred in drawing a contrived analogy between underwriters and "quality control employee[s] who prevent[] a defective product from being sold." ER 21 (citing 29 C.F.R. § 541.201(b)). Underwriters do not engage in the sort of high level-quality control work contemplated by the example in the regulations. The district court veered off track by looking at a single example in isolation, without analyzing the ultimate question of whether underwriters "engage in 'running the business itself or determining its overall course or policies,'" rather than "in the day-to-day carrying out of [the] business' affairs." *Bothell*, 299 F.3d at 1125 (quoting *Bratt*, 912 F.2d at 1068). In so doing, the district court improperly inverted the cardinal rule of construction that FLSA exemptions must be narrowly construed against the employer.

The district court erred a second time in concluding that underwriters' primary duty "includes the exercise of discretion and independent judgment with respect to matters of significance"—an independent element required to invoke the exemption. 29 C.F.R. § 541.201(a).

Underwriters' job involves applying guidelines to individual loan files. Such work is a paradigmatic example of the "use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources"—a function inconsistent with the exercise of discretion and independent judgment. 29 C.F.R. § 541.202(e). The fact that underwriters can make relatively minor decisions does not change the outcome. The regulations recognize that so long as an employer's rules, standards, or guidelines establish "closely prescribed limits" within which employees operate, employees do not exercise discretion and independent judgment. *See* 29 C.F.R. § 541.704.

The district court erred in concluding that underwriters exercise discretion and independent judgment with respect to matters of significance by attaching conditions to loans. First, the "decision" of whether to attach conditions was principally controlled by the applicable guidelines. And second, attaching conditions to loans does not amount to the "real and substantial" discretion necessary to invoke the exemption.

The district court similarly erred when it concluded that

underwriters' ability to ask a higher authority to deviate from the guidelines demonstrates the exercise of discretion and independent judgment with respect to matters of significance. The governing regulations make clear that an administrative employee must have the "authority to make an *independent* choice." 29 C.F.R. § 541.202(c) (emphasis added). Underwriters had no independent ability to deviate from Provident's guidelines.

Last, the numerous factors cited in the regulations confirm that Provident's underwriters do not exercise of discretion and independent judgment with respect to matters of significance. Underwriters have no authority to "formulate, affect, interpret, or implement management policies or operating practices." 29 C.F.R. § 541.202(c). They do not "carry out major assignments," or "perform work that affects business operations to a substantial degree." *Id.* Underwriters have no independent authority to commit Provident in "matters that have significant financial impact," or "negotiate and bind the company." *Id.* Underwriters do not provide "consultation or expert advice to management," "investigate or resolve matters of significance on behalf of management," or "represent the company in handling complaints,

arbitrating disputes or resolving grievances." *Id.* Underwriters are not involved in planning long- or short-term business objectives. *Id.* Underwriters apply Provident's guidelines to loan files one at a time according to pre-determined criteria; they do not exercise the kind of discretion and independent judgment contemplated by the regulations.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT MORTGAGE UNDERWRITERS QUALIFY FOR THE FLSA'S ADMINISTRATIVE EXEMPTION.

The district court erred in concluding underwriters qualify for the administrative exemption. First, underwriters' primary duty is not the performance of work directly related to the management or general business operations of Provident. 29 C.F.R. § 541.200(a). Underwriters underwrite loans according to strict guidelines; they engage in "the day-to-day carrying out of [Provident's] affairs." *Bothell*, 299 F.3d at 1125 (quoting *Bratt*, 912 F.2d at 1068). Underwriters do not "engage[] in 'running the business itself or determining its overall course or policies[.]'" *Id.* Second, underwriters' primary duty of underwriting loans does not include the exercise of discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200(a).

Rather, underwriters "use . . . skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." 29 C.F.R. § 541.202(e). The district court erred in reaching the contrary conclusion.

A. The FLSA Is a Broad Remedial Statute and Statutory Exemptions Must Be Construed Narrowly.

Congress passed the FLSA with "a remedial and humanitarian . . . purpose." *See Lambert v. Ackerley*, 180 F.3d 997, 1003 (9th Cir. 1999) (citing *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944)); *Brennan v. Wilson Bldg., Inc.*, 478 F.2d 1090, 1094 (5th Cir. 1973). Because of its remedial character, the FLSA "must not be interpreted or applied in a narrow, grudging manner." *See Lambert*, 180 F.3d at 1003 (citing *Tenn. Coal*, 321 U.S. at 597). Instead, the Act "is to be given a broad, liberal construction rather than a strained, technical one." *Brennan*, 478 F.2d at 1094; *Lambert*, 180 F.3d at 1003. The FLSA must be "liberally construed to apply to the furthest reaches consistent with Congressional direction." *Klem v. Cnty. of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000) (citing *Biggs v. Wilson*, 1 F.3d 1537, 1539 (9th Cir. 1993)).

In enacting the FLSA, Congress sought to achieve three core objectives: "to spread work in order to reduce unemployment, to discourage (by increasing the cost to the employer) a degree of overtime that might impair workers' health or safety, and to increase the welfare of low-paid workers." *Yi*, 480 F.3d at 510; *see also* 29 U.S.C. § 202(a).

The FLSA meets these objectives, in part, by requiring that "for a workweek longer than forty hours," an employee working "in excess of" forty hours shall be compensated for those excess hours "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1).

There are certain statutory exemptions to the FLSA's overtime requirement. Relevant here, Congress exempted any employee "employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman." 29 U.S.C. § 213(a)(1).

