

## Florida Law Review

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Volume 65 | Issue 4

Article 4

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July 2013

# Regulation by *Amicus*: The Department of Labor's Policy Making in the Courts

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REGULATION BY *AMICUS*: THE DEPARTMENT OF LABOR'S  
POLICY MAKING IN THE COURTS

*Deborah Thompson Eisenberg\**

Abstract

This Article examines the practice of “regulation by amicus”: that is, an agency’s attempt to mold statutory interpretation and establish policy by filing “friend of the court” briefs in private litigation. Since the United States Supreme Court recognized agency amicus interpretations as a source of controlling law entitled to deference in *Auer v. Robbins*, agencies have used amicus curiae briefs—in strategic and at times aggressive ways—to advance the political agenda of the President in the courts.

Using the lens of the U.S. Department of Labor’s amicus activity in wage and hour cases, this Article explores the tension between the extraordinary power and efficiency of agency amicus policy making on the one hand, with the harms this less transparent approach may inflict on fundamental democratic values such as public participation and separation of powers.

The Article first puts the issue in empirical context by examining the nature and impact of the DOL’s amicus filings in 324 Fair Labor Standards Act cases from the Roosevelt through Obama administrations. To evaluate the normative implications of amicus policy making, the piece then juxtaposes the especially active amicus strategies employed by the Bush administration—which manipulated deference principles to weaken worker protection laws—and the Obama administration—which increased amicus filings to revive enforcement of the Fair Labor Standards Act. This Article proposes an analytical framework for judicial review of agency amicus arguments that remains faithful to separation of powers—especially to the legislative public policy established in remedial statutes like the FLSA.

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*It would be a considerable paradox if before 2001 the plaintiffs would win because the President was a Democrat, between 2001 and 2009 the defendant would win because the President was a Republican, and in 2012 the plaintiffs would win because the President is again a Democrat. That would make a travesty of the principle of deference to interpretations of statutes by the agencies responsible for enforcing them, since that principle is based on a belief either that agencies have useful knowledge that can aid a court or that they are delegates of Congress charged with interpreting and applying their organic statutes consistently with legislative purpose.<sup>1</sup>*

#### INTRODUCTION

This Article examines the practice of “regulation by amicus”: that is, an agency’s strategic attempt to mold the interpretation of the law and establish policy through the filing of amicus curiae or “friend of the court” briefs in private litigation. The amicus strategy provides a powerful tool by which agencies may establish and change the law governing federal statutes through binding judicial precedents.

Amicus briefs by the government can be helpful to courts and efficient for the agency—providing “more bang for the buck” than traditional agency enforcement actions and promoting uniform interpretation of the law. But agencies can also improperly exploit amicus filings and manipulate judicial deference doctrine to pursue political goals, sometimes to the detriment of the statutory purpose with which Congress has entrusted them. “Regulation by amicus” can, in some cases, undermine the democratic values of accountability, transparency, public participation, and reflective, reasoned decision making embodied in the Administrative Procedure Act (APA).<sup>2</sup> The APA contemplates that agencies will carry out their congressionally delegated mission primarily through formal rulemaking<sup>3</sup> or adjudication.<sup>4</sup> The APA envisions that courts will serve as a

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1. In this passage from *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 599 (7th Cir. 2012), Judge Richard Posner criticized the Department of Labor’s “gyrating” interpretations during the Clinton, Bush, and Obama administrations about the compensability under the Fair Labor Standards Act of the time workers spend donning and doffing protective clothing.

2. 5 U.S.C. §§ 551–559 (2006); *see also* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 697 (2000) (“Whatever the weaknesses of the American Administrative Procedure Act—and they are serious—the statute recognizes that regulatory decisionmaking needs special forms of legitimation that enhance popular participation, provide ongoing tests for bureaucratic claims of knowledge, and encourage serious normative reflection upon the policy choices inevitably concealed in abstract statutory guidelines.”).

3. 5 U.S.C. §§ 551–559. “[R]ule making” under the APA means “the agency process for formulating, amending, or repealing a rule.” *Id.* § 551(5). Rulemaking requires that the agency provide an opportunity for public notice and comment on the proposed rule. *Id.* § 553(b)–(e).

check on the agency's actions, mandating that courts "shall decide all relevant questions of law [and] interpret constitutional and statutory provisions."<sup>5</sup>

As other scholars have noted, the APA's reservation of legal questions to the courts has been weakened by doctrine regarding judicial deference to agency interpretations.<sup>6</sup> Most notably, in *Chevron v. Natural Resources Defense Council, Inc.*,<sup>7</sup> the U.S. Supreme Court proclaimed judicial deference to an agency's reasonable interpretation of an ambiguous statute that Congress has charged it with implementing, particularly when that interpretation is set forth in regulations developed through notice-and-comment rulemaking.<sup>8</sup>

Since *Chevron*, deference doctrine has reached far beyond rulemaking to include informal agency interpretations and amicus arguments. Specifically, in *Auer v. Robbins*,<sup>9</sup> the Court extended controlling *Chevron* deference to an agency's informal interpretations of its own vague regulations set forth—for the first time—in an amicus brief.<sup>10</sup> As explored in this Article, *Auer* led to a jubilee of agency amicus activity and court confusion about the appropriate level of deference that should be given to agency amicus positions, particularly when those positions advanced novel theories, contradicted prior agency interpretations, or were not based on rulemaking or other formal processes. Recently, in *Christopher v. SmithKline Beecham Corp.*,<sup>11</sup> the Court upheld *Auer* but limited its reach to exclude cases in which when the agency's amicus interpretation would constitute "unfair surprise"<sup>12</sup> to regulated entities or if "there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'"<sup>13</sup>

Because amicus filings lack the transparency and public participation of rulemaking, the practice of "regulation by amicus" has occurred a bit under

4. "Adjudication" under the APA means the "agency process for the formulation of an order." *Id.* § 551(7). So, for example, hearings before the National Labor Relations Board would be a form of "adjudication."

5. *Id.* § 706.

6. One scholar has described the judicial review function under the APA as "a dead letter" because of the Court's common law deference frameworks. J. Lyn Entrikin Goering, *Tailoring Deference to Variety with a Wink and a Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 89 (2010); see also Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why it Matters*, 59 ADMIN. L. REV. 673 (2007).

7. 467 U.S. 837 (1984).

8. *Id.* at 865–66.

9. 519 U.S. 452 (1997).

10. See *id.* at 461 (holding that the DOL's amicus interpretation of its own ambiguous regulation was entitled to deference).

11. 132 S. Ct. 2156 (2012).

12. *Id.* at 2167.

13. *Id.* at 2166 (quoting *Auer*, 519 U.S. at 462).

the radar and has not been comprehensively analyzed by legal scholars. Scholarship concerning the impact of amicus briefs generally, or administrative deference doctrine more specifically, has focused on judicial response. For example, legal scholars have examined how courts—primarily the U.S. Supreme Court—have applied various doctrines of administrative deference to agency interpretations, including those set forth in amicus briefs.<sup>14</sup> And political scientists have examined the impact of amicus curiae filings by the Solicitor General on behalf of federal administrative agencies in the Supreme Court.<sup>15</sup>

Little to no scholarly analysis has been focused in the *opposite* direction; that is, on the affirmative use of amicus briefs by agencies—in strategic and at times aggressive ways—to advance the President's political agenda in the courts. This Article begins to fill that gap, focusing on one agency that has been especially active and masterful at using an amicus approach to mold policy for the statutes with which Congress entrusted it

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14. See, e.g., Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1491–92 (2005) (finding that lower courts have generally waffled on the issue of how and why to defer to agency interpretations); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008) (analyzing U.S. Supreme Court cases between 1984 and 2006 involving an agency's interpretation of a statute and finding that judicial ideology was a significant predictor of outcomes); Foote, *supra* note 6, at 722–23 (arguing that *Chevron's* premise that administrative actions are a type of statutory interpretation is flawed and allows administrative procedures to displace statutes as a source of law); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007) (discussing revitalization of *Skidmore* after *United States v. Mead*); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 828–30 (2000) (concluding that amicus briefs, especially those submitted by the Solicitor General, have an impact on the Supreme Court); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 873–89 (2001) (proposing a “step zero” to *Chevron* analysis in which the court would decide whether to analyze the issue under *Chevron* or *Skidmore*); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 870–71 (2006) (finding that application of *Chevron* framework is greatly affected by the judges' own ideological convictions); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1817 (2010) (concluding that formal deference regimes do not predict votes, but justices are likely to vote according to ideological influences).

