

Individual or Classwide? Determining How the MCA Exemption to the FLSA's Overtime Rules Should Be Applied

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INTRODUCTION

The Fair Labor Standards Act of 1938¹ (FLSA) is one of the fundamental labor laws of the United States. Passed by Congress to correct and eliminate conditions detrimental to the “health, efficiency, and general well-being” of American workers,² it establishes minimum wage,³ overtime-pay,⁴ record-keeping,⁵ and youth-employment⁶ standards that affect employees in the private sector as well as in federal, state, and local governments. Section 7 of the FLSA prescribes the rules for overtime pay and requires that covered employees receive compensation for hours worked in excess of 40 per workweek (defined as any fixed and regularly recurring period of 168 hours—that is, 7 consecutive 24-hour periods) at a rate not less than 1.5 times the regular rate of pay.⁷

The FLSA does not apply to all workers, however. The statute and its accompanying regulations contain hundreds of exemptions, which have led to the exclusion of certain groups of workers from FLSA coverage on a case-by-case basis. A unique exemption to the FLSA's overtime rules applies to “any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service”⁸ pursuant to the provisions of the Motor Carrier Act of

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¹ 52 Stat 1060, codified as amended at 29 USC § 201 et seq.

² FLSA § 2(a), 52 Stat at 1060, codified as amended at 29 USC § 202(a).

³ 29 USC § 206.

⁴ 29 USC § 207.

⁵ 29 USC § 211.

⁶ 29 USC § 212.

⁷ 29 USC § 207(a)(1).

⁸ 29 USC § 213(b)(1).

1935⁹ (MCA). Therefore, while under the FLSA employers must pay eligible employees overtime for hours worked in excess of forty hours per workweek, the MCA exempts from this requirement any employee who is engaged in activities that directly affect the safety of motor vehicles that transport passengers or property across state or national borders.

The MCA exemption affects thousands of employees on a daily basis and is useful for employers engaged in interstate commerce, but it is not always clear which employees are exempt. Courts are divided as to whether the MCA exemption should be applied based on an employee-by-employee analysis or based on a classwide analysis. In a trilogy of cases decided in 1947, the Supreme Court suggested both that an *individual* analysis of each employee is required and, in contrast, that the *class* of employees to which an individual belongs can be used to determine FLSA-exempt status. In the aftermath of these decisions, federal circuit courts have not reached a consensus on how the MCA exemption should be applied.

This Comment seeks to determine the proper method of analysis for courts to use in determining whether the MCA exemption applies. Part I provides background on the enactment of the FLSA and on the MCA exemption. Part II chronicles the development of the judicial split over the application of the MCA exemption, focusing on how circuit courts have constructed competing interpretations of Supreme Court precedent. Part II also analyzes the current US Department of Labor (DOL) regulations governing the exemption's application. Part III explains why courts should adopt a classwide method of analysis, finding support in congressional intent as well as both private- and public-interest considerations. Finally, Part IV invites regulatory action on the basis of the Supreme Court's 2005 decision in *National Cable & Telecommunications Association v Brand X Internet Services*¹⁰ ("Brand X"), arguing that private litigation has failed to effectively resolve MCA-exemption disputes and concluding that it is appropriate for the DOL to promulgate a formal rule establishing that the MCA exemption should be applied on a classwide basis.

⁹ 49 Stat 543, codified as amended in various sections of Title 49.

¹⁰ 545 US 967 (2005).

I. BACKGROUND: THE FLSA AND THE MCA EXEMPTION

This Part discusses the federal statutes at issue. Part I.A introduces the FLSA, establishes its purpose, and defines its scope. Part I.B then introduces the MCA and explains when the FLSA's MCA-exemption provision applies.

A. The FLSA

Aside from the Social Security Act, President Franklin D. Roosevelt considered the FLSA to be “the most important Act that [was] passed” between 1935 and 1938.¹¹ The FLSA was hailed at the time of its passage as “a sincere effort to raise the standard of living of underpaid and overworked labor.”¹² Congress enacted the FLSA for the threefold purpose of (1) creating a minimum wage standard to remedy the exploitation of the lowest-wage earners, (2) promoting fair competition in interstate commerce by creating a nationwide floor under which competition cannot drive wages, and (3) generating more jobs by using the overtime-pay requirement to encourage employers to spread existing work among a greater number of employees.¹³ Now in its eighth decade, the FLSA has generally achieved its objectives.¹⁴ The FLSA has improved labor standards and actual working conditions, a result that “continues to better the daily lives of millions of working Americans.”¹⁵

¹¹ Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, *Monthly Labor Rev* 32, 32 (Dec 2000).

¹² *Id.* at 37 (quoting Sidney Hillman, president of the Amalgamated Clothing Workers of America labor union, in 1938).

¹³ See 29 USC § 202 (discussing the FLSA's goals of improving the lives of the lowest-paid workers and promoting fair competition); Amanda Walck, *Overregulation or Fair Interpretation: Christopher v. SmithKline and the Question of Judicial Deference in Department of Labor Rulemaking* *4–5 (Louis Jackson National Student Writing Competition, Jan 1, 2013), archived at <http://perma.cc/HZZ2-HCQB> (discussing the FLSA's goal of increasing employment by discouraging overtime).

¹⁴ As one contemporary scholar writes, “the FLSA has had a significant role in the country's intent to give greater dignity, security, and economic freedom to millions of workers and has undoubtedly played an influential part in the economic growth of our country.” James C. Hardman, *Motor Carrier Service and Federal and State Overtime Wage Coverage*, 35 *Transp L J* 1, 2 (2008).

¹⁵ Ross Eisenbrey and Nathaniel Ruby, *Celebrating 75 Years of the Fair Labor Standards Act* (Economic Policy Institute, June 25, 2013), archived at <http://perma.cc/2N62-C93H> (noting that a special study conducted by the Bureau of Labor Statistics found that the FLSA would “raise wages for almost 700,000 workers, reduce hours or prompt overtime pay for over one and a half million workers, and prohibit the continued employment of roughly 600,000 children,” and concluding that the FLSA has been “an unequivocal success”).

An employer's liability under the FLSA depends on the existence of an employer-employee relationship.¹⁶ The FLSA applies to employees, not otherwise exempt, who are (1) "engaged in commerce," (2) engaged "in the production of goods for commerce," or (3) "employed in an enterprise engaged in commerce or in the production of goods for commerce."¹⁷

The FLSA does not apply to employees for whom an employer can claim an exemption from coverage. There are a number of exemptions to the FLSA; some suspend all four of the Act's standards (minimum wage, overtime-compensation, equal pay, and child labor restrictions), while others suspend only some.¹⁸ Groups of employees who were exempt from the wage and hour provisions under the original 1938 statute included executives, administrative and professional employees, employees of local retailers, outside salesmen, most employees of commercial fishing companies, and all agricultural employees.¹⁹ However, the nature and scope of the FLSA's exemptions have changed over time,²⁰ and "some of the exemptions that remain no longer serve the purposes for which they were enacted."²¹ Furthermore, many of these exemptions are remarkably complex—indeed, they are "so complicated and confusing that Thompson Publishing Group produces a monthly newsletter to inform employees of their rights under the FLSA and alert them to the ways in which their employers might be misinterpreting the law."²² In general, all exemptions to any of the FLSA's rules, including the overtime rules, "are to be narrowly construed against the

¹⁶ See 29 USC § 203 (defining an employer as "any person acting directly or indirectly . . . in relation to an employee" and an employee as "any individual employed by an employer").

¹⁷ 29 USC §§ 206(a)–(b), 207(a). The constitutionality of the FLSA's overtime rules was challenged and upheld in *United States v Darby*, 312 US 100, 111, 125 (1941).

¹⁸ See 29 USC § 213.

¹⁹ See Walck, *Overregulation or Fair Interpretation* at *5 (cited in note 13); Willis J. Nordlund, *The Quest for a Living Wage: The History of the Federal Minimum Wage Program* 51 (Greenwood 1997).

²⁰ For example, Congress amended the FLSA in 1966 to bring nursing homes, laundries, and "the entire construction industry" under the Act's coverage. Walck, *Overregulation or Fair Interpretation* at *9 (cited in note 13).

²¹ *Id.* at *10. For example, not all agricultural workers are covered by the FLSA's wage and hour provisions, even though the majority of these workers are immigrants who receive low wages and work long hours. *Id.*

²² *Id.*

employers seeking to assert them,”²³ with employers shouldering the burden of proving the applicability of an exemption.²⁴

B. The MCA Exemption

The MCA predates the FLSA by three years. Its enactment, which amended the Interstate Commerce Act of 1887²⁵ to allow for common carrier regulation of bus lines and trucking,²⁶ was primarily a response to the Supreme Court’s 1925 decision in *Buck v Kuykendall*.²⁷ The *Buck* Court held that the state of Washington could not require a motor vehicle carrier engaged in interstate commerce to obtain a certificate of “public convenience and necessity.”²⁸ The decision created a regulatory void by eliminating state controls on entry for motor carriers engaged in interstate commerce and by invalidating state requirements concerning insurance and standards of service.²⁹ The purpose of the MCA was to fill this void by bringing federal regulation to private motor carrier operations.³⁰ The MCA, in effect, provided the Interstate Commerce Commission (ICC) with powers over motor carriers that were similar to the powers it had over railroads—an industry that the ICC had regulated since 1887.³¹ Thus, the MCA sought to “maintain the stable transportation

²³ *Arnold v Ben Kanowsky, Inc.*, 361 US 388, 392 (1960) (further adding that “[t]he [] conditions of [the Act] are explicit prerequisites to exemption, not merely suggested guidelines for judicial determination of the employer’s status”). See also *Songer v Dillon Resources, Inc.*, 618 F3d 467, 471 (5th Cir 2010).

²⁴ See *Fair Labor Standards Act Advisor: Exemptions* (DOL), archived at <http://perma.cc/YP25-8FXW>; *Exempt vs Non-exempt Employees* (HR Hero), archived at <http://perma.cc/8LZY-4K89>.

²⁵ An Act to Regulate Commerce (“Interstate Commerce Act of 1887”), 24 Stat 379, codified as amended in various sections of Title 49.

²⁶ See MCA § 202(a), 49 Stat at 543.

²⁷ 267 US 307 (1925).

²⁸ *Id.* at 316.

²⁹ See Charles A. Webb, *Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers*, 8 *Transp L J* 91, 91–93 (1976) (noting that the “net effect of the [*Buck*] decision was to confine regulation of interstate motor carrier transportation to the area of State police powers”).

³⁰ The MCA’s stated purpose is to “recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation . . . in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive practices.” MCA § 202(a), 49 Stat at 543. See also John J. George, *The Federal Motor Carrier Act of 1935*, 21 *Cornell L Rev* 249, 252–53 (1936).

³¹ See Note, *Railroad Operation of Trucks*, 4 *Stan L Rev* 89, 91 (1951).

industry,” as well as to protect the viability of the commercial motor vehicle industry from undue restraints on competition.³²

Section 13(b)(1) of the FLSA provides an exemption from the Act’s overtime-wages requirement.³³ This exemption applies to employees for whom the Secretary of Transportation may establish qualifications and maximum hours of service pursuant to § 204 of the MCA,³⁴ but it does not apply to employees covered by the small vehicle exception. As a result, the § 13(b)(1) overtime exemption applies to employees who are: (1) “[e]mployed by a motor carrier or motor private carrier, as defined in 49 U.S.C. Section 13102”; (2) employed as “drivers, driver’s helpers, loaders, or mechanics whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce”; and (3) “[n]ot covered by the small vehicle exception.”³⁵

Under DOL regulations, the MCA exemption applies to employees who

(1) [a]re employed by carriers whose transportation of passengers or property by motor vehicle is subject to [the Secretary of Transportation’s] jurisdiction under section 204 of the [MCA] . . . and (2) engage in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the [MCA].³⁶

The Supreme Court has found that the critical consideration in determining whether the MCA governs an employee (and so exempts him from the FLSA) is whether that employee’s activities “affect the safety of operation[s].”³⁷ The scope of the exemption is

³² Gary J. Edles, *Motor Carrier Act (1935)* (Encyclopedia.com, 2004), archived at <http://perma.cc/GD5Y-5PQQ>. See also John F. Meck Jr and Robert W. Bogue, *Federal Regulation of Motor Carrier Unification*, 50 *Yale L J* 1376, 1383 (1941).

