

No. 14-2308

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GERARD MORRISON, et al.,
Plaintiffs-Appellants,

v.

COUNTY OF FAIRFAX, VIRGINIA,
Defendants-Appellees.

On Appeal from the United States District Court for the
Eastern District of Virginia

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE*
IN SUPPORT OF REVERSAL OF THE DISTRICT COURT'S
GRANT OF SUMMARY JUDGMENT

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INTEREST OF THE SECRETARY

Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor (“Secretary”) submits this brief as *amicus curiae* in response to this Court’s request for the Government’s view of this case. Upon review of the issues raised in this case and based on evidence presented by the Plaintiffs-Appellants, the Secretary recommends reversal of the district court’s opinion and remand for further proceedings to determine the Plaintiffs’ primary duty, an outcome the

Secretary acknowledges is different than that sought by either of the parties on appeal.

The Secretary has a substantial interest in the proper judicial interpretation of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. 201 *et seq.*, because he administers and enforces the Act. *See* 29 U.S.C. 204, 211(a), 216(c), 217. In particular, the Secretary has a strong interest in ensuring that courts correctly interpret and apply the first responder regulation, 29 C.F.R. 541.3(b), which is among the regulations that “define and delimit” the executive and administrative exemptions from FLSA protections pursuant to Congress’s direction in 29 U.S.C. 213(a)(1).

ISSUE PRESENTED

Whether the district court erred by granting summary judgment to the County of Fairfax, Virginia (“County”) based on a determination that the County properly treats certain categories of its Fire Department employees as exempt from the overtime requirement of the FLSA pursuant to the executive exemption despite evidence in the record raising a genuine dispute as to whether the primary duty of those employees is emergency response.

STATEMENT

A. Factual Background

The Fairfax County Fire Department employs, among other categories of workers, Shift Commanders, Station Commanders, Safety Officers, and EMS Supervisors (collectively “Captains”). Joint Appendix (“JA”) 4517. The Captains are ranked below top Fire Department managers, including the Fire Chief, Assistant Chiefs, Deputy Chiefs, and Battalion Chiefs, and above other categories of employees, including Lieutenants, Technicians, and Firefighters. JA 1694 (Fire Department-issued document detailing the chain of command). Station Commanders and EMS Supervisors earn a base salary of between \$77,798.86 and \$126,722.96 annually; Shift Commanders and Safety Officers earn a base salary of between \$70,894.51 and \$115,480.35 annually; and Lieutenants, by contrast, earn a base salary of between \$61,380.80 and \$99,983.94 annually. JA 2153-54 (Fire Department salary chart).¹ None of the Captains receive overtime compensation from the County. County Br. at 5; Captains Br. at 5.

Shift Commanders. According to the County’s position description, or “class specification,” Shift Commanders “serve[] as the officer-in-charge on a

¹ The Fire Department’s salary chart does not list position titles. Station Commanders and EMS Supervisors “are paid at the F-27 grade,” Shift Commanders and Safety Officers “are paid at the F-25 grade,” and Lieutenants “are paid at the F-22 grade.” JA 2148 (County’s 30(b)(6) deposition).

24-hour shift in a fire and rescue station.” JA 2005. They have “all related administrative, managerial, and operational responsibilities” associated with supervising a shift, including “[s]upervis[ing], plan[ning], organiz[ing], coordinat[ing] and evaluat[ing] the work of assigned staff,” “[i]nspect[ing] the work location and all equipment for compliance with county, station and federal safety regulations,” “[s]chedul[ing] in-station training for shift personnel,” and “[p]lann[ing] and participat[ing] in public relations programs.” *Id.*

But Shift Commanders indicated in deposition testimony that their management role is not as significant as the class specification suggests. They testified that their power to supervise subordinates and to manage the fire station is limited: they do not have authority to “assign overtime to off-duty fire personnel,” “approve leave,” “set minimum staffing levels,” or make purchases or order supplies for the station. *See, e.g.*, JA 246, 573, 934, 1100, 1139-40, 1168, 1215, 1220-21. Although Shift Commanders administer discipline to their subordinates, they cannot do so without approval from their own supervisors. *See, e.g.*, JA 215, 574, 1103, 1131-33 (stating that “discipline comes from above me” and describing an incident in which the Shift Commander disagreed with the disciplinary action but nevertheless administered it), 1142, 1221. They are in daily phone and email communication with the Battalion Chief to whom they report. JA 2518

(declaration of Battalion Chief). One Shift Commander said he is “just an officer to execute the policies of the department.” JA 1097.

According to the class specification, Shift Commanders also “perform[] fire suppression ... duties,” including “[s]iz[ing] up fire ... emergencies and determin[ing] the necessity for additional firefighting companies ... as well as the proper course of action to effectively abate the emergency,” “[a]ssum[ing] command at the scene until relieved by a higher-ranking officer,” “respond[ing] to emergency incidents, direct[ing] the activities of the crews, and participat[ing] in firefighting.” JA 2005-06. Shift Commanders explained that they always went on emergency calls with their subordinates, *see, e.g.*, JA 251, 1107-08, 1416, and that their roles at an emergency scene included firefighting tasks such as “making sure the hoses are pulled, pulling the hoses, ventilating, forcing entry, searching, and extinguishing and confining the fire,” as well as emergency medical response. JA 1104, 199-200 (the Shift Commander provides “hands-on care” as needed, even if there are other medics at the scene); *see* JA 197 (the Shift Commander wears his protective gear during training, just as his subordinates do, because “in a real fire I’m going to pull the hose and I’m going to be right in there with them”), 204 (whoever rides in a fire engine in the supervisor’s role is “going to pull hose, they’re going to search, they’re going to hook ceiling, they’re going to do whatever type of suppression activities that any suppression piece would do”), 250 (at a

house fire, the Shift Commander “would engage in hands-on firefighting activities as far as maybe forcing a door open ... and then advancing a hose line, looking for victims, pulling victims out of the building if we find them, ventilating as we go, looking for other hazards”), 575-76 (the Shift Commander’s activities at an emergency response scene could include “taking a blood pressure,” “bandaging somebody,” or “doing CPR on a patient”), 1142-43, 1219 (the Shift Commander’s “hands-on firefighting” includes “anything [from] breaking stuff to pulling hose to – whatever needs to be done”), 1417 (the Shift Commander’s activities at an emergency scene could include “giving people direction, getting involved in patient care, putting out a fire, throwing a ladder, pulling hose lines”). A study of records of emergency vehicle dispatch time over a period of three years showed that Shift Commanders spend an average of one and a half hours (ranging from a low of essentially no time to a high of 15 and a half hours) per 24-hour shift responding to emergency calls. JA 1696-97, 1700.

Furthermore, the class specification provides that Shift Commanders “[p]articipate[] in the physical fitness program” as well as “all required training ... to ensure operational readiness at all times.” JA 2005. In depositions, Shift Commanders explained that they engage in the same physical fitness and other training as all employees at the station, which if not interrupted by responding to calls occupies two to three hours in each 24-hour shift, because they need to be

prepared to participate in emergency response. JA 1101-02; *see* JA 247, 801-02, 1137-38, 1170, 1171-73, 1192-93. Shift Commanders can run training sessions, but their subordinates can do so as well. JA 387-88 (deposition of Assistant Chief).

Significantly, in addition to explaining that responding to an emergency call takes precedence over any other duty, JA 252, 576-77, 1108-09 (“Nothing trumps our primary role of responding to the fires and emergency incidents.”), 1145-46, 1208-09, 1213-15, several Shift Commanders said that their most important job duty is emergency response, 250 (most important job duty is “[r]esponding to emergency incidents”), 938-39 (most important job duty is “[r]esponding to incident calls”), 1104 (most important job duty is “[t]o respond to emergency incidents, fight fire, help people”), 1142 (top priority is “running emergency calls”), 1189 (most important job “is to save lives and protect property”).