Congress has never defined the terms "executive," "administrative," "professional," or "outside salesman." The FLSA, however, grants the Secretary of Labor authority to "defin[e] and delimi[t]" the scope of these exemptions. 29 U.S.C. § 213(a)(1). Because

of Congress' broad delegation of rulemaking authority, the legislative regulations issued by the Secretary have the binding effect of law. *See Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

The Department of Labor ("DOL") has promulgated detailed regulations defining these so-called white collar exemptions, *see* 29 C.F.R. § 541, and "[t]he major substantive provisions of the [white collar] regulations have remained virtually unchanged for 50 years." Department of Labor, Wage and Hour Division, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,124 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541).[3]

In order to further the broad remedial purpose of the Act, courts "do not give FLSA exemptions generous application." *Reich v. New York*, 3 F.3d 581, 586 (2d Cir. 1993). Rather, FLSA "exemptions are to

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[3] The DOL last amended the white collar regulations in 2004. *See id.* The revisions, however, did not alter the long-standing substance of the old regulations. Instead, "[t]he revisions were meant to 'consolidate and streamline' the old regulations and to be "consistent with" the old [duties] test." *See, e.g.*, *Smith v. Gov't Emps. Ins. Co.*, 590 F.3d 886, 892 n.6 (D.C. Cir. 2010) (citing 69 Fed. Reg. 22,122, 22,126 & 22,139). Accordingly, cases and other authorities analyzing prior versions of the regulations retain significant value.

be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Klem*, 208 F.3d at 1089. The employer—not the employee bringing suit—bears the heavy burden of proving that it is entitled to the benefit of an exemption. *Mitchell v. Ky. Fin. Co.,* 359 U.S. 290, 291 (1959); *Klem*, 208 F.3d at 1089.

B. Standard of Review.

The district court decided this case on the parties' cross-motions for summary judgment. Summary judgment should be granted if "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). This Court reviews a district court's grant of summary judgment de novo. *Swoger v. Rare Coin Wholesalers*, 803 F.3d 1045, 1047 (9th Cir. 2015).[4]

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[4] Appellants moved for summary judgement only on the administrative exemption's second element: whether Provident's mortgage underwriters' primary duty is the performance of work directly related to the management or general business operations of their employer or their employer's customers. *See* 29 C.F.R. § 541.200(a). This Court, however, has the "discretion to order that summary judgment be entered for the non-moving party without the requirement that a cross-motion for summary judgment be filed in that party's favor." *Neal v. Shimoda*, 131 F.3d 818, 831 n.16 (9th Cir. 1997) (citing *Cool Fuel, Inc.*

In FLSA cases, the question of how an employee "spen[ds] his working time is a question of fact." *Bothell*, 299 F.3d at 1124 (citations omitted). Whether an employee's activities "exclude[] him from the overtime benefits of the FLSA is a question of law" subject to de novo review. *Id.* (citing *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986)).

"Courts must focus on the actual activities of the employee in order determine whether or not he is exempt from the FLSA's overtime regulations." *Ale v. Tenn. Valley Auth.*, 269 F.3d 680, 688–89 (6th Cir. 2001). Where "[t]he parties have not disputed [the employees'] actual duties, only the characterization of those duties[,]" the court must apply the historical facts in the record to the governing legal framework and enter judgment as a matter of law. *See Hein v. PNC Fin. Servs. Grp., Inc.*, 511 F. Supp. 2d 563, 572 (E.D. Pa. 2007). The ultimate decision whether an employee is exempt is a question of law. *Bothell*, 299 F.3d at 1124.

C. The Administrative Exemption.

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v. Connett, 685 F.2d 309, 311 (9th Cir. 1982)). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).

The administrative exemption contains three requirements. Under the governing regulations, the term "employee employed in a bona fide administrative capacity" means any employee:

> (1) Compensated on a salary or fee basis at a rate of not less than $455 per week . . .
>
> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
>
> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200(a). There is no dispute in this case that Provident's underwriters met the exemption's minimum salary requirement and performed "office or non-manual work."

D. Work Directly Related to the Management or General Business Operations of the Employer or the Employer's Customers.

The second element of the administrative exemption requires that an employee's primary duty be work "directly related to the management or general business operations" of the employer or its customers. 29 C.F.R. § 541.201(a). This means the employee "must perform work directly related to assisting with the running or servicing

of the business, as distinguished, for example, from "production" or "selling." *Id.* As this Court has explained, the crucial question is whether "the employee engages in 'running the business itself or determining its overall course or policies,' not just in the day-to-day carrying out of [the] business' affairs." *Bothell*, 299 F.3d at 1125 (quoting *Bratt*, 912 F.2d at 1068).

The DOL's regulations further explain that "[w]ork directly related to management or general business operations" includes work in functional areas "such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities." 29 C.F.R. § 541.201(b).

Because the exemption specifically identifies "production" as an example of work that is not directly related to running or servicing of a business, "courts analyzing whether the directly related element has been satisfied have often focused their inquiry on whether the work is

'production-type' work or analogous thereto." *See, e.g.*, *Calderon v. GEICO Gen. Ins. Co.*, --- F.3d ----, Nos. 14–2111, 14–2114, 2015 WL 9310544, at *7 (4th Cir. Dec. 23, 2015) (citing *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688, 694 (4th Cir. 2009)). This so-called "administrative/production" dichotomy distinguishes between "work related to the goods and services which constitute the business' marketplace offerings and work which contributes to 'running the business itself.'" *Bothell*, 299 F.3d at 1127 (citing *Bratt*, 912 F.2d at 1070). But as this Court and others have frequently cautioned, the administrative/production dichotomy "is useful only to the extent that it helps clarify the phrase 'work directly related to the management policies or general business operations.'" *Id.* at 1126 (citing *Webster v. Pub. Sch. Emps. of Wash., Inc.*, 247 F.3d 910, 916 (9th Cir. 2001)). One reason that the dichotomy is imperfect is "that while production-type work is not administrative, not all non-production-type work is administrative." *Calderon*, 2015 WL 9310544, at *7 (citing *Bothell*, 299 F.3d at 1127). "Only when work falls squarely on the 'production' side of the line, has the administration/production dichotomy been determinative." *Bothell*, 299 F.3d at 1127.

