No. 03-146

In the Supreme Court of the United States

JOHN W. LOTZ, JORGE GUTIERREZ AND JULIAN PANEK, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

An Office of Personnel Management regulation implements the overtime provisions of the Fair Labor Standards Act of 1938 as applied to federal employees and defines the provisions' exemption for "executive" employees. The question presented is whether the regulation is invalid because it does not use the "salary basis" test contained in the Department of Labor regulation applicable to private-sector employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-16a) is reported at 322 F.3d 1328. The opinions of the Court of Federal Claims (Pet. App. 17a-26a, 27a-42a) are reported at 40 Fed. Cl. 303 and 51 Fed. Cl. 460.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2003. A petition for rehearing was denied on May 15, 2003 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on July 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, requires an employer to compensate an employee at the rate of one and a half times the employee's regular rate of pay for overtime worked in excess of 40 hours per week. 29 U.S.C. 207(a). This overtime scheme applies to all employees except those whom the FLSA exempts, a category that includes "executive" employees. 29 U.S.C. 213(a)(1). The FLSA does not define the term "executive." See Pet. App. 12a.

The Fair Labor Standards Amendments of 1974 (1974 Amendments), Pub. L. No. 93-259, 88 Stat. 55, made the FLSA applicable to the federal government, 29 U.S.C. 203(e)(2), and gave the Civil Service Commission, now the Office of Personnel Management (OPM), authority to administer the FLSA as it applies to federal employees, 29 U.S.C. 204(f). As a result of the 1974 Amendments, two separate entities interpret the FLSA exemptions. The Department of Labor (DOL) promulgates regulations applicable to the private sector, 29 U.S.C. 204, and OPM promulgates regulations applicable to the federal government, 29 U.S.C. 204(f). According to the House Report accompanying the 1974 Amendments, the Committee on Education and Labor intended that the Civil Service Commission would administer the FLSA "in such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy." H.R. Rep. No. 913, 93d Cong., 2d Sess. 28 (1974).

Under the applicable OPM regulation, 5 C.F.R. 551.205, an employee is an "executive," and thus exempt from the FLSA's overtime provisions, if he or she is a "supervisor or manager who manages a Federal agency or any subdivision thereof" and "customarily and regularly directs the work of subordinate employees." *Ibid.* The employee must also have the authority to make personnel changes and customarily and regularly exercise discretion and independent judgment in planning and assigning work. 5 C.F.R. 551.205(a).

DOL's regulation concerning the executive exemption, 29 C.F.R. 541.1, is similar to OPM's, except that it also includes a requirement that the employee be paid on a "salary basis," 29 C.F.R. 541.1(f), which means that the employee must "regularly receive[] each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation," 29 C.F.R. 541.118(a). An employee does not meet DOL's salary-basis test, however, if his or her pay is "subject to reduction because of variations in the quality or quantity of the work performed." *Ibid.* And while the possibility that an employee's pay will be reduced for violations of "safety rules of major significance" does not "affect the employee's salaried status," 29 C.F.R. 541.118(a)(5), the availability of pay reductions for other violations does. This is sometimes referred to as the "disciplinary deduction" exception to the salary-basis test. See *Auer* v. *Robbins*, 519 U.S. 452, 458-459 (1997).

2. Petitioners are GS-13 supervisory border patrol agents. Pet. App. 19a.[1] They were originally plaintiffs

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[1] When this case began, petitioners were employed by the Immigration and Naturalization Service. See Pet. App. 7a, 10a, 15a. That agency has since been abolished and its components

in *Adams* v. *United States*, a suit in the Court of Federal Claims alleging that supervisory border patrol agents had improperly been denied overtime pay under the FLSA. *Id.* at 18a.[2] The plaintiffs in *Adams* filed a motion for summary judgment, contending that OPM's "executive employee" regulation was invalid because it differed from DOL's "executive employee" regulation; that they should be covered by the salary-basis test and its disciplinary-deduction exception; that the undisputed evidence established that they were subject to disciplinary suspensions and thus not within the executive exemption under the DOL regulation; and that they were therefore entitled to overtime pay under the FLSA. *Id.* at 30a.

The Court of Federal Claims denied petitioners' motion for summary judgment. Pet. App. 27a-42a. It held that, while a DOL regulation is presumed to be the proper interpretation of the FLSA, a different regulation for federal employees is permissible when it is justified (*id.* at 32a-34a), and that there is a justification for OPM's "executive employee" regulation not to include a salary-basis test (*id.* at 37a-41a). The court explained that, under the civil-service system, which covers "the great majority of federal employees" (*id.* at 37a), federal pay is calculated from an annual rate of basic pay for both "management" and "labor," not just

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transferred into the Department of Homeland Security. See 6 U.S.C. 291. Petitioners now work for the Bureau of Border Security. See 6 U.S.C. 251-252.

[2] The claims of some of the plaintiffs in *Adams*, including petitioners, and the claims of some of the plaintiffs in *Barnes* v. *United States*, which involved the same issues, were subsequently severed and consolidated in *Bates* v. *United States*. When *Bates* reached the court of appeals, it was restyled *Billings* v. *United States*. See Pet. 2-3.

for management (*ibid.*), and federal employees "across the board" (*ibid.*), not just unskilled employees, are subject to various statutorily required suspensions without pay (*id.* at 37a-41a). The court thus concluded that application of DOL's salary-basis test would not meaningfully distinguish "unskilled federal employees" from "upper federal management" (*id.* at 37a), and would lead to absurd results (*id.* at 41a).