Station Commanders. The relevant class specification explains that Station Commanders have “overall responsibility for station management and assigned resources.” JA 1984. Specifically, their duties include “manag[ing] the fire and rescue station’s resources and maintenance needs,” “[p]repar[ing] the budget for the fire and rescue station,” “[r]equisition[ing] and receiv[ing] equipment and supplies,” “[p]lan[ning] and execut[ing] the work assignments of a specific shift,”

and “[d]evelop[ing] and maintain[ing] policy and procedures for an assigned station.” JA 1985.

But according to the Station Commanders’ deposition testimony, like the Shift Commanders below them, Station Commanders do not have the management authority that the class specification suggests. For example, they cannot assign overtime, approve leave, or set minimum staffing levels. JA 534-35, 646-47, 961-62. Station Commanders can only issue discipline that is approved, or in some cases ordered despite being inconsistent with the Station Commander’s recommendation, by a supervisor. JA 260-61, 957, 1444-47; *see* JA 659-60 (Station Commander explaining that he “was simply the delivery boy” of a disciplinary action that came from the Deputy Chief). They are in daily phone and email communication with the Battalion Chief to whom they report. JA 2518 (declaration of Battalion Chief). Additionally, Station Commanders “really do not do any budgetary tasks at the station.... I don’t have an amount of money I can use.... What we get is all up to the higher ups in the department to decide.” JA 313; *see* JA 657 (Station Commander stating he has no purchasing authority), 1004-05 (Station Commander explaining that he doesn’t “really budget,” but rather generates a “request for resources” or “wish list”). Station Commanders also testified that particular management tasks occupied only a very small fraction of their work time. For example, one said that he spends “no more than three or four

hours max ... [f]or the whole year” creating a list of desired station purchases.

JA 1013. He also testified that reviewing and updating station policies takes four or five hours in the first year as a Station Commander and “an hour a year” in subsequent years on the job. JA 1014. Similarly, another Station Commander testified that he spent “[t]wo to four hours, six max” over the course of a full year writing performance appraisals for his supervisees. JA 647; *see* JA 962 (estimating five to six hours writing performance appraisals, an hour and a half to two hours writing a wish list, and two hours updating station policies annually).

According to the class specification, Station Commanders also “[p]articipate[] in fire suppression and rescue activities,” including by “[a]ssum[ing] command at the scene of an incident until relieved by a higher-ranking officer,” “[s]iz[ing] up fire, EMS, or rescue emergencies and determin[ing] the necessity for additional firefighting companies, EMS units, or specialized rescue units ... as well as the proper course of action to effectively abate the emergency,” and “[m]ak[ing] decisions and direct[ing] subordinates as to the best method for combating fires and coping with other emergency situations.”

JA 1985. In depositions, Station Commanders explained that they go on all calls with their subordinates, leaving behind any other tasks they might be doing when the call arises. JA 286, 327-28, 537, 656, 965-66, 1466-67. On the scene, they “[p]articipate with the mitigation of the emergency, whatever ... it may be”; their

activities at the scene could include “[m]aking a size-up, presenting that information on the radio,” “[f]orcing entry to allow the hose line to advance,” “[a]ssisting with the advancement of the hose line, potentially the raising ladders.” JA 1466; *see* JA 538-40 (a Station Commander might “throw a ladder,” “help to pick up a fan,” “help to ... stand in the corner and extend a hose line,” or “force entry on a door,” and considers it his “job to go into a burning building”); JA 965 (a Station Commander might “deploy[] a hose line, utiliz[e] forcible entry [tools], deploy[] ground ladders”). In a medical emergency, a Station Commander might “have to put ... hands on the patient.” JA 333. Station Commanders spend an average of one hour and 23 minutes (ranging from a low of essentially no time to a high of just over 11 hours) per 24-hour shift responding to emergency calls. JA 1700.

Station Commanders also “[p]articipate[] in the physical fitness program” and “[p]articipate[] in all required training and maintain[] all professional certifications to ensure operational readiness at all times.” JA 1984. Station Commanders’ descriptions of their participation in physical fitness and other training matched those of Shift Commanders—i.e., they did the same training as all fire fighters—because Station Commanders “need to be physically fit so that we can go out and respond to emergencies.” JA 283-84; *see* JA 648, 963, 1460-61.

Station Commanders can run training sessions, but their subordinates can do so as well. JA 387-88 (deposition of Assistant Chief).

One Station Commander testified that the “most important job duty” of a Station Commander is “[r]unning emergency incidents.” JA 1466. Another stated that “[o]ur number one priority is to run emergency calls.” JA 330. A third agreed that “running a call is the primary task, the most important task that you have.” JA 534.

Safety Officers. The class specification describing the role of Safety Officers explains that they “serve[] as the agency’s primary contact for matters dealing with employee safety,” including “[i]nvestigat[ing] all injuries, significant emergency incidents and department vehicle accidents occurring during the shift,” “[i]nspect[ing] fire station work and living quarters for code compliance and safety hazards,” “[i]nspect[ing] personal protective clothing,” and “[p]repar[ing] and deliver[ing] safety instruction to shift officers and subordinates for station activities, physical fitness training, vehicle operation and emergency incident procedures.” JA 2006.

The class specification also indicates that Safety Officers perform duties at emergency scenes. Specifically, they “perform[] ... advanced life support duties,” “[r]espond[] to emergency incidents as a member of the Incident Command staff, advise[] the Incident Commander of unsafe conditions or acts, recommend[]

alternative tactics,” and “[t]est[] and monitor[] atmosphere at emergency incidents to assist in determining the appropriate level of personal protective equipment.”

JA 2005-06. In deposition testimony, Safety Officers discussed responding to emergencies and providing advice regarding the safety of the fire fighters at the scene. *See* JA 666, 1429. In particular, one explained that his role at an emergency scene is to “look[] out for the safety and well-being of everybody on the fire ground” and gave the examples of preventing fire fighters from being too close to dangerous wires or from being inside a building where they were not safe. JA 1312-13, 1322. At the scene of an accident or injury, a Safety Officer would perform “EMT functions,” such as “start CPR.” JA 722. When dispatched to a call, Safety Officers are required to abandon any other task in order to respond. JA 1328-29. Safety Officers spend an average of 58 minutes (ranging from a low of essentially no time to a high of 9 hours, 42 minutes) per 24-hour shift responding to emergency calls. JA 1700.

Like Shift Commanders and Station Commanders, Safety Officers must “[p]articipate[] in the physical fitness program” as well as “all required training,” and they must “maintain[] all professional certifications to ensure operational readiness at all times.” JA 2005; *see* JA 714, 1327, 1431 (deposition testimony confirming that Safety Officers engage in daily physical fitness training).

Safety Officers testified that they see their role in emergency response as the most important part of their jobs. One Safety Officer said his most important job duty was “ensuring the safety of our members and the citizens.” JA 1328.

Another said his most important job duty was “[b]eing the advocate for health and safety on emergency incidents,” by which he meant “going around the scene, just making sure everybody is safe, making sure everybody is wearing the right gear,” or “get[ting] them out” if “conditions change.” JA 717.

EMS Supervisors. The relevant class specification explains that EMS Supervisors “supervise[] and coordinate[] the emergency medical services (EMS) in a battalion (comprised of fire and rescue stations located in one region of the county).” JA 1984. Related EMS Supervisor duties include “[r]eview[ing] incident reports for completeness and accuracy,” “[e]valuat[ing] initial field training provided to EMS interns” as well as “remedial training,” “[c]onduct[ing] investigative review boards for non-compliance of protocols,” “[e]nsur[ing] that quality medical care is provided by systematically inspecting personnel and apparatus in his/her assigned battalion,” and “[s]chedul[ing] and critiqu[ing] provider training and/or drills that test the ability of emergency medical services personnel and equipment to meet agency standards and goals.” JA 1985-86.