Notably, application of the administrative/production dichotomy is not limited to the "production" of goods in the manufacturing context. *See, e.g.*, *Davis* 587 F.3d at 532 (noting that "this literal reading of 'production' to require tangible goods has no basis in law or regulation"); *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 903 (3d Cir. 1991) (noting that the concept of production is "not to be understood as covering only work involving the manufacture of tangibles"); *Shaw v. Prentice Hall Computer Pub., Inc.*, 151 F.3d 640, 644 (7th Cir. 1998) ("[C]ourts have applied the production/ administrative dichotomy to settings quite different from a typical blue-collar/white-collar separation"). Indeed, the dichotomy has been applied in a wide variety of non-manufacturing settings. *See Bothell*, 299 F.3d at 1127–28 (customer service may be production); *Davis*, 587 F.3d at 529 (mortgage underwriters are production employees); *Desmond*, 564 F.3d at 694–95 (employees of horse racing company "produce" live horse racing events); *Reich*, 3 F.3d at 587–88 (employees produce criminal investigations); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1230 (5th Cir. 1990) (employees produce television newscasts); *Clark v. Centene Co. of Texas, L.P.*, 44 F. Supp. 3d 674, 683 (W.D. Tex. 2014) (plaintiffs produce "the service of

administering Medicaid claims for the State of Texas."); *Arasimowicz v. All Panel Sys., LLC*, 948 F. Supp. 2d 211, 219 (D. Conn. 2013) (plaintiff's "primary duty was the production of drawings for panels that would be manufactured by" the employer); *Gallegos v. Equity Title Co. of Am.*, 484 F. Supp. 2d 589, 595 (W.D. Tex. 2007) (in the escrow closing business, the duties of reviewing documents, checking for errors, contacting the borrower or lender to correct discrepancies, and assuring that closing instructions are followed are "production").

In the end, regardless of whether the administrative/production dichotomy serves as a useful construct or not, "the critical focus . . . remains [on] whether an employee's duties involve 'the running of a business,' as opposed to the mere 'day-to-day carrying out of [the business'] affairs.'" *Calderon*, 2015 WL 9310544, at *7 (citing *Bratt*, 299 F.3d at 1127) (internal quotations omitted).

E. Appellants' "Primary Duty" Is Underwriting Mortgage Loans, and Underwriting Is Not Directly Related to Provident's "Management or General Business Operations."

Provident's underwriters do not engage in "running the business itself or determining its overall course or policies." *Bothell*, 299 F.3d at 1125 (citing *Bratt*, 912 F.2d at 1068). Rather, they engage "in the day-to-

day carrying out of [the] business' affairs." *Id.* It is undisputed that appellants' primary duty was to underwrite mortgage loan applications for Provident on each and every loan file. Their primary duty was *not* representing the company, promoting sales, advertising or marketing, advising borrowers, performing quality control reviews or audits, determining credit policy, drafting underwriting guidelines, determining pricing, or establishing relationships with investors. *See* 29 C.F.R. § 541.201(b). Accordingly, to prevail on its administrative exemption defense, Provident needed to establish that the underwriting of individual mortgage loans, one-by-one, is "plainly and unmistakably" an exempt activity. *See Klem*, 208 F.3d at 1089. Provident failed to meet that burden.

(1) Appellants are nonexempt production workers like the mortgage underwriters considered by the Second Circuit in *Davis*.

In 2009, the Second Circuit, applying the principles developed by this Court in *Bratt* and *Bothell*, held that underwriters were not exempt administrative employees. *See Davis*, 587 F.3d at 529. Applying the same legal framework to materially identical facts, this Court should reach the same conclusion. The Second Circuit held that underwriters

performed the day-to-day loan production activities of their employer. *Id.* at 534. The court reasoned:

> Underwriters . . . performed work that was primarily functional rather than conceptual. They were not at the heart of the company's business operations. They had no involvement in determining the future strategy or direction of the business, nor did they perform any other function that in any way related to the business's overall efficiency or mode of operation. It is undisputed that the underwriters played no role in the establishment of Chase's credit policy. Rather, they were trained only to apply the credit policy as they found it, as it was articulated to them through the detailed Credit Guide.

Id. at 535.

The Second Circuit went on to hold that underwriters' role in assessing creditworthiness did not make them administrative employees. *Id.* The court explained:

> The context of a job function matters: a clothing store accountant deciding whether to issue a credit card to a consumer performs a support function auxiliary to the department store's primary function of selling clothes. An underwriter for Chase, by contrast, is directly engaged in creating the "goods"—loans and other financial services—produced and sold by Chase.

Id.

The Second Circuit found that additional factors supported a finding that the underwriters were production employees. For example,

underwriters were evaluated not on whether loans they approved were paid back, but by productivity in terms of "average total actions per day." *Id.* at 535. The court explained: "[T]here is a relatively direct correlation between hours worked and materials produced in the case of a production worker that does not exist as to administrative employees." *Id.* In the case of underwriters, "[p]aying production incentives to underwriters shows that Chase believed that the work of underwriters could be quantified in a way that the work of administrative employees generally cannot." *Id.*

Davis provides compelling legal analysis of nearly identical facts, and this Court should adopt *Davis*' holding and analysis. Just as in *Davis*, Provident is in the business of producing mortgage loans, and Provident's underwriters are directly engaged in that activity. ER 565–70, 642–43, 646–49, 744, 774, 821–23, 941–42. Provident refers to the quantity of loans its underwriters review as their "production." ER 710, 949. Underwriters are evaluated based on whether they review enough loans, and whether they review loans quickly enough. ER 585–90, 708, 724, 730, 733, 765–66, 816, 838–39, 881–902, 925–29, 945–47. Like Chase, Provident relies on managers, not front-line underwriters, to

create its underwriting guidelines. ER 550–51, 613–14, 617, 947–48. Provident's underwriters do not establish relationships with vendors or determine whether loans would be profitable. ER 539–40, 947. They simply apply the underwriting guidelines as they find them. *See Davis*, 587 F.3d at 535. Moreover, like the underwriters in *Davis*, Provident's underwriters play no role in "determining the future strategy or direction of the business;" other departments within the company create and price the loans that Provident offers to the public. ER 537–40, 546–47, 550–51, 554, 602–03, 613–14, 617, 635–36, 743–44, 777, 824, 942–43, 947–48. Provident's underwriters, like the underwriters in *Davis*, are not evaluated based on whether a loan gets repaid, but rather by whether the loan met guidelines, and whether the underwriter met expected turn times. ER 602–03, 620–22, 632, 713–16, 743, 781, 812, 944–45. In *Davis*, there was "no indication that underwriters were expected to advise customers as to what loan products best met their needs and abilities." 587 F.3d at 534. The same is true here. ER 578–81, 642–43, 744, 773–75, 821–23, 948–49.

