No. 14-1744

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

GASSAN MARZUQ, on behalf of himself and all others similarly situated; and TANISHA RODRIGUEZ, personal representative of the Estate of Lisa Chantre
Plaintiffs-Appellants,
v.
CADETE ENTERPRISES, INC.; T.J. DONUTS, INC.; SAMOSET ST. DONUTS, INC.; JOHN CADETE
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
Case No. 11-10244
The Honorable F. Dennis Saylor

MOTION OF NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, ECONOMIC POLICY INSTITUTE, AND MASSACHUSETTS FAIR WAGE CAMPAIGN TO FILE *AMICI CURIAE* BRIEF SUPPORTING APPELLANTS AND REVERSAL

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Dated: October 29, 2014

Pursuant to Federal Rule of Appellate Procedure 29(b), the National Employment Law Project, the National Employment Lawyers Association, the Economic Policy Institute, and the Massachusetts Fair Wage Campaign (collectively "*Amici Curiae*") respectfully seek leave to file the accompanying brief supporting the appeal of Plaintiffs/Appellants and urging reversal of the district court's underlying summary judgment decision. *Amici Curiae* have sought all parties' concurrence in this motion. Plaintiffs/Appellants concur, while Defendants/Appellees do not concur.

Amici Curiae submit that, for the reasons described below, this motion should be granted because each *Amici Curiae* has an interest in the outcome of this appeal and because the matters asserted in the accompanying brief are relevant to the appeal's disposition:

1. The National Employment Law Project ("NELP") is a non-profit legal organization with over 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers, including workers in the food service industry. NELP seeks to ensure that all employees receive the full protection of labor and employment laws and that employers are not rewarded for skirting those basic rights.

2. The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprised of lawyers

who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

3. The Economic Policy Institute ("EPI") is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI believes every working person deserves a good job with fair pay, affordable health care, and retirement security. To achieve this goal, EPI conducts research and analysis on the economic status of working America. EPI proposes public policies that protect and improve the economic conditions of low- and middle-income workers and assesses policies with respect to how they affect those workers. EPI staff have submitted comments during rulemaking on Part 541, have testified in both the House and Senate on the so-

called white collar exemptions, and advocate for broader overtime coverage as a way to increase employment and wages.

4. The Massachusetts Fair Wage Campaign ("FWC") is a coalition of non-profit immigrants' and workers' rights organizations that engage in a range of legal and policy advocacy, community organizing, and support and referrals for legal action for low-wage workers in Massachusetts. Most of FWC's member organizations are community-based groups that work closely with immigrant workers who are victims of exploitative and abusive employment practices, including nonpayment of wages and violations of the Massachusetts and federal minimum wage and overtime laws.

5. Based on the above, *Amici Curiae* have an interest in this appeal, which concerns the impact of overtime rights laws on salaried and hourly workers in the fast food sector.

6. Moreover, the matters asserted in the accompanying brief are relevant to the appeal's disposition. For example, the accompanying brief (i) addresses the important public policies underlying the federal overtime rights laws and (ii) asserts that the district court incorrectly read this Court's decision *Donovan v. Burger King*, 672 F.2d 221 (1st Cir. 1982), as excusing a detailed analysis of the four "primary duty" factors described in 29 C.F.R. § 541.700(a).

WHEREFORE, *Amici Curiae* respectfully request that the Court grant this motion and accept the accompanying brief.

Dated: October 29, 2014

By their attorneys,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c)(1), each of the *amici curiae* certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: October 29, 2014

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CERTIFICATE OF SERVICE

I hereby certify that, on October 29, 2014, I electronically filed the foregoing motion with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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RULE 29(c)(1) DISCLOSURE STATEMENT

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RULE 29(c)(4) STATEMENT OF INTEREST

Each of the *amici curiae* listed below have an interest in this appeal, which concerns the impact of overtime rights laws on salaried and hourly workers in the fast food sector. In particular:

The **National Employment Law Project ("NELP")** is a non-profit legal organization with over 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers, including workers in the food service industry. NELP seeks to ensure that all employees receive the full protection of labor and employment laws and that employers are not rewarded for skirting those basic rights.

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including nonpayment of wages and violations of the Massachusetts and federal minimum wage and overtime laws.