15. See, e.g., PAUL M. COLLINS, JR., *FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING* (2008). Professor Collins conducted an empirical study of amicus briefs submitted to the U.S. Supreme Court and found “strong support for the Solicitor General's influence in the Court.” *Id.* at 113. Specifically, “[w]hen the SG argues a liberal position, a justice is 13% more likely to cast a liberal vote; conversely, when the SG advocates for the conservative position, the likelihood of observing a justice cast a conservative vote increases by 13%.” *Id.*; see also Rebecca E. Deen et al., *The Solicitor General as Amicus, 1953-2000: How Influential?*, 87 JUDICATURE 60, 68 tbl.6 (2003) (finding that the Solicitor General was more successful as an amicus than as a litigant, prevailing a high of 84.6% of the time during the Warren Court and a low of 73.1% during the Rehnquist Court).

to enforce: the U.S. Department of Labor. The DOL's amicus activity in cases involving the Fair Labor Standards Act (FLSA)<sup>16</sup> provides a unique lens for analyzing how courts should treat agency amicus arguments. Many of the leading agency deference cases—*Skidmore v. Swift & Co.*,<sup>17</sup> *Auer v. Robbins*,<sup>18</sup> *Christensen v. Harris County*,<sup>19</sup> *Long Island Care at Home, Ltd. v. Coke*,<sup>20</sup> and *Christopher v. SmithKline Beecham Corp.*<sup>21</sup>—involved the DOL offering an interpretation of the FLSA—often for the first time—in an amicus brief rather than through rulemaking or a direct enforcement action.

In particular, the DOL under President George W. Bush—coming to power on the heels of *Auer*—used deference doctrine as a sword to emasculate worker protection statutes. For the first time in the agency's history, the Bush DOL affirmatively filed amicus briefs on behalf of *employers* rather than employees to change the direction of FLSA policy. The Bush DOL argued that positions articulated in its amicus briefs should be afforded the highest level of deference under *Chevron* and *Auer*—even where those arguments were inconsistent with long-standing prior agency interpretations, were not based on formal rulemaking, and were announced for the first time in the amicus brief or in an informal opinion letter issued during the pending litigation.<sup>22</sup>

The amicus strategy gave the Bush administration a means to change the law to benefit favored regulated interests without the public scrutiny and compromises involved in promulgating formal regulations pursuant to the APA. Indeed, the Bush DOL's amicus efforts culminated in a significant victory in *Long Island Care at Home, Ltd. v. Coke*,<sup>23</sup> in which a unanimous Court deferred to the agency's new, pro-employer interpretation that home healthcare workers were not entitled to overtime—a position that contradicted decades of prior DOL positions that these workers were entitled to overtime under the FLSA. After *Long Island Care at Home*, the DOL publicly touted amicus briefs as “a very powerful tool” to influence how the Department's regulations are interpreted by the courts.<sup>24</sup>

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16. 29 U.S.C. §§ 201–219 (2006).

17. 323 U.S. 134 (1944).

18. 519 U.S. 452 (1997).

19. 529 U.S. 576 (2000).

20. 551 U.S. 158 (2007).

21. 132 S. Ct. 2156 (2012) (reviewing *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011)).

22. See *infra* Part II.F.1 for examples.

23. *Long Island Care at Home*, 551 U.S. at 171–74.

24. Michael R. Triplett, *DOL Focus on Amicus Briefs, Opinion Letters Pays Off With Increased Deference by Courts*, 217 Daily Lab. Rep. Online (BNA) B-1 (Nov. 9, 2007) (reporting comments by Paul L. Frieden, head of the appellate litigation department of the DOL Solicitor's Office at the American Bar Association's Labor and Employment Section meeting on November 8, 2007).

Although the Bush administration was especially adept at using amicus briefs to accomplish its political aims of limiting the scope of the FLSA, the Obama DOL used amicus briefs even more frequently to revive and expand FLSA enforcement. In the four years of its first term, the Obama DOL submitted more amicus briefs (forty-three) than the Bush DOL did in eight years (twenty-three), partly to reverse certain pro-employer interpretations of the Bush DOL.<sup>25</sup> In some cases, the Obama DOL's attempts to restore FLSA policy to pre-Bush, pro-employee interpretations have been rejected by courts, which have criticized the “gyrating” positions of the DOL from the Clinton, to the Bush, to the Obama administrations.<sup>26</sup>

Although the Obama DOL so far has a lower success rate with its amicus filings than the Bush DOL—with its amicus position prevailing in 56% of cases that have been decided as compared to the Bush DOL's amicus success rate of 74%—it has achieved significant victories on behalf of workers. For example, in *Kasten v. Saint-Gobain Performance Plastics Corp.*,<sup>27</sup> the Supreme Court followed the DOL's position that oral complaints of wage violations are protected under the FLSA's anti-retaliation clause.<sup>28</sup> It suffered a blow, however, in *Christopher v. SmithKline Beecham*, in which the Court upheld *Auer*'s principle of deference for agency amicus interpretations so long as they do not to create “unfair surprise” to regulated entities.<sup>29</sup>

The increasingly politically charged nature of both the agency's amicus efforts—as seen during the Bush and Obama administrations in particular—and the ideological split in the Supreme Court's decisions about whether to defer to them portends a chaotic future for FLSA litigation in the lower courts. But one thing is clear: the agency amicus strategy can be a potent tool of policy making. While the Supreme Court vacillates about the level of deference, if any, that should be applied to amicus arguments, the empirical analysis in this Article shows that lower

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25. See Jake Blumgart, *The Long Fight for Labor: Why is Barack Obama Having Such a Difficult Time Undoing Bush-era Damage to the Department of Labor?*, AM. PROSPECT, Mar. 9, 2010, <http://prospect.org/article/long-fight-labor-0> (“George W. Bush staffed his Department of Labor with rigidly pro-business ideologues who allowed the department's investigative functions to wither. Obama promised to end conservative influence over the department, freeing the career staff to fulfill the agency's core missions.”). Although employer groups did not complain about the Bush administration's aggressive amicus strategy that tended to favor employers, they have criticized the Obama DOL for active amicus filings on behalf of employees. See News Release, HR Policy Association to Scrutinize DOL Activity in the Courts on Wage and Hour Cases (Oct. 2, 2009), [http://www.hrpolicy.org/issues\\_story.aspx?gid=543&sid=3356&miid=8&msid=43](http://www.hrpolicy.org/issues_story.aspx?gid=543&sid=3356&miid=8&msid=43) (“Well below the radar, the Obama DOL is already seeking changes in the wage and hour laws by filing numerous amicus briefs in the federal courts trying to reshape the laws in a more plaintiff-friendly manner.”).

26. See *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 599 (7th Cir. 2012).

27. 131 S. Ct. 1325 (2011).

28. *Id.* at 1336.

29. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (quoting and citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007)).



courts have tended to rule consistently with DOL amicus positions, often without identifying any particular deference regime or guiding interpretive principles.