EMS Supervisors also have emergency response duties. They “[r]espond[] to EMS emergencies with assigned battalion to evaluate and monitor medical

treatment.” JA 1985. Like Station Commanders, they “[a]ssume[] command at the scene of an incident until relieved by a higher-ranking officer,” “[s]ize[] up fire, EMS, or rescue emergencies and determine[] the necessity for additional firefighting companies, EMS units, or specialized rescue units ... as well as the proper course of action to effectively abate the emergency.” *Id.* Like the other Captains, EMS Supervisors have no discretion about responding to a call if dispatched, JA 859, 1017; one EMS Supervisor testified at his deposition that because he can be called to an array of scenes, he “run[s] more calls than” Lieutenants. JA 644. At those calls, he “will initiate patient care ... if it’s a working cardiac arrest, I’ll initiate CPR; I’ll get the automatic [defibrillator] ... placed on the patient ... [o]r interviewing, getting the vital signs”; because he “carr[ies] all medical tools,” he “can start IV lines, take vital signs, give medications.” JA 653-54; *see* JA 862-63. Another EMS Supervisor explained that at a fire scene he is part of a medical unit that provides “immediate care to [any] firefighter in need.” JA 861. EMS Supervisors spend an average of one hour and 11 minutes (ranging from a low of essentially no time to a high of 12 hours, 18 minutes) per 24-hour shift responding to emergency calls. JA 1700.

Additionally, EMS Supervisors “[p]articipate[] in the physical fitness program” and “[p]articipate[] in all required training and maintain[] all professional certifications to ensure operational readiness at all times.” JA 1984.

EMS Supervisors explained that they, like the other Captains, try to spend two hours a day engaging in physical fitness activities, but it is not always possible to meet that goal because of interruptions to respond to emergency calls. JA 649, 856.

Finally, the EMS Supervisors believe their most significant duty to be emergency response. One stated at his deposition that his “primary responsibility is to respond, assist, fit in where I can, assure ... that we do the right thing, that the guys come home; we do it safely.” JA 652. Another explained that his most important job duty was “[p]erforming patient care, delivering medications, treating patients, and providing ... support in any fire task that may be needed.”

JA 858-59. A third said his most important job duty is “[r]esponding to calls [and] providing care to the injured civilians and visitors of Fairfax County.” JA 1064.

B. Procedural History

In January 2014, 176 Captains filed suit against the County in the U.S. District Court for the Eastern District of Virginia for violations of the FLSA’s overtime compensation requirement. JA 1-20, 48. In August 2014, the parties filed cross-motions for summary judgment. JA 31-32. The County argued that all of the Captains were exempt from the FLSA’s overtime requirement because they are “highly compensated employees” under 29 C.F.R. 541.601. JA 2093. The County argued in the alternative that the FLSA’s executive exemption, 29 C.F.R.

541.100, applies to Shift Commanders and Station Commanders because those employees are supervisors and spend nearly all of their time “ensuring the operational readiness of their subordinates, their station, and their apparatuses,” and that the FLSA’s administrative exemption, 29 C.F.R. 541.200, applies to Safety Officers and EMS Supervisors because those employees’ “primary duties are non-manual work related to the overall management and services of the [Fire Department] and the community it serves” and they “exercise judgment and discretion in the performance of their jobs.” *Id.* The Captains argued that because they are all “first-line public safety supervisors who engage in fire fighting and emergency response,” they are not exempt from the FLSA’s overtime requirement under 29 C.F.R. 541.3(b). JA 110-11.

On November 3, 2014, the district court granted summary judgment in favor of the County. JA 4516-25. The court’s opinion briefly described the management duties of each category of Captain: Shift Commanders and Station Commanders “lead four-person fire engine crews in addition to performing a litany of administrative tasks” and “are in charge of either a specific shift or an entire station”; Safety Officers “respond to fire scenes” to “monitor emergency operations and recognize hazards” as well as perform “management functions includ[ing] formulating safety policy, service on accident review boards, and ensuring training compliance”; and EMS Supervisors “oversee the provision of

medical care at incidents involving accidents with injuries, people trapped, cardiac arrest, overdose, and hazardous materials” and “perform managerial and supervisory functions such as participating in Quality Management, reviewing electronic Patient Care Reports, and evaluating compliance with government standards and established medical protocols.” JA 4517-18. The court noted that all these employees “spend the vast majority of their working hours managing station personnel and ensuring operational readiness,” further explaining that “[a]lthough they participate in emergency response, the bulk of their time is spent performing the various tasks required to operate a fire station, such as: evaluating personnel; providing correction, guidance, and counsel to their subordinates; recommending and administering discipline; identifying training needs and requisitioning supplies; and physical fitness training.” JA 4518.

After summarizing the relevant statutory and regulatory provisions, the district court briefly described two cases regarding the application of the executive exemption to fire fighters in which it issued opinions in 1989. JA 4521-22. In both *Hartman v. Arlington County, Virginia*, 720 F. Supp. 1227 (E.D. Va. 1989), and *International Ass’n of Firefighters v. City of Alexandria, Virginia*, 720 F. Supp. 1230 (E.D. Va. 1989), the court reached the conclusion that shift commanders and engine captains were exempt from the FLSA’s overtime requirement. JA 4521-22. This Court affirmed those decisions. *See Hartman v.*

Arlington Cnty., Va., 903 F.2d 290 (4th Cir. 1990); *Alexandria Comm. of Police v. City of Alexandria*, 912 F.2d 463 (Table) (4th Cir. 1990), 1990 WL 122044 (unpublished). *Id.* The district court also noted that in *West v. Anne Arundel County, Maryland*, 137 F.3d 752 (4th Cir. 1998), this Court applied the executive exemption to EMS captains. JA 4522. On the basis of these cases, the court reasoned that “the exempt status of fire captains and EMS captains in the Fourth Circuit is well-established.” JA 4522.

The district court explained its view that 29 C.F.R. 541.3(b), the first responder regulation promulgated in 2004, does not change the import of this pre-2004 caselaw. JA 4522. According to the court, the Captains had taken the position that the first responder regulation provides that all fire department employees who “perform *any* hands-on firefighting work” are non-exempt “regardless of rank or pay level.” JA 4522-24 (quoting 29 C.F.R. 541.3(b)(1)). The court rejected that reading, reasoning that when the first responder regulation is read in context with 29 C.F.R. 541.3(a), which provides that “‘blue collar’ workers” are not exempt, the first responder regulation “plainly applies to ‘blue collar’ firefighters.” JA 4523-24. The notion that the regulation applies to any fire department employee who performs any firefighting work, the district court explained, “has no limiting principle” and would allow even the fire chief to be non-exempt. JA 4524.

Finally, the district court addressed the elements of the executive exemption in a single paragraph, concluding that the exemption applies because the Captains “are compensated on a salary basis at a rate of not less than \$455 per week; their primary duty is management of the enterprise; they customarily and regularly direct the work of two or more other employees; and their suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.” JA 4524-25.

The Captains appealed to this Court seeking reversal of the district court’s opinion and an order for the grant of summary judgment in their favor.

ARGUMENT

I. THE EXECUTIVE AND ADMINISTRATIVE EXEMPTIONS ARE NOT APPLICABLE TO FIRE FIGHTERS WHOSE PRIMARY DUTY IS EMERGENCY RESPONSE

The FLSA generally requires a covered employer to pay an employee in compliance with its minimum wage and overtime requirements. *See* 29 U.S.C. 206, 207. It creates an exemption from those requirements, however, for “any employee employed in a bona fide executive[or] administrative ... capacity ... (as such terms are defined and delimited from time to time by regulations of the Secretary).” 29 U.S.C. 213(a)(1). Like all FLSA exemptions, the executive and administrative exemptions “are to be ‘narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly

and unmistakably within [the exemptions'] terms and spirit.” *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688, 692 (4th Cir. 2009) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)) (alteration in original); *see Purdham v. Fairfax County Sch. Bd.*, 637 F.3d 421, 427 (4th Cir. 2011) (“The Act is ‘remedial and humanitarian in purpose,’ and is meant to protect ‘the rights of those who toil[’].... The FLSA should be broadly interpreted and applied to effectuate its goals.” (quoting *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944); citing *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 296 (1985))). Furthermore, the employer “b[ears] the burden of proving, by clear and convincing evidence, ... that the [employees’] jobs fell within the [FLSA] exemption.” *Desmond*, 564 F.3d at 691-92 & n.3 (citing *Shockley v. City of Newport News*, 997 F.2d 18, 21 (4th Cir. 1993); *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190 (1966); *Clark v. J.M. Benson Co.*, 789 F.2d 282, 286 (4th Cir. 1986)).