RULE 29(c)(5) STATEMENT

No party's counsel has: (a) authored this brief in whole or in part or (b) contribute money that was intended to fund preparing or submitting this brief. Moreover, only *amici curiae*, its members, or its counsel has contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

Amici curiae urge this Court to reverse the district court's summary judgment decision. As discussed below, Congress passed the FLSA's "time and one-half" overtime pay requirement with the intent of benefitting ***all*** workers by spreading work hours and increasing employment. The district court's application of *Donovan v. Burger King*, 672 F.2d 221 (1st Cir. 1982), to excuse a detailed analysis of the four "primary duty" factors described in 29 C.F.R. § 541.700(a) threatens to undermine this legislative purpose. In particular, the district court's approach makes it far too easy for companies to avoid assigning extra work to the hourly workforce by simply requiring salaried employees to perform the extra work free-of-charge. Moreover, the district court's reading of *Burger King* as excusing a rigorous primary duty analysis cannot be reconciled with decisions from other circuit courts.

A. The FLSA's Overtime Pay Mandate Was Enacted for the Purpose of Benefitting *All* Workers by Spreading Work Hours and Increasing Employment.

The FLSA requires that employees receive extra "time and one-half" pay for working over 40 hours per week. *See* 29 U.S.C. § 207(a)(1). In enacting this requirement, Congress intended "to spread work and thereby reduce unemployment, by requiring an employer to pay a penalty for using fewer workers to do the same amount of work as would be necessary if each worker worked a

shorter week." *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987) (Posner, J.).

This public policy favoring "work-spreading" is fundamental to the FLSA's overtime pay mandate. As the Supreme Court explained shortly after the FLSA's passage:

> The provision of § 7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum wage. By this requirement, ***although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage*** and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours of the act. ***In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work.*** Reduction of hours was part of the plan from the beginning.

Overnight Motor Transport v. Missel, 316 U.S. 572, 577-78 (1941) (emphasis supplied); *see also Bay Ridge Operating Co., Inc. v. Aaron*, 334 U.S. 446, 460 (1948) (overtime pay mandate intended "to spread employment through inducing employers to shorten hours because of the pressure of extra cost"); *Walling v. Youngerman-Reynolds Hardwood Co., Inc.*, 325 U.S. 419, 423-24 (1945) (overtime pay mandate intended "to reduce the hours of work and to employ more men"); *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161, (1945) ("the plain design of § 7(a) to spread employment through imposing the overtime pay requirement on the employer"); *Walling v.*

Helmerich & Payne, Inc., 323 U.S. 37, 40 (1944) (overtime pay mandate intended "to spread employment by placing financial pressure on the employer through the overtime pay requirement").

In sum, the FLSA's overtime pay mandate is intended to benefit ***ALL*** employees, not just those who actually are called upon to work extra overtime hours. When a company classifies a salaried employee as an overtime-exempt "executive," the economic implications are felt by the entire workforce. This is why overtime exemptions must be narrowly construed. As this Court has recognized: "Because of the remedial nature of the statute, the Supreme Court has emphasized that the exemptions should be 'narrowly construed' and 'limited to those establishments plainly and unmistakably within their terms and spirit.'" *Hines v. State Room, Inc.*, 665 F.3d 235, 242 (1st Cir. 2011) (quoting *Arnold v. Ben Kanowski, Inc.*, 361 U.S. 388, 392 (1960)).

B. Cadete's Business Model Contradicts the FLSA's Purpose of Spreading Work Hours Among the General Workforce.

Mindful of the FLSA's Congressional purpose of spreading work among ***all*** employees, courts should be skeptical of business models in which employers classify a few employees as overtime-exempt managers, pay them modest weekly salaries, require them to work long hours performing non-managerial tasks, and

prohibit their hourly co-workers from working additional hours.[1] Such business models clearly undermine Congress' intent that the overtime premium foster the spreading of work hours among the entire workforce.