³³ 29 USC § 213(b)(1).

³⁴ When first enacted, the statute was enforced not by the US Department of Transportation (DOT)—which was not created until decades later—but by a predecessor agency, the ICC. See *Hardman*, 35 *Transp L J* at 10 n 58 (cited in note 14) (noting that the “ICC was abolished and its functions were [] transferred . . . effective January 1, 1996”).

³⁵ Wage and Hour Division, *Fact Sheet #19: The Motor Carrier Exemption under the Fair Labor Standards Act (FLSA) *1* (DOL, Nov 2009), archived at <http://perma.cc/67SE-7FZR>. The small vehicle exception prevents the MCA exemption from applying to employees engaged in the operation of motor vehicles weighing ten thousand pounds or less. See *id.* at *2.

³⁶ 29 CFR § 782.2(a).

³⁷ *United States v American Trucking Associations, Inc.*, 310 US 534, 553 (1940).

determined on the basis of actual work done—not on the basis of the employee’s title.³⁸

In effect, the MCA exemption removes employees from the overtime-pay protections of the FLSA and provides the Secretary of Transportation broad powers to regulate their working conditions. Employees subject to the exemption have no claim for overtime pay under federal law.³⁹ But as this Comment discusses, they do enjoy the benefits of the DOT’s safety regime.⁴⁰

II. THE UNCERTAIN STATUS QUO: THE FAILURE OF COURTS AND THE DOL TO REACH A CONSENSUS ON THE APPLICATION OF THE MCA EXEMPTION

Debate over the proper application of the MCA exemption has arisen in cases in which employees allege that they worked more than forty hours in a given week and that their employer wrongfully denied them overtime pay under the FLSA.⁴¹ Since an employee-by-employee analysis and a classwide analysis may yield different results, how a court chooses to apply the MCA exemption can be outcome determinative.

This Part details the present legal regime surrounding the exemption’s application. Part II.A provides an overview of the precedent established by the Supreme Court in a trilogy of cases decided in 1947. Parts II.B and II.C examine how competing interpretations of the Court’s precedents have led to disagreement among four circuit courts. Finally, Part II.D analyzes the regulations governing the MCA exemption to conclude that the DOL has failed to provide definitive guidance on how the exemption should be interpreted.

A. Supreme Court Precedent

Following Congress’s enactment of the FLSA, tension between the FLSA itself and the MCA exemption developed quickly. In the

³⁸ See *Quinn v Earl Bray, Inc.*, 108 F Supp 355, 357 (WD Okla 1952).

³⁹ See *Driving Employers up the Wall: FLSA Overtime Pay Exemptions for FSEs Driving Trucks* (Boyar Miller, July 24, 2014), archived at <http://perma.cc/AF8X-TXX2> (“[T]he FLSA requires an employer to pay overtime compensation to any employee working more than 40 hours in a workweek. However, under the MCA, employees are exempt from FLSA overtime pay [if certain conditions are met].”).

⁴⁰ See Part III.B.2.

⁴¹ See, for example, *Levinson v Spector Motor Service*, 330 US 649, 651–55 & n 7 (1947). See also Part II.A.

1940 case *United States v American Trucking Associations, Inc.*⁴² a trucking-industry association petitioned the ICC to regulate qualifications and maximum hours for common carrier and contract carrier employees whose duties were not related to the safety of operations.⁴³ Looking to the legislative history of the FLSA, the Supreme Court held that the ICC's reach was "limited to those employees whose activities affect the safety of operation" and reasoned that "[t]he Commission [had] no jurisdiction to regulate the qualifications or hours of service of any others."⁴⁴ The *American Trucking* decision was followed by a line of cases in which employees challenged the extent of the ICC's jurisdiction.⁴⁵ By the mid-1940s, it was clear that resolution of this issue would require further Supreme Court review.

Unfortunately, in 1947 the Vinson Court issued three decisions that provided inconsistent guidance on how to apply the MCA exemption. In *Levinson v Spector Motor Service*,⁴⁶ the Court established the exemption's legitimacy, holding that employees subject to the MCA exemption are not entitled to overtime pay.⁴⁷ In *Pyramid Motor Freight Corp v Ispass*,⁴⁸ decided on the same day, the Court further determined that district courts have a role to play in deciding whether employees are subject to the exemption, holding that "[w]hether or not an individual employee is within any such classification is to be determined by judicial process."⁴⁹ The Court also suggested that an individual analysis may be required, reasoning that the job of the courts is to measure the "activities of each respondent" against the definitions

⁴² 310 US 534 (1940).

⁴³ *Id.* at 538, 541–42.

⁴⁴ *Id.* at 553.

⁴⁵ For example, in a 1945 case, a driver who engaged in interstate movements for "three hours a week" challenged a determination that he should be subject to the MCA exemption. *Walling v Comet Carriers*, 151 F2d 107, 111 (2d Cir 1945). The Second Circuit ruled in the driver's favor, holding him outside the exemption because of the minimal time involved in the affected operation. *Id.* Similarly, in a case two years prior, an employee challenged the meaning of the term "loader" for the purposes of the exemption. See *McKeown v Southern California Freight Forwarders*, 49 F Supp 543, 543 (SD Cal 1943). The district court ruled in favor the employee, holding that merely placing goods in a truck does not qualify an employee as an exempt "loader." *Id.*

⁴⁶ 330 US 649 (1947).

⁴⁷ *Id.* at 653 ("We hold that the Commission has that power and that § 13(b)(1) of the Fair Labor Standards Act therefore expressly excludes any such employee from a right to the increased pay for overtime service prescribed by § 7 of that Act.") (citation omitted).

⁴⁸ 330 US 695 (1947).

⁴⁹ *Id.* at 707.

established by the ICC.⁵⁰ Finally, in *Morris v McComb*,⁵¹ decided fewer than nine months later, the Court found that the MCA exemption applied to a class of full-time drivers, despite the fact that only 3 to 4 percent of the employees' services involved interstate commerce.⁵² Reaching a seemingly different conclusion than that of *Pyramid*, the Court considered the class of drivers as a whole, looking at their average work rather than at the specific activities of each individual driver.⁵³ Since this trilogy of early MCA-exemption cases, courts have from time to time considered the question whether, as *Pyramid* suggests, an individual analysis of each employee is required to determine if he is exempt from the FLSA, or whether, as *Morris* implies, a universal determination should be made based on the class of workers to which the employee belongs.

B. The Employee-by-Employee Approach

In the 1960s, the Seventh and Third Circuits addressed this issue and decided that an individual analysis of each employee was required to determine if the MCA exemption applies. In the mid-1990s, the Fourth Circuit reached the same conclusion when presented with a similar case.

1. The Seventh Circuit.

In *Goldberg v Faber Industries, Inc.*,⁵⁴ the Seventh Circuit disagreed with a district court's conclusion that an employer is "either fish or fowl under the Motor Carrier Act."⁵⁵ The circuit court concluded that for the MCA exemption to apply, an employee must engage in activities that affect the "safety of

⁵⁰ *Id.*

⁵¹ 332 US 422 (1947).

⁵² *Id.* at 423–24. See also *id.* at 432 n 11, quoting *Levinson*, 330 US at 687 (Rutledge dissenting):

[N]ot the amount of time an employee spends in work affecting safety, but what he may do in [that] time . . . determines the effect on safety. Ten minutes of driving by an unqualified driver may do more harm on the highway than a month or a year of constant driving by a qualified one.

The Court further reasoned that, in practical terms, the safety concerns facing a carrier who sent every driver on an interstate trip would be the same as if the carrier sent only some or most of its drivers on interstate trips. See *Morris*, 332 US at 433–34.

⁵³ See *Morris*, 332 US at 437–38 (finding that the level of interstate commerce for the class as a whole was sufficient to remove the drivers from the protection of § 7 of the FLSA).

⁵⁴ 291 F2d 232 (7th Cir 1961).

⁵⁵ *Id.* at 234.

operation[s]” in interstate commerce.⁵⁶ In so doing, the Seventh Circuit reversed the district court’s determination that an employee’s class of operations was controlling.⁵⁷ The district court had relied on *Morris* to reach this result, finding that because other drivers for the carrier unquestionably engaged in interstate commerce, the drivers at issue were also subject to the MCA exemption.⁵⁸ The Seventh Circuit found this reliance to be incorrect because “[t]he exemption in the [FLSA] depends upon the activities of the *individual* employees.”⁵⁹ The Seventh Circuit further asserted that the employees whom the Supreme Court appeared to hold exempt from overtime pay in *Morris* were exempt only because those “two drivers were subject, at any time, to be assigned to interstate trips, and [] at some time during the year they would, in all likelihood, share in the carrier’s interstate commerce trips.”⁶⁰ Thus, the Seventh Circuit held that while the nature of an employer’s operations may play a role, the application of the MCA exemption requires an individual determination of each employee’s work.⁶¹

2. The Third Circuit.

Four years after *Faber Industries*, the Third Circuit addressed the application of the MCA exemption in *Harshman v Well Service, Inc.*⁶² At issue in that case were the claims of three employees that their employer, a company involved in the transportation of oil-and-gas-well-servicing equipment across state lines, had allegedly failed to provide the employees with overtime pay as required under § 7 of the FLSA.⁶³ The Third Circuit, in a one-sentence order, affirmed the district court’s decision to bar the employees from recovering overtime wages.⁶⁴ In

⁵⁶ Id at 235.

⁵⁷ Id. The district court reasoned that “[i]f the Commission has power to control any part of a carrier’s operations, it has power to extend its control, through the carrier, over all employees who work within the controlled classification.” Id at 234, quoting *Mitchell v Faber Industries, Inc.*, 188 F Supp 370, 374 (SD Ill 1960).

⁵⁸ See *Faber Industries*, 188 F Supp at 374. The district court in *Faber Industries* concluded that because five of the carrier’s twenty drivers were admittedly engaged in interstate commerce, the other fifteen also fell in the same category. Id at 371–73.

⁵⁹ *Faber Industries*, 291 F2d at 235 (emphasis added).

⁶⁰ Id.

⁶¹ Id.

⁶² 355 F2d 206 (3d Cir 1965).

⁶³ *Harshman v Well Service, Inc.*, 248 F Supp 953, 954 (WD Pa 1964).

⁶⁴ *Harshman*, 355 F2d at 206 (“On review of the record we find no error. The Order of the District Court will be affirmed for the reasons so well stated in [its] opinion.”).

that decision, the district court had concluded that to determine MCA jurisdiction, a court must decide “whether *each* plaintiff, during the relevant time periods, performed duties which substantially affected the safety of operation.”⁶⁵ The district court had considered the activities of each individual plaintiff, and it had found both that none of the plaintiffs had a valid claim for overtime compensation and that all plaintiffs were subject to the MCA exemption because they each, “at all pertinent times, performed duties which substantially and directly affected the safety of [the employer’s] operation . . . in interstate commerce.”⁶⁶

3. The Fourth Circuit.

The question of what type of employee analysis is required to determine whether the MCA exemption applies did not receive significant attention again until the 1990s, when the Fourth Circuit addressed the discrepancy between *Morris* and *Pyramid* in *Troutt v Stavola Brothers, Inc.*⁶⁷ In *Troutt*, an employee responsible for loading race cars onto transports to be driven interstate sued his employer for overtime pay, asserting that his work did not affect the “safety of operation[s]” because it ultimately was not his personal responsibility to regularly ensure that the cars and other equipment were secured during the loading process.⁶⁸

The employer argued that the court should find that an employee is covered by the MCA, and therefore “exempt from the FLSA, if he is a member of *a class of employees* that regularly engage[s] in activities that affect[] the safety of interstate transportation.”⁶⁹ The Fourth Circuit instead affirmed the district court’s judgment for the employee, reasoning that the employer’s argument was “incomplete.”⁷⁰ Like the Seventh Circuit in *Faber Industries*, the Fourth Circuit sought to reconcile *Morris* with a rule of individual determinations, finding that while “an

⁶⁵ *Harshman*, 248 F Supp at 958 (emphasis added).

