

No. 02-

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IN THE  
**Supreme Court of the United States**

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LOCATING, INC.,

*Petitioner,*

v.

SCHYLAR PARKS,

*Respondent.*

\_\_\_\_\_  
**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI**  
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**QUESTION PRESENTED**

Under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, certain employees are entitled to time and a half for workweeks exceeding forty hours. Under regulations promulgated by the Secretary of Labor, employers may use fluctuating workweeks—which provide a fixed salary regardless of the number of hours worked each week—as long as the parties have a “clear mutual understanding” of the policy. 29 C.F.R. § 778.114(a). The question presented under this regulation is whether employees must formally consent to a fluctuating workweek, as the Ninth Circuit held in this case, or merely understand it, as the First, Fourth and Fifth Circuits have held.

**PARTIES TO THE PROCEEDING AND RULE 29.6  
STATEMENT**

The parties in the Ninth Circuit Court of Appeals were Schylar Parks, individually and on behalf of a still-to-be defined class that he represents, and Locating, Inc., which is a wholly owned subsidiary of Dycom Industries, Inc, a publicly held company.

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**PETITION FOR A WRIT OF CERTIORARI**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 3a), the order of the court of appeals denying petitioner's petition for rehearing en banc (Pet. App. 1a), and the district court's orders granting summary judgment in favor of petitioner (Pet. App. 6a & 10a) all are unreported.

**JURISDICTION**

The court of appeals denied Locating, Inc.'s petition for rehearing and rehearing en banc on August 28, 2002. (Pet. App. 1a.) Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

**STATUTORY PROVISIONS AND REGULATIONS**

The Fair Labor Standards Act provides in relevant part:

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half the regular rate at which he is employed.

29 U.S.C. § 207(a)(1).

The FLSA regulation involved in this case, 29 C.F.R. § 778.114, is set forth in full at Pet. App. 16a. The sections of

this regulation most relevant to this petition provide as follows:

Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act . . . .

29 C.F.R. § 778.114(a).

The “fluctuating workweek” method of overtime payment may not be used . . . unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek.

29 C.F.R. § 778.114(c).

#### STATEMENT

At issue in this case is when employers and employees may use a fluctuating workweek method of overtime compensation, a recurring question that has divided the courts of appeals. In accordance with the Fair Labor Standards Act, the Secretary of Labor has promulgated regulations that allow employers to offer certain salaried employees “fluctuating” workweek schedules. 29 C.F.R. § 778.114. Under this system, the employee “may have hours of work which fluctuate from week to week,” while the employee is paid “such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many.” *Id.* For any week where an employee works more than forty hours, the employee is compensated for the “overtime” hours “at a rate not less than one-half his regular rate of pay.” *Id.* Under this kind of arrangement, one-half the regular rate satisfies the FLSA's overtime requirements because the salary provides base pay for all hours worked (no matter how few or how many). *Id.*

These fluctuating workweek arrangements, popular with employers and employees alike, are permissible “[w]here there is a clear mutual understanding” between the employer and employee. *Id.* To meet this standard, the employee must “clearly understand[] that the salary covers whatever hours the job may demand in a particular workweek.” *Id.*

In this case, notwithstanding respondent Parks' knowledge of Locating's longstanding use of a fluctuating workweek payment plan, the Ninth Circuit held that the parties had not reached a “clear mutual understanding” of Mr. Parks' fluctuating workweek status. In doing so, the appeals court read § 778.114 to require employers to establish a formal “agreement” between the parties, a greater burden than merely showing that the employees “understood” the compensation method. Absent such an agreement, the Ninth Circuit deemed all but irrelevant evidence that is probative—if not dispositive—of any such “clear mutual understanding.”

The Ninth Circuit's approach is groundbreaking. At least five circuits have addressed this issue. Yet not one court of appeals, save for the Ninth Circuit, has read the Secretary's regulation to require such heightened standards for demonstrating a valid fluctuating workweek. This case presents an appropriate vehicle for resolving this recurring issue.

## **I. THE FAIR LABOR STANDARDS ACT**

In most instances, the FLSA requires employers to pay employees an overtime premium of “time-and-one-half” for all hours worked in a week in excess of forty hours. 29 U.S.C. § 207(a). To satisfy various other employment considerations, however, the Act's regulations provide employers with a variety of methods to calculate overtime premiums in compliance with the Act. One such method is the fluctuating workweek plan. *See* 29 C.F.R. § 778.114.