Davis is the only circuit court to rule on the application of the administrative exemption defense for mortgage underwriters. The same

facts that led the Second Circuit to conclude that Chase's underwriters were misclassified are also present here. Provident's mortgage underwriters were not involved in running the business itself, directing Provident's course, or establishing its policies. *Bothell*, 299 F.3d at 1125 (citing *Bratt*, 912 F.2d at 1068). They therefore did not perform "work directly related to the management or general business operations of the employer." 29 C.F.R. § 541.200(a).

(2) *Davis*'s holding accords with authorities holding that bank employees who work on loan files one-by-one are not bona fide administrators.

The Second Circuit's decision in *Davis* accords with a wider body of case law holding that financial services employees who process mortgage loans on a loan-by-loan, customer-by-customer basis do not qualify for the administrative exemption. According to the Department of the Treasury, lending institutions originate nearly *ten million* mortgage loans every year in the United States. *See* Board of Governors of the Federal Reserve System, U.S. Dep't of Treasury, *The 2013 Home Mortgage Disclosure Act Data*, Vol. 100, No. 6, at 2 (Nov. 2014), *available at* http://www.federalreserve.gov/pubs/bulletin/2014/pdf/2013_hmda.pdf

(last visited Jan. 7, 2016). Certain employees in the mortgage industry—including loan officers, underwriters, appraisers, and closers—share a single common attribute: they are responsible for one or more discrete steps that must be taken on each individual loan transaction; they are not responsible for establishing their employers' broader policies or steering the course of their employers' business.

These workers collectively work on a kind of modern-day assembly line, processing the nearly ten million mortgages originated each year. Not surprisingly, courts have roundly rejected employers' attempts to classify such employees as exempt administrators. *See, e.g.*, *Mortg. Bankers Ass'n v. Solis*, 864 F. Supp. 2d 193 (D.D.C. 2012), *aff'd*, *Perez v. Mort. Bankers Ass'n*, 135 S. Ct. 1199 (2015) (loan officers, who work with borrowers to select a loan product, do not qualify for the administrative exemption); *Wong v. HSBC Mortg. Corp.*, No. C-07-2446 MMC, 2008 WL 753889, at *6–7. (N.D. Cal. Mar. 19, 2008) (same); *Casas v. Conseco Fin. Corp.*, No. Civ.00-1512, 2002 WL 507059, at *6–10 (D. Minn. Mar. 31, 2002) (same); *Davis*, 587 F.3d at 529 (underwriters, who underwrite loans pursuant to established guidelines, do not qualify for the administrative exemption); *Bollinger*, 863 F. Supp. 2d at 1048 (same);

Boyd v. Bank of Am. Corp., No. SA CV 13–0561–DOC, 2015 WL 3650207, at *12 (C.D. Cal. May 6, 2015) (appraisers, who appraise and generate reports for properties on which banks offer mortgages, do not qualify for the administrative exemption); *Gallegos*, 484 F. Supp. at 595 (escrow officers, who review closing documents, check for errors, and ensure that closing instructions are followed do not qualify for the administrative exemption); *Reich v. Chi. Title Ins. Co.*, 853 F. Supp. 1325, 1330 (D. Kan. 1994) (same).

In these cases, the courts faithfully applied this Circuit's framework articulated in *Bratt* and *Bothell*, reaching the commonsense conclusion that such employees engage in the day-to-day carrying out of the business' affairs—not in running the business itself or determining its overall course or policies. *E.g.*, *Casas*, 2002 WL 507059, at *9; *Davis*, 587 F.3d at 535; *Boyd*, 2015 WL 3650207, at *12–13; *Reich*, 853 F. Supp. at 1330. It makes little to sense to treat one category of employees in the same chain of production—underwriters—as exempt administrators.

(3) Underwriters do not perform administrative duties.

Analyzing underwriters' duties from a different vantage point yields the same result: underwriters do not perform the kinds of duties

the regulations cite as examples of bona fide administrative work.

The *Bollinger* case, following on the heels of *Davis*, criticized the Second Circuit's reliance on the administrative/production dichotomy—but nevertheless found that mortgage underwriters do not perform duties that are administrative in nature. *See Bollinger*, 863 F. Supp. 2d at 1046–47.

The plaintiffs in *Bollinger* performed materially identical job duties to the underwriters here. There, the underwriters' "main duties were to confirm that mortgage applications met Defendants' guidelines and secondary market guidelines." *Id.* at 1043. Other employees advised borrowers about loan options, took the loan applications, collected customer data, and fed the data through an automated review. *Id.* at 1043–44. While the automated system generated a preliminary decision, the underwriters "verified the accuracy of the data in the application and reviewed the application for compliance with guidelines that the automated system could not process . . . then gave final approval for the mortgage." *Id.* at 1044. Underwriters "had some latitude in calculating items such as income and assets," but ultimately underwriters had to meet investor guidelines. *Id.* Underwriters did not counsel borrowers.

Id. Underwriters could also suggest alternative loan products, but that suggestion would run back through the loan officer. *Id.* Underwriters were evaluated on the basis of productivity. *Id.*

Focusing on the regulation providing examples of exempt administrative work, *Bollinger* stated that:

> [The regulations] distinguish[] between work that any employer needs performed—such as accounting, human resources, and regulatory compliance—and work that is particular to an employer's industry. *See Bratt,* 912 F.2d at 1070. The former is part and parcel of running a business and therefore exempt administrative work. The latter is not. Under this framework, Plaintiffs' work was not administrative. The work Plaintiffs did—collecting customers' financial data and measuring that data against Defendants' lending guidelines—was necessary because Defendants provided mortgages, not because Defendants were in business generally.

Id. at 1048.

Bollinger grounded its analysis in the observation that "exempt administrative work is about running a business, not implementing its day-to-day operations." *Id.* at 1049. Thus, while *Bollinger* purported to follow a different analytical path than *Davis*, both cases ultimately applied this Court's framework in *Bratt* and *Bothell*. Whether applying the administrative/production dichotomy or simply analyzing the regulation's examples of exempt work, the critical inquiry reduces to

distinguishing between "employee[s] engage[d] in 'running the business itself or determining its overall course or policies,'" and employees engaged "in the day-to-day carrying out of [the] business' affairs." *Bothell*, 299 F.3d at 1125 (quoting *Bratt*, 912 F.2d at 1068).