Executive and administrative exemptions. The Department updated the regulations that implement the executive and administrative exemptions—contained in Part 541 of Title 29 of the Code of Federal Regulations—in 2004. *See* U.S. Dep’t of Labor, Wage & Hour Div., *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122 (Apr. 23, 2004). Under the revised

Part 541 regulations, an employer may properly claim the executive exemption as to an employee if, among other requirements, that employee's "primary duty" is "management." 29 C.F.R. 541.100(a).² The regulations further explain the meaning of the term "management":

Generally, "management" includes activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

29 C.F.R. 541.102.

An employer may properly claim the administrative exemption if an employee's "primary duty" is "the performance of office or non-manual work directly related to the management or general business operations of the employer

² To properly claim the executive exemption, an employer must also show that the employee is paid a weekly salary of at least \$455; regularly supervises two or more employees; and has the authority to hire or fire or makes recommendations as to tangible employment actions affecting others that are given particular weight. *See* 29 C.F.R. 541.100(a).

or the employer’s customers.” 29 C.F.R. 541.200(a).³ To meet this requirement, “an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.” 29 C.F.R. 541.201(a).

Primary Duty. The regulations provide that an employee’s “primary duty” is “the principal, main, major or most important duty that the employee performs.” 29 C.F.R. 541.700(a). They further explain:

Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee’s relative freedom from direct supervision; and the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

Id. Although “[t]he amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee[,] ... [t]ime alone ... is not the sole test.” 29 C.F.R. 541.700(b).

³ To properly claim the administrative exemption, an employer must also show that the employee is paid a weekly salary of at least \$455 and exercises discretion and independent judgment with respect to matters of significance in performing her primary duty. *See* 29 C.F.R. 541.200(a).

First responder regulation. As part of the 2004 final rule, the Department added new regulatory text explaining how the Part 541 exemptions apply with respect to fire fighters and other emergency responders. *See* 69 Fed. Reg. at 22,260-61 (codified at 29 C.F.R. 541.3(b)). This “first responder regulation” provides that the Part 541 exemptions “do not apply to ... fire fighters ..., regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire ... or accident victims; ... or other similar work.” 29 C.F.R. 541.3(b)(1). The regulation then makes explicit that this conclusion is grounded in first responders’ primary duty. Specifically, it goes on to explain that “[s]uch employees do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed.” 29 C.F.R. 541.3(b)(2). “Thus, for example, a ... fire fighter whose primary duty is to ... fight fires is not exempt ... merely because the ... fire fighter also directs the work of other employees in ... fighting a fire.” *Id.* Additionally, “[s]uch employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer.” 29 C.F.R. 541.3(b)(3). Therefore, the first responder regulation clarifies that employees whose primary duty is emergency response are non-exempt. It does not

affect the significance of the primary duty analysis in determining whether a particular employee of a fire department must receive overtime.

The 2004 preamble includes a discussion of the purpose of the first responder regulation. *See* 69 Fed. Reg. at 22,128-30. The new provision was being added, it explained, in response to concerns about the application of the Part 541 exemptions to first responders, because “th[e] silence in the current regulations [as to that issue] has resulted in significant federal court litigation.” 69 Fed. Reg. at 22,129. The Department went on to explain that “[m]ost of the courts facing [the issue of whether first responders qualify for the Part 541 exemptions] have held that police officers, fire fighters, paramedics and EMTs and similar employees are not exempt because they usually cannot meet the requirements for exemption as executive or administrative employees.” *Id.* It proceeded to describe several such cases; with regard to fire fighters, it summarized *Department of Labor v. City of Sapulpa, Oklahoma*, 30 F.3d 1285 (10th Cir. 1994), in which “the court held that fire department captains were not exempt executives because they were not in charge of most fire scenes; had no authority to call additional personnel to a fire scene; did not set work schedules; participated in all the routine manual station duties such as sweeping and mopping floors, washing dishes and cleaning bathrooms; and did not earn much more than the employees they allegedly supervised.” 69 Fed. Reg. at 22,129 (citing *City of Sapulpa*, 30 F.3d at 1288).

The purpose of the new regulation was not to “depart[] from this established case law” but rather “to make clear ... that such ... fire fighters ... and other first responders are entitled to overtime pay.” *Id.* In particular, “[p]olice sergeants, for example, are entitled to overtime pay even if they direct the work of other police officers because their primary duty is not management or directly related to management or general business operations.” *Id.*

The preamble went on to explain that the executive or administrative exemptions do apply if, “in addition to satisfying the other pertinent requirements, ... [fire officials’] primary duty is performing managerial tasks.” 69 Fed. Reg. at 22,130. In this context, managerial tasks include:

evaluating personnel performance; enforcing and imposing penalties for violations of the rules and regulations; making recommendations as to hiring, promotion, discipline or termination; coordinating and implementing training programs; maintaining company payroll and personnel records; handling community complaints, including determining whether to refer such complaints to internal affairs for further investigation; preparing budgets and controlling expenditures; ensuring operational readiness through supervision and inspection of personnel, equipment and quarters; deciding how and where to allocate personnel; managing the distribution of equipment; maintaining inventory of property and supplies; and directing operations at ... fire or accident scenes, including deciding whether additional personnel or equipment is needed.

Id. The preamble cited several cases in which courts had concluded, because fire department employees had management as their primary duty, that such employees were exempt. *Id.* (citing *West v. Anne Arundel Cnty., Md.*, 137 F.3d 752 (4th Cir. 1998); *Smith v. City of Jackson, Miss.*, 954 F.2d 296 (5th Cir. 1992); *Masters v.*

City of Huntington, 800 F. Supp. 363 (S.D. W.Va. 1992); *Simmons v. City of Fort Worth, Tex.*, 805 F. Supp. 419 (N.D. Tex. 1992); *Keller v. City of Columbus, Ind.*, 778 F. Supp. 1480 (S.D. Ind. 1991)). It further noted that “[a]nother important fact considered in at least one case is that exempt police and fire executives generally are not dispatched to calls, but rather have discretion to determine whether and where their assistance is needed.” *Id.* (citing *Anderson v. City of Cleveland, Tenn.*, 90 F. Supp. 2d 906, 909 (E.D. Tenn. 2000)).

Highly compensated employee exemption. The Part 541 regulations also provide that “[h]ighly compensated employees,” meaning employees who earn at least \$100,000 per year, are exempt from the FLSA’s minimum wage and overtime protections if they “customarily and regularly perform[] any one or more of the exempt duties or responsibilities of an executive [or] administrative employee.” 29 C.F.R. 541.601(a). Importantly, the highly compensated employee exemption “applies only to employees whose primary duty includes performing office or non-manual work.” 29 C.F.R. 541.601(d). In discussing the first responder regulation in the 2004 preamble, the Department noted that first responders, including fire fighters, who do not qualify for the Part 541 exemptions under the other tests “also cannot qualify as exempt under the highly compensated test” because their primary duty—emergency response—is not office or non-manual work. 69 Fed. Reg. at 22,129.

II. THE DISTRICT COURT OPINION REFLECTS MISUNDERSTANDINGS OF IMPORTANT ASPECTS OF THE UNDERLYING LAW

As a threshold matter, the district court misconstrues the import of the first responder regulation. Contrary to the district court's suggestion, JA 4522, the executive exemption does not apply categorically to all fire and EMS captains. Rather, the first responder regulation codifies the principle that fire fighters and other first responders whose primary duty is emergency response are not exempt from FLSA protections under either the executive or administrative exemption. *See* 29 C.F.R. 541.3(b); 69 Fed. Reg. at 22,129. The preamble explained that the insertion of the new regulation did not reflect an intent to "depart[] from" the "established case law" discussed in the preamble finding emergency responders to be non-exempt but rather an intent "to make clear" that fire fighters whose primary duty is not management are entitled to overtime pay. 69 Fed. Reg. at 22,129. It explained that certain "high-level ... fire officials" would be exempt in part because their primary duty was management, highlighting the types of tasks that, if the employees' primary duty, constituted management. *See* 69 Fed. Reg. at 22,130 (noting that such employees must also meet the other requirements for the executive exemption in order to be exempt).