⁶⁶ *Id* at 960 (considering in turn the activities of each individual plaintiff).

⁶⁷ 107 F3d 1104 (4th Cir 1997).

⁶⁸ *Id* at 1106. The district court found, and the employer did not contest, that the plaintiff-employee performed activities affecting the “safety of operation[s]” (classified as the securing of “chocks” on transports) on only two occasions in more than three years of employment. *Id* at 1106, 1110.

⁶⁹ *Id* at 1107–08, citing Brief of Appellant, *Troutt v Stavola Brothers, Inc.*, Docket No 95-2736, *8 (4th Cir filed Sept 26, 1995) (available on Westlaw at 1995 WL 17043942) (quotation marks omitted) (emphasis in original).

⁷⁰ *Troutt*, 107 F3d at 1108.

employee's class of work plays an important role in the determination . . . when there is a factual question as to whether a particular employee is within one of these covered classifications[,] that question is decided in the judicial process and on an *individual* basis."⁷¹ The *Troutt* court focused on language from *Pyramid* suggesting that within a purported class of exempt employees—in *Troutt*, loaders—a specific employee's activity can be so "trivial, casual or occasional" that the employee retains the protections of the FLSA's overtime rule.⁷² The court further distinguished *Morris* from *Pyramid* by asserting that the issue in *Morris* was "not whether an employee's activities affected [the] safety of operation" but rather "the very different question of whether the motor carrier provided transportation in interstate commerce."⁷³

C. The Fifth Circuit's Classwide Approach

More recently, this issue has received noteworthy consideration in the Fifth Circuit, as that court has found on two occasions that an employee-by-employee analysis is inappropriate. In both *Songer v Dillon Resources, Inc*⁷⁴ and *Allen v Coil Tubing Services, LLC*,⁷⁵ the Fifth Circuit, breaking from the Third, Fourth, and Seventh Circuits, found that a classwide analysis was necessary to determine whether employees were owed overtime pay under § 7 of the FLSA.⁷⁶ In *Songer*, a group of employees argued that their employer had to demonstrate that each driver personally transported property by motor vehicle across state lines for the MCA exemption to apply. The court disagreed, finding instead that "if drivers can be reasonably expected to perform interstate transport, the MCA exemption applies."⁷⁷ In *Allen*, the Fifth Circuit took an even stronger stance, holding that a classwide analysis was appropriate because *Songer* effectively foreclosed an employee-by-employee analysis.⁷⁸ The *Allen* opinion was not unanimous, however, and Judge James Dennis

⁷¹ *Id.* (emphasis in original).

⁷² *Id.*, quoting *Pyramid*, 330 US at 708.

⁷³ *Troutt*, 107 F3d at 1109 (concluding that *Morris* did not overrule *Pyramid* and that the issue in the case at hand was more like the issues in *Pyramid* and *Levinson* than the issue in *Morris*).

⁷⁴ 618 F3d 467 (5th Cir 2010).

⁷⁵ 755 F3d 279 (5th Cir 2014).

⁷⁶ *Songer*, 618 F3d at 474; *Allen*, 755 F3d at 284.

⁷⁷ *Songer*, 618 F3d at 474.

⁷⁸ *Allen*, 755 F3d at 284.

argued in a lengthy dissent that the majority went against the Supreme Court's precedent in *Pyramid* and "misinterpreted and misapplied" federal regulations concerning the FLSA's overtime requirements.⁷⁹ In light of the majority's decision to grant and affirm summary judgment for the employer, Dennis lamented that his "colleagues mistakenly [] failed to require the employer to carry its heavy burden under its affirmative MCA exemption defense to show, on an *individual* basis, that each employee's job activities demonstrate[d] that he [was] exempt from FLSA overtime protection."⁸⁰

D. Current DOL Regulations Governing the Application of the MCA Exemption

The *Allen* majority asserted that the DOL regulations governing the application of the MCA exemption specifically refer to the evaluation not of the activities of the individual employee but rather of the "class of work involved in [an] employee's job."⁸¹ A closer look at these regulations, however, reveals a more nuanced picture.

In 1948, the DOL, as the agency charged with enforcing the FLSA,⁸² promulgated regulations delineating the requirements for the MCA exemption in general.⁸³ The DOL's regulations have been amended only slightly over the years, such that today they are almost identical to the version originally enacted.⁸⁴ The regulations reflect "the construction of the law [regarding the MCA exemption] which the [DOL] believe[s] to be correct in [] light of the decisions of the courts, [and] the Interstate Commerce Commission."⁸⁵

Notably, these regulations do not mandate either an individual or a classwide analysis. Instead, they provide substantial deference to judicial decisionmaking and past precedent,⁸⁶ while also acknowledging the DOL's power to make classification determinations.⁸⁷ However, 29 CFR § 782.2 contains references to

⁷⁹ Id at 288 (Dennis dissenting).

⁸⁰ Id at 290 (Dennis dissenting) (emphasis added).

⁸¹ Id at 286 (emphasis omitted).

⁸² See 29 USC § 204.

⁸³ See 29 CFR § 782.0 et seq.

⁸⁴ See *Allen*, 755 F3d at 302–03 (Dennis dissenting).

⁸⁵ 29 CFR § 782.0(b).

⁸⁶ See 29 CFR § 782.2(b)(2) (noting that "whether or not an individual employee is within any such classification *is to be determined by judicial process*") (emphasis added).

⁸⁷ See 29 CFR § 782.2(b)(1):

The U.S. Supreme Court has accepted the Agency determination, that activities of this character are included in the kinds of work . . . defined as the work

both an individual analysis⁸⁸ and a classwide analysis.⁸⁹ Further, the regulations cite both *Faber Industries* (the Seventh Circuit case mandating an employee-by-employee analysis)⁹⁰ and *Morris* (the Supreme Court case used to justify a classwide analysis).⁹¹

It is useful here to compare the MCA exemption to the application of a different exemption to the FLSA. Perhaps the FLSA's best-known exemption is the white-collar exemption. Under § 13(a)(1) of the FLSA, there is an exemption from the minimum wage and overtime-pay requirements for employees in executive, administrative, professional, or outside-sales capacities, as well as for computer professionals.⁹² The DOL has established two separate tests, both of which must be satisfied to qualify for the white-collar exemption: the salary-basis test and the duties test.

The salary-basis test specifies the minimum salary level for executive, administrative, and most professional employees to be exempt—\$23,660 per year.⁹³ To qualify for the exemption, employees generally must be paid at least \$455 per week on a salary basis.⁹⁴ Being paid on a “salary basis” means that an employee regularly receives a predetermined amount of compensation

of drivers, driver's helpers, loaders, and mechanics . . . and that no other classes of employees employed by such carriers perform duties directly affecting such safety of operation.

(quotation marks omitted).

⁸⁸ See, for example, 29 CFR § 782.2(b)(3) (“On the other hand, where the continuing duties of the employee's job have no substantial direct effect on such safety of operation . . . the exemption will not apply to *him* in any workweek so long as there is no change in *his duties*.”) (emphasis added); 29 CFR § 782.2(b)(4) (“Where the same employee of a carrier is shifted from one job to another . . . the application of the exemption to him in a particular workweek is tested by application of the above principles to the job or jobs in which *he is employed* in that workweek.”) (emphasis added).

⁸⁹ See, for example, 29 CFR § 782.2(a) (“The exemption of an employee from the hours provisions of the [FLSA] depends both on the *class* to which his employer belongs and on the *class of work* involved in the employee's job.”) (emphasis added); 29 CFR § 782.2(b)(3) (indicating that when “a member of a *group of drivers* . . . is likely to be [] called upon in the ordinary course of his work . . . the rule applies *regardless of the proportion of the employee's time* or of his activities which is actually devoted to such safety-affecting work in the particular workweek”) (emphasis added).

⁹⁰ 29 CFR § 782.2(c)(2), citing *Faber Industries*, 291 F2d 232.

⁹¹ 29 CFR § 782.2(c)(1), citing *Morris*, 332 US 422.

⁹² 29 USC § 213(a)(1). See also 29 CFR Part 541 (defining and delimiting the terms of the white-collar exemption).

⁹³ See 29 CFR § 541.600; 29 CFR § 541.700.

⁹⁴ 29 CFR § 541.100(a)(1).

each pay period on a weekly (or less frequent) schedule.⁹⁵ “The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee’s work,” and an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked.⁹⁶

To qualify for the white-collar exemption, an employee’s job duties must additionally meet the duties test established by DOL regulations. The duties test considers the employee’s “primary duty”—the “principal” or “most important duty that the employee performs.”⁹⁷ The determination of whether an employee is exempt is made on a *case-by-case* basis with consideration given to a number of factors relating to the overall character of the employee’s job.⁹⁸ For example, an employee qualifying for the executive white-collar exemption must have a primary duty of either “managing the enterprise” or at least “managing a customarily recognized department or subdivision of the enterprise,” and the “employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent[s].”⁹⁹ The employee must also have the authority to hire, fire, or otherwise influence the advancement or change of status of other employees.¹⁰⁰

Both of the white-collar exemption tests consider either the individual salary or individual duties of the employee. To be exempt from overtime pay, an employee’s specific compensation and work activities must meet the standards established by the DOL.¹⁰¹ Thus, it is evident that the DOL regulations require the white-collar exemption to be applied on an employee-by-employee basis. In contrast to the MCA exemption, there is little

⁹⁵ 29 CFR § 541.602(a).

⁹⁶ Wage and Hour Division, *Fact Sheet #17G: Salary Basis Requirement and the Part 541 Exemptions under the Fair Labor Standards Act (FLSA)* *1 (DOL, July 2008), archived at <http://perma.cc/LUB3-LF7M>.

⁹⁷ 29 CFR § 541.700(a) (defining the term “primary duty”).

⁹⁸ 29 CFR § 541.700(a).

⁹⁹ Wage and Hour Division, *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees under the Fair Labor Standards Act (FLSA)* *1 (DOL, July 2008), archived at <http://perma.cc/Y3FM-LHEU>.

¹⁰⁰ 29 CFR § 541.100. Similarly, an employee qualifying under the administrative white-collar exemption must have a primary function of “performing office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers.” 29 CFR § 541.200(a)(2).

¹⁰¹ See, for example, *White Collar Exemptions* (West Virginia Division of Personnel), archived at <http://perma.cc/ASS2-AUT6>.

room for controversy over *how* the white-collar exemption should be applied.¹⁰²

III. COURTS SHOULD USE A CLASSWIDE ANALYSIS TO APPLY THE MCA EXEMPTION

This Part focuses on resolving the controversy over the application of the MCA exemption, and it calls for courts to adopt a classwide method of analysis. Part III.A first explains why congressional intent demands that courts follow a classwide approach. Part III.B then discusses why employee-safety and public-interest considerations favor placing employees under the jurisdiction of the Secretary of Transportation.

A. Understanding the Congressional Goal of Safety

Why did Congress create the MCA exemption? Why did Congress determine that it was necessary to exempt certain groups of motor carrier employees from the overtime-pay protections of the FLSA? The Fifth Circuit's decisions in *Songer* and *Allen* created a circuit split.¹⁰³ Courts on both sides of the split cite Supreme Court precedent and use factual circumstances to determine whether their cases are more like *Pyramid* (requiring an individual analysis) or more like *Morris* (permitting a classwide analysis). This approach is problematic, however, because the distinction is not so clear-cut. Consider the decision in *Pyramid*. As previously noted, multiple circuits have used *Pyramid* to justify an individual analysis. In that case, the Supreme Court remanded to the district court for a determination of "whether or not the activities of *each respondent* consisted . . .