Bollinger establishes that underwriting mortgage loans for a mortgage company is not an administrative task. This court should adopt that holding here. Underwriters were not responsible for establishing underwriting guidelines or determining Provident's credit policy, and were not involved in the overall running or servicing of Provident's general business operations. Their work was not directly related to areas such as human resources, employee benefits, marketing, finance, tax, budgeting, or auditing, which must be performed no matter what the business produces. 29 C.F.R. § 541.201(b). Underwriters did not perform work "directly related to assisting with the running or servicing of the business." 29 C.F.R. § 541.201(a).

(4) Underwriters do not perform exempt quality control work.

The district court concluded that underwriters' job is "analogous to a quality control employee who prevents a defective product from being sold." ER 21 (citing 29 C.F.R. § 541.201(b)). But the district court erred

in looking at a single isolated phrase in the list of examples and applying it outside the framework established in *Bratt* and *Bothell*.

To be sure, *some* employees who work in quality control engage in running the business itself or determining its overall course or policies. In the business context, quality control typically means "an aggregate of functions designed to insure adequate quality in manufactured products by initial critical study of engineering design, materials, processes, equipment, and workmanship followed by periodic inspection and analysis of the results of inspection to determine causes for defects and by removal of such causes." Webster's Third New International Dictionary 1859 (1981). Thus, for example, an engineer responsible for designing and implementing a quality control program for an automobile assembly line surely qualifies as an exempt administrator. But an assembly line worker whose job involves making sure that the previous worker installed each and every muffler one to two inches from the vehicle frame does not. The analogy aptly applies to Provident, which employs no less than three auditing and quality control programs in which front-line underwriters play no role whatsoever. ER 558–62, 598, 625, 948.

The district court's mode of analysis, if accepted, would lead to absurd results inconsistent with the exemption. For example, a bank teller is not an administrative employee by virtue of working in "finance," even though the regulations mention "finance" as a functional area where some administrators work. *Schaefer v. Indiana Michigan Power Co.*, 358 F.3d 394, 404 (6th Cir. 2004). By the same token, a paralegal does not perform administrative work because her work relates to "legal and regulatory compliance" for her employer's clients. Similarly, a lower-level human resources employee who merely screens applicants according to established guidelines does not qualify for the administrative exemption despite working in the area of "human resources." 29 C.F.R. § 541.203(e). "Context . . . matters." *Davis*, 587 F.3d at 535. The regulations' examples of exempt work must be read in light of the background principle that "exempt administrative work is about running a business, not implementing its day-to-day operations." *Bollinger*, 863 F. Supp. 2d at 1049.

The district court erred by finding underwriters exempt merely because they performed work "similar" to one of the examples in section 541.201(b), without analyzing the ultimate question of whether

underwriters "engage in 'running the business itself or determining its overall course or policies,'" rather than "in the day-to-day carrying out of [the] business' affairs." *Bothell*, 299 F.3d at 1125 (quoting *Bratt*, 912 F.2d at 1068). In so doing, the district court improperly inverted the rule of construction applicable in FLSA cases that "exemptions are to be narrowly construed." *Arnold*, 361 U.S. at 392; *Klem*, 208 F.3d at 1089.

(5) The Southern District of Ohio's *Lutz* decision is not persuasive authority.

At the district court, Provident relied heavily on a single out-of-circuit, unpublished district court opinion holding that underwriters do not qualify for the administrative exemption. *See Lutz v. Huntington Bancshares Inc.*, No. 2:12–cv–01091, 2014 WL 2890170 (S.D. Ohio June 25, 2014).[5] Although the district court only adopted one element of *Lutz*'s reasoning (the quality control analogy discussed above), appellants anticipate that Provident will urge this Court to adopt other elements of *Lutz*'s reasoning. A close examination of *Lutz* demonstrates that the opinion is inconsistent with Ninth Circuit case law and unpersuasive on its own terms.

[5] *Lutz* was appealed to the Sixth Circuit and has been fully briefed and argued. Appellants will alert this Court pursuant to Fed. R. App. P. 28(j) when the Sixth Circuit renders its decision.

Principally, *Lutz* applied a legal framework totally at odds with this Court's jurisprudence. Unlike *Davis* and *Bollinger*, which extensively applied Ninth Circuit case law, *Lutz* did not apply (or even cite) this Court's framework articulated in *Bratt* and *Bothell*. *See id.* Instead, *Lutz* stated that "[c]ourts in this circuit have interpreted the term 'production' narrowly." *Id.* at *8. The court claimed Sixth Circuit case law "show[s] that the definition of 'production' . . . is limited to those employees who actually create or sell the product/service the employer offers; it does not encompass any employee whose job responsibilities are related to the production process." *Id.* This Court, of course, has held just the opposite. *See Bothell*, 299 F.3d at 1127 (the administrative exemption "distinguishes between work *related to* the goods and services which constitute the business' marketplace offerings and work which contributes to 'running the business itself.'" (quoting *Bratt*, 912 F.2d at 1070 (emphasis added))); *Klem*, 208 F.3d at 1089 ("FLSA exemptions are to be 'narrowly construed against . . . employers.'") (citations omitted). In applying its incorrect legal framework, *Lutz* never analyzed the fundamental question in this case: whether underwriters "engage in 'running the business itself or

determining its overall course or policies,'" or rather engage "in the day-to-day carrying out of [the] business' affairs." *Bothell*, 299 F.3d at 1125 (quoting *Bratt*, 912 F.2d at 1068).