Therefore, subsequent to the promulgation of the first responder regulation, there is neither a categorical rule making all fire captains exempt, as the district

court believed, nor an unlimited principle making all employees who go to fire scenes non-exempt, as the court suggested the Captains believed. *See* JA 4522-24. The regulation’s focus on primary duty calls for the consideration of the particular facts of an employee’s job. *See City of Sapulpa*, 30 F.3d at 1288 (responding to employer’s citation to cases finding fire captains to be exempt by explaining that “[t]he common thread in each of these cases is that a title as ‘captain’ provides no guidance on whether the administrative exemption applies; rather, a fact-sensitive inquiry like that the district court conducted here is required”); *see also* 29 C.F.R. 541.2 (“A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee’s salary and duties meet the requirements of the regulations in this part.”); *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446, 453 (4th Cir. 2004) (“[C]ourts must focus on the actual activities of the employee in order [to] determine whether or not he is exempt from FLSA’s overtime regulations.” (quoting *Ale v. Tenn. Valley Auth.*, 269 F.3d 680, 688-89 (6th Cir. 2001)) (alteration in original)).⁴ This focus on primary duty supplies the

⁴ For this reason, the cases the district court cited—and on which the County places significant emphasis, *see* County Br. at 34-39—are not determinative of the outcome of this case. *Hartman v. Arlington County, Virginia*, 720 F. Supp. 1227 (E.D. Va. 1989), *International Ass’n of Firefighters v. City of Alexandria, Virginia*, 720 F. Supp. 1230 (E.D. Va. 1989), and *West v. Anne Arundel County, Maryland*, 137 F.3d 752 (4th Cir. 1998), do not address, and cannot replace an analysis of, the

limiting principle that the district court believed was absent from the Captains' theory.

Moreover, the district court's statement that "the First Responder Regulation ensures the Executive Exemption does not apply to 'blue collar' fire fighters, regardless of rank or pay level, regardless of the work they do at the fire scene,"

particular facts at issue here. In *Hartman*, the fire shift commanders' "own admissions establish[ed] that their primary duty [was] the management of their fire station," and the district court therefore found that "[t]here was no dispute that their primary duty consists of managing in their department." *Hartman*, 720 F. Supp. at 1229; *see also Hartman*, 903 F.2d at 292 (affirming the district court's opinion with an abbreviated analysis noting that "there are no material facts in dispute"). In *International Ass'n of Firefighters*, the analysis of whether the executive exemption applies to "engine company captains" was limited to a few sentences stating without reference to specific facts that those employees are similar to the fire shift commanders in *Hartman* and concluding, again without description of the engine company captains' particular duties, that the employees' primary duty was management. *See Int'l Ass'n of Firefighters*, 720 F. Supp. at 1233; *see also Alexandria Committee of Police v. City of Alexandria*, Nos. 89-2495 to 89-2496, 1990 WL 122044, at *1 (unpublished opinion affirming the application of the executive exemption on grounds unrelated to the primary duty analysis). In *West*, this Court's discussion of the primary duty of the relevant captains did not indicate that those employees spent any time responding to emergency calls or that any evidence suggested that their position descriptions, which described management responsibilities, gave anything other than a complete, accurate picture of their duties. *See West*, 137 F.3d at 763. This Court's discussion of field lieutenants did not indicate that those employees perform emergency response themselves (as opposed to solely "supervis[ing] EMS operations") or that evidence in the record called into question the significance of the employees' management duties. *See id.* Similarly, with regard to EMS training lieutenants, this Court did not address any argument by the employees that their primary duty—or any part of their duties at all—was emergency response. *See id.* at 764. These cases with distinguishable facts cannot stand in for a primary duty analysis on the basis of the record in this case and do not lead to the conclusion that summary judgment was appropriate here.

JA 4523, reflects a misguided focus on the reference in 29 C.F.R. 541.3(a) to “‘blue collar’ workers.” That provision articulates the general principle that the Part 541 exemptions “do not apply to manual laborers or other ‘blue collar’ workers who perform work involving repetitive operations with their hands, physical skill and energy” because their skills are not the type that qualify under the professional exemption described in 29 C.F.R. 541.300. 29 C.F.R. 541.3(a). Its purpose when added to Part 541 in 2004 was to “respond[] to comments revealing a fundamental misunderstanding of the scope and application of the Part 541 regulations” to manual laborers. 69 Fed. Reg. at 22,128. Although the provision immediately precedes the first responder regulation, there is no basis for reading the provision as altering the plain and distinct meaning of 29 C.F.R. 541.3(b) or as otherwise detracting from the importance of the primary duty inquiry.

The district court’s explanation of why the executive exemption applies to the Captains, including its description of the facts relevant to that determination, also reflects a misapplication of the law. As the parties have noted, the district court considered whether the executive exemption applied to all of the Captains even though the County had claimed only the administrative exemption as to the Safety Officers and EMS Supervisors. JA 4524-25; County Br. at 58; Captains Reply Br. at 24. The court therefore failed to address the question whether the

primary duty of those employees was emergency response or instead “the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers.”

29 C.F.R. 541.200(a).

Furthermore, the court’s discussion of the Captains’ duties placed inappropriate emphasis on the amount of time they spent performing managerial tasks. In its sparse description of the facts that supported its conclusion that the Captains’ “primary duty is management of the enterprise,” JA 4524, the court stated that “[a]lthough [the Captains] participate in emergency response, *the bulk of their time* is spent performing the various tasks required to operate a fire station,” JA 4518 (emphasis added). But the amount of time spent on management tasks is, as a legal matter, not determinative of the Captains’ primary duty. The regulation defining “primary duty” explicitly provides that although “[t]he amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee[,] ... [t]ime alone ... is not the sole test.” 29 C.F.R. 541.700(b). Rather, “[t]he term ‘primary duty’ means the principal, main, major or most important duty that the employee performs,” regardless of whether it is the duty that occupies most of the employee’s time. 29 C.F.R. 541.700(a); *see Henry v. Quicken Loans, Inc.*, 698 F.3d 897, 899 (6th Cir. 2012) (““[P]rimary duty” does not mean the most time-consuming duty; it instead

connotes the “principal” or “chief”—meaning the most important—duty performed by the employee.” (quoting *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 504 (6th Cir. 2007))).

III. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT TO THE COUNTY BECAUSE THE CAPTAINS PRESENTED EVIDENCE THAT CREATES A GENUINE DISPUTE AS TO WHETHER THEIR PRIMARY DUTY IS EMERGENCY RESPONSE

A. In a case regarding the application of Part 541 exemptions, an employee’s primary duty is a material fact.

The district court failed to recognize the genuine dispute of material fact regarding what constituted the Captains’ primary duty. Summary judgment is only appropriate if “there is no genuine issue as to any material fact.” Fed. R. Civ. P. 56(c); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A “material” fact is one “that might affect the outcome of the suit under the governing law.” *Liberty Lobby*, 477 U.S. at 248. A dispute of fact is “genuine” “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* Such a dispute cannot be based only on “a scintilla of evidence,” *id.* at 252, but in considering the record the court is to believe all evidence, and draw all justifiable inferences, in the non-movant’s favor, *id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

At the summary judgement stage, “the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether

there is a genuine issue for trial.” *Liberty Lobby*, 477 U.S. at 249; *see Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., Md.*, 721 F.3d 264, 283 (4th Cir. 2013) (“The court’s role in deciding a motion for summary judgment is to identify factual issues, not to resolve them.” (quoting *Redd v. N.Y. State Div. of Parole*, 678 F.3d 166, 174 (2d Cir. 2012))); *Mercantile Peninsula Bank v. French (In re French)*, 499 F.3d 345, 352 (4th Cir. 2007) (“In [considering the evidence at summary judgment], a court is not entitled to either weigh the evidence or make credibility determinations.” (citing *Liberty Lobby*, 477 U.S. at 255)).