¹⁰² Most cases involving determinations about the applicability of the white-collar exemption require complex, fact-intensive assessments of an employee's individual skills and responsibilities. For example, the district court in *Allen* also considered—and rejected—claims brought under the white-collar exemption. *Allen v Coil Tubing Services, LLC*, 846 F Supp 2d 678, 706–12 (SD Tex 2012) (addressing the salary and duties of the specific employees). Compare the court's analysis of the white-collar exemption with its MCA-exemption analysis, in which the court specifically noted that an individual-employee analysis was not appropriate, because "the applicability of the MCA Exemption should be determined as to [the] group as a whole." *Id.* at 695.

¹⁰³ In *Allen*, Judge Dennis lamented that the majority's opinion created a split with the decisions of "at least three of [the court's] sister circuits." *Allen*, 755 F3d at 304–05 (Dennis dissenting), citing *Harshman v Well Service, Inc.*, 248 F Supp 953, 958 (WD Pa 1964), *Troutt*, 107 F3d at 1107–10, and *Faber Industries*, 291 F2d at 234–35. See also Adam Kielich, *Fifth Circuit Deals Blow to Overtime Pay with MCA Exemption* (The Kielich Law Firm, July 1, 2014), archived at <http://perma.cc/W2M7-NS8A> (describing the application of the MCA exemption as "a seemingly well-settled issue" until the *Allen* decision).

[of] that of a loader of freight for an interstate common carrier by motor vehicle.”¹⁰⁴ It is possible, however, to construe this language to suggest that an individual analysis is *not* required. For instance, the employer in *Allen* argued that *Pyramid* actually supported its position, reasoning that “while an individual inquiry may be required *to determine whether an employee belongs to a class of employees*, once that determination is made, no further individual inquiry is warranted.”¹⁰⁵

In general, courts addressing this issue agree on a common historical narrative: in *Pyramid* and *Morris*, the Vinson Court determined both that the MCA exemption applies only to employees who are engaged in job activities that affect the “safety of operation[s]” and that it is the duty of courts to make this determination through the “judicial process.”¹⁰⁶ Much of the current disagreement, however, results from the use and meaning of specific words, such as “each” or “class of work,” in the 1947 trilogy of cases.¹⁰⁷ This disagreement almost explicitly pits the Court’s decision in *Pyramid* against its decision in *Morris*. Though some judges (for example, Dennis) see the two as in harmony,¹⁰⁸ the circuit split is primarily due to competing interpretations of these two cases.

All four circuit courts to weigh in have largely overlooked the first case of the 1947 trilogy, *Levinson*.¹⁰⁹ In *Levinson*, the Supreme Court not only held that whether particular job activities affect the safety of operations is “squarely within the jurisdiction of the Commission”¹¹⁰ but also conducted a detailed analysis of Congress’s intent in enacting the MCA, enacting the FLSA, and preserving the MCA exemption within the FLSA. Importantly, while both *Pyramid* and *Morris* concerned matters of factual interpretation, *Levinson* directly addressed the underlying law.

¹⁰⁴ *Pyramid*, 330 US at 698 (emphasis added and quotation marks omitted).

¹⁰⁵ Appellee’s Brief, *Allen v Coil Tubing Services, LLC*, Docket No 12-20194, *42 (5th Cir filed Aug 6, 2012) (available on Westlaw at 2012 WL 3517432) (“*Allen* Appellee Brief”) (emphasis added), citing *Pyramid*, 330 US at 698.

¹⁰⁶ *Pyramid*, 330 US at 707.

¹⁰⁷ *Id* at 698.

¹⁰⁸ See, for example, *Allen*, 755 F3d at 300 (Dennis dissenting) (“Importantly, *Morris* also reaffirmed *Pyramid*.”).

¹⁰⁹ For example, *Faber Industries* does not cite *Levinson* at all. Other cases cite *Levinson* only in reference to historical background. See, for example, *Allen*, 755 F3d at 298–99.

¹¹⁰ *Levinson*, 330 US at 669.

Therefore, given the current uncertainty over the exemption's application, this decision warrants a closer look.¹¹¹

In *Levinson*, the Court granted certiorari specifically due to the pressing need to interpret the MCA in the context of the FLSA.¹¹² The Court began its analysis by looking at the historical development of the “congressional safety program in interstate commerce” up to and including the enactment of the MCA and FLSA.¹¹³ The Court made it clear that there is no concurrent or overlapping jurisdiction between the MCA and the FLSA—either DOL regulations deem an employee to be subject to the jurisdiction of the ICC (now the Secretary of Transportation), or the employee is owed overtime under the FLSA.¹¹⁴ The Court reasoned that Congress could have legislated otherwise, as it

might have permitted both Acts to apply. There is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done in excess of the limits set in [the FLSA].¹¹⁵

However, the Court determined that Congress had deliberately chosen not to do so.¹¹⁶ The *Levinson* Court additionally noted that the word “employees” as used in the MCA should not be given its broadest meaning, suggesting that the exemption is based on the nature of an employee's duties rather than on the proportion of time spent performing such duties.¹¹⁷

¹¹¹ While this Comment refers to *Levinson* as the “first” case in the MCA-exemption trilogy, the Court decided both *Levinson* and *Pyramid* on March 31, 1947. See Part II.A. Further, the Court's reasoning in *Pyramid* and *Morris* does not overrule the authority of its decision in *Levinson*.

¹¹² *Levinson*, 330 US at 654.

¹¹³ *Id.* at 657.

¹¹⁴ *Id.* at 661 (“Congress has prohibited the overlapping of the jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service.”). See also *Morris*, 332 US at 437–38 (noting that *Levinson* considered and rejected the possibility of concurrent jurisdiction); *id.* at 432 (“The Fair Labor Standards Act . . . has recognized and does not restrict the Commission's power over the safety of operation under the Motor Carrier Act.”).

¹¹⁵ *Levinson*, 330 US at 661.

¹¹⁶ *Id.* In dissent, however, Justice Wiley Rutledge advocated for concurrent jurisdiction between the FLSA and MCA. *Id.* at 685–87 (Rutledge dissenting) (accepting the “safety first” view of the ICC's power but arguing that there is no necessary inconsistency between enforcing ICC regulations on maximum hours of service for safety purposes and requiring compliance with the FLSA's provisions for overtime pay).

¹¹⁷ See *id.* at 681.

This reasoning should not be read, however, to imply that the *Levinson* Court explicitly favored an approach that would make the MCA exemption applicable on an employee-by-employee basis. Importantly, the plaintiff in *Levinson* was a “terminal foreman” whose duties included directing the work of freight loaders.¹¹⁸ The Court found that because the “safety of operation[s]” is also affected by the activities of mechanics, loaders, and driver’s helpers, the exemption itself is *not limited* to drivers that “directly affect the safety of operation of motor vehicles in interstate or foreign commerce.”¹¹⁹ Furthermore, the Court found that the ICC’s power to regulate such employees was *not limited* to those employees whose work “exclusively” deals with the safety of operations.¹²⁰ Therefore, the use of individual-specific words, such as “[h]is activities” and “his qualifications,”¹²¹ should not be viewed as a limiting principle on the scope of the exemption. In fact, the Court asserted that the exemption must apply “regardless of whether or not in any particular week [employees] may have devoted more hours and days to activities not affecting safety of operation than they may have devoted to those affecting such safety of operation.”¹²² It is the existence, rather than the exercise, of the ICC’s authority that determines the scope of the exemption.¹²³

The *Levinson* Court also provided valuable insight into Congress’s objective in creating the MCA exemption:

Congress, in the Fair Labor Standards Act, does not attempt to impinge upon the scope of the Interstate Commerce Commission safety program. It accepts that program as expressive of a pre-existing congressionally approved project. Section 13(b)(1) of the Fair Labor Standards Act thus requires that we interpret the scope of § 204 of the Motor Carrier Act in accordance with the purposes of the Motor Carrier Act and the regulations issued pursuant to it.¹²⁴

The obvious goal here, the Court found, is to put “safety first,”¹²⁵ and therefore the purpose of the FLSA’s MCA exemption is not

¹¹⁸ *Id.* at 654.

¹¹⁹ *Levinson*, 330 US at 671–74.

¹²⁰ *Id.* at 660, 678–80.

¹²¹ *Id.* at 679 (emphasis added).

¹²² *Id.* at 675.

¹²³ *Levinson*, 330 US at 678–79 (reasoning that the exemption should apply even if the agency has not actually exercised its authority to regulate employment).

¹²⁴ *Id.* at 677.

¹²⁵ *Id.*

to interfere with but rather “to give full recognition to the safety program of the Motor Carrier Act.”¹²⁶ The district court in *Harshman* later noted that, as “the Supreme Court indicated in the [*Levinson*] case, Congress apparently thought it even more humanitarian to give the Interstate Commerce Commission extensive power to avoid slaughter on the highways.”¹²⁷

Levinson is not the only instance in which the Court, addressing the MCA exemption, found a legislative purpose of ensuring that the MCA (rather than the FLSA) covered the employees in question. This goal is also evident in the Court’s *American Trucking* decision, in which the majority, addressing the scope of the ICC’s jurisdiction, noted that:

While efficient and economical movement in interstate commerce is obviously a major objective of the [MCA], there are numerous provisions which make it clear that Congress intended to exercise its powers in the *non-transportation phases* of motor carrier activity. Safety of operation was constantly before the committees and Congress in their study of the situation.¹²⁸

Similarly, in *Morris*, the Court recognized that “Congress has gone out of its way to make this purpose clear in cases comparable to the one before [it],” and that it did this “by making the power of the Commission, under [the MCA], expressly applicable . . . to transportation in interstate commerce.”¹²⁹ The Court concluded that “[Congress] has made the Commission’s power over safety requirements expressly applicable to these operations, even though, at the same time, Congress has exempted [the operations] from general regulatory control.”¹³⁰

Thus, in analyzing the legislative history of the MCA exemption, the Court has consistently reasoned that safety considerations are the underlying purpose for removing some employees from the coverage of the FLSA. A direct review of the MCA’s legislative

¹²⁶ *Id.* at 681.

¹²⁷ *Harshman*, 248 F Supp at 959–60. The court further noted that in reconciling the FLSA and MCA, “a court must think in terms of safety first” and “must, in accord with [*Levinson*’s] teaching, give full effect to the safety program to which Congress has attached primary importance, even to the corresponding exclusion by Congress of certain employees from the benefits of the compulsory overtime pay provisions of the [FLSA].” *Id.* at 959 (quotation marks and emphasis omitted).

¹²⁸ *American Trucking*, 310 US at 538–39 (emphasis added and citations omitted).

¹²⁹ *Morris*, 332 US at 435.

¹³⁰ *Id.* at 436.

history further supports this proposition—in fact, the Congressional Record itself notes that the bill’s Senate sponsor amended portions of the text “to confer power on the [ICC] to establish reasonable requirements with respect to the qualifications and maximum hours of service” in order to “make the highways more safe.”¹³¹

Moreover, it is important to note that since the passage of the FLSA, there have been other instances in which Congress could have affirmatively acted to limit the DOT’s regulatory power but chose not to do so. For example, in 1984, Congress amended the MCA to require that the DOT “consider the costs and benefits” of revising the statute, but it did not limit the jurisdiction of the Secretary of Transportation.¹³² Instead, Congress made it clear that unless the Secretary of Transportation amended existing regulations, the status quo would remain in effect.¹³³ In a subsequent legal challenge brought in the United States District Court for the Eastern District of Pennsylvania, a group of field engineers for a computer supplier asserted that they were due overtime compensation under the FLSA.¹³⁴ The district court found for the employer, however, determining that the employees were subject to the MCA exemption and noting that the fact “[t]hat the DOT has not exercised its power to regulate does not mean that such power does not exist.”¹³⁵

Thus, not only has Congress kept the MCA exemption in place—despite significant changes to the original 1935 statute—but it has also kept the text of the original exemption almost

¹³¹ *American Trucking*, 310 US at 547 n 32, quoting *Regulation of Interstate Traffic by Motor Carriers*, 74th Cong, 1st Sess, in 79 Cong Rec 5652 (Apr 15, 1935) (statement of Sen Burton Wheeler, Chairman of the Committee on Interstate Commerce). For further discussion on the legislative history of the MCA, see George, 21 Cornell L Rev at 263–75 (cited in note 30). For further discussion of Congress’s intent to exclude employees subject to the MCA from the FLSA, see John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 L & Contemp Probs 464, 484–85 (1939).