Relatedly, *Lutz* rejected *Bollinger*'s description of administrative work as "work that any employer needs performed—such as accounting, human resources, and regulatory compliance—[instead of] work that is particular to an employer's industry." *See Lutz*, 2014 WL 2890107, at **10–11 (citing *Bollinger*, 863 F. Supp. 2d. at 1048). Once again, however, *Lutz*'s assertion conflicts squarely with Ninth Circuit precedent. *See Bothell*, 299 F.3d at 1125; *Bratt*, 912 F.2d at 1070; *Nigg v. U.S. Postal Serv.*, 829 F. Supp. 2d 889, 899–900 (C.D. Cal. 2011) *aff'd*, 544 F. App'x 766 (9th Cir. 2013) (holding that while "activities such as investigation, apprehension, and detention" are not exempt when performed for a business that primarily produces and markets those services, the same activities can be exempt where the "law enforcement duties are intended to provide support for their employer's business operations")

Lutz's application of its own flawed legal framework similarly misses the mark. First, *Lutz* held that underwriters are not "production"

workers because they do not "create or sell loan products." *Lutz*, 2014 WL 2890107, at *12. This holding stems principally from the court's narrow conception of production work, and therefore holds no value to this Court. The holding also rests on factual assumptions contrary to the record here. Specifically, *Lutz* focuses exclusively on the relationship between underwriters and borrowers, while ignoring the relationship between underwriters and funded, salable loans produced by underwriters. *See id.* at **2–4 (summarizing underwriters' job duties). Where, as here, the bank sells the funded loans, underwriters are responsible for producing the bank's "market offering." *Bollinger*, 863 F. Supp. 2d at 1044 ("Plaintiffs had some latitude in calculating items such as income and assets, but their results had to match what Defendants' investors would calculate."); *Davis*, 587 F.3d at 535 (recognizing that underwriters' work is related to the production of loans, "the fundamental service provided by the bank.").

Once it moves beyond the administrative/production dichotomy, *Lutz* offers a deeply flawed analysis of the administrative exemption regulations. It first holds that underwriters' duties are administrative because they are "analogous" to those of a quality control or regulatory

compliance employee. *See Lutz*, 2014 WL 2890107, at *13 (citing 29 C.F.R. § 541.201(b)). This holding flies in the face of the longstanding requirement that employees must fit "plainly and unmistakably" within the "terms and spirit" of a claimed exemption. *Arnold*, 361 U.S. at 392. As discussed above, mortgage underwriters are not the sort of high-level quality control employees who "run[] the business itself or determin[e] its overall course or policies." *Bothell*, 299 F.3d at 1125 (citing *Bratt*, 912 F.2d at 1068). And Provident's underwriters play no role at all in Provident's legal and regulatory compliance.

Lutz also draws crude analogies to insurance adjustors and financial advisors—two classes of employees who typically qualify as bona fide administrators. *See Lutz*, 2014 WL 2890107, at *13. But these analogies fail, for two reasons. First, the regulations discourage finding exemptions by analogy. *See* Wage & Hour Div., U.S. Dep't of Labor, Administrator's Interpretation, No. 2010-1, 2010 WL 1822423, at *9 (Mar. 24, 2010) ("[T]he administrative exemption is only applicable to employees that meet the requirements set forth in 29 C.F.R. § 541.200. The regulation at 29 C.F.R. § 541.203(b) merely provides . . . example[s]."). The exempt or nonexempt status of any particular

employee "must be determined on the basis of whether the employee's . . . duties meet the requirements of the regulations." 29 C.F.R. § 541.2. Awarding exemptions based on "loosely analogous" positions, *see Lutz*, 2014 WL 2890107, at *13, runs counter to the bedrock principle that employees must fit "plainly and unmistakably" within the terms and spirit of an exemption. *Arnold*, 361 U.S. at 392; *Klem*, 208 F.3d at 1089.

Second, mortgage underwriters perform entirely different duties than insurance adjusters or financial advisors. Insurance adjusters' "duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation." 29 C.F.R. § 541.203(a). Thus, a typical insurance adjuster performs "some duties that are unmistakably administrative, such as 'negotiating settlements' and 'making recommendations regarding litigation.'" *Calderon*, 2015 WL 9310544, at *12. Insurance adjusters also do not operate in the chain of production. Rather, they analyze only the tiny subset of policies that triggers a claim for payment. *See Clark*,

44 F. Supp. 3d at 683 (rejecting the analogy between insurance adjustors, who work on a small subset of claims, and utilization review nurses, who must review every request for service received by the company in the business of providing the same service).

Lutz commits the same error in reaching for a strained analogy to financial advisors. *Lutz*, 2014 WL 2890107, at *13. The regulations recognize that "employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example)" typically qualify as exempt administrative employees. *See* 29 C.F.R. § 541.201; *see also* 29 C.F.R. § 541.203(b). As the DOL recognized in commentary accompanying the regulations, "advisory specialists and consultants to management, such as tax experts, insurance experts, or financial consultants, who are employed by a firm that furnishes such services for a fee" qualify for the administrative exemption. *See* 69 Fed. Reg. 22122, 22146.

The court in *Bollinger* properly rejected the same analogy accepted by *Lutz*, reasoning that underwriters do "not perform the sort of high-level analysis and counseling that constitutes exempt administrative work in the financial services industry." *Bollinger*, 863 F. Supp. 2d at

1049. Underwriters "do not determine which products best met clients' needs, advise clients on the merits of particular products, or market different products to clients." *Id.*

Lutz is simply not compelling authority. It rests on a crabbed reading of Sixth Circuit law, openly parts ways with this Court's decisions in *Bratt* and *Bothell*, misreads the governing regulations, and presupposes facts that do not apply here. This Court should follow *Davis* and *Bollinger*, and hold that appellants here, like the mortgage underwriters in those cases, were not administrative employees.

F. The Exercise of Discretion and Independent Judgment with Respect to Matters of Significance.

The third and final element of the administrative exemption requires that an employee's primary duty "include[] the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.201(a). The exercise of discretion and independent judgment "involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.202(a). It "implies the employee has authority to make an independent choice, free from immediate direction or supervision." 29 C.F.R. § 541.202(c).

The term applies to the kinds of "decisions normally made by persons who formulate policy within their spheres of responsibility." *Cooke v. Gen. Dynamics Corp.*, 993 F. Supp. 56, 65 (D. Conn. 1997) (citations omitted).

As numerous courts have cautioned, "the most frequent cause of misapplication of the term 'discretion and independent judgment' is the failure to distinguish it from the use of skill in various respects." *Schaefer*, 358 F.3d at 404 (6th Cir. 2004) (citing 29 C.F.R. § 541.207(c)(1) (2003)). The exercise of discretion and independent judgment "must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." 29 C.F.R. § 541.202(e). While the use of manuals, guidelines, or procedures does not per se preclude the application of the exemption, "employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances" do not meet the exemption's requirements. 29 C.F.R. § 541.704.