Under this policy, an employee receives a fixed salary as straight-time compensation for all hours worked, no matter how few or how many. *See* 29 C.F.R. § 778.114(a). In addition, the employee receives an overtime premium for each overtime hour. The overtime premium is calculated by dividing the employee's fixed weekly salary by the total number of hours that the employee actually works in a particular week, yielding the employee's "regular rate of pay." 29 C.F.R. § 778.114(a). The regulation provides that the employee's required overtime premium is "one-half his regular rate of pay for each overtime hour." *Samson v. Apollo Resources, Inc.*, 242 F.3d 629, 633 (5th Cir.), *cert. denied* 122 S. Ct. 63 (2001). "Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement." 29 C.F.R. § 778.114(a).

The Secretary's regulation establishes a precondition for creating a valid fluctuating workweek. Most relevant to this case is the requirement that "the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek." 29 C.F.R. § 778.114(c); *see also* 29 C.F.R. § 778.114(a) (requiring a "clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number").

## II. FACTS

Petitioner Locating identifies and marks underground pipes and wires for utilities to ensure that the utility lines remain safe during excavation. All told, the company employs over 300 employees in four states. Like many other employers, Locating's business opportunities ebb and flow. Much of the work is seasonal, with the demand for Locating's services being greater during the year's warmer months. In view of these and other vagaries in its business, Locating in 1984

implemented a fluctuating workweek plan for its employees. Under the plan, employees receive a fixed salary for all hours worked, regardless of the number, and are paid an overtime premium in weeks in which they work more than 40 hours. (Pet. App. 6a & 11a.) Locating employees thus receive their full salaries even when they work less than 40 hours. (Pet. App. 6a & 13a.)

Locating's overtime payments are also more generous than those required by the regulation. Section 778.114(a) requires an employer to pay overtime at only 50% of the "regular rate." The regular rate is "determined by dividing the number of hours worked in the workweek into the amount of the salary." 29 C.F.R. § 778.114(a). A company adhering to this requirement, and doing no more, would pay an employee as follows. For an employee that works 50 hours for the week and earns a weekly salary of \$500, the employee's regular rate is \$10. Because the employee worked 10 hours overtime, he is paid an overtime premium. The premium for those overtime hours is one-half of the regular rate, which is to say \$5 per hour. *See* 29 C.F.R. § 778.114(a). The employee thus earns \$50 ( $\$5/\text{hour} \times 10 \text{ hours}$ ) in overtime payments, for a total payment for the week of \$550.

Locating's employees, however, are paid for overtime hours based upon an overtime rate that does not decrease as the number of hours worked increases. Locating determines the regular rate by dividing the weekly salary by 40 hours, not the total hours worked. Thus, using the example above, a Locating employee's regular rate would be \$500 divided by 40 hours, or \$12.50. What is more, unlike in the traditional fluctuating workweek setting, Locating does not reduce the overtime premium by 50%. If the employee works 50 hours, or 10 hours of overtime, he receives an overtime payment of \$125 ( $\$12.50/\text{hour} \times 10 \text{ hours}$ ), for a total payment for the week of \$625.

Locating's calculations thus benefit its employees over and above the formula provided in § 778.114(a) in two ways. First, in weeks in which overtime is earned, Locating's regular rate is always a higher figure than the regular rate established by § 778.114(a). (*E.g.*, \$12.50 vs. \$10.) Second, Locating pays its employees an overtime premium of 100%—not 50%—of this higher rate for each hour of overtime. (Pet. App. 11a-12a); *see also* 29 C.F.R. § 778.114(c) (noting that “the Act, in requiring 'not less than' the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more”). And the relative benefits of Locating's policy increase as the number of overtime hours rise. Thus, using the \$500 weekly salary from the example above, a Locating employee that works 60 hours in a week would earn \$750, while a non-Locating employee could earn as little as \$583.

Locating ensures that its employees have a proper understanding of the company's fluctuating workweek compensation plan in a variety of ways. For one, the company's policy is available to employees in writing and it explains that employees will receive a fixed salary for all hours worked. (Pet. App. 6a-7a & 13a.) For another, the policy lists the minimal overtime premiums required by § 778.114, explains how Locating calculates overtime premiums, and makes plain that Locating pays more overtime than is required by the regulations. As to the latter, the policy contains examples of overtime calculations under the regulations and under Locating's fluctuating workweek method, both of which demonstrate Locating's method of compensation. (Pet. App. 11a.)