¹³² 49 USC § 31502(d). See also *Friedrich v U.S. Computer Services*, 974 F2d 409, 414 (3d Cir 1992).

¹³³ See 49 USC § 31136(d) (“If the Secretary does not prescribe regulations on commercial motor vehicle safety under this section, [the] regulations on commercial motor vehicle safety prescribed by the Secretary . . . and in effect on October 30, 1984, shall be deemed . . . to be regulations prescribed by the Secretary under this section.”).

¹³⁴ See *Friedrich v U.S. Computer Services*, 787 F Supp 449, 450–51 (ED Pa 1991).

¹³⁵ *Id* at 452. See also *id* at 453 (“Thus, the DOT’s failure to regulate, or more precisely, to find regulation necessary in a particular area, does not, of itself, mean that the DOT is without ‘power’ to regulate, within the meaning of 29 U.S.C. § 213(b)(1).”). The *Friedrich* district court classified the field engineers as “drivers” subject to the MCA exemption because they engaged in interstate commerce, driving to customer sites in multiple states “to install, maintain, or repair computer hardware.” *Id* at 450.

entirely unchanged.¹³⁶ The fact that Congress has not limited the DOT's jurisdiction under the MCA to encompass fewer activities than those "affecting the safety of operation[s],"¹³⁷ despite ample opportunity to do so, is evidence that Congress prefers the employees in question to be covered by the MCA.

In preserving the MCA's jurisdiction within the FLSA, therefore, Congress prioritized safety above overtime pay.¹³⁸ The issue, then, is which method of application better serves this goal. It is difficult (if not impossible) to foresee a situation in which a class-wide analysis would not yield a greater (or at least equal) number of employees subject to the exemption than an analysis of each specific employee. To demonstrate, consider the following illustrations involving three employees in the same class.

FIGURE 1. INDIVIDUAL ANALYSIS

Employee	Involved in Interstate Commerce	Subject to MCA Exemption
Driver A	Directly	Yes
Driver B	Directly	Yes
Driver C	On call or potentially available	No

FIGURE 2. CLASSWIDE ANALYSIS

Employee	Involved in Interstate Commerce	Subject to MCA Exemption
Driver A	Directly	Yes
Driver B	Directly	Yes
Driver C	On call or potentially available	Yes

¹³⁶ One notable exception is the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), Pub L No 109-59, 119 Stat 1144 (2005). Since its passage, SAFETEA-LU has had the effect of exempting from DOT jurisdiction many common carriers and delivery-service vehicles. See Hardman, 35 *Transp L J* at 19 (cited in note 14).

¹³⁷ 29 CFR § 782.2(a).

¹³⁸ For further discussion of this prioritization, see Part II.B.2.

In this example, all three employees belong to the same class of workers (drivers)¹³⁹ but only two of the employees (Driver A and Driver B) are directly involved in activities affecting the safety of interstate transportation. The third employee (Driver C) could potentially be involved in such interstate commerce, but an analysis of his individual duties would reveal that he does not even meet the minimum “reasonable expectation” standard outlined in *Morris*.¹⁴⁰ Thus, because a classwide approach reaches more employees, it is the more effective method of judicial analysis for achieving the congressional goal of safety.

B. Why a Classwide Analysis Better Serves Employees and Protects the Interests of the General Public

In *American Trucking*, the Supreme Court noted that the MCA exemption in the FLSA “[brings] sharply into focus the coverage of employees by [the] Motor Carrier Act.”¹⁴¹ As previously discussed, safety (and not overtime pay) appears to have been Congress’s primary goal in creating the MCA exemption, suggesting that a classwide analysis may be the more appropriate standard. The current circuit split further signals that it is unclear whether the MCA exemption has *always* turned on the circumstances of each individual employee’s job, as suggested by Dennis’s dissent in *Allen*.¹⁴² Therefore, it is also imperative to consider which method of analysis provides a superior means of protecting employees while also serving the interests of the general public.

1. Employers and employees disagree on which method of analysis should apply.

To be clear, there is no overlapping jurisdiction between the FLSA and the MCA¹⁴³—either DOL regulations deem an

¹³⁹ Note that while this example uses drivers as the designated class, it is equally applicable to the other possible classes of workers covered under 29 CFR § 782.2(b)(3): driver’s helpers, loaders, and mechanics.

¹⁴⁰ Recall that in *Morris*, the Court found that the ICC had the power to establish qualifications and maximum hours of service for workers employed by a motor vehicle carrier whose interstate business consisted of only 3 to 4 percent of its total business. See Part II.A. See also 29 CFR § 782.2(b)(3) (defining the standard as whether an employee could reasonably have been expected to be “called upon in the ordinary course of his work to perform . . . safety-affecting activities”).

¹⁴¹ *American Trucking*, 310 US at 540.

¹⁴² See *Allen*, 755 F3d at 304 (Dennis dissenting).

¹⁴³ See Part II.A.

employee to be subject to the jurisdiction of the Secretary of Transportation, or the employee is eligible for overtime pay under the FLSA.¹⁴⁴ To be included within the MCA exemption, an employer must be a motor vehicle carrier “engaged in interstate or foreign commerce.”¹⁴⁵ Likewise, the employer’s employees must also be engaged in interstate commerce and their employment must directly affect the safety of operation of vehicles.¹⁴⁶

Predictably, employers and employees have differing opinions on which method of analysis should apply. Employers, in general, favor a classwide analysis. In *Allen*, for example, the employer argued that the only “individual analysis” required with respect to the MCA exemption is a determination of whether an individual employee actually belongs to such a “class of employees.”¹⁴⁷ The general nature of an employer’s argument is typically that “it is the character of the activities, rather than the proportion of the employee’s time or activities, that determines the jurisdiction of the Secretary of Transportation under the MCA.”¹⁴⁸ Hence, it is not the employees’ individual experiences that are determinative; the deciding factor is what the employer reasonably expects of its employees.¹⁴⁹

Rather than focus on the MCA’s safety goal, employers cite the more practical concern of business necessity. From an employer’s perspective, the important interests (aside from saving money on overtime) are predictability and flexibility in scheduling. Thus, the dispositive factors indicating that the MCA exemption applies should be (1) the possibility of interstate travel and (2) whether any member of a group of employees could reasonably be expected to engage in interstate commerce.¹⁵⁰

¹⁴⁴ See *Gerard v Northern Transportation, LLC*, 146 F Supp 2d 63, 65 (D Me 2001). See also *Levinson*, 330 US at 684.

¹⁴⁵ *Barefoot v Mid-America Dairymen, Inc*, 1994 WL 57686, *2 (5th Cir) (noting that “[a] carrier engages in interstate commerce by either actually transporting goods across state lines or transporting within a single state goods that are in the flow of interstate commerce”).

¹⁴⁶ *Id* at *3.

¹⁴⁷ *Allen* Appellee Brief at *25 (cited in note 105).

¹⁴⁸ *Id* at *26, quoting *Barefoot*, 1994 WL 57686 at *3 (quotation marks omitted).

¹⁴⁹ See *Allen* Appellee Brief at *32–33 (cited in note 105). Courts have even found that employees who themselves *never drove interstate* can be subject to the MCA exemption. See *id*, citing *Songer*, 618 F3d at 473–76, *Starrett v Bruce*, 391 F2d 320, 323 (10th Cir 1968), and *Garza v Smith International, Inc*, 2011 WL 835820, *11 (SD Tex).

¹⁵⁰ See, for example, Brief of Defendants - Appellees, *Songer v Dillon Resources, Inc*, Docket No 09-10803, *41–42 (5th Cir filed Nov 16, 2009) (available on Westlaw at 2009 WL 6482641) (arguing, for the employers, that “the record firmly establishes that Appellants transported or could have been called upon to transport goods in interstate

Importantly, the Court in *Morris* directly supported this consideration. There, addressing a legal challenge that it considered to be “a practical situation such as may confront any common carrier engaged in a general [interstate] business,”¹⁵¹ the Court reasoned that it is “the character of the activities rather than the proportion of either the employee’s time or of his activities that determines the actual need for the Commission’s power to establish reasonable requirements with respect to qualifications, maximum hours of service, safety of operation and equipment.”¹⁵² Thus, an employer’s operative argument is that the MCA exemption applies regardless of whether an individual employee actually happens to perform work directly affecting the “safety of operations” in a given workweek.¹⁵³

Employees, in contrast, generally advocate for an individual analysis, and their primary argument tends to be a functional one. For example, in *Allen*, the employees countered the employer’s argument by asserting that “[s]ince the real world of employment often does not divide neatly into two groups—those who always drive interstate versus those who never do—the regulations [should] address . . . the various situations of workers.”¹⁵⁴ Thus, employees often demand that their individual circumstances be taken into account, reasoning that the “only way” a court can know which statute applies is to “perform an individual analysis of each employee’s work duties and assignments.”¹⁵⁵

2. The benefits that employees receive from the MCA’s safety protections outweigh the availability of overtime compensation under the FLSA.

As the Supreme Court explained in *Levinson*, the disjuncture between the MCA exemption and the general FLSA rule—which both have the objective of limiting the total number of

commerce”); *id.* at *44 (asserting that evidence in the record that certain individual employees actually crossed state lines or engaged in interstate transportation was unnecessary because those employees “could have been called upon to transport interstate goods at any time during their employment”).

¹⁵¹ *Morris*, 322 US at 434.

¹⁵² *Id.* at 431–32.

¹⁵³ In addition, in *Crooker v Sexton Motors, Inc.*, 469 F2d 206 (1st Cir 1972), the First Circuit upheld a 1968 DOL regulation establishing that the MCA exemption should be applied on a week-by-week basis. *Id.* at 210–11.

¹⁵⁴ Brief for Appellants, *Allen v Coil Tubing Services, LLC*, Docket No 12-20194, *26 (5th Cir filed June 18, 2012) (available on Westlaw at 2012 WL 2374318).

¹⁵⁵ *Id.* at *30.

hours worked—occurs because the MCA exemption allows for “police regulation” to promote safety whereas the general FLSA overtime rules function as a “remedial measure” deriving from an “economic and social program.”¹⁵⁶ While the FLSA seeks to deter employers from asking for overtime by forcing them to pay more for such work, the MCA exemption looks to limit the incentive for employees to seek overtime themselves.¹⁵⁷ Because “Congress has established a boundary line dividing the territories of authority” between the DOL and the DOT with regard to the regulation of employment practices,¹⁵⁸ the result has been that courts from the 1940s onward have struggled with how the “safety through absolute maximums” approach endorsed by the MCA exemption balances with the humanitarian aim of the FLSA.¹⁵⁹

A question left open, however, is the manner in which employees *benefit* from the MCA exemption. When under the jurisdiction of the Secretary of Transportation, employees give up the overtime-pay protections of the FLSA. Unaddressed by employees and their counsel is the issue of what employees get in return: the safeguards of the MCA’s alternative safety regime. The DOT is authorized to administer the MCA and has set out its “[t]ransportation policy” goals.¹⁶⁰ Notably, 49 USC § 13101(a) explicitly states that “it is the policy of the United States Government to . . . promote safe, adequate, economical, and efficient transportation [and] to encourage sound economic conditions in transportation, including sound economic conditions among carriers.”¹⁶¹ Section 13101(a) goes on to note that it is the federal government’s role to “enable efficient and well-managed carriers to earn adequate profits, attract capital, and *maintain fair wages and working conditions*.”¹⁶²

The Federal Motor Carrier Safety Administration (FMCSA) enforces the alternative safety regime of the MCA. Established within the DOT pursuant to the Motor Carrier Safety Improve-

¹⁵⁶ *Levinson*, 330 US at 657.