The Captains’ primary duty is a material fact in this case. As explained above, identifying an employee’s primary duty is crucial to determining whether the executive or administrative exemption applies to that employee. *See* 29 C.F.R. 541.100(a) (listing as an element of the executive exemption test whether the employee’s “primary duty” is “management”); 29 C.F.R. 541.200(a) (listing as an element of the administrative exemption test whether the employee’s “primary duty” is “the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers”). Under the first responder regulation, that general principle remains true for employees of fire departments. *See* 29 C.F.R. 541.3(b). And the identification of an employee’s primary duty is a question of fact. *See Shockley*, 997 F.2d at 26 (“[T]he amount of time devoted to managerial duties, and the

significance of those duties, present factual questions.” (citing Fed. R. Civ. P. 52(a); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Clark*, 789 F.2d at 286 n.2)); *Watkins v. City of Montgomery, Ala.*, 775 F.3d 1280, 1291 (11th Cir. 2014) (“[T]he ‘primary duty’ determination ... was a question of fact for the jury to decide.” (citing *Icicle Seafoods*, 475 U.S. at 714)); *see also Quicken Loans*, 698 F.3d at 901 (“The [employees] and [employer] presented conflicting evidence in the form of documents and testimony about the [employees’] primary job responsibilities. On this record, ‘it must be left to a trier of fact to weigh the credibility’ of the parties’ contradictory ‘characterization[s] of [the employees’] day-to-day duties.” (quoting *Schaefer v. Ind. Mich. Power Co.*, 358 F.3d 394, 407 (6th Cir. 2004))).

Importantly, an employee’s primary duty is a question of fact even if there is no dispute about what tasks an employee performs. *See Maestas v. Day & Zimmerman, LLC*, 664 F.3d 822, 827 (10th Cir. 2012) (“The plaintiffs do not materially contest any of the employer’s factual claims about the employees’ job duties, some of which are managerial and some of which relate to first response. However, the parties sharply dispute which of plaintiffs’ duties are primary under FLSA.... We conclude that such a dispute is a factual one that, if genuine and material, precludes summary judgment.”); *see also Quicken Loans*, 698 F.3d at 901 (naming as “fact disputes [that] fall within the jury’s domain” whether employees’

daily activities “involved management-like responsibilities, discretion and independent judgment”).⁵

B. A reasonable jury could find that the Captains’ primary duty was emergency response, which precludes a grant of summary judgment as to any of the exemptions the County claims.

Shift Commanders and Station Commanders. A reasonable jury could find that the Shift Commanders’ and Station Commanders’ primary duty is emergency response. The County has presented evidence that the Shift Commanders and Station Commanders had management duties. For example, their position descriptions indicate that they direct, train, and discipline employees, *see* JA 1984, 2005, tasks that are part of management under the Department’s regulatory explanation of the term, *see* 29 C.F.R. 541.102 (listing as management activities “directing the work of employees,” “training of employees,” and “disciplining employees”); 69 Fed. Reg. at 22,130 (listing as management activities of exempt fire department employees “directing operations at ... fire or accident scenes, including deciding whether additional personnel or equipment is needed,”

⁵ The ultimate question whether a Part 541 exemption applies, however, is a legal issue. *See Shockley*, 997 F.2d at 26 (“Whether a particular duty is administrative or managerial presents a legal question ‘governed by the pertinent regulations promulgated by the Wage and Hour Administrator.’” (quoting *Icicle Seafoods*, 475 U.S. at 714)). For example, if a factfinder determines that an employee’s primary duty is management, the executive exemption will (provided the other requirements for the exemption are also met) apply, but if a factfinder determines that the employee’s primary duty is emergency response, it will not. *See* 29 C.F.R. 541.100(a), 541.3(b).

“coordinating and implementing training programs,” and “enforcing and imposing penalties for violations of the rules and regulations”). The County asserts that these tasks are the Shift Commanders’ and Station Commanders’ primary duty. County Br. at 50-53. But the Captains have presented evidence showing that Shift Commanders and Station Commanders respond to emergency calls and perform emergency response, such as fighting fires and providing medical care, *see* JA 197, 199-200, 204, 250, 333, 538-40, 575-76, 965, 1104, 1142-43, 1219, 1417, 1466, work that they argue constitutes those employees’ primary duty, Captains Br. at 39-41. Consideration of the factors listed in the regulatory provision defining “primary duty,” 29 C.F.R. 541.700(a), while viewing the evidence in the light most favorable to the Captains, could support a jury’s finding that the Shift Commanders’ and Station Commanders’ primary duty is emergency response.

The first regulatory factor is “the relative importance of the exempt duties compared with other types of duties.” 29 C.F.R. 541.700(a). The Captains call into question the significance of the Shift Commanders’ and Station Commanders’ management responsibilities. They have presented evidence that there are a host of responsibilities crucial to the management of a shift or station that Shift Commanders and Station Commanders do not perform, such as setting employee schedules, approving leave and overtime, and controlling budgets. *See* JA 246, 534-35, 573, 646-47, 800-01, 934, 961-62, 1100, 1139-40, 1168, 1215, 1220-21;

29 C.F.R. 541.102 (listing as management activities “setting and adjusting [employees’] rates of pay and hours of work” and “planning and controlling the budget”); 69 Fed. Reg. at 22,130 (listing as management activities of exempt fire department employees “deciding how and where to allocate personnel,” “maintaining company payroll and personnel records,” and “preparing budgets and controlling expenditures”). Moreover, deposition testimony from the Captains as well as one of the County’s witnesses indicates that Shift Commanders and Station Commanders participate in as much training as their subordinates, and not always as the instructor, *see* JA 247, 283-84, 648, 801-02, 957, 963, 1137-38, 1170, 1171-73, 1192-93, 1460-61; JA 387-88, which could suggest both that the purpose of the training—being prepared to participate in emergency response—is as central to Shift Commanders’ and Station Commanders’ jobs as it is to those who have no management role, and that training employees, a management task, is not a focus of their jobs. Shift Commanders and Station Commanders also testified that their administration of discipline constitutes compliance with instructions from their own supervisors rather than the exercise of discretion or meaningful authority, *see* JA 215, 260-61, 574, 659-60, 957, 1097, 1103, 1131-33, 1142, 1221, 1443-47, which could indicate that that management task is a routine function. Most significantly, Shift Commanders and Station Commanders leave behind any other task in progress when an emergency call comes in, *see* JA 251, 286, 327-28, 537,

656, 965-66, 1107-08, 1416, 1466-67, and the employees testified that they consider emergency response to be their most important job duty, *see* JA 250, 717, 938-39, 1104, 1142, 1189, 1328.⁶ This evidence could support a reasonable jury's finding that the Shift Commanders' and Station Commanders' emergency response duties are more important than their management duties.

The second primary duty factor is "the amount of time spent performing exempt work." 29 C.F.R. 541.700(a). Although the County emphasizes that the Captains spend only an average of less than an hour and a half of each 24-hour shift away from the station on emergency response calls, *see* County Br. at 6-7; JA 1700, that fact does not mean that this factor weighs in favor of a conclusion that management is the Shift Commanders' and Station Commanders' primary duty. As explained above, the law is plain that time is not determinative.