Further, the discretion and independent judgment exercised must be both substantial and consequential. Courts emphasize "that almost every employee exercises some discretion." *Clark v. J.M. Benson Co., Inc.*, 789 F.2d 282, 287–88 (4th Cir. 1986). To demonstrate administrative status, however, "the discretion and independent judgment exercised must be *real and substantial*." *Id.*; *see In re Novartis Wage and Hour Litig.*, 611 F.3d 141, 157 (2d Cir. 2010) (employees' relatively minor choices are insufficient to demonstrate discretion and independent judgment).

Last, the regulations require a close nexus between the discretion and independent judgment exercised and the matters of significance to which such discretion and independent judgment apply. Employees are not "exempt if the *performance* of their work was significant to [their employer], but the matters over which they had *discretion* were not." *Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F. Supp. 2d 254, 275 (D. Conn. 2008). Instead, the focus must remain on "the importance of the decisions over which [the employee] ha[s] control." *Bothell*, 299 F.3d at 1129.

The regulations supply a lengthy list of factors to consider in determining whether an employee exercises the requisite discretion and independent judgment with respect to significant matter. Factors to consider include:

> whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
>
> whether the employee carries out major assignments in conducting the operations of the business;
>
> whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;
>
> whether the employee has authority to commit the employer in matters that have significant financial impact;
>
> whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
>
> whether the employee has authority to negotiate and bind the company on significant matters;
>
> whether the employee provides consultation or expert advice to management;
>
> whether the employee is involved in planning long- or short-term business objectives;
>
> whether the employee investigates and resolves matters of significance on behalf of management; and

> whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. § 541.202(c). No single factor is dispositive. Rather, "federal courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment . . . ." *Boyd*, 2015 WL 3650207, at *18 (quoting 69 Fed. Reg. at 22,143).

G. Underwriters Do Not Exercise Discretion and Independent Judgment with Respect to Matters of Significance.

Provident failed to demonstrate "plainly and unmistakably" that its underwriters exercise discretion and independent judgment with respect to matters of significance. Instead, the record shows that underwriters apply knowledge and skill to perform their job. Underwriters are bound to follow the underwriting guidelines and obligated to approve only those loans that satisfy the guidelines.

(1) Underwriters use skill in applying well-established techniques, procedures or specific standards described in guidelines.

The sine qua non of underwriters' job is applying guidelines to individual loan files. Such work is a paradigmatic example of the "use of skill in applying well-established techniques, procedures or specific

standards described in manuals or other sources"—a function inconsistent with the exercise of discretion and independent judgment. 29 C.F.R. § 541.202(e). As discussed extensively above and not repeated fully here, underwriting involves the application of objective, concrete, and mandatory rules. *See supra* Facts Section I.D (describing Provident's detailed, objective, and mandatory guidelines). Such work does not amount to discretion and independent judgment with respect to matters of significance. *See Zannikos v. Oil Inspections (U.S.A.), Inc.*, 605 Fed. App'x. 349, 354 (5th Cir. Mar. 27, 2015) (holding employees did not exercise discretion and independent judgment where the employer's orders strictly defined the actions or techniques the employee used); *see also Schaefer*, 358 F.3d at 401 (stating that the purpose of detailed guidelines and procedures "is to create conformity which has the practical effect of minimizing discretion"); *Gallegos*, 484 F. Supp. 2d at 596–97 ("[A]n employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow . . . is not exercising discretion and independent judgment.").

That conclusion does not change on account of the minor choices underwriters exercise in the course of their work. The regulations

recognize that so long as an employer's rules, standards, or guidelines establish "closely prescribed limits" within which employees operate, employees do not exercise discretion and independent judgment. *See* 29 C.F.R. § 541.704; *Boyd*, 2015 WL 3650207, at **12–13 (home appraisers did not exercise discretion and independent judgment in selecting appropriate comparables to estimate a home's value or weighing different subjective factors in assessing a home's value); *Casas*, 2002 WL 507059, at *10 (mortgage loan officers' ability to adjust points and rates within a range set by employer guidelines is insufficient to show discretion and independent judgment); *Hodgson v. Penn Packing Co.*, 335 F. Supp. 1015, 1021 (E.D. Pa. 1971) (concluding that an employee's ability to deviate from the standard pricing sheet was legally insufficient to demonstrate the exercise of independent discretion and judgment).

(2) Underwriters' ability to attach conditions to loans and to ask supervisors to circumvent the guidelines does not amount to discretion and independent judgment with respect to matters of significance.

The district court cited two pieces of evidence in support of its legal conclusion that underwriters exercise discretion and independent

judgment with respect to matters of significance: first, that underwriters sometimes attach conditions to loans; and second, that underwriters may sometimes (although very rarely) ask supervisors to deviate from the guidelines. Neither piece of evidence supports the conclusion that underwriters exercise the requisite discretion and independent judgment.

Attaching conditions to loans does not amount to discretion and independent judgment with respect to matters of significance. First, the "decision" of whether to attach conditions was principally controlled by the applicable guidelines. ER 285–86, 307. And in any event, attaching conditions does not amount to the "real and substantial" discretion necessary to invoke the exemption. *See Clark*, 789 F.2d at 287–88. Asking for one additional year of tax returns or income records hardly amounts to the kind of discretion and judgment necessary to invoke the exemption. *See Novartis*, 611 F.3d at 157.

Underwriters' ability to ask a higher authority to deviate from the guidelines similarly fails to demonstrate discretion and independent judgment with respect to matters of significance. The regulations dictate that an employee must have "authority to make an *independent*

choice." 29 C.F.R. § 541.202(c) (emphasis added). The DOL's list of relevant factors asks "whether the employee has authority to waive or deviate from established policies and procedures *without prior approval*." 29 C.F.R. § 541.202(c) (emphasis added). If anything, the undisputed fact that underwriters were required to ask a manager to exercise *his* authority to deviate from the guidelines shows that underwriters did not have any such discretion in the first instance. *See Casas*, 2002 WL 507059, at *10 n.7 (the fact that an employee needs to get permission from above to deviate from the guidelines "further supports the conclusion that plaintiffs lacked the discretion and independent judgment necessary to qualify under th[e] exemption"); *Zannikos*, 605 Fed. App'x. at 354 (finding no discretion or independent judgment where employees were "typically required to confer with" management as part of the decision making process).[6] Simply put, the

[6] The record suggests exception requests were infrequent. One underwriter testified she would request exceptions "not too often . . . maybe once a month." ER 222. A corporate witness testified there were only a few exception requests per month over the entire underwriter employee pool. ER 585. Given Provident underwriters' production average of approximately two loans per day ER 587-90, 894-902, 945, the exception request rate would be less than one percent. Such infrequent requests for an exception to the guidelines cannot support an exemption defense—especially where Provident provides no evidence as

regulations reject the idea that the mere *discretion to ask permission* amounts to discretion and independent judgment with respect to matters of significance.