This Article shines a light on the phenomenon of regulation by amicus to ensure that the integrity of the administrative enforcement process and the core remedial intent of worker protection statutes are not lost in the midst of the deference battles. Congress's remedial purpose in passing the FLSA guided judicial review of DOL amicus briefs until the age of *Auer*. Although meant to promote uniformity of the law and efficiency for courts, *Auer* has caused confusion and unintended consequences. In particular, the Bush DOL used *Auer* and *Chevron* to undermine—rather than promote—the FLSA's goal of improving conditions for wage earners. The Obama DOL zealously used amicus briefs to push FLSA enforcement so broadly that it caused corporate and judicial backlash, as seen in *Christopher*. If agency amicus activity is perceived to be guided by the ideology of the political party in control of the White House—rather than the core remedial intent of worker protection statutes—both the credibility of the DOL and its effectiveness as an advocate on behalf of statutory beneficiaries of the FLSA will be harmed.

Using the DOL's amicus activity in FLSA cases, this Article explores the tension between the extraordinary power and efficiency of agency amicus briefs on the one hand with the harms amicus policy making may inflict on bedrock democratic values such as transparency, public participation, and separation of powers on the other. To be sure, having the government as a “friend” to weigh in on difficult issues of statutory interpretation can help to guide courts through the thicket of complex regulatory schemes, such as the FLSA's web of exemptions and broad standards that must be applied to an ever-changing economy. If the DOL exercises its amicus power in harmony with the remedial purpose of the FLSA, the agency can be a critical, effective voice on behalf of the workers who are protected by the FLSA. But amicus briefs and other informal guidance also can be more easily, and stealthily, manipulated by regulated interests to achieve political aims than traditional administrative processes such as rulemaking. Given its greater malleability, amicus policy making poses a higher risk of agency capture.<sup>30</sup> Because amicus positions can flip-

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30. “Agency capture” means the agency is unduly influenced by the industries that it is charged with regulating. See David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 497 (1999) (“In ‘captured’ agencies, agency regulators do not act as ‘arms-length’ representatives of some larger ‘public interest’ in their interaction with regulated industries. Instead, government officials work to advance the agenda of current firms in the industry by formulating regulations that benefit or at least do not substantially burden the industry.”); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1565 (1992) (“According to the capture hypothesis, instead of providing meaningful input into deliberation about the public interest, industry representatives co-opt governmental regulatory power in order to satisfy their private desires.”).

flop quickly with a change in administration, inconsistent agency amicus positions may undermine the credibility of the DOL as a technical statutory expert, to the detriment of the workers whom Congress sought to protect with the FLSA.

The Article proceeds as follows: Part I provides background information about the DOL and the FLSA and analyzes the doctrinal continuum of judicial deference to agency actions from *Skidmore* through *Christopher*. The empirical analysis in Part II examines the nature and impact of DOL amicus filings in 324 FLSA cases from the time the Act was passed during the Roosevelt administration in 1938 through the end of President Obama's first term (ending December 31, 2012). This Part then juxtaposes the DOL's amicus activity under the Bush and Obama administrations to highlight the benefits and harms of an amicus approach to policy making.

Part III considers the normative implications of the agency amicus strategy in the modern administrative state and proposes an analytical framework for judicial review of agency amicus activity in the wake of *Auer* and *Christopher*. The Article argues that deference should not apply to amicus arguments where the agency's interpretation conflicts with Congress's core remedial purpose in enacting worker protection statutes.

## I. BACKGROUND

This Part provides background information about the DOL, the FLSA, and the nature of the agency deference questions that arise in FLSA cases.

### A. *The Department of Labor and the FLSA*

President William Howard Taft reluctantly added the DOL to the presidential cabinet in 1913,<sup>31</sup> after decades of lobbying for such a department by labor unions and progressives.<sup>32</sup> The DOL's purpose was "to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment."<sup>33</sup>

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31. See Judson MacLaury, *A Brief History: The U.S. Department of Labor* (rev. ed. reprinted from A HISTORICAL GUIDE TO THE U.S. GOVERNMENT (George T. Kurian ed., 1998)), available at <http://www.dol.gov/oasam/programs/history/dolhistoxford.htm>. President Taft signed the bill just hours before President Wilson took office. President Taft's signing memorandum indicated that he signed the bill "with considerable hesitation," not because he disagreed with the purpose but because he thought that "nine departments [were] enough for the proper administration of the government" and that a reorganization of departments was required. Memorandum from President William Howard Taft, Memorandum to Accompany the Act to Create a Department of Labor, Mar. 4, 1913, available at <http://www.dol.gov/oasam/programs/history/memo.htm>.

32. See MacLaury, *supra* note 31 ("A Federal Department of Labor was the direct product of a half-century campaign by organized labor for a 'Voice in the Cabinet,' and an indirect product of the Progressive Movement.").

33. 29 U.S.C. § 551.

The FLSA is one of the most well-known and controversial<sup>34</sup> laws enforced by the DOL.<sup>35</sup> President Franklin Roosevelt pushed for the FLSA, a centerpiece of the New Deal, “to end starvation wages and intolerable hours.”<sup>36</sup> The legislation overcame several defeats in Congress<sup>37</sup> and legal challenges to its constitutionality.<sup>38</sup> The FLSA aimed to overcome “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”<sup>39</sup> The FLSA mandates a minimum wage and overtime pay for certain workers and prohibits certain types of child labor.<sup>40</sup> With limited exceptions, most employers in the United States are now covered by the FLSA.<sup>41</sup>

Within the DOL, the FLSA is enforced by the Wage and Hour Division, led by an Administrator who is appointed by the President and approved by the Senate.<sup>42</sup> The Administrator is authorized to investigate and gather wage data, conduct employer compliance audits, and sue employers for violations.<sup>43</sup> The FLSA also authorizes the Secretary of Labor to “define

34. Business groups have claimed that the FLSA “is an ‘anachronism’ that has become a ‘job killer’” while employee advocates caution “that broadening exemptions from the act’s minimum wage and overtime protections could result in a ‘race to the bottom’ against foreign competitors that would ultimately not serve American employers or U.S. workers.” Lawrence E. Dubé, *Business Groups, Lawyer Urge FLSA Review, Telling House Panel Legislation is Outdated*, 135 Daily Lab. Rep. Online (BNA) A-11 (July 14, 2011) (reporting on testimony before the Workforce Protections Subcommittee of the House of Representatives Education and Workforce Committee). For differing perspectives on the FLSA, see *The Fair Labor Standards Act: Is it Meeting the Needs of the Twenty-First Century Workplace?: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. and the Workforce*, 112th Cong. (2011).

35. 29 U.S.C. §§ 201–219 (2006).

36. FRANKLIN ROOSEVELT, *Annual Message to the Congress*, 1938 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 6 (Samuel I. Rosenman comp., 1941).

37. See Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage* (rev. ed. reprinted from MONTHLY LAB. REV., June 1978), <http://www.dol.gov/oasam/programs/history/flsa1938.htm>. For historical descriptions of the FLSA, see John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 L. & CONTEMP. PROBS. 464, 464–73 (1939), and Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 7–25 (2001) (examining historical origins of “short hours movements” that led to the FLSA’s passage).

38. See, e.g., *United States v. Darby*, 312 U.S. 100 (1941) (upholding constitutionality of the FLSA).

39. 29 U.S.C. § 202(a) (2006).

40. *Id.* § 206 (minimum wage); *id.* § 207 (overtime), *id.* § 212 (child labor).

41. There are two ways in which an employee can be covered by the FLSA. First, the FLSA applies to any “enterprises” that employ at least two employees and that have an annual dollar volume of sales or business done of at least \$500,000. *Id.* § 203(s)(1)(A). Hospitals, institutions providing medical or nursing care for residents, schools, and preschools, and public agencies are also covered. *Id.* § 203(r)(2). Second, individual employees are protected if they are “engaged in commerce or in the production of goods for commerce.” *Id.* §§ 206(a)(1), 207(a)(1). Even if these general coverage provisions are satisfied, the FLSA contains pages of exemptions. *Id.* § 213.