Locating also provides its policy to employees before they are hired. It then requests that each employee sign an acknowledgment after the company has explained the policy to the employee and after the employee has reviewed the policy. Indeed, Mr. Parks signed such a written acknowledgment stating that he understood and accepted Locating's method of calculating overtime. (Pet. App. 13a.)

### III. LOWER COURTS

Notwithstanding Locating's efforts to exceed the FLSA's fluctuating workweek requirements and to explain to its employees the fact that it was doing so, Mr. Parks filed a class action against Locating in federal court in Washington in 1999. In doing so, he alleged that Locating's fluctuating workweek compensation system violated the FLSA.

On February 10, 2000, Locating moved for summary judgment on Mr. Parks' overtime claim. Mr. Parks in turn filed a cross-motion for summary judgment on the overtime claim. On June 1, 2000, the district court denied Mr. Parks' motion for summary judgment, holding that Locating's "compensation policy does not violate the Fair Labor Standards Act on its face; that [Locating] pays a fixed weekly salary and overtime premiums of at least 50% of the 'regular rate;' and that a 'clear mutual understanding' existed with respect to the payment of a fixed base salary, all in compliance with 29 C.F.R. § 778.114." (Pet. App. 14a-15a.) Mr. Parks filed a motion for reconsideration, asserting that "newly discovered evidence" demonstrated that he was not, in fact, paid on a salary basis as required under § 778.114. On July 24, 2000, the district court denied Mr. Parks' motion and granted Locating's summary judgment motion. In doing so, the court held that Mr. Parks' "new evidence" did not change the facts that Locating "always paid a minimum sum certain, that its method of calculating overtime was consistent with the policy it had explained to plaintiff, and that its policy more than met the requirements of the fluctuating workweek method." (Pet. App. 7a.)

Parks appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. On June 17, 2002, in a 2-1 decision, the Ninth Circuit reversed the district court. According to the appeals court, Locating's compensation method did not qualify as a valid fluctuating workweek plan because the parties had not entered into an

“agreement to pay a fixed salary for all hours worked.” (Pet. App. 4a.) The appeals court further held that a valid fluctuating workweek plan did not exist because such an “agreement . . . requires a clear mutual understanding of the parties,” and no such understanding existed in this case. (Pet App. 4a (internal quotations and citations omitted).)

At the same time, the Ninth Circuit *sua sponte* entered summary judgment in Mr. Parks' favor. Even though Parks did not cross-appeal the district court's decision denying *his* summary judgment motion, the Ninth Circuit believed that it had the power to review and decide this distinct issue.

Judge Trott dissented from the Ninth Circuit's decision. He stated that he would affirm for the reasons given by the district court. (Pet. App. 5a.) Locating's subsequent petition for rehearing en banc was denied. (Pet. App. 2a.)

#### REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision warrants review. For a fluctuating workweek plan to be valid, the Ninth Circuit held that a *formal* “agreement” must exist between the employer and its employees. (Pet. App. 4a.) This holding directly conflicts with decisions from the First, Fourth and Fifth Circuits, all of which do not require a formal “agreement” to establish a “clear mutual understanding.” 29 C.F.R. § 778.114(a).

The Ninth Circuit's heightened “agreement” requirement also rejects the evidentiary standards employed by every other circuit that has addressed the issue of whether an employee properly understands his or her employer's compensation system. In holding that Mr. Parks did not have such an understanding, the Ninth Circuit cast aside evidence that had been probative—and often dispositive—in cases decided by the other courts of appeal.

In the first and last analysis, the Ninth Circuit adopted a legal standard that fails to respect the plain language of

§ 778.114 and that has not been adopted by any other circuit. The case deserves the Court's time and attention.

**I. THE COURT SHOULD GRANT REVIEW TO RESOLVE A SPLIT OF AUTHORITY OVER THIS QUESTION.**

**A. The Ninth Circuit's Interpretation of § 778.114—Requiring A Formal “Agreement” Between The Employer And Employee—Conflicts With Decisions Of The First, Fourth And Fifth Circuits.**

The lower courts are not of one mind when it comes to the type of “understanding” that must exist between an employer and employee to satisfy 29 C.F.R. § 778.114. Section 778.114 uses the terms “understand” or “understanding” in two places. Section 778.114(a) allows for a fluctuating workweek salary arrangement if, among other things, “there is a clear *mutual understanding* of the parties” regarding the employee's salary. *Id.* (emphasis added). And § 778.114(c) provides that “[t]he ‘fluctuating workweek’ method of overtime payment may not be used . . . unless *the employee clearly understands* that the salary covers whatever hours the job may demand in a particular workweek . . . .” (Emphasis added).