¹⁵⁷ See *id.* See also Walck, *Overregulation or Fair Interpretation* at *5 (cited in note 13).

¹⁵⁸ *Gerard*, 146 F Supp 2d at 66.

¹⁵⁹ See Parts II.A–C.

¹⁶⁰ 49 USC § 13101.

¹⁶¹ 49 USC § 13101(a)(1)(B)–(C).

¹⁶² 49 USC § 13101(a)(2)(F) (emphasis added).

ment Act of 1999,¹⁶³ the FMCSA promotes “safety in motor carrier transportation” by enforcing safety regulations, targeting high risk carriers, improving safety information systems, strengthening motor vehicle operating standards, and increasing safety awareness.¹⁶⁴ The greatest protection that DOT jurisdiction provides for employees is the FMCSA’s ability to initiate enforcement actions against and impose sanctions on employers who violate safety regulations. FMCSA enforcement cases can be initiated following “compliance reviews, complaint investigations, terminal audits, roadside inspections, or other investigations.”¹⁶⁵ Data collected by the FMCSA reveal that it closed 35,558 enforcement cases between 2009 and 2014, settling with employers for a total amount of \$180,172,577.¹⁶⁶ The FMCSA specifically provides for employee safety by (1) regulating hours of service¹⁶⁷ and (2) providing rules regulating employer behavior and compliance.¹⁶⁸ The FMCSA also provides whistleblower protection from retaliation for drivers and other individuals who work for commercial motor carriers and report unsafe working conditions.¹⁶⁹

Thus, although it does not require overtime pay, the DOT’s safety program *is* designed to consider the actual well-being of covered employees. The benefits that employees receive from the MCA’s due care protections and from FMCSA oversight are powerful deterrents to employers who might otherwise expose their workers to hazardous labor conditions. FMCSA regulations also work to protect against gamesmanship by trucking compa-

¹⁶³ Pub L No 106-159, 113 Stat 1748, codified as amended in various sections of Titles 5, 23, and 49.

¹⁶⁴ 49 USC § 113(b). See also Federal Motor Carrier Safety Administration, *About Us* (DOT, Mar 31, 2014), archived at <http://perma.cc/4L7N-V2XQ>.

¹⁶⁵ Federal Motor Carrier Safety Administration, *Civil Penalties* (DOT, July 29, 2015), archived at <http://perma.cc/87CL-UL6E>.

¹⁶⁶ See *id.*

¹⁶⁷ See Federal Motor Carrier Safety Administration, *Hours of Service* (DOT, Dec 17, 2014), archived at <http://perma.cc/7A32-WAMU>. See also 49 CFR § 398.6.

¹⁶⁸ See, for example, 49 CFR § 325.13 (requiring the inspection and examination of motor vehicles).

¹⁶⁹ The FMCSA’s authority to enforce whistleblower protections comes from the anti-retaliation provision in Act of July 5, 1994 § 1(e), Pub L No 103-272, 108 Stat 745, 990–91, codified as amended at 49 USC § 31105. See also Federal Motor Carrier Safety Administration, *Federal Motor Carrier Safety Administration, OSHA, Sign Agreement Strengthening Protections for Workers from Coercion, Retaliation* (DOT, July 24, 2014), archived at <http://perma.cc/V96V-QA2S> (describing, with regard to whistleblower claims, a recent Memorandum of Understanding reached between the FMCSA and the DOL’s Occupational Safety and Health Administration designed to improve coordination and cooperation between the agencies).

nies and other employers,¹⁷⁰ requiring compliance with DOT rules in exchange for avoiding overtime payments. As FMCSA Administrator Anne Ferro recently warned:

[P]ressuring drivers to stay behind the wheel beyond their hours-of-service limits, or to disregard other federal safety rules, seriously jeopardizes the safety of every traveler on our highways and roads. Commercial truck and bus companies that knowingly endanger the motoring public . . . will be prosecuted to the fullest extent of the law.¹⁷¹

This consideration, along with the previously discussed congressional intent underlying the MCA exemption,¹⁷² favors a regime in which employees involved in the safety of interstate commerce operations fall under the jurisdiction of the DOT rather than the DOL. This outcome is best accomplished by considering employees on a classwide basis rather than individually. Consequently, the optimal analysis will consider whether affected employees belong to a *class of employees* who, as defined by the MCA, “engage[] in activities that affect[] the safety of operations of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce.”¹⁷³

The fact that a classwide approach can easily be viewed as paternalistic in nature should not be taken as a negative—sometimes the government needs to interfere with a person’s freedom for his own good. While some philosophers might disagree,¹⁷⁴ paternalism can be justified when dealing with persons whose freedom of choice is either limited or impaired.¹⁷⁵ The lure of overtime pay has a coercive effect, leading employees to ignore rational reasons for otherwise preferring DOT jurisdiction.

¹⁷⁰ For an illustration of such gamesmanship, see *Overtime Pay and the Motor Carrier Exemption* (Drew Eckl & Farnham, LLP, Mar 2004), archived at <http://perma.cc/BMC7-3CF5> (advising employers to “review their employee classifications to ensure they are paying overtime [only] where appropriate,” and stating that employers “wishing to ensure they are not paying overtime where it is not required, should consider the ‘motor carrier’ exemption in this review process”).

¹⁷¹ FMCSA, *Federal Motor Carrier Safety Administration, OSHA, Sign Agreement* (cited in note 169).

¹⁷² See Part III.A.

¹⁷³ *Allen*, 755 F3d at 284 (quotation marks omitted).

¹⁷⁴ For example, John Stuart Mill famously argued against government intrusion into personal decisionmaking. See John Stuart Mill, *On Liberty*, in Stefan Collini, ed., *J.S. Mill: On Liberty and Other Writings* 1, 5–18 (Cambridge 2003).

¹⁷⁵ For a general discussion of when government paternalism can be morally justified, see Claire Andre and Manuel Velasquez, *For Your Own Good* (Santa Clara University, Fall 1991), archived at <http://perma.cc/7HQU-G45R>.

Given that paternalistic government intervention has been widely accepted when dealing with other issues involving motor vehicle safety,¹⁷⁶ extending such intervention to the well-being of employees involved in MCA-exemption lawsuits—when there has to be a trade-off between overtime pay and DOT safety protections¹⁷⁷—is justified.

3. The general public will benefit if employees fall under the Secretary of Transportation's jurisdiction.

Another reason to prefer a paternalistic approach is that private litigation over MCA-exemption disputes inevitably leads to a valuation problem: the actions of workers engaged in activities involving interstate operations affect more than just the interested parties. Not only have employees seeking exclusion from the MCA failed to observe the benefits that they gain from DOT jurisdiction but private litigants on both sides have failed to internalize the effects of interstate commercial motor vehicle transportation on public safety. Even Mill admitted that paternalism can be justified to “prevent harm to others.”¹⁷⁸ Therefore, it is important to address which statute better serves the public interest.

The public interest was very much a factor in Congress's enactment of the MCA. Writing shortly after the MCA's passage, one commentator observed a “pervading” public-interest motivation in the MCA.¹⁷⁹ In fact, the MCA contains numerous provisions

¹⁷⁶ For example, mandatory motorcycle-helmet laws, which are often defended on paternalistic grounds, have been enacted in forty-seven states despite the absence of a federal enforcement mechanism to require states to adopt such laws. See *Helmet Laws* (Governors Highway Safety Association, Feb 2015), archived at <http://perma.cc/L88K-S6WR>.

¹⁷⁷ See notes 114–16 and accompanying text. Importantly, overtime and extended work shifts have been shown to have a significant negative impact on workers' health and safety. For example, a 2004 Centers for Disease Control and Prevention report found that “[i]n 16 of 22 studies addressing general health effects, overtime was associated with poorer perceived general health, increased injury rates, more illnesses, [and] increased mortality.” Claire C. Caruso, et al, *Overtime and Extended Work Shifts: Recent Findings on Illnesses, Injuries, and Health Behaviors* *iv (Department of Health and Human Services, Apr 2004), archived at <http://perma.cc/XK73-PDVA>. The report also noted that a “pattern of deteriorating performance on psychophysiological tests as well as injuries while working long hours was observed across study findings, particularly with very long shifts and when 12-hour shifts combined with more than 40 hours of work a week.” *Id.*

¹⁷⁸ Mill, *On Liberty* at 13 (cited in note 174).

¹⁷⁹ See George, 21 Cornell L Rev at 270, 275 (cited in note 30) (reasoning that “[i]f the Commission can command intelligence and tact throughout its administrative per-

designed to protect the well-being of the general public.¹⁸⁰ In addition, the congressional debate on the MCA's provisions for the "safety of operation and hours of service for employees" specifically included discussion of, *inter alia*, employee alertness as a "potent cause of highway accidents [that] inevitably result[] from the lengthy hours to which . . . drivers are subjected."¹⁸¹ The debate further establishes a "[p]ractically unanimous" opinion in Congress that regulations were needed to ensure the safety of highway travel.¹⁸² The FLSA, in contrast, lacks such foundations of public interest. Instead, the FLSA focuses on the rights of workers, albeit with the idea, expressed by President Roosevelt during debate over the FLSA's passage, that the nation as a whole benefits from "barring goods produced under unfair standards."¹⁸³

Most importantly, the FLSA—in the context of motor carrier transportation—lacks an enforcement mechanism for ensuring that safety regulations are followed. The FMCSA's National Consumer Complaint Database allows any person to lodge a safety complaint against an employer or employee who may be in violation of DOT rules.¹⁸⁴ In contrast, the general public derives no such benefit from a rule forcing employers to pay their workers overtime wages under the FLSA.¹⁸⁵ As a result, not only do employees significantly benefit from the MCA's protections but the public at large also profits from a safety regime focused on employer regulation and employee well-being.

sonnel and fair consideration of its rulings is obtained in the courts, its success in administering the Motor Carrier Act in the public interest is assured").

¹⁸⁰ For example, the MCA requires prospective motor carrier operators to "prove fitness, willingness, and ability," to "conform to the statutory requirements and Commission rules," and to "prove that either the present or future public convenience and necessity demands the establishment of the proposed service." *Id.* at 255. In addition, the MCA explicitly authorizes regulatory action on behalf of the general public, allowing for the now-defunct ICC to "investigate qualifications of employees, proper hours, size and weight of equipment and to make to Congress recommendations" for future legislation. *Id.* at 262.

¹⁸¹ *Id.* at 265 (discussing the "[e]xtensive House debate on the provisions for safety of operations and the hours of service for employees").

¹⁸² *Id.* (observing that a primary argument set forth by the proponents of regulation was "the serious endangering of life on the highways result[ing] from operation of vehicles by exhausted employees"). See also *id.* at 251 (noting the increasing "urgency of problems of public safety on the highways" at the time of the MCA's passage).

¹⁸³ Forsythe, 6 L & Contemp Probs at 466 (cited in note 131) (quotation marks omitted).

¹⁸⁴ Federal Motor Carrier Safety Administration, *National Consumer Complaint Database* (DOT), archived at <http://perma.cc/9W2L-NN2A>.

¹⁸⁵ See notes 156–58 and accompanying text.