42. *Id.* § 204(a).

43. *Id.* § 211 (concerning data collection); *id.* § 216(c) (establishing the powers to audit and

and delimit” exemptions from the minimum wage and maximum hour requirements.<sup>44</sup>

Any government enforcement of the FLSA and other worker protection statutes is litigated by the DOL's Office of the Solicitor.<sup>45</sup> The Solicitor of Labor (SOL) is the DOL's “third highest ranking official and its chief legal officer.”<sup>46</sup> Like the Wage and Hour Administrator, the Solicitor is also a political appointee. “All SOL attorneys report to the Solicitor, rather than to client program agency heads, as is the practice in many executive branch departments.”<sup>47</sup> Consequently, the Solicitor has unique independence and power in enforcing the policy priorities of the President under whom he or she serves.<sup>48</sup>

The basic provisions of the FLSA seem simple on their face: employers must pay covered workers at least the minimum wage (originally twenty-five cents and now \$7.25 per hour)<sup>49</sup> and pay them “not less than one and one-half times” their regular hourly rate for every hour after forty hours worked in a week.<sup>50</sup> In practice, however, these mandates are complicated by a complex web of exceptions to the general rules.<sup>51</sup> Two recurring issues appear in FLSA case law: (1) whether the plaintiffs are exempt from the Act's requirements and (2) whether certain tasks performed by the employee count as “hours worked” for purposes of minimum wage and overtime computations.

Unlike some statutes, which use an administrative process to determine whether a particular situation falls under the law,<sup>52</sup> Congress designed the FLSA to be enforced in the courts in two ways. First, the Secretary of Labor may file a direct enforcement action in which the DOL is the plaintiff.<sup>53</sup> In this scenario, the DOL, like any other plaintiff, would bear the burden of proving that the employer violated the statute. Second,

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to sue).

44. *Id.* § 213(a)(1), (a)(15). The Secretary's FLSA regulations are found at 29 C.F.R. §§ 510–794.

45. OFFICE OF THE SOLICITOR, U.S. DEP'T OF LABOR, WORKING FOR AMERICA'S WORKFORCE 2, available at <http://www.dol.gov/sol/media/brochure/sol.pdf> (last visited June 12, 2013).

46. *Id.*

47. *Id.*

48. *Id.*

49. 29 U.S.C. § 206(a)(1)(C) (2006).

50. *Id.* § 207(a)(1).

51. To provide a few examples, farmworkers, employees of a “motion picture theater,” “domestic service” workers, and various processing workers in the seafood and maple sap industries are all exempt from FLSA overtime requirements. *See, e.g., id.* §§ 213(a)(5), (a)(15), (b)(15), (b)(21), (b)(27).

52. For example, the DOL adjudicates claims for benefits under various disability compensation programs for various workers, such as the Federal Black Lung Program for coal miners, 30 U.S.C. §§ 901–945 (2006), and the Longshore and Harbor Workers' Compensation Program, 33 U.S.C. §§ 901–950 (2006).

53. 29 U.S.C. § 216(c) (2006).

because the DOL lacks the resources to enforce all wage and hour violations, Congress allowed employees to sue as “private attorneys general,” with the right to recover double liquidated damages and attorneys’ fees from the employer if they prevail.<sup>54</sup> Whether the case is filed by the DOL directly, or by employees on their own behalf, courts have the ultimate responsibility to resolve legal issues under the Act. As the Supreme Court explained in one of the earliest FLSA cases, *Kirschbaum v. Walling*,<sup>55</sup> “the [FLSA] puts upon the courts the independent responsibility of applying ad hoc the general terms of the statute to an infinite variety of complicated industrial situations.”<sup>56</sup>

Given the nature of these questions, FLSA cases often involve intricate examination of the statutory text, the Act’s legislative history and implementing regulations, and a variety of informal interpretive materials developed by the DOL. The most commonly reviewed documents in FLSA cases include opinion letters, interpretive bulletins, advisory memoranda, field enforcement guides written for wage and hour investigators and, of course, agency amicus briefs.

The interpretive issues in FLSA cases, and the power of the courts to ultimately resolve them, offer a rich study of how federal courts have addressed the question of how much deference to grant to the agency’s regulations, to informal guidance developed without formal rulemaking, and to the agency’s positions in amicus briefs. The next section describes the agency deference frameworks most frequently invoked in FLSA jurisprudence.

### B. *Continuum of Agency Deference Regimes*

Administrative law scholars have recognized that “the Supreme Court’s deference jurisprudence is a mess.”<sup>57</sup> This section attempts to make sense of relevant administrative deference case law to lay a foundation for the analysis that follows.

The application of broad statutory language to precise factual situations often gives rise to ambiguity. The Court has attempted to define deference principles for agency interpretations of the meaning or application of vague statutes or regulations. The level of deference to agency interpretations has been described as a continuum ranging from “persuasive weight” under

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54. *Id.* § 216(b).

55. 316 U.S. 517 (1942) (holding landlords’ employees covered under the FLSA).

56. *Id.* at 523.

57. Eskridge & Baer, *supra* note 14, at 1157; *see also* Goering, *supra* note 6, at 22 (describing deference case law as “mish-mash of a muddled mess”); Ann Graham, *Searching for Chevron in Muddy Watters: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229, 262 (2008) (referring to “a confusing muddle of decisions which turn on internecine disputes, back-filling from the desired result, and flavor-of-the-week analytical models”).

*Skidmore* to binding deference under *Chevron*.<sup>58</sup>

*Skidmore v. Swift & Co.*, one of the first deference cases, continues to figure prominently in modern administrative law.<sup>59</sup> In *Skidmore*, seven employees at a packing plant sued their employer under the FLSA arguing that the time the employer required them to be “on call” constituted hours worked for overtime purposes.<sup>60</sup> The Administrator of the Wage and Hour Division submitted an amicus brief,<sup>61</sup> arguing that all of the time that the workers spent on duty, including waiting time, constituted compensable time under the FLSA.<sup>62</sup>

The Court noted the fact-intensive nature of the question presented and emphasized the Court's duty to determine the application of the law.<sup>63</sup> The Court explained that in the FLSA, “Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts.”<sup>64</sup> But, the Court noted, Congress created the Administrator of the Wage and Hour Division and “put on him the duties of bringing injunction actions to restrain violations.”<sup>65</sup> To carry out this enforcement function, the Administrator developed “an interpretative bulletin” and informal rulings that “provide[d] a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it.”<sup>66</sup>

In its amicus brief in *Skidmore*, the agency described the prior Interpretative Bulletin that set forth general standards and examples designed to guide the determination of the compensability of waiting time. Although none of the examples in the Bulletin dealt specifically with the type of employees involved in *Skidmore*, the Administrator's amicus brief applied the Bulletin to the factual scenario at issue and concluded that all on-call time was compensable except for sleeping and eating time.

The Court stated that the agency's interpretation, although not reached by trial in an adversary form, was nevertheless entitled to respect. The oft-quoted passage from *Skidmore* provided that the agency's enforcement experience and informed judgment may provide helpful guidance to courts and litigants:

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58. See Eskridge & Baer, *supra* note 14.

59. See, e.g., Hickman & Krueger, *supra* note 14, at 1236.

60. *Skidmore v. Swift & Co.*, 323 U.S. 134, 135–36 (1944).

61. The DOL is represented by the U.S. Solicitor General in the U.S. Supreme Court.

62. Brief of the Adm'r of the Wage and Hour Div. as Amicus Curiae, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (No. 12), 1944 WL 42828.