Prior to the Ninth Circuit's decision, every court of appeals to consider this requirement had held that a “clear mutual understanding” requires only that the employee understand that the salary is intended to be compensation for all hours worked, but not specifically agree or consent to it. For instance, in *Griffin v. Wake County*, 142 F.3d 712 (4th Cir. 1998), the Fourth Circuit required that the employee “only understand” the plan to satisfy § 778.114. Writing for the court, Judge Wilkinson explained the point this way:

Plaintiffs appear to suggest that there was no “clear mutual understanding” of the plan because they were not asked to consent to the plan, but rather were told

about it. But *this argument confuses understanding with agreement, and the regulation speaks only of the former*. We are unable to find, and the EMTs have not identified, any case in which a court has required that employees consent to the fluctuating workweek plan to satisfy section 778.114—*employees need only understand it*.

*Id.* at 715-16 (emphasis added); *cf. Bailey v. County of Georgetown*, 94 F.3d 152, 156-57 (4th Cir. 1996) (rejecting employees' contention that § 778.114 requires the employer to secure written acknowledgments that the pay plan had been explained to them).

The Fourth Circuit is not alone in this reading of the Secretary's regulation. At least two other circuits have rejected the notion that the employee formally agree or consent to the employer's compensation system. In *Samson v. Apollo Resources, Inc.*, 242 F.3d 629, 637 (5th Cir. 2001), *cert denied* 122 S. Ct. 63 (2001), the Fifth Circuit made clear that “Section 778.114 is specific as to *what the employee must understand before* the [fluctuating workweek] method may be used.” (Emphasis added). In rejecting an employee's claim that an understanding did not exist, the appeals court held that “Section 778.114 does not require *that the employee know* the hours expected to be worked, that the fixed salary is not [to] be paid for weeks where the employee performs no work, or any other details of how the [fluctuating workweek plan] is administered.” *Id.* at 637 (emphasis added).

The same is true in the First Circuit. In *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35, 40 (1st Cir. 1999), in affirming summary judgment for the employer due to the existence of a “clear mutual understanding,” the court premised its conclusion on the fact that “there was no genuine dispute that, at the time [the employee] was hired, *she knew* that her weekly hours would fluctuate” and “the parties' post-hiring conduct reinforces [the employer's] contention that [the employee]

understood that her salary was to compensate her for fluctuating hours.” *Id.* at 39 (emphasis added). The First Circuit thus did not impose a heightened standard requiring a formal “agreement” between the employer and employee.

In marked contrast, the Ninth Circuit adopted an “agreement” requirement, a standard explicitly rejected by the Fourth Circuit and never adopted by the First and the Fifth Circuits in settings like this one. The Ninth Circuit held that Locating’s payment method could not be characterized as a fluctuating workweek plan because “[a]n *agreement* to compensate a minimum of forty hours is not the same as an *agreement* to pay a fixed salary for all hours worked . . . .” (Pet. App. 4a (emphasis added).) At the same time, the court made plain that the agreement it required to satisfy § 778.114 was something over and above the regulation’s “understanding” requirement. According to the Ninth Circuit, “any agreement to pay a fixed salary for all hours worked requires a ‘clear mutual understanding of the parties,’ 29 C.F.R. § 778.114(a), not present here.” (Pet. App. 4a.) In the Ninth Circuit’s view, an employee’s understanding of the employer’s compensation system is just one facet of the “agreement” required to satisfy § 778.114. This recurring conflict of authority independently supports the writ.

**B. The Ninth Circuit’s Standards for Establishing The Requisite Employee “Understanding” Conflict With Those of Other Circuits.**

In holding that “a clear mutual understanding” did not exist in this case, the Ninth Circuit embraced evidentiary standards that conflict with those of other circuits. The Court found that no genuine issue of material fact existed as to what Mr. Parks and (remarkably) the class he represented understood about Locating’s compensation system. In reaching this conclusion, the appeals court rejected evidence that has been probative—if not dispositive—in other cases. This aspect of the decision also supports the writ.