IV. A DOL REGULATORY SOLUTION

This Part presents a possible regulatory solution to the judicial split. Part IV.A provides a brief history of the *Chevron* doctrine, the modern standard for judicial deference to administrative agencies regarding matters of statutory interpretation, and Part IV.B introduces *Brand X*, the Supreme Court's watershed decision regarding agency rulemakings that conflict with circuit precedent. Part IV.C synthesizes the MCA exemption with *Brand X* and asserts that *Brand X* provides an opportunity for the DOL to promulgate a formal position on how the MCA exemption should be applied.

A. The *Chevron* Doctrine

Though the Supreme Court has long recognized the need for deference to administrative agencies on interpretations of laws administered by those same agencies,¹⁸⁶ for the greater part of the last century there has been an ongoing conflict between federal courts and agencies over the right to interpret federal statutes. At times, courts have deferred to agencies' interpretations. At other times, courts have demanded that agencies follow court interpretations.

Prior to the landmark ruling in *Chevron U.S.A. Inc v Natural Resources Defense Council, Inc*,¹⁸⁷ general deference was extended to an agency's *persuasive* interpretation of a statute that it administered.¹⁸⁸ Courts applied a case-by-case analysis as prescribed by *Skidmore v Swift & Co*¹⁸⁹ to determine proper deference, and they varied the range and weight of factors considered.¹⁹⁰ Under *Skidmore*, an agency's interpretation is not

¹⁸⁶ See *Chevron U.S.A. Inc v Natural Resources Defense Council, Inc*, 467 US 837, 842–44 (1984).

¹⁸⁷ 467 US 837 (1984).

¹⁸⁸ For a detailed discussion regarding the history of judicial deference to administrative agencies, see Bradley George Hubbard, Comment, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 U Chi L Rev 447, 452–59 (2013). Prior to *Skidmore v Swift & Co*, 323 US 134 (1944), agency decisions regarding statutory interpretation rarely received deference. Hubbard, Comment, 80 U Chi L Rev at 453 (cited in note 188) (noting that through the New Deal era, “the Court clung tightly to both the common law and its duty to say what the law is, making clear that agency determinations . . . were to be paid no deference by a reviewing court”) (quotation marks omitted).

¹⁸⁹ 323 US 134 (1944).

¹⁹⁰ *Id* at 139–40. The Supreme Court recognized that agency interpretations may be worthy of significant persuasive weight though they “lack[] the power to control,” and it reasoned that such interpretations deserve persuasive force because agencies have

accorded deference as a matter of right; it merely receives “respect” to the extent that the agency’s reasoning has the power to persuade the court.¹⁹¹

Chevron brought a sweeping change to the federal regulatory landscape. In *Chevron*, the Supreme Court introduced a new framework for judicial review of agency decisionmaking. The Court promulgated a two-step analysis under which reviewing courts should evaluate an agency action when confronted with a potentially ambiguous statute. First, courts are to assess “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.”¹⁹² If, however, the reviewing court finds that the statute is ambiguous—that is, if the court finds that Congress has not “directly spoken to the precise question at issue” and therefore that the intent of Congress cannot be found in the clear meaning of the statute¹⁹³—then the second question for the court is “whether the agency’s answer is based on a permissible construction of the statute.”¹⁹⁴

The *Chevron* Court held that when “Congress has explicitly left a gap for the agency to fill,” the agency’s interpretation must be given controlling weight unless it is “arbitrary, capricious, or manifestly contrary to the statute.”¹⁹⁵ Importantly, *Chevron* provides a “categorical presumption that silence or ambiguity in an agency-administered statute should be understood as an implicit delegation of authority to the agency,”¹⁹⁶ and that courts are ill

specialized expertise and breadth of knowledge in their respective fields and also because agencies determine the policies that guide enforcement. *Id.* The Court determined that the factors affecting the weight given to an agency interpretation should include the interpretation’s thoroughness, reasoning, and consistency with other agency pronouncements. *Id.* See also Hubbard, Comment, 80 U Chi L Rev at 455 (cited in note 188) (“*Skidmore* deference is premised on practicality—a recognition that agencies are institutionally superior to the courts with respect to the interpretation of their statutes.”).

¹⁹¹ *Madison v Resources for Human Development, Inc*, 233 F3d 175, 186 (3d Cir 2000).

¹⁹² *Chevron*, 467 US at 842.

¹⁹³ *Id.* at 842–43. In determining the clear meaning of a statute, a court will start with the text itself and then use various methods of statutory interpretation to determine if the statute’s purpose is clear. The use of legislative history is an example of such a method, as is the use of canons of construction. See *Statutory Construction* (Cornell University Law School Legal Information Institute), archived at <http://perma.cc/5P6X-NZ3P>.

¹⁹⁴ *Chevron*, 467 US at 843.

¹⁹⁵ *Id.* at 843–44.

¹⁹⁶ John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum L Rev 612, 623 (1996) (emphasis added). See also Hubbard, Comment, 80 U Chi L Rev at 456–58 (cited in note 188).

equipped to make the policy decisions necessary to fill gaps left by Congress.¹⁹⁷

Chevron ushered in the modern doctrine of “administrative deference” and remains arguably the most significant case in American administrative law.¹⁹⁸ By requiring courts to give significant deference to agency interpretations of ambiguous statutory provisions, the *Chevron* Court entirely changed the approach that judges use to review agency interpretations of statutes. The importance of the *Chevron* doctrine has grown steadily over the past three decades and the Court has continued to refine its applicability.¹⁹⁹

B. *Brand X*

Brand X is a recent Supreme Court decision in the evolution of the *Chevron* doctrine.²⁰⁰ In *Brand X*, the Supreme Court assessed the relationship between the “*stare decisis* effect” of a federal circuit court’s statutory interpretation and an administrative agency’s subsequent interpretation of that same statutory provision.²⁰¹ The case reached the Court by way of the Ninth Circuit, where petitions had been filed seeking review of the Federal Communication Commission’s (FCC’s) declaratory ruling that cable companies providing broadband Internet access

¹⁹⁷ See *Chevron*, 467 US at 866 (“When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.”).

¹⁹⁸ Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L J 969, 980–85, 1010 (1992).

¹⁹⁹ Most notably, the Court limited the doctrine’s scope in *United States v Mead Corp.*, 533 US 218 (2001), by finding that only those agency interpretations that Congress has explicitly found to have the force of law qualify for *Chevron* deference. *Id.* at 226–27 (“[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”).

²⁰⁰ The *Chevron* framework is essential to the operation of *Brand X*. In short, if the authority to act with the force of law is not delegated to an agency, *Chevron* does not apply and therefore *Brand X* will also be inapplicable. Likewise, if the language of the statute in question is determined to be clear such that there is no gap for the agency to fill, the analysis stops at the first step of *Chevron* and *Brand X* does not apply. “Only if the statutory language is ambiguous or silent, leaving a gap to be filled by the agency’s interpretation of Congress’ intent, will the rule articulated in *Brand X* potentially apply.” Stephen Manning, Lory Rosenberg, and Mary Kenney, *A Brand X Primer* *444 (American Immigration Lawyers Association, 2009), archived at <http://perma.cc/B3KZ-6NBX>.

²⁰¹ *Brand X*, 545 US at 979–80.

do not provide a “telecommunications service”²⁰² and are therefore not subject to the mandatory regulations in Title II of the Communications Act of 1934.²⁰³ In finding that the FCC could not permissibly construe the Communications Act to reach this conclusion, the Ninth Circuit did not use the *Chevron* framework²⁰⁴ but rather based its holding on the circuit’s prior interpretation of the Communications Act in *AT&T Corp v City of Portland*,²⁰⁵ in which the court had concluded that cable modem service is a telecommunication service.²⁰⁶

The Supreme Court overruled the Ninth Circuit, holding that the FCC’s statutory interpretation must control and reiterating that “*Chevron’s* premise is that it is for agencies, not courts, to fill statutory gaps.”²⁰⁷ Thus, the Court determined that when an agency’s interpretation of law is entitled to deference under the *Chevron* standard, a federal circuit court’s interpretation is not entitled to trump the agency’s interpretation based on *stare decisis*. Rather, the agency’s interpretation is entitled to deference.²⁰⁸

By extending *Chevron* deference even to agency interpretations that directly contradict prior judicial interpretations of ambiguous statutes,²⁰⁹ the Court granted a significant victory to

²⁰² Id at 968.

²⁰³ 48 Stat 1064, 1070, codified as amended at 47 USC § 201 et seq.

²⁰⁴ See *Brand X Internet Services v Federal Communications Commission*, 345 F3d 1120, 1135 (9th Cir 2003), revd, 545 US 967.

²⁰⁵ 216 F3d 871 (9th Cir 2000).

²⁰⁶ Id at 880 (“[T]he transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service under the Communications Act.”). In *AT&T*, AT&T sued the city of Portland, Oregon, as well as the local county government, over a decision that conditioned the transfer of a cable franchise on AT&T’s grant of unrestricted access to its cable broadband network. Id at 873. Reversing the judgment of the district court, the Ninth Circuit concluded that the Communications Act prohibits a government entity from imposing such conditions. Id. In so doing, the court held that the “Communications Act includes cable broadband transmission as one of the ‘telecommunications services’ a cable operator may provide over its cable system.” Id at 878.

²⁰⁷ *Brand X*, 545 US at 982–83.

²⁰⁸ See id at 982–85.

²⁰⁹ Because the Ninth Circuit had concluded that its earlier decision in *AT&T* must control, the *Brand X* Court did not directly consider an administrative agency’s interpretation of a statute that was both subsequent *and* contrary to a federal circuit court’s previous interpretation. Multiple circuit courts, however, have extended the *Brand X* holding to apply even to conflicting circuit court precedent. See, for example, *Ali v Mukasey*, 521 F3d 737, 741–43 (7th Cir 2008) (overruling the court’s prior decisions in *Hashish v Gonzales*, 442 F3d 572 (7th Cir 2006), and *Padilla v Gonzales*, 397 F3d 1016 (7th Cir 2005), based on the finding that under *Brand X* the court must defer to an administrative agency’s contrary ruling). For decisions employing similar reasoning, see *Garfias-Rodriguez v Holder*, 649 F3d 942, 950–51 (9th Cir 2011); *Levy v Sterling Holding Co*, 544

administrative agencies. Accordingly, the new rule embraced in *Brand X* tells courts that even after they go through the exercise of independently interpreting a statute, an agency remains free to override the court's own independent interpretation and adopt a contrary construction, provided that the judicial construction does not rest on the statute's clear text.²¹⁰

Importantly, the Court's opinion also prompted a spirited dissent from Justice Antonin Scalia. Scalia criticized the majority, interpreting its holding as a declaration that "judicial decisions [are] subject to reversal by executive officers"²¹¹ and reminding the Court that "Article III courts do not sit to render decisions that can be reversed or ignored by executive officers."²¹² Scalia's major concern, left unaddressed by the majority opinion, was that the Court's ruling would allow for agencies to not only overrule circuit decisions but also reverse the Supreme Court itself.²¹³

C. Under *Brand X*, the DOL Has the Authority to Promulgate a Rule Clarifying Its Interpretation of the MCA Exemption

The principle of stare decisis is a powerful component of the American legal system. While Part III establishes the benefits of a classwide analysis, stare decisis makes it unlikely that any of the circuits that have previously addressed this issue and adopted an individual-basis analysis—specifically the Third, Fourth, and Seventh Circuits—will overrule prior precedent. Merely a decade ago, this may have been the end of the story—barring Supreme Court intervention, stare decisis would in all probability have precluded the application of a classwide analysis

F3d 493, 503 (3d Cir 2008) ("[W]e conclude that a judicial opinion construing an agency's regulation does not necessarily bar a court from giving effect to a subsequent, different interpretation by the agency. . . . To find otherwise would produce the same 'anomalous results' that the *Brand X* Court sought to avoid."); *Zhang v Mukasey*, 543 F3d 851, 857 (6th Cir 2008).

²¹⁰ See *Brand X*, 545 US at 982 (explaining that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion"). See also Kathryn A. Watts, *Adapting to Administrative Law's Erie Doctrine*, 101 Nw U L Rev 997, 998–99 (2007).