See 29 C.F.R. 541.700(b) ("Time alone ... is not the sole test."). Indeed, the

⁶ Although the County has not focused on the Captains' management role while responding to emergency calls, the Department notes that it takes the position, to which the Second Circuit has deferred, that if first responders "direct the work of [their] subordinate officers while performing the types of [first response] duties enumerated in section 541.3(b)(1), such supervision does not constitute management that, in applying the primary duties test, would satisfy the second prong of [the] executive exemption." *Mullins v. City of New York*, 653 F.3d 104, 110, 115 (2d Cir. 2011) (citing Sec'y of Labor's Amicus Curiae Letter Br. in that case (No. 09-3435) (filed Mar. 18, 2011)); *see* 29 C.F.R. 541.3(b)(2) ("[A] ... fire fighter whose primary duty is to... fight fires is not exempt ... merely because the ... fire fighter also directs the work of other employees in ... fighting a fire.").

County's point about time is more revealing of the nature of firefighting than of the significance of the Captains' duty to respond to calls. As a practical matter, fire department employees must be available and prepared to respond to emergency calls around the clock but only respond to such calls as frequently as they arise; the Captains spend as much time performing emergency response as do their subordinates. *See* JA 251, 286, 327-28, 534, 656, 965-66, 1107-08, 1416, 1466-67 (an emergency vehicle to which a Captain is assigned does not leave the station without the Captain); JA 156, 160, 1697 (County's evidence explaining that its time study was based on movement of the emergency vehicles rather than of a particular person). Additionally, the Captains presented evidence that Shift Commanders and Station Commanders spend several hours per shift participating in physical fitness and other training, just as the fire fighters they supervise do, because those tasks prepare them for emergency response. *See* JA 247, 283-84, 648, 801-02, 963, 1137-38, 1101-02, 1170, 1171-73, 1192-93, 1460-61. Finally, the Captains presented evidence showing that certain management tasks took less time over the course of a year than they spent on training over the course of only a small number of shifts; in particular, Station Commanders testified that they spend less than six hours over an entire year writing performance evaluations, *see* JA 647, 962, no more than three or four hours in a year creating "wish lists" of new purchases for the station, *see* JA 1013, and only an hour each year reviewing

station policies (after spending four or five hours on such review in the first year in the position), *see* JA 1014. Viewing this evidence in the light most favorable to the Captains, a reasonable jury could find that the way the Shift Commanders and Station Commanders spent their time suggests that emergency response was a more important duty than management.

The third factor to consider in a primary duty analysis is “the employee’s relative freedom from direct supervision.” 29 C.F.R. 541.700(a). Although the County notes that Shift Commanders’ and Station Commanders’ superiors are not present at the fire stations frequently, *see* County Br. at 9 (asserting that the Battalion Chief visits the station only once a week), the County’s own declarant explained that communication between those employees and the Battalion Chiefs to whom they report occurs daily, *see* JA 2518, and the Shift Commanders’ and Station Commanders’ deposition testimony explains that they spoke to or emailed with higher-ranking officers about all discipline, and many believed themselves to be giving effect to the orders of such officers rather than exercising their own discretion. *See* JA 194 (“Any good captain will tell you he doesn’t have an opinion about anything. He has whatever opinion the fire chief tells him it is.... [W]e are told what to do and, by and large, we do it.”), 215, 260-61, 574, 659-60, 957, 1097, 1103, 1131-33, 1221, 1443-47. This evidence of close supervision

could support a reasonable finding that management was not the Shift Commanders' or Station Commanders' most significant responsibility.

The final primary duty factor is “the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.” 29 C.F.R. 541.700(a). Although the Captains are assigned to a higher pay grade than the employees they supervise, the County’s pay scale shows that Lieutenants can earn as much or more than a Captain’s salary, even before taking into account the overtime compensation Lieutenants receive for working long hours. *See* JA 2153-54; *see also* JA 577-78 (Shift Commander testimony that he postponed seeking a promotion from the Lieutenant position because losing overtime compensation constituted “a considerable drop in pay”); JA 947-48 (Shift Commander testimony that he waited to seek a promotion from Lieutenant until reaching the top end of the pay scale because becoming a Shift Commander would mean “losing money”). Crediting the evidence that some Shift Commanders and Station Commanders received salaries below the pay of the Lieutenants they supervised could reasonably contribute to a finding that the non-exempt duties Shift Commanders and Station Commanders have in common with Lieutenants—emergency response—were more important than their exempt duties.

In sum, if the evidence is viewed in the light most favorable to the Captains, a reasonable jury could find that the County has not met its burden to show that the

Shift Commanders' and Station Commanders' primary duty is management.

See Desmond, 564 F.3d at 691-92 (noting that exempt status is an issue as to which the employer has the burden of proof). A jury could find that because the Shift Commanders and Station Commanders perform emergency response, believe that duty to be the most important part of their jobs, spend as much time on emergency calls as lower-ranked fire fighters, have limited management responsibilities, are closely supervised, and are not paid significantly, if at all, more than some lower-ranked fire fighters, the facts as a whole indicate that their "main, major or most important duty" is emergency response. 29 C.F.R. 541.700(a). Therefore, there is a genuine dispute as to the Shift Commanders' and Station Commanders' primary duty. *See Liberty Lobby*, 477 U.S. at 252, 255 (explaining that for purposes of determining whether an issue of material fact is genuine, a court must credit anything more than a "scintilla" of evidence); *see also Maestas*, 664 F.3d at 830 (noting that statements by employees "that their primary duty is to protect [the location for which they were hired to provide security]" were among the evidence in the record creating a genuine dispute of material fact with regard to the application of the executive exemption). Discrediting the Captains' evidence, including their deposition testimony, is not permitted at the summary judgment stage. *See French*, 499 F.3d at 353-54 (overturning a bankruptcy court's grant of summary judgment because the court disbelieved statements made by a party and a

witness rather than drawing inferences in the non-moving party's favor). Because a grant of summary judgment to the County would require overlooking or rejecting the Captains' evidence, it is not the correct result.

Safety Officers and EMS Supervisors. A reasonable jury could also find that the Safety Officers' and EMS Supervisors' primary duty is emergency response. Because the County claims the administrative exemption as to the Safety Officers and EMS Supervisors, it must show that the primary duties of those employees are "office or non-manual work directly related to the management or general business operations of the employer." 29 C.F.R. 541.200(a). The County emphasizes the role of Safety Officers and EMS Supervisors in investigating injuries and accidents and overseeing the provision of medical services, respectively, arguing that these duties are primary and "are non-manual or office work." County Br. at 60. But Safety Officers and EMS Supervisors explained in deposition testimony that they contribute to the Fire Department's response at emergency scenes: the Safety Officers explained that they ensure that Fire Department employees do not attempt to control a fire in a manner that jeopardizes their safety, *see* JA 666, 1312-13, 1322, 1429, and EMS Supervisors explained that they provide medical services to accident or fire victims, *see* JA 653, 861-63; *see also* JA 654 (testimony that EMS Supervisors travel with medical supplies so that they can provide such services). The Captains assert that these emergency response tasks are the employees'

primary duty. Captains Br. at 39, 42-44; Captains Reply Br. at 24-26. Evidence in the record could support a reasonable jury's finding that, considering the Safety Officers' and EMS Supervisors' jobs as a whole, their emergency response duties were "principal, main, major or most important." 29 C.F.R. 541.700(a); *see Liberty Lobby*, 477 U.S. at 248.

Consideration of the primary duty factors, 29 C.F.R. 541.700(a), leads to this result. As to the relative importance of their emergency response duties, Safety Officers and EMS Supervisors testified that they believed their emergency response duties were their most important tasks. *See* JA 652, 717, 858-59, 1064, 1328. Neither Safety Officers nor EMS Supervisors have discretion not to go to accident scenes when dispatched to them. *See* JA 859, 1017, 1328-29; *see* 69 Fed. Reg. at 22,130 (noting as an "important fact" in finding fire department employees exempt that they "generally are not dispatched to calls, but rather have discretion to determine whether and where their assistance is needed" (citing *Anderson*, 90 F. Supp. 2d at 909)). They must leave behind any other task in order to respond to calls. *See* JA 859, 1328-29. This evidence could contribute to a reasonable jury's finding that the Safety Officers' and EMS Supervisors' primary duty is emergency response.