As the district court determined, Locating's written workweek policy expressly details the company's compensation system along with the fact that the employee will receive a fixed salary for all hours worked. (Pet. App. 11a & 13a.) The policy further explains the minimum overtime premium required by § 778.114 and how Locating calculates all overtime. On top of that, it provides an example comparing the regulation's calculation with Locating's more beneficial calculation. (Pet. App. 11a.) Mr. Parks signed a written acknowledgment stating that Locating's fluctuating workweek policy had been explained to him and that he agreed to it. (Pet. App. 13a.) In granting summary judgment in favor of Mr. Parks, however, the Ninth Circuit found such acknowledgments could not prove an employee's understanding. That holding is not only mistaken—because it permits the employees to hold employers liable on the basis of “post hoc self-serving assertion[s] at trial,” *Highlander v. K.F.C. Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986)—but it also directly conflicts with the holdings of at least two other circuits.

The Fourth and Sixth Circuits agree that an employee's signed acknowledgment of an employer's compensation system is probative of the “clear understanding” required by the regulation. In the Fourth Circuit, while “written acknowledgments are not required to satisfy section 778.114,” they are “certainly probative of the employees' clear understanding of the fluctuating workweek plan.” *Griffin v. Wake County*, 142 F.3d 712, 716 (4th Cir. 1998). Similarly, in *Highlander*, the Sixth Circuit held that a district court's determination that a plaintiff “possessed a clear understanding of the procedure that was applied in calculating her wages” was not clearly erroneous where the evidence demonstrated that she “had signed and acknowledged the explanatory calculation form indicating that she understood the Fair Labor Standards Act's fluctuating work week method of overtime compensation.” *Highlander*, 805 F.2d at 648.

The Ninth Circuit's decision also establishes a novel method for measuring evidence of the parties' working relationship. The record below contained evidence that Locating's compensation policy had been in place since 1984. As noted by the district court, "given the express language of [Locating's] policy and the fact that employees received 40 hours pay even when they worked fewer than 40 hours, any reasonable employee would have understood that they were receiving a guaranteed minimum amount of compensation regardless of hours worked." (Pet. App. 13a.) In finding no genuine issue of material fact as to the existence of a mutual understanding on these facts, the Ninth Circuit again applied a different standard from the one employed by its sister circuits.

Other circuits, for example, hold that a clear mutual understanding may be established when the employee worked under the employer's policies, practices and procedures for an extended period of time. In *Griffin*, the Fourth Circuit could not "overlook the fact that [the employer] implemented the fluctuating workweek plan nearly eight years ago." *Griffin*, 142 F.3d at 716. By itself, this fact was largely dispositive. "In these eight years the [plaintiffs] have not identified a single instance of the [employer] paying an [employee] less than his full salary for a week in which he performed any regular work. Thus, since 1990, the [employees] have received a regular lesson—in the form of their paychecks—about how the fluctuating workweek plan operates." *Id.* at 716-17. The First Circuit has followed the same evidentiary path. See *Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35, 39 (1st Cir. 1999) ("Additionally, the evidence of the parties' post-hiring conduct reinforces [the employer's] contention that [the employee] understood that her salary was to compensate her for fluctuating hours. During the first eleven months of her employment, [the employee] routinely worked without complaint more than 40 hours per week without extra pay."). This difference of opinion also supports the writ.

## II. THIS CASE RAISES AN IMPORTANT AND RECURRING FEDERAL QUESTION CONCERNING THE PROPER USE OF FLUCTUATING WORKWEEKS.

Whether employees have a “clear mutual understanding” of a fluctuating workweek is an important question that impacts countless employees and employers alike. Locating is not alone in instituting a flexible workweek program for its employees. As one might expect, the fluctuating workweek is utilized by numerous employers and hundreds of thousands of employees in various economic sectors around the nation. *See, e.g., Shoney's Pays \$18 Million to Settle Overtime Pay Suits*, HR-Wire, Pay & Benefits/FLSA (Mar. 29, 1999) (“suit covered approximately 18,000 hourly and ‘fluctuating work week’ employees who claimed Shoney's violated the FLSA”); N. Douglas Grimwood, *The Application of the Fair Labor Standards Act To The Law Office*, 32 Arizona Attorney 36, 37 (1995) (applying the “fluctuating workweek” to law office employees).

Changes to the modern workplace coupled with technological advancements have resulted in significant revisions to the traditional 8 a.m. to 5 p.m., 40-hour workweek. *See* Joseph E. Tilson, *FLSA Cases: The New Wave of Employment Litigation*, 664 PLI/Lit 789, 795 (2001) (recognizing the “advent of the ‘virtual workplace,’ telecommuting by employees, and flexible scheduling arrangements”). As technology and employer needs continue to change, so too do labor demands. “In the future,” employers “will rely on large numbers of contingent employees to provide expertise for specific projects and to meet the demands of unpredictably fluctuating workflows.” Burton J. Fishman, *The Impact of Technology on the Nature of Work and the Structure of the Workplace*, 8 Metro. Corp. Couns. 19 (Mar. 2000). Many of these contingent employees together with accommodating employers will seek to avail themselves of the FLSA's fluctuating workweek provisions.