²¹¹ *Brand X*, 545 US at 1016 (Scalia dissenting).

²¹² *Id* at 1017 (Scalia dissenting).

²¹³ See *id* at 1016–17 (Scalia dissenting). For further discussion of Scalia's *Brand X* dissent, see notes 226–28 and accompanying text.

in these circuits. *Brand X*, however, provides the opportunity for the DOL to promulgate a regulatory solution.²¹⁴

Recall that in *Brand X*, the Supreme Court declared that a federal court must reverse its own prior precedent in deference to an intervening agency decision unless that precedent found the statute at issue to be “unambiguous” under *Chevron’s* framework. Thus, if the first-in-time court sets the law at A, and if a second-in-time agency later finds that B is a superior interpretation of the statute, then the third-in-time court must defer to the agency and move the law from A to B, so long as the agency’s statutory interpretation is reasonable and does not run contrary to a clear command from Congress.

In the context of the MCA exemption, *Brand X* establishes that regardless of how prior federal circuit courts have interpreted Supreme Court precedent and agency regulations, a subsequent reasonable interpretation of the FLSA by the DOL will be given deference. As a result, the DOL *can* promulgate a forward-looking interpretation of whether the MCA exemption should be applied on an individual or classwide basis that codifies the agency’s position, even if it contradicts a circuit court’s construction of the statute and regulations.

A comprehensive analysis of the DOL’s administrative authority is beyond the scope of this Comment.²¹⁵ Nevertheless, there are several important principles to note. As a federal administrative agency, the DOL has the authority to engage in both formal and informal rulemaking in accordance with federal regulations.²¹⁶ The DOL also has the authority to issue interpretive rules regarding agency policy, which allows the agency to interpret ambiguous terms in legislative enactments. The agency frequently exercises this authority through the publication of

²¹⁴ To reiterate, although the MCA falls under the DOT’s jurisdiction, the DOL’s regulations determine how the exemption should be applied. See Part III.A. See also 29 CFR § 782.2; *Levinson*, 330 US at 676–77:

[W]e are *not* dealing with an exception to [the FLSA] which is to be measured by regulations which Congress has authorized to be made by [the DOL]. Instead, we are dealing here with the interpretation of the scope of the safety program . . . which in turn is to be interpreted in the light of the regulations made by the Interstate Commerce Commission pursuant to [the MCA].

(emphasis added).

²¹⁵ For further discussion of this topic, see Walck, *Overregulation or Fair Interpretation* at *19–20 (cited in note 13).

²¹⁶ See Office of the Assistant Secretary for Policy, *Rulemaking and Regulations* (DOL), archived at <http://perma.cc/7XSW-JX3Y> (describing the procedures for DOL rulemaking activities).

interpretive bulletins as well as the issuance of opinion letters.²¹⁷ An interpretive solution, however, is likely not the best course of action here, as courts do not automatically give *Chevron* deference to such pronouncements.²¹⁸ The more appropriate choice is for the DOL to issue formal guidance through the informal notice-and-comment rulemaking procedure,²¹⁹ clarifying the agency's position on how the MCA exemption should be applied.²²⁰ Importantly, informal rulemaking allows for an administrative agency "to claim insulation from judicial review for any reasonable interpretation" of an ambiguous statutory provision.²²¹ Thus, by following the notice-and-comment procedures, the DOL should receive *Chevron* deference for its interpretation of the FLSA's MCA-exemption provision.

As it stands, DOL regulations regarding the MCA exemption have focused on conforming to Supreme Court precedent rather than on promulgating a workable rule. In short, the DOL has parroted the Court's conflicting guidance. What will a clarified DOL regulation denoting that the MCA exemption is to be applied on a "classwide" basis mean? Most importantly, it will mean that cases such as *Faber Industries*, *Harshman*, and *Troutt* will no longer be controlling precedents in their respective circuits, and that the agency's clarified interpretation should be given appropriate deference by reviewing courts. After all, *Brand X* tells us that the DOL's interpretation will be

²¹⁷ For an example of a DOL interpretive bulletin, see 29 CFR § 2509.75-2. For an example of a DOL opinion letter, see Alfred B. Robinson Jr, *FLSA2005-27* (DOL, Aug 26, 2005), archived at <http://perma.cc/UBB8-GZ7M>.

²¹⁸ See Walck, *Overregulation or Fair Interpretation* at *15 (cited in note 13) (noting that the *Chevron* Court "expressly stated that some agency interpretations of statutory provisions, including interpretive rules, informal orders, and other pronouncements issued . . . are not entitled to *Chevron* deference"). In fact, one of the "major driving forces" behind recent FLSA litigation has been the issue of how much judicial deference DOL opinion letters should receive. *Id.* at *2.

²¹⁹ Notice-and-comment requirements originate and are defined in the Administrative Procedure Act. See 5 USC § 553.

²²⁰ When its enabling statute does not require rules to be made "on the record after the opportunity for an agency hearing," an administrative agency has the choice between formal and informal rulemaking. *United States v Florida East Coast Railway Co*, 410 US 224, 236–38 (1973). Here, the FLSA does not mandate formal rulemaking; therefore, because informal rulemaking generally is more efficient and contains fewer procedural hurdles, the DOL should (and can be reasonably expected to) choose this procedure. See Christopher C. DeMuth and Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 Harv L Rev 1075, 1077 (1986).

²²¹ Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of Chevron and Brand X*, 89 BU L Rev 189, 198 (2009) (emphasis omitted).

applied even in the face of conflicting circuit precedent. As the Third Circuit found in *Levy v Sterling Holding Co.*,²²² a case “does not control the result [] simply by virtue of the fact that it came first and has not been overturned.”²²³

This proposed solution will likely raise two major concerns. First, it is possible that the application of the MCA exemption may not be an appropriate matter for an administrative law resolution. Here, the Court’s language in *Morris* is illuminating: “Congress [] expressly has authorized the [agency], and not the courts, to decide when the case is an appropriate one for such a general exemption.”²²⁴ Thus, since the Supreme Court has expressly determined that an administrative agency is better suited to determine *when* the MCA exemption applies, it is reasonable to infer that the agency is also better suited to determine *how* the exemption should be applied. The failure of private litigation to resolve MCA-exemption disputes also makes such a resolution appropriate. This is an area of law in which both employers and employees have been unable (or unwilling) to see beyond their own perceived business interests.²²⁵ Congress did not create the MCA exemption to allow for employers to take advantage of their workers without due compensation, nor did it create the exemption solely for the interests of motor carrier employees. Overriding public-interest concerns and Congress’s greater goal of safety make the application of this exemption a prime matter for post-*Brand X* regulatory intervention.

A second concern is the one expressed by Scalia—dissenting in *Brand X*—that the majority gave too great a power to federal regulatory agencies to interpret governing statutes and thereby altered the relationship between the judiciary and agencies.²²⁶ This concern is mitigated by the fact that the Supreme Court did not determine a best reading of the MCA exemption when it addressed the issue in 1947. While the *Brand X* Court determined,

²²² 544 F3d 493 (3d Cir 2008).

²²³ *Id.* at 503 (“[W]e conclude that a judicial opinion construing an agency’s regulation does not necessarily bar a court from giving effect to a subsequent, different interpretation by the agency. . . . To find otherwise would produce the same ‘anomalous results’ that the *Brand X* Court sought to avoid.”).

²²⁴ *Morris*, 322 US at 436–37.

²²⁵ See Part II.B.

²²⁶ In his dissent, Scalia asserted that the Court’s new rule does not merely allow an agency to erase judicial precedents that rest on *Chevron* deference; rather, it goes much further and allows an agency to override even independent judicial interpretations reached in the absence of *Chevron* deference. *Brand X*, 545 US at 1015–18 & n 12 (Scalia dissenting).

much to Scalia's dismay, that an administrative agency can interpret a statute in a manner that conflicts with prior circuit court precedent, the Court did not go so far as to say that an agency can adopt *any* possible interpretation. Indeed, *Brand X* does not provide a blank check for an agency to revise its interpretations of existing statutes.²²⁷ The well-documented ambiguity of the MCA-exemption provision, however, supports the DOL's authority to promulgate a regulatory solution. A DOL interpretation requiring the exemption to be applied on a class-wide basis will almost certainly be upheld as a "reasonable interpretation" capable of passing the second step of *Chevron*.²²⁸

Courts and commentators alike have recognized that *Brand X* has the makings of a seminal decision.²²⁹ The Court's determination that a *Chevron*-enabled administrative agency has the ultimate say over any lower court reviewing the agency's interpretation has created a significant opening for administrative agencies to interpret ambiguous statutory language. This issue presents an opportunity for the DOL to resolve a long-standing circuit split and provide much-needed regulatory guidance without concerns of infringing on the Supreme Court's jurisdiction. To measure whether an employee is likely to be "called upon in the ordinary course of his work" to perform safety-affecting activities that are interstate in nature,²³⁰ judges should look to whether the employee could reasonably have been expected to engage in interstate commerce consistent with his job duties. A clarified DOL interpretation regarding how the MCA exemption

²²⁷ See *United States v Home Concrete & Supply, LLC*, 132 S Ct 1836, 1838, 1843 (2012) (holding that, if a court determines that a law is unambiguous and interprets the law on this basis, an administrative agency must adhere to the court's interpretation absent congressional action). For a detailed discussion of the *Home Concrete* decision, see generally Elizabeth Milito, *United States v. Home Concrete & Supply, LLC and Its Implications for Administrative Law*, 13 Engage 19 (2012). See also Manning, Rosenberg, and Kenney, *A Brand X Primer* at *445 (cited in note 200) ("*Brand X* in no way calls into doubt the many previous judicial interpretations that rested on the unambiguous words of a statute.>").

²²⁸ *Chevron*, 467 US at 843–44 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.>").

²²⁹ See, for example, *AARP v Equal Employment Opportunity Commission*, 390 F Supp 2d 437, 442 (ED Pa 2005) (noting that *Brand X* has "dramatically altered the respective roles of courts and agencies under *Chevron*"); Claire R. Kelly, *The Brand X Liberation: Doing Away With Chevron's Second Step as Well as Other Doctrines of Deference*, 44 UC Davis L Rev 151, 153 (2010) (theorizing that the *Brand X* ruling has reshaped the *Chevron* doctrine).

²³⁰ 29 CFR § 782.2(b)(3).

should be applied will necessarily upset stare decisis, and an interpretation mandating a classwide analysis will overrule prior decisions in the Third, Fourth, and Seventh Circuits. Because of *Brand X*, however, this is not an overriding limitation. The DOL should promulgate a forward-looking regulation that codifies its position regarding the application of the MCA exemption.

CONCLUSION

For more than seven decades, the disjuncture between the MCA and the FLSA has left workers uncertain as to which statute protects their rights. The current circuit split regarding how the MCA exemption to the FLSA's overtime rules should be applied pits the employee-by-employee analysis mandated by the Third, Fourth, and Seventh Circuits against the classwide analysis deemed appropriate by the Fifth Circuit. The DOL's regulations governing the exemption's application do not provide meaningful guidance, and both sides cite precedent set forth by the Supreme Court when it last addressed this issue in 1947. Employers, hoping to take advantage of the exemption, generally prefer a classwide analysis; employees, seeking the protection of the FLSA, generally advocate for an approach that considers the specific duties of each employee. This Comment urges courts to adopt a classwide approach, arguing that congressional intent and modern policy considerations—even if paternalistic in nature—favor placing qualified employees (those whose duties may affect the “safety of operations”) under the jurisdiction of the Secretary of Transportation. This Comment also promotes a unique potential resolution for the circuit split, one made available by the Supreme Court's decision in *Brand X*. A DOL regulation mandating the application of the MCA exemption on a classwide basis will allow for uniform analysis of this issue in the judicial system and end the uncertainty inherent in the current legal regime.