Safety Officers and EMS Supervisors do not spend all or most of their work time performing emergency response, but that fact is not determinative. As

explained above, time is not the sole factor in a primary duty inquiry. 29 C.F.R. 541.700(b). Furthermore, if viewed in the light most favorable to the Captains, the context here suggests that the amount of time Safety Officers and EMS Supervisors spend responding to calls does not undercut the Captains' position that that responsibility is important: the time Safety Officers and EMS Supervisors spend out on calls reflects the number of emergencies that arise rather than the significance of the work; they spend similar amounts of time responding to calls as lower-ranked fire fighters, *see* JA 156, 160, 1697, 1700; and they spend other time during each shift training to prepare for emergency response tasks, *see* JA 649, 714, 856, 1327, 1431.

Finally, the Safety Officers' and EMS Supervisors' salaries compare to those of Lieutenants just as Shift Commanders' and Station Commanders' do; they are assigned a higher pay grade but do not always make more money than Lieutenants, either because of where they fall on the range of salaries within the grade or because the Lieutenants are paid overtime compensation. *See* JA 2153-54. This evidence could be understood to suggest that the most important duties of Safety Officers and EMS Supervisors are the types of tasks they have in common with Lieutenants, i.e., emergency response.

If viewed in the light most favorable to the Captains, this evidence—the Safety Officers and EMS Supervisors believe emergency response to be their most

important duty, they prioritize response calls above all other tasks, they spend about as much time at emergency response and training in preparation for emergency response as lower-ranked fire fighters, and they do not always earn more pay than such fire fighters—could support a reasonable jury’s finding that the Safety Officers’ and EMS Supervisors’ primary duties were their activities at emergency scenes. To conclude otherwise would require improperly weighing evidence and assessing the credibility of the Captains’ deposition testimony. *See Liberty Lobby*, 477 U.S. at 255 (“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.”).

Highly compensated employee exemption. A grant of summary judgment to the County based on the highly compensated employee exemption would also be error. The parties do not dispute that the Captains meet the salary threshold set by that exemption. *See* County Br. at 5; Captains Reply Br. at 29-30 (presenting no argument about whether the Captains earn more than \$100,000 per year). But the question whether the employees’ primary duty is emergency response is as central to the application of the highly compensated exemption as it is to the executive and administrative exemptions; an employer cannot properly claim the highly compensated exemption unless the employee’s primary duty “includes performing office or non-manual work.” *See* 29 C.F.R. 541.601(d). Therefore, there is a

genuine issue of material fact as to each category of Captain with respect to this exemption as well, and the issue cannot be resolved at the summary judgment stage. *See Liberty Lobby*, 477 U.S. at 255.

C. Caselaw cited in the 2004 preamble and recent opinions from other circuits support this conclusion.

This analysis of the applicability of the Part 541 exemptions to the Captains is consistent with the case law that informed the development of the first responder regulation, as discussed in the 2004 preamble. The opinion cited in the preamble to demonstrate that many courts had found fire fighters to be non-exempt employees, *City of Sapulpa*, 30 F.3d 1285, affirmed a district court’s conclusion that certain captains’ primary duty was not management based on factual findings including that the captains “do not set work schedules for other employees” and “do not earn much more than the employees they allegedly supervise.” *Id.* at 1288. *City of Sapulpa* also distinguished several cases finding other fire captains to be exempt because they had different facts such as that the employees “perform limited manual fire fighting,” “have authority to assign firemen to particular jobs,” or “rarely participate in actual firefighting.” *Id.* (citing *Atlanta Prof. Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991); *Masters*, 800 F. Supp. at 365-66; *Harkins v. City of Chesapeake*, No. 88-254, 1988 WL 235927 (E.D. Va. Dec. 2, 1988); *Smith*, 954 F.2d at 297-99).

The cases cited in the preamble to demonstrate the circumstances under which high-level fire officials are properly held to be exempt involved facts distinguishable from those presented here, as is evident from the preamble text immediately preceding the discussion of the cases. *See* 69 Fed. Reg. at 22,130 (noting that managerial tasks were the employees’ primary duty and listing as examples of such tasks “preparing budgets and controlling expenditures,” “deciding how and where to allocate personnel,” and “managing the distribution of equipment”). In *West v. Anne Arundel County, Maryland*, 137 F.3d 752 (4th Cir. 1998), for instance, the Fourth Circuit concluded that the executive exemption applied to emergency medical technicians (“EMTs”) who served as captains and field lieutenants, and that the administrative exemption applied to EMTs who served as EMS training lieutenants, in the absence of any suggestion that the employees’ primary duty was emergency response. *Id.* at 757, 763-64; *see also supra note 4*. In *Smith v. City of Jackson, Mississippi*, 954 F.2d 296 (5th Cir. 1992), the exempt employees were district chiefs or battalion chiefs who supervised captains, responded to only some types of calls, and rarely performed “hands on” firefighting. *Id.* at 297, 299. In *Masters v. City of Huntington*, 800 F. Supp. 363 (S.D. W.Va. 1992), captains were found to be exempt after a trial at which the court was apparently not asked to consider whether emergency response was their primary duty. *Id.* at 365-67.

Furthermore, the conclusion that summary judgment is inappropriate as to the Captains is consistent with recent decisions from other circuits considering similar scenarios. In *Maestas v. Day & Zimmerman, LLC*, 664 F.3d 822 (10th Cir. 2012), the Tenth Circuit addressed the application of the executive exemption to a private security officer who “performs a mix of managerial duties, such as ensuring that his subordinates are well-prepared, and first responder duties, like patrolling his zone and responding to emergencies.” *Id.* at 829-30. The court discussed the factors described in the primary duty regulation, noting that “[t]he relative importance of [the employee’s] managerial, administrative, and first responder duties is debatable”; “the strict hierarchical structure of the security force also suggests that [this category of employees] do not enjoy significant freedom from supervision”; and “[these employees] appear to receive only ten percent more in salary than their non-exempt subordinates.” *Id.* at 830. It also found significant that “the record contains numerous statements from plaintiffs that their primary duty is to protect the laboratory [where the private security force works].” *Id.* Because “a dispute [about primary duty] presents a question of fact rather than an issue of law,” and “[a] rational factfinder could ... find that [the employee’s] primary duty is patrolling,” the Tenth Circuit concluded that the district court’s grant of summary judgment to the employer on this issue was improper. *Id.* at 824, 829-30. Similar reasoning, and the same result, should apply here.

In *Watkins v. City of Montgomery, Alabama*, 775 F.3d 1280 (11th Cir. 2014), the Eleventh Circuit affirmed a jury verdict in which one of “the issues ... properly before [the jury]” was the primary duty of fire suppression lieutenants whose employer claimed the executive exemption. *Id.* at 1282, 1285, 1289. Notably, the jury’s verdict was based on instructions from the district court explaining that the parties disagreed about whether fire “lieutenants’ primary duty was the ‘prevention, control, or extinguishment of fires and the rescue of fire victims,’ on the one hand, or management, on the other.” *Id.* at 1291. The district court also—properly, in the Eleventh Circuit’s view—instructed the jury that “the determination of whether an individual qualifies as an executive must be made on a case-by-case basis, accounting for the factors set out in the definition of ‘primary duty,’” and that “[i]f you determine that the plaintiff’s primary duty is management, then the executive exemption applies to the plaintiffs ... [c]onversly, if you determine that the plaintiffs’ primary duty is to fight fires ... the executive exemption does not apply to the plaintiffs.” *Id.* at 1293. This is just the kind of determination that should be left to a jury in this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment to the County and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and (d), and 32(a)(7)(C), I certify the following with respect to the foregoing Brief for the Secretary of Labor as *Amicus Curiae*:

This brief complies with the length limitation permitted in this Court's order of November 13, 2015 in accordance with Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,943 words (excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii)).

This brief also complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 32(a)(5) because this brief was prepared with Microsoft Office Word, using Times New Roman, 14-point font.

s/ Sarah Marcus _____
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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2015, I electronically filed the foregoing Brief for the Secretary of Labor as Amicus Curiae with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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