63. 323 U.S. at 136–37 (“Whether in a concrete case such [waiting] time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court.”).

64. *Id.* at 137.

65. *Id.*

66. *Id.* at 138.

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, *do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.* The weight of such a judgment in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.<sup>67</sup>

*Skidmore* recognized that context matters. That context includes the underlying remedial purpose of the statute, the agency's enforcement role pursuant to that statute, the circumstances that led to the agency guidance, and the consistency and integrity of the agency's interpretation vis-à-vis the remedial purpose of the law. The agency, in this sense, is akin to an expert witness providing an additional factual data point to the court,<sup>68</sup> with the court ultimately responsible for interpreting and enforcing legislative will.

Contrast *Skidmore* with *Chevron*.<sup>69</sup> *Chevron* resulted from a battle between environmental groups and various industries over the definition of "stationary sources" of air pollution under the Clean Air Act Amendments of 1977.<sup>70</sup> The Clean Air Act capped emissions levels from "stationary sources" but did not define the term.<sup>71</sup> After notice-and-comment rulemaking and intense lobbying efforts from stakeholders, the Environmental Protection Agency (EPA) decided "to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' . . . ."<sup>72</sup> The Natural Resources Defense Council challenged the new regulation.<sup>73</sup>

In *Chevron*, a unanimous Court<sup>74</sup> upheld the regulation as a reasonable construction of the statute and announced the famous two-step agency deference framework. Under step one, the court should determine whether Congress has "directly spoken to the precise question at issue."<sup>75</sup> If so, the court "must give effect to the unambiguously expressed intent of

67. *Id.* at 140 (emphasis added).

68. See Kathryn A. Watts, *Adapting to Administrative Law's Erie Doctrine*, 101 Nw. U. L. REV. 997, 1042 (2007) (arguing that *Skidmore* "should be read as requiring courts to take agency views into account as a relevant data point when independently construing statutory ambiguity").

69. 467 U.S. 837 (1984).

70. *Id.* at 839–40.

71. See *id.* at 866.

72. *Id.* at 840.

73. *Id.* at 837.

74. Justices Marshall, Rehnquist, and O'Connor did not participate in the decision. *Id.* at 866.

75. *Id.* at 842.

Congress.”<sup>76</sup> Under step two, “if 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.”<sup>77</sup> The Court found that the EPA’s new stationary source rule “represent[ed] a reasonable accommodation of manifestly competing interests and [was] entitled to deference: the regulatory scheme [was] technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involve[d] reconciling conflicting policies.”<sup>78</sup>

As in *Skidmore*, the Court expressed respect for the experience and expertise of the agency charged with administering the statute. But unlike the Court in *Skidmore*, which emphasized the judiciary’s responsibility to be the ultimate interpreter of a statute’s purpose and scope, the *Chevron* Court urged deference to the agency’s policy choices, at least those made via a rulemaking process, because of the greater political accountability of the executive branch. The Court advised that if the agency has resolved competing views of the public interest in a reasonable way, “federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”<sup>79</sup>

In *Auer v. Robbins*,<sup>80</sup> the Court extended *Chevron* deference far beyond rulemaking to informal agency interpretations in amicus briefs. *Auer* was filed by police sergeants seeking overtime wages under the FLSA.<sup>81</sup> The police department claimed that the officers were exempt as “bona fide executive, administrative, or professional” employees.<sup>82</sup> The officers contended that the employer lost the exemption because the personnel manual permitted pay deductions for disciplinary infractions, even though no deductions were actually made.<sup>83</sup> In its amicus brief, filed at the Court’s request, the DOL explained that the employer may lose the administrative exemption when employers make actual deductions from pay, but not when there is only a theoretical possibility of such deductions.<sup>84</sup> Applying this rule, the DOL agreed that the employer did not lose the benefit of the exemption and that the officers were not entitled to overtime.

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76. *Id.* at 842–43.

77. *Id.* at 843.

78. *Id.* at 865.

79. *Id.* at 866. See also Eskridge & Baer, *supra* note 14, at 1085 (explaining *Chevron*); Merrill & Hickman, *Chevron’s Domain*, *supra* note 14, at 853–56 (comparing the *Skidmore* and *Chevron* doctrines).

80. 519 U.S. 452 (1997).

81. *Id.* at 455.

82. *Id.* (quoting 29 U.S.C. § 213(a)(1)) (internal quotation marks omitted). To satisfy this exemption, the employer bears the burden of satisfying two tests: (1) the employee must be paid on a salaried, rather than hourly, basis; and (2) the employee must perform duties that show sufficient degrees of discretion and managerial functions.

83. *Auer*, 519 U.S. at 455.

84. *Id.* at 461.



Justice Antonin Scalia, writing for a unanimous Court in *Auer*, invoked *Chevron* to defer to the agency's amicus interpretation. The Court explained that the fact that the Secretary's interpretation came in the form of an amicus curiae brief did not make it unworthy of deference.<sup>85</sup> The Court found that the agency's position was not a litigation position or "'post hoc rationalizatio[n] advanced by an agency seeking to defend past agency action against attack" and that there was "simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."<sup>86</sup>

Under *Auer*, an agency's interpretation of its own ambiguous regulations is binding and entitled to deference unless it is plainly erroneous or inconsistent with the regulation.<sup>87</sup> Some scholars have argued that *Auer* affords a type of "super-deference" even greater than *Chevron* and have advocated for its reversal.<sup>88</sup> *Auer* effectively enshrined an agency's amicus arguments as controlling law. As one scholar wrote: "What set *Auer* apart was that it granted super-deference to an informal agency interpretation expressed in an amicus brief that the Court had specifically requested."<sup>89</sup>

Upon examination of the DOL's actual amicus arguments in *Auer*, it is unclear what all of the deference fuss was really about: the Court could have reached the same result if it simply had applied *Skidmore*. The DOL did the same thing in its *Auer* amicus brief as it had done in *Skidmore*: describe and apply the applicable law and existing agency guidance to the factual scenario before the Court. Indeed, the DOL had urged the Supreme Court not to grant certiorari in *Auer* because the issue involved was so fact-bound and the governing law settled.<sup>90</sup> In its amicus brief, the agency did

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85. *Id.* at 462 ("Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference.")

86. *Id.* at 462 (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)) (alteration in original).

87. *Auer* deference has been compared to an earlier case, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), which was decided on the heels of *Skidmore*. In *Seminole Rock*, the Office of Price Administration filed suit to enjoin a manufacturer of crushed stone from violating the Emergency Price Control Act of 1942 and its implementing regulations. *Seminole Rock*, 325 U.S. at 412. The Court deferred to the agency's interpretation of its own regulation, which it characterized as having "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414.

88. See, e.g., Eskridge & Baer, *supra* note 14, at 1184 (urging Court to abrogate *Seminole Rock*); Goering, *supra* note 6, at 50 (arguing that *Auer* "'super deference' . . . cannot be reconciled with *Chevron*'s 'two-step' approach" and has, in effect, "abdicate[d] judicial responsibility for resolving ambiguities"); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614–16 (1996) (criticizing *Seminole Rock*).

89. Goering, *supra* note 6, at 49.

90. Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 7–8,

not argue for any novel legal interpretation or request *Chevron*-like deference. The agency's views were persuasive because the interpretation was venerable and established long before the case. Even though the Court did not need to reach for a new "super deference" standard, Justice Scalia proclaimed that the agency's amicus views should be afforded the highest level of deference under *Chevron*.