(3) The factors cited in the regulations confirm that underwriters do not exercise discretion and independent judgment with respect to matters of significance.

Last, the factors listed in section 541.202(c) only confirm that underwriters do not find themselves in the class of employees exercising discretion and independent judgment with respect to matters of significance.

- Underwriters have no authority to formulate, affect, interpret, or implement management policies or operating practices. 29 C.F.R. § 541.202(c). Instead, underwriters apply guidelines written by others. *See Zannikos*, 605 Fed. App'x. at 355 (applying guidelines does not amount to "interpreting" or "implementing" management policies).

- Underwriters do not carry out major assignments in conducting the operations of the business. 29 C.F.R. § 541.202(c); *see Zannikos*, 605 Fed. App'x. at 356 (rejecting the argument that an employee carries out major assignments because his work is "significant" or "very important"); *Martin*, 940 F.2d at 906 ("[T]o suggest that . . . [an employee applying pricing sheets] is carrying out major

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to the degree or extent of the exceptions. *See Schaefer*, 358 F.3d at 405 (summary judgment improper because defendant failed to establish the frequency with which plaintiff exercised the alleged discretion and independent judgment).

assignments is to strain the interpretation of the regulation beyond common sense . . . .").

• Underwriters do not perform work that affects business operations to a substantial degree. 29 C.F.R. § 541.202(c). Courts have interpreted this rather vague factor narrowly, "read[ing] that requirement of the regulation as meaning that only employees whose work substantially affects the structure of an employer's business operations and management policies may be characterized as administrative workers." *Martin*, 940 F.2d at 906. The regulations note that "[a]n employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly." *See* 29 C.F.R. § 541.202(f); *see also Dalheim*, 918 F.2d at 1231. Underwriters do not affect the structure of Provident's business operations and management policies. *Martin*, 940 F.2d at 906. And the mere fact that an underwriter's mistake in applying guidelines may prove costly to Provident is insufficient to satisfy this factor.

• Underwriters have no independent authority to commit Provident in matters that have significant financial impact. 29 C.F.R. § 541.202(c). Although underwriters play a role in *Provident* committing to a given loan transaction, underwriters' role is limited to applying the applicable guidelines. An underwriter is similar to an employee who is instructed by his supervisor to purchase a red Chevy truck, between eight and ten years old, with manual transmission, fewer than 100,000 miles, and for a price between $18,000 and $20,000. The fact that such an employee successfully buys a truck within the specified parameters does not demonstrate that the employee has "authority to commit [his] employer in matters that have significant financial impact." 29 C.F.R. § 541.202(c). The "commitment" must stem from an act of discretion or independent judgment, not

simply the application of guidelines within "closely prescribed limits." *See* 29 C.F.R. § 541.704. To conclude otherwise would be to ignore this Court's admonition that courts must focus on "the importance of the decisions over which [the employee] ha[s] control." *Bothell*, 299 F.3d at 1129.

• Underwriters have no authority to waive or deviate from established policies and procedures without prior approval. 29 C.F.R. § 541.202(c). Underwriters strictly adhered to the relevant and applicable guidelines. As previously discussed, on the rare occasions where underwriters wanted to circumvent the guidelines, Provident required underwriters to seek approval from management.

• Underwriters have no authority to negotiate and bind the company on significant matters. *Id.* Underwriters do not negotiate—they have no interaction with either borrowers or Provident's customers in the secondary market. Underwriters do not "bind" Provident for the same reasons that underwriters do not commit Provident financially: underwriters' role is limited to applying pre-established guidelines.

• Underwriters do not provide consultation or expert advice to management. *Id.* This factor "requires the employee to provide expert advice, not merely to utilize expertise." *See Zannikos*, 605 Fed. App'x. at 357 (applying expertise in the inspection and handling of cargo involves "the use of skill in applying well-established techniques, procedures or specific standards") (citing 29 C.F.R. § 541.202(e)).

• Underwriters are not involved in planning long- or short-term business objectives. 29 C.F.R. § 541.202(c).

• Underwriters do not investigate or resolve matters of significance on behalf of management. *Id.*

- Underwriters do not represent the company in handling complaints, arbitrating disputes or resolving grievances. *Id.*

And even if this Court were to find that underwriters satisfy one or even two of the factors listed in the regulation, the factors certainly do not predominate in Provident's favor. *See Boyd*, 2015 WL 3650207, at *18 (quoting 69 Fed. Reg. at 22,143). Provident has failed to show the confluence of factors demonstrating that underwriters make the kinds of "decisions normally made by persons who formulate policy within their spheres of responsibility." *Cooke v. Gen. Dynamics Corp.*, 993 F. Supp. 56, 65 (D. Conn. 1997) (citations omitted). To hold otherwise would ignore the Supreme Court's requirement that employees must fit "plainly and unmistakably" within the "terms and spirit" of a claimed exemption. *Arnold*, 361 U.S. at 392.

CONCLUSION

The judgment of the district court must be reversed and remanded with instructions to enter summary judgment in appellants' favor.

Respectfully submitted,

Dated: January 11, 2016

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ATTORNEYS FOR PLAINTIFFS-APPELLANTS

STATEMENT OF NO RELATED CASES PURSUANT TO CIRCUIT RULE 28-2.6

Appellants hereby state that there are not related cases.

Dated: January 11, 2016

s/Adam W. Hansen
Adam W. Hansen

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,997 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

Dated: January 11, 2016

s/Adam W. Hansen
Adam W. Hansen

CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of January, 2016, I caused the foregoing brief to be filed electronically with the Court, where it is available for viewing and downloading from the Court's ECF system, and that such electronic filing automatically generates a Notice of Electronic Filing constituting service. 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.

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