In *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233 (11th Cir. 2008), the Eleventh Circuit affirmed a jury finding that the Family Dollar retail chain violated the FLSA by misclassifying their "store managers" as overtime-exempt. The *Morgan* Court put special emphasis on Family Dollar's use of strict store payroll budgets to force the store managers to perform tasks that otherwise would be performed by the hourly employees. *See Morgan*, 551 F.3d at 1251-54, 1270. The Court offered the following summary:

> Because store managers are under orders that overtime labor is not allowed, they are required to do any and all work, even if the payroll budget does not allocate enough hourly employees to get the job done. Cuts to a store's payroll budget necessarily reduce a store's workforce and ensure that the salaried store manager (and not the hourly employees) makes up the difference by working more hours.

Id. at 1252 (footnote omitted).

Here, Cadete has implemented a similar business model. Plaintiffs were paid modest weekly salaries, *see* Joint Appendix ("JA") at 296, and worked

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[1] *See generally* David Jamieson, "Join the Booming Dollar Store Economy! Low Pay, Long Hours, May Work While Injured," *HuffingtonPost.com* (Aug. 29, 2013) (available at http://www.huffingtonpost.com/2013/08/29/dollar-stores-work_n_3786781.html, last accessed on October 28, 2014) (generally describing business model of requiring salaried managers to perform all of store's extra work).

alongside other donut shop employees paid on an hourly basis, *see id.* Plaintiffs were expected to regularly work at least 48 hours per week and often worked over 60 hours per week." *See* JA 45, 60, 147, 170-71, 219. During these work hours, Appellants often spent over 90% of their time performing the same routine tasks as the donut shop's hourly employees, *See* JA 105-06, 168-69, 171-72, 179, 186-88, 193, 198, 217-18, 222, 244-45, 252, 319.

C. Cadete's Practices Harm the Very Employees Who Most Need the FLSA's Protections.

It is easy to view Appellants as the only individuals harmed by Cadete's overtime-exempt classification. But such a viewpoint is incomplete. As already discussed, Cadete's current and prospective ***hourly*** employees also have suffered harm. Absent the overtime-exempt classification of Appellants, the donut shop's hourly employees would have worked more hours and received more pay. Alternatively, Cadete would have hired a new employee, possibly lifting him/her out of unemployment.

The $8.00/hour donut shop employees harmed by Cadete's practices desperately need the FLSA's protections. The food service industry employs almost 10% of our nation's private sector workers.[2] Almost half of all food service

[2] *See* Heidi Shierholz, "Low Wages and Few Benefits Mean Many Restaurant Workers Can't Make Ends Meet," *Economic Policy Institute Report* (Aug. 21, 2014) ("EPI Report") at p. 5 (available at

workers live near or below the poverty level.[3] As a whole, food service workers earn only one-half of the national average wage for all industries, and the average food service manager's salary is less than twice the wage of their hourly employees.[4] Moreover, over 22 percent of restaurant managers can be classified as low-wage employees.[5]

D. Careful Analysis of Each of the Four "Primary Duty" Factors is Crucial to Ensuring that an Overly-Broad Executive Exemption Does Not Undermine the FLSA's Work-Spreading Goals.

Whether a purportedly overtime-exempt executive has "management" as her "primary duty" depends on consideration of four separate factors. As explained in the pertinent regulation:

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http://www.epi.org/publication/restaurant-workers/, last accessed on October 28, 2014).

[3] *See* EPI Report, *supra*, at Table 7. Generally speaking, many of this Nation's poor are employed. "In 2009, according to the US Census Bureau's official definition of poverty, 8.8 million US families were below the poverty line (11.1% of all families). Of these families, 5.19 million, or 58.9%, had at least one person who was classified as working. In the same year, there were 11.7 million unrelated individuals (people who do not live with family members) whose incomes fell below the official poverty line (22% of all unrelated individuals). This means that 3.9 million of these poor individuals, or 33%, were part of the working poor." (Wikipedia, Working Poor, http://en.wikipedia.org/wiki/Working_poor, last accessed on October 28, 2014.)

[4] EPI Report, *supra*, at Table 6, p. 17 [$10.00 ÷ $18.00 = .55], Table 5, p. 14 [$15.42 ÷ $8.23 = 1.87]. By comparison, managers in all employment earn approximately 2.5 times more than hourly employees ($54.66 versus $21.78.). *See* Bureau of Labor Statistics, "May 2013 National Industry-Specific Occupational Employment and Wage Estimates For Cross Industries, Private." ("May 2013 Wages") (available at http://www.bls.gov/oes/current/000001.htm#00-0000, last accessed on October 28, 2014)

[5] EPI Report, *supra*, Table 8, at p. 20.

> Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

29 C.F.R. § 541.700(a).

Magistrate Judge Boal's Report and Recommendation carefully analyzed each of the four primary duty factors. *See* JA at 294-309. Judge Saylor, however, did not undertake any analysis of the primary duty factors. *See* JA at 317-27. Instead, Judge Saylor appeared to read this Court's decision in *Donovan v. Burger King*, 672 F.2d 221 (1st Cir. 1982), as requiring a finding that Appellants are exempt executives by virtue of their status as "in charge" of their stores. *See* JA at 325-26.

Amici Curiae respectfully disagree with Judge Saylor's approach. This Court has never held that *Burger King* permits a district court to avoid a rigorous analysis of the primary duty factors just because the plaintiff is the person "in charge" of his assigned store or work department. Such a reading of *Burger King* would put this Court at odds with circuit courts authority throughout the nation.

For example, in *Morgan*, the Eleventh Circuit flatly rejected the company's argument that "its store managers were 'in charge' of the store, and therefore, exempt as a matter of law." *Morgan*, 551 F.3d at 1271. The *Morgan* Court

cogently observed:

> In answering the primary duty inquiry, courts do not "simply slap[]on a talismanic phrase." Family Dollar's "in charge" label strikes us as a way to bypass a meaningful application of the fact-intensive factors.

Id. at 1272 (quoting *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1264 (11th Cir. 2008)).

Likewise, in *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1145 (3d Cir. 1983), the Third Circuit explained that an employee's status as the person "in charge" of an entity's operations does not excuse a thorough analysis of the primary duty factors:

> Preliminarily, we reject the implication in the district court's opinion that by merely holding that the foremen were "in charge" of their respective sections, without analyzing the underlying criteria of the relevant regulation, the district court could properly conclude that the regulation's requirement that the foremen's primary duty be management had been satisfied. The regulation clearly directs the court's attention to several factors, which must be considered before a determination of "primary duty of management" may be made. Thus, the regulation requires more than a conclusory leap from a holding of "in charge" to a conclusion that a "primary duty of management" has been established.

Guthrie, 722 F.2d at 1145.

Similarly, in *Ale v. Tennessee Valley Auth.*, 269 F.3d 680 (6th Cir. 2001), the Sixth Circuit observed: "The words 'in charge' are not a magical incantation that render an employee a *bona fide* executive regardless of his actual duties." *Id.* at

691; *see also Indergit v. Rite Aid Corp.*, No. 08-09361, 2010 U.S. Dist. LEXIS 32322, *16-19 (S.D.N.Y. March 31, 2010) (store manager's status as "captain of the ship," as person "in charge," and as "highest ranked employee in his store" not relevant to exemption analysis); *Kohl v. Woodlands Fire Dept.*, 440 F. Supp. 2d 626, 634 (S.D. Tx. 2006) (exempt status not determined by "the labels the employee or the employer place on those duties").

Consistent with the above principles, various circuit courts have held that an employee can be misclassified as overtime-exempt notwithstanding her status as the highest-ranking employee or the person in-charge. *See, e.g.*, *Rodriguez*, 518 F.3d at 1263-65 (store managers); *Jackson v. Go-Tane Services, Inc.*, 56 Fed. Appx. 267, 268-72 (7th Cir. 2003) (manager of car wash facility); *Aaron v. City of Wichita*, No. 96-3091, 1997 U.S. App. LEXIS 13039, *11-17 (10th Cir. May 23, 1997) (fire captains); *Dept. of Labor v. City of Sapula*, 30 F.3d 1285, 1287-88 (10th Cir. 1994) (fire captains).

In sum, district courts must carefully analyze each specific primary duty factor in deciding whether an employee is properly classified as an overtime-exempt manager. This Court should not permit employers and trial courts to read *Burger King* as excusing a detailed primary duty analysis.

E. Conclusion.

For the above reasons, *Amici Curiae* submit that the district court's summary judgment decision should be reversed.

Dated: October 29, 2014

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and 29(d) (for an amicus) because it contains 2,686 words, 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 in 14-point Times New Roman.

Dated: October 29, 2014

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