Three years after *Auer*, a divided Court seemed to reverse course on the degree of deference to give to an informal agency interpretation in *Christensen v. Harris County*.<sup>91</sup> In a split decision, the Court refused to defer to a DOL position in an opinion letter and amicus brief that the FLSA prohibited state employers from compelling employees to use accrued compensatory time in the absence of a prior agreement or understanding authorizing compelled use.<sup>92</sup> The Court held that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."<sup>93</sup> Justice Clarence Thomas, for the majority, wrote: "To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."<sup>94</sup> After "a doctrinal tug of war within the Supreme Court" about the scope of *Chevron* and continuing viability of *Skidmore*,<sup>95</sup> the Court attempted to reconcile *Skidmore* and *Chevron* in *United States v. Mead Corp.*<sup>96</sup> The *Mead* Court held that a letter ruling by the Customs Service regarding the characterization of an import item for tariff purposes was not entitled to *Chevron* deference, but may be entitled to respect under *Skidmore*.<sup>97</sup> The Court clarified that "administrative 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."<sup>98</sup> The Court also confirmed the continuing vitality of *Skidmore*—which had been in some doubt<sup>99</sup>—instructing that it should be

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*Auer v. Robbins*, 419 U.S. 452 (No. 95-897), 1996 WL 33414029.

91. 529 U.S. 576 (2000).

92. *Id.* at 588.

93. *Id.* at 587.

94. *Id.* at 588. Justice Scalia filed a concurring opinion, agreeing that the DOL's position did not seem to be a reasonable interpretation of the statute, but arguing that the DOL's amicus brief, standing alone, and opinion letter were entitled to *Chevron* deference. *Id.* at 591 (Scalia, J., concurring in part and concurring in the judgment).

95. Eskridge & Baer, *supra* note 14, at 1088.

96. 533 U.S. 218 (2001).

97. *Id.* at 221.

98. *Id.* at 226–27.

99. See Hickman & Krueger, *supra* note 14, at 1243 (2007) (describing debate about *Skidmore*'s viability after *Chevron*).

used when such delegated lawmaking authority does not exist. *Mead* did not, however, overrule *Auer*.

After *Christensen* and *Mead*, the Court swung back again to *Auer*-like deference for informal agency interpretations in *Long Island Care at Home Ltd. v. Coke*.<sup>100</sup> *Long Island Care at Home* went even farther than *Auer*. Whereas *Auer* involved the application of a well-established agency position to a new factual scenario, *Long Island Care at Home* deferred to the DOL's change in policy during pending litigation, expressed for the first time in an amicus brief and informal agency guidance, to support a litigant who had lost in the trial court—and a regulated entity to boot.<sup>101</sup>

In this case, the Bush administration argued—contrary to prior longstanding DOL positions—that in-home companionship workers who work for home healthcare companies were exempt from overtime.<sup>102</sup> It did not bother the Court that the DOL's interpretation “had sometimes been circuitous and inconsistent”<sup>103</sup> or that the agency's new interpretation was set forth in an informal Advisory Memorandum prepared in response to a court defeat for the employer. Citing *Auer*, the Court found that the change in interpretation did not provide reason to disregard the DOL's new position and that the agency's position was entitled to deference so long as it did not create “unfair surprise.”<sup>104</sup>

During the Obama administration, the Court shifted back to reliance on *Skidmore* and *Mead* to defer to the DOL's amicus position in *Kasten v. Saint-Gobain Performance Plastics Corp.*<sup>105</sup> Specifically, the Court gave “a degree of weight” to the DOL's view that the FLSA anti-retaliation provision covered employees who made internal oral complaints about wage violations to employers.<sup>106</sup> Some circuits had found that only written wage complaints filed with the agency or in court constituted activity immune from retaliation.<sup>107</sup> The Court found the DOL's amicus position reasonable because the agency had held the position since at least 1961 and had reaffirmed that interpretation numerous times in subsequent amicus filings.<sup>108</sup> The Court concluded that the “length of time” the DOL held the view “reflect[ed] careful consideration” and “add[ed] force” to the Court's

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100. 551 U.S. 158 (2007).

101. *See id.* at 174.

102. *Id.* at 161–62.

103. *See* Michael R. Triplett, *Justices Rule 9-0 that Home Health Workers Employed by Third Parties Not Owed Overtime*, 112 Daily Lab. Rep. Online (BNA) AA-1 (June 12, 2007).

104. *Long Island Care at Home* at 170. The Article returns to the backstory behind the *Long Island Care at Home* case in Part II.F.

105. 131 S. Ct. 1325 (2011).

106. *Id.* at 1335.

107. *See, e.g., Lambert v. Genesee Hosp.*, 10 F.3d 46 (2d Cir. 1993), *abrogated by Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (holding anti-retaliation protection did not cover oral complaints).

108. *Kasten*, 131 S. Ct. at 1335.

conclusion that oral complaints were protected.<sup>109</sup>

These competing deference doctrines from *Auer/Long Island Care at Home* on the one hand and *Mead/Christensen* on the other came to a head in *Christopher v. SmithKline Beecham Corp.*<sup>110</sup> The case concerned whether pharmaceutical representatives fell within the “outside sales” exemption of the FLSA.<sup>111</sup> In 2009, the DOL began to file amicus briefs in private litigation arguing that pharmaceutical detailers—who promote pharmaceutical products to physicians but are prohibited by law from selling them to doctors—are not exempt from overtime because they do not “sell” as that term is defined in the outside sales exemption.<sup>112</sup> The Second Circuit had deferred to the DOL’s interpretation set forth in an amicus brief.<sup>113</sup> In contrast, the Ninth Circuit criticized the DOL for using its “appearance as amicus to draft a new interpretation of the FLSA’s language.”<sup>114</sup>

The U.S. Supreme Court unanimously found that the DOL’s amicus position in *Christopher* was not entitled to deference.<sup>115</sup> Although the DOL had not changed its position that pharmaceutical detailers were entitled to overtime because they did not satisfy the definition of the outside sales exemption, the Court refused to defer because the agency’s reasoning—that is, the legal argument in its brief—about why detailers were covered by the Act had changed in its amicus brief to the Supreme Court as compared to its briefs in the circuit courts below.<sup>116</sup> This is perplexing given the Court’s unanimous deference to an agency’s complete about-face—from a pro-employee to pro-industry position during pending litigation—in *Long Island Care at Home*.

The conservative majority<sup>117</sup> in *Christopher* went one step further to add a surprising gloss to *Auer* deference that elevated the concerns of regulated businesses over that of statutory beneficiaries. Although well-established FLSA precedent dictates that the Act must be interpreted liberally to effectuate Congress’s remedial purpose,<sup>118</sup> and that any exemptions from the law should be narrowly construed against the employer,<sup>119</sup> the majority’s dicta turned these principles on their head. The

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109. *Id.*

110. 132 S. Ct. 2156 (2012).

111. *Id.* at 2161.

112. *See* 29 U.S.C. § 203(k) (2006).

113. *See In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 153 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011), *abrogated by* *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

114. *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 395 (9th Cir. 2011).

115. *Christopher*, 132 S. Ct. at 2168–69.

116. *Id.* at 2169–70.

117. Chief Justice Roberts and Justices Alito, Scalia, Kennedy, and Thomas.

118. *See, e.g.,* *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 296 (1985).