Revisions to the traditional employment schedule have often resulted in a spate of FLSA-related litigation. As a whole, this litigation is increasing at a feverish rate. See Tilson, *FLSA Cases*, 664 PLI/Lit at 795 (citing “the dramatic increase in the use of FLSA class actions and the resulting large settlements that are being obtained”). Among the issues fueling this increase are the growing number of cases challenging the Act's fluctuating workweek provisions. A majority of circuits have now addressed issues arising out of the Secretary's fluctuating workweek regulation—whether directly related to the “understanding” requirement or not—with more litigation assuredly on the horizon. See *supra* at 9-13; see also *Heder v. City of Two Rivers, Wis.*, 295 F.3d 777, 780 (7th Cir. 2002) (holding that firefighters did not work fluctuating workweek in accordance with 29 C.F.R. § 778.114); *Marshall v. Hamburg Shirt Corp.*, 577 F.2d 444, 447 (8th Cir. 1978) (rejecting the district court's conclusion that “the compensation plan is valid under 29 C.F.R. § 778.114”).

By all accounts, the fluctuating workweek and the litigation surrounding its implementation are unlikely to disappear anytime soon. Technology and changes in the modern workplace continue unabated. Yet the varying standards applicable to this changing workforce leave these employees, to say nothing of their employers, on unstable footing. Although fluctuating workweeks remain a popular alternative to employers and employees, neither one can know with any certainty when a FLSA fluctuating workweek has been validly put in place. Employees in Washington, for example, now operate under a different fluctuating workweek regime from those in Virginia. Indeed, in the case of Locating, which has employees in States in different circuits, the varying standards create a host of predictable operational challenges. This recurring uncertainty over an important matter of federal law deserves resolution.

**III. THE NINTH CIRCUIT'S DECISION IS WRONG ON THE MERITS AND WILL HAVE DIRE CONSEQUENCES FOR EMPLOYERS AND EMPLOYEES ALIKE.**

As to the merits, there is little to commend the Ninth Circuit's decision. Above all, the decision confuses the distinction between a sufficient condition for establishing the requisite employee "understanding" and a necessary one. While a formal agreement or consent assuredly would suffice to meet the requirement, the plain terms of the regulation—just requiring an "understanding"—plainly show that employers may satisfy this condition in other ways.

If left to stand, the Ninth Circuit's decision also puts in place standards that are seemingly impossible for employers to meet. The Ninth Circuit's test for determining whether the "understanding" requirement is satisfied appears insurmountable. If both past practice and an employee's signed acknowledgment fail to demonstrate even a jury question on this issue, one wonders how an employer could ever prove that the employee understood the relevant aspects of the compensation system in the face of an employee's after-the-fact denials. (*Cf.* Pet. App. 13a-14a ("Any other conclusion would leave an employer's compliance with the law at the whim of the employee who could always assert after-the-fact that he did not understand.")) What is more, the Ninth Circuit's "agreement" requirement will retroactively invalidate virtually any fluctuating workweek arrangement previously implemented in States in that circuit, including those adopted with an eye towards the textually accurate interpretations of § 778.114 previously announced by the First, Fourth, Fifth and Sixth Circuits.

The decision will have equally dire circumstances for employees, however. Without predictable, attainable standards for implementing fluctuating workweek compensation systems, employers will be forced to scrap

existing programs and forego future ones. This in turn will rob employees of the inherent benefits of such plans—*i.e.*, predictable pay levels in industries in which working hours fluctuate from week to week and season to season. These benefits, after all, were what made the fluctuating workweek compensation method attractive to Locating and, of course, to Mr. Parks in the first instance. And Locating, recall, paid employees their full salaries even in weeks in which they worked less than 40 hours. (*See* Pet. App. 13a.) It is no exaggeration to conclude that Ninth Circuit's decision will eliminate, rather than improve, these employee-favorable plans. The petition should be granted or, at a minimum, the Ninth Circuit's decision should be summarily reversed.

#### CONCLUSION

The petition should be granted.

Respectfully submitted,

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