The Court of Federal Claims subsequently granted the government's motion for summary judgment and dismissed petitioners' complaint. Pet. App. 17a-26a. It concluded that petitioners satisfy the requirements of the OPM regulation defining an executive employee, and that they are therefore exempt from the FLSA's overtime provisions. *Id.* at 21a-26a.

3. The court of appeals affirmed. Pet. App. 3a-16a.

The court held that the OPM regulation defining an "executive" employee is a reasonable interpretation of the FLSA and that the difference between OPM's definition and DOL's definition is permissible, because it "effectuate[s] the consistency of application of the [FSLA] to both federal and non-federal employees." Pet. App. 13a. The court relied on the fact that federal employees are subject to suspensions under Title 5 of the United States Code that are not applicable in the private sector and that, under petitioners' view, "nearly every federal employee would be considered non-exempt," because Title 5 applies to the "vast majority" of federal employees. *Ibid.* Observing that the OPM regulation and the DOL regulation are "nearly identical, but for the salary-basis test," the court concluded that the difference between the regulations is "no more than needed to accommodate the difference between private and public sector employment." *Ibid.*

The court of appeals (Pet. App. 14a) found the case before it distinguishable from *American Federation of Government Employees* v. *Office of Personnel Management*, 821 F.2d 761 (D.C. Cir. 1987) (*AFGE*), which invalidated an earlier version of OPM's regulation defining an executive employee on the ground that it differed in certain respects from DOL's regulation. *Id.* at 771. That case, according to the court of appeals, stands for the proposition that, "under the same facts," a federal employee should receive the same overtime compensation as a private-sector employee. Pet. App. 14a. This case does not involve "the same facts," the court said, because federal employees "are subject to Title [5] suspensions not present in the private sector." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 4-8) that the OPM "executive exemption" regulation applicable to federal employees is invalid, because it differs from the DOL "executive exemption" regulation applicable to private-sector employees. They contend (*ibid.*) that the court of appeals erred in concluding otherwise, and that its decision conflicts with the D.C. Circuit's decision in *AFGE*. Petitioners are mistaken. The court of appeals' decision is correct and does not conflict with any decision of any other court. Further review is therefore unwarranted.

1. OPM's regulation is a reasonable interpretation of FLSA's executive-employee exemption and permissibly differs from DOL's regulation. As the court of appeals observed (Pet. App. 13a), Title 5 of the United States Code subjects the "vast majority of all federal employees" to various types of disciplinary actions that are "not applicable in the private sector." See, *e.g.*,

5 U.S.C. 7511-7514 (allowing for removal, suspension, grade reduction, pay reduction, or furlough to promote efficiency of service); 5 U.S.C. 7531-7533 (allowing for suspension or removal in interest of national security). As the court of appeals also observed (Pet. App. 13a), applying the disciplinary-deduction rule to both federal and private-sector employees would mean that the FLSA's overtime provisions cover "nearly every federal employee," but cover a far smaller proportion of private-sector employees. Contrary to petitioners' contention (Pet. 5), that would lead, not to "equity and fairness between Federal and non-Federal employees," but to inequity and unfairness. Applying different rules to employees who are differently situated is not only reasonable but faithful to the expectation, expressed in the House Report accompanying the 1974 Amendments, that OPM would administer the FLSA "in such a manner as to assure consistency" in the law's application. H.R. Rep. No. 913, 93d Cong., 2d Sess. 28 (1974).

2. Petitioners are mistaken in their contention (Pet. 6-8) that the court of appeals' decision conflicts with the D.C. Circuit's decision in *AFGE*.

a. Relying on the House Report, *AFGE* applied the principle that OPM is "obliged to exercise its administrative authority in a manner that is consistent with the Secretary of Labor's implementation of the FLSA" (821 F.2d at 770), and invalidated an earlier version of the OPM regulation defining an "executive" employee because it differed in certain respects from the DOL regulation (*id.* at 771). The provisions of the DOL regulation at issue in *AFGE* (*ibid.*)—provisions that, at the time, did not appear in the OPM regulation (see 5 C.F.R. 551.204 (1986))—stated that, to be an "executive," an employee must manage the "enterprise" or a "department" of the "enterprise" in which he is em-

ployed and must "customarily and regularly" direct the work of others (29 C.F.R. 541.1(a) and (b)). Requiring that OPM include comparable provisions in its regulation—as it has since done (see 5 C.F.R. 551.205)—is understandable, because there is no obvious difference between federal and private-sector employment that justified the differences in the regulations, and because it was likely that, as a result of the differences, similarly situated federal and private-sector employees would be treated differently.

Precisely the opposite is true of the disciplinary-deduction rule. By omitting that provision from its regulation, OPM has increased the likelihood that similarly situated federal and private-sector employees will be treated similarly, since, as explained above, applying the disciplinary-deduction rule to federal managerial employees would mean that they are much more likely to be entitled to overtime pay than their counterparts in the private sector. The court of appeals correctly concluded, therefore, that this case, unlike *AFGE*, does not involve employment under "the same facts." Pet. App. 14a.

b. Contrary to petitioners' assertion (Pet. 7), it is not the government's position that, to uphold an OPM regulation that differs from a DOL regulation, a court need only identify "some difference" between federal employees and private-sector employees. In order to ensure that similarly situated government and private-sector employees are treated similarly, applicable OPM and DOL regulations may differ when there is a difference between government and private-sector employment that justifies the difference in the regulations. There was no such difference in *AFGE*, but there is here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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