119. *See, e.g.,* *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

Court expressed concern that the pharmaceutical company would be exposed to “potentially massive liability” if required to pay overtime.<sup>120</sup> The Court noted that the DOL had never instituted an enforcement action against the employer and announced its position that pharmaceutical detailers were not exempt for the first time in an amicus brief.<sup>121</sup> The majority concluded: “To defer to the agency’s interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’”<sup>122</sup> No deference is warranted, the Court said, if it would constitute “unfair surprise” to employers.<sup>123</sup> Justice Alito dropped a vague footnote stating that the longstanding principle that exemptions must be narrowly construed against employers was “inapposite where, as here, we are interpreting a general definition that applies throughout the FLSA.”<sup>124</sup>

The Court’s approach to deference doctrine from *Auer* to *Christopher* reflects an ideological, results-oriented approach. While the conservative justices have strongly deferred to the DOL’s position when it has favored employers—as in *Auer* and *Long Island Care at Home*—they have refused to defer to DOL positions that have favored workers, as in *Christopher* and *Christensen*.<sup>125</sup> With the exception of *Christopher*, the liberal-leaning justices have deferred to the DOL in all cases, even those in which the agency interpretation favored business. Although the liberal justices did not defer to the DOL’s interpretation in *Christopher*, they ruled consistently with the DOL’s position that the employees were entitled to overtime—finding that pharmaceutical detailers did not meet the test for the outside sales exemption because they were prohibited by law from actually conducting any sales.

*Christopher* adds a spin on deference doctrine that may be especially worrisome for the DOL’s future efforts to enforce worker protection statutes. In short, the Court’s latest ruling sets up a regime in which the agency may advance amicus arguments that *withdraw* FLSA protection for

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120. *Christopher*, 132 S. Ct. at 2167.

121. *Id.* at 2168.

122. *Id.* at 2167 (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

123. *Id.* (internal quotation marks omitted).

124. *Id.* at 2171 n.21.

125. *Id.* The majority in *Christensen* included Chief Justice Rehnquist and Justices Thomas, O’Connor, Scalia, Kennedy and Souter. *Christensen v. Harris Cnty.*, 529 U.S. 576, 577 (2000). Justice Scalia concurred, arguing that agency positions, even in opinion letters and amicus briefs, should be afforded *Chevron* deference, but found, without explanation, that the DOL’s position was nevertheless “unreasonable.” *Id.* at 589–91. The dissent included Justices Ginsburg and Breyer, both Clinton appointees, plus Justice Stevens, a Ford appointee who ruled more consistently with Democratically appointed justices over time. An exception is *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011), in which the only dissenters were Justices Scalia and Thomas. *Id.* at 1336.

workers and interpret the law to favor the regulated—as was the case in *Long Island Care at Home*. But agency efforts to advance arguments on behalf of workers might be rejected if regulated entities are subjected to “unfair surprise” by an amicus brief supporting liability. Because the DOL is such an active litigant and amicus curiae, lower federal courts will undoubtedly be sorting through how *Christopher* fits into deference doctrine. The Article returns to this question in Part III to help guide courts through that task.

The next Part puts the recent explosion of agency amicus activity in empirical context by tracing the extraordinary, albeit often hidden, impact that DOL amicus arguments have had in shaping FLSA policy.

## II. EMPIRICAL ANALYSIS OF DOL AMICUS ACTIVITY IN FLSA CASES FROM ROOSEVELT TO OBAMA

### A. Methodology

The dataset for the empirical analysis consisted of all DOL amicus curiae briefs in FLSA cases since its passage in 1938 through December 31, 2012. Briefs were identified and obtained from multiple sources. First, most of the amicus briefs for the Bush and Obama administration were obtained from the website of the DOL's Office of Solicitor.<sup>126</sup> Second, searches were conducted in Westlaw and LEXIS to find any cases in which the U.S. Department of Labor, the Secretary of Labor, or the Administrator of the Wage and Hour Division were identified as amicus curiae. Third, briefs not available on public electronic databases were obtained from the DOL through a Freedom of Information Act request or reviewed at the DOL law library.<sup>127</sup> Many of the older briefs were in such poor condition that they were reviewed and indexed at the DOL library.

All amicus briefs and the corresponding cases in which they were filed were reviewed and coded based on twenty-five variables.<sup>128</sup> The resulting

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126. See *SOL Briefs*, U.S. DEPT' OF LABOR, <http://www.dol.gov/sol/media/briefs/main.htm> (last visited Mar. 14, 2012).

127. A FOIA request to the Bush DOL went completely unanswered. Letter to Paul DeCamp, U.S. Dep't of Labor Employment Standards Div. (Nov. 13, 2008) (on file with author). The Obama administration responded to updated FOIA request. The DOL does not maintain a centralized collection of all amicus curiae briefs it has filed. The DOL Wirtz Labor Law Library had some older amicus briefs that had been donated by the Solicitor of Labor's office at some point, but the collection is incomplete. Starting with the administration of George W. Bush, most, but not all, of the DOL's amicus curiae briefs have been posted on the agency's website.

128. These variables are: (1) case name and citation; (2) year of the court decision; (3) the court in which the brief was filed; (4) the author of the majority opinion; (5) the President who appointed the author of the opinion (if a federal judge); (6) the author of any dissenting opinion; (7) the President who appointed the dissenting judge; (8) whether the dissenting opinion discussed the appropriate level of deference; (9) the counsel for the employee(s); (10) counsel for the employer; (11) the level at which the DOL became involved as an amicus in the case (district court, court of appeals, U.S. Supreme Court, or state court); (12) the holding in the case; (13) whether the

database consisted of 324 FLSA cases, which are listed by presidential administration in the Appendix.<sup>129</sup>

It is possible that some cases in which the DOL filed FLSA amicus briefs, especially prior to the Reagan administration, were not identified, but there is no indication from case research or from the DOL that there are more briefs. The DOL reported in response to my FOIA request that it may have discarded some old briefs during office moves. There are twenty-two cases for which case research indicated that the DOL filed an amicus brief in the case but the agency's brief is no longer available.<sup>130</sup> For the cases for which the DOL's amicus briefs are no longer available, the judicial opinions alone were analyzed. The database of briefs from the Clinton, Bush, and Obama administrations—which were the first to advance deference arguments consistently and form the core of this Article's analysis—are believed to be complete.

### B. Overview of DOL Amicus Activity from Roosevelt to Obama

Some scholars have observed that the submission of amicus briefs, by the government and by private groups, has skyrocketed in recent years.<sup>131</sup>

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decision was consistent with the DOL's amicus position, regardless of whether the amicus brief or deference principles were discussed; (14) which party prevailed (employer or employee); (15) the level of deference, if any, that the DOL argued in its brief; (16) the deference case(s) or principle(s) cited or discussed in the court's opinion; (17) the type of agency interpretation for which the DOL requested deference (e.g., regulation, opinion letter or other informal agency guidance, amicus argument); (18) summary of the DOL's argument in its amicus brief; (19) the President who was in office at the time the DOL filed the brief; (20) the President who was in office at the time the court ruled in the case; (21) the statute under which the plaintiff sued (all FLSA); (22) whether the DOL requested deference for an opinion letter(s); (23) the date that any opinion letter(s) for which the DOL requested deference was issued; (24) whether the court requested DOL amicus participation; and (25) whether the court asked the DOL for supplemental amicus briefing.

129. See *infra* Appendix.

130. The cases for which the DOL's amicus briefs are no longer available include: *Alewine v. City Council of Augusta*, 699 F.2d 1060 (11th Cir. 1983); *Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185 (5th Cir. 1979); *Williams v. Univ. of Tex. at El Paso*, 477 F.2d 595 (5th Cir. 1973); *Asker v. Stephens*, 394 F.2d 513 (5th Cir. 1968); *Childress v. Earl Whitley Enters., Inc.*, 388 F.2d 742 (4th Cir. 1968); *Cont'l/Moss-Gordin, Inc. v. Harp*, 386 F.2d 995 (5th Cir. 1967); *Allen v. Atl. Realty Co.*, 384 F.2d 527 (5th Cir. 1967); *Rachal v. Allen*, 321 F.2d 449 (5th Cir. 1963); *Norman v. Moseley*, 313 F.2d 544 (8th Cir. 1963); *Goldstein v. Dabanian*, 291 F.2d 208 (3d Cir. 1961); *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943 (2d Cir. 1959); *Crook v. Bryant*, 265 F.2d 541 (4th Cir. 1959); *Sams v. Beckworth*, 261 F.2d 889 (5th Cir. 1958); *Mateo v. Auto Rental Co.*, 240 F.2d 831 (9th Cir. 1957); *Thomason v. Alester G. Furman Co.*, 222 F.2d 421 (4th Cir. 1955); *E.I. Du Pont De Nemours & Co. v. Harrup*, 227 F.2d 133 (4th Cir. 1955); *Clougherty v. James Vernor Co.*, 187 F.2d 288 (6th Cir. 1951); *United States Cartridge Co. v. Powell*, 185 F.2d 67 (8th Cir. 1950); *Grant v. Bergdorf & Goodman Co.*, 172 F.2d 109 (2d Cir. 1949); *Brenna v. Federal Cartridge Corp.*, 174 F.2d 732 (8th Cir. 1949); *Chapman v. Home Ice Co.*, 136 F.2d 353 (6th Cir. 1943); *Williams v. Eastside Mental Health Ctr., Inc.*, 509 F. Supp. 579 (N.D. Ala. 1980); *Peterson v. McDonald*, 73 F. Supp. 840 (D. Minn. 1947); *Belanger v. Hopeman Bros., Inc.*, 6 F.R.D. 459 (D. Me. 1947); *Brewer v. Cent. Greenhouse Corp.*, 352 S.W.2d 101 (Tex. 1961).

131. See *Kearney & Merrill, supra* note 14, at 754 (noting increase in the mean number of

That is not true for the DOL's amicus activity, which was at its peak during the New Deal, although the nature of the activity has changed dramatically over time. Overall DOL amicus activity in FLSA cases by presidential administration is reflected in Table 1:

Table 1: DOL Amicus Activity in FLSA Cases by Administration (through December 31, 2012)

President at Time of Filing	Number of Amicus Briefs Filed
Roosevelt	96
Truman	74
Eisenhower	19
Kennedy	3
Johnson	9
Nixon	14
Ford	3
Carter	7
Reagan	7
Bush I	4
Clinton	22
Bush	23
Obama	43
<b>Total FLSA Amicus Briefs</b>	<b>324</b>

The most active DOL amicus curiae activity in FLSA cases occurred immediately after the Act's passage. After the battle to achieve passage of the FLSA, the Roosevelt and Truman administrations used amicus briefs to establish judicial precedents broadly construing the scope of the FLSA's protections.<sup>132</sup> Indeed, more than half of all FLSA amicus briefs in the database (170 out of 324 briefs) were filed by these two administrations.

Many of these early DOL amicus efforts, such as *Skidmore*, remain important precedents in employment and administrative law. Most of the cases involved questions about the FLSA's scope and fell into three basic categories: first, briefs arguing that the employees in question were engaged in "interstate commerce" and therefore covered by the Act;<sup>133</sup>

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amicus briefs per case from about 0.50 in the late 1940s to 4.23 in the 1990s); Kirstin Lustila, *Ethical Duties of Expert Supreme Court Counsel*, 24 GEO. J. LEGAL ETHICS 659, 665 (2011) (reporting that the number of amicus filings in support of petitions for certiorari in the Supreme Court increased by more than 40% from 1982 to 2002).

132. See *infra* Appendix.

133. See, e.g., *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88, 92-93 (1942) (holding that



second, briefs arguing that various tasks were work activities that should be included in the calculation of “hours worked;”<sup>134</sup> and third, briefs arguing that purported waivers from the FLSA’s protection were not enforceable.<sup>135</sup>

Another surprising finding was the number of early amicus briefs filed in state appellate courts, which have concurrent jurisdiction over FLSA claims.<sup>136</sup> The Roosevelt administration filed twenty-five amicus briefs in state appellate courts.<sup>137</sup> Roosevelt also filed forty-nine amicus briefs in the federal courts of appeal and twenty-two in the U.S. Supreme Court.

The number of agency amicus briefs in FLSA cases declined dramatically during subsequent administrations. Eisenhower’s DOL filed nineteen briefs; Kennedy, three; Johnson, nine; Nixon, fourteen; Ford, three; Carter, seven; Reagan, seven; and Bush I, four.<sup>138</sup> There are several possible explanations for the decline in the DOL’s filing of amicus briefs in FLSA cases after the Truman administration. First, the scope of the FLSA became relatively well established during the Roosevelt and Truman administrations, with thirty Supreme Court opinions clarifying its basic coverage. As the FLSA became a more routine aspect of doing business, the agency’s amicus appearances may not have been as necessary. Second, the number of statutes being enforced by the DOL increased substantially and amicus efforts shifted to shaping the contours of the new statutes.

oil rig workers were engaged in interstate commerce and therefore covered by the FLSA); *Overstreet v. N. Shore Corp.*, 318 U.S. 125, 132 (1943) (holding employees who maintained toll road were engaged in interstate commerce); *McLeod v. Threlkeld*, 319 U.S. 491, 497–98 (1943) (holding cooks not engaged in interstate commerce); *Walton v. S. Package Corp.*, 320 U.S. 540, 542–43 (1944) (holding that a watchman was engaged in interstate commerce); *Borden Co. v. Borella*, 325 U.S. 679, 684 (1945) (holding maintenance employees are engaged in interstate commerce if they work in a building that is engaged in interstate commerce); *10 East 40th St. Bldg., Inc. v. Callus*, 325 U.S. 578, 583 (1945) (holding that renting office space was “local business” and not interstate commerce).

134. *See, e.g.*, *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) (holding walking time and preliminary activities may be compensable time under FLSA if not “de minimis”); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944) (holding that waiting time is compensable).

135. *See, e.g.*, *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 209–10 (1947) (holding work agreement did not deprive employees of right to overtime compensation); *Martino v. Mich. Window Cleaning Co.*, 327 U.S. 173, 177–78 (1946) (holding work agreement did not deprive employees of right overtime compensation).

136. *See* 29 U.S.C. § 216(b) (2006). FLSA claims filed in state court today are typically removed to federal court by the employer.

137. *See, e.g.*, *Colbeck v. Dairyland Creamery Co.*, 17 N.W.2d 262 (S.D. 1945); *Umthun v. Day & Zimmerman*, 16 N.W.2d 258 (Iowa 1944); *Stoike v. First Nat’l Bank of N.Y.*, 48 N.E.2d 482 (N.Y. 1943); *Floyd v. Du Bois Soap Co.*, 41 N.E.2d 393 (Ohio 1942); *Johnson v. Phillips-Buttorff Mfg. Co.*, 160 S.W.2d 893 (Tenn. 1942); *Ikola v. Snoqualmie Falls Lumber Co.*, 121 P.2d 369 (Wash. 1942) (en banc); *Tidewater Optical Co. v. Wittkamp*, 19 S.E.2d 897 (Va. 1942); *Reck v. Zarnocay*, 33 N.Y.S.2d 582 (Sup. Ct. 1941); *Emerson v. Mary Lincoln Candies, Inc.*, 17 N.Y.S.2d 851 (Sup. Ct. 1940).

138. *See infra* Appendix (listing cases by administration).

While the number of FLSA amicus briefs declined, the DOL continued to appear as an amicus curiae (and frequent litigant) in cases involving the many other statutes which it enforced.<sup>139</sup> For example, the Kennedy administration focused its litigation efforts on enforcing the nascent Equal Pay Act. The Carter administration also vigorously litigated the Age Discrimination in Employment Act.

In addition to its amicus efforts, the DOL files direct enforcement actions under the FLSA and other worker protection statutes, which can dominate the resources of the Solicitor of Labor's office. According to a former attorney who worked in the appellate division of the DOL's Office of Solicitor from 1978 to 2005, amicus filings during the Carter, Reagan, and Bush I administrations were rare and tended to be submitted only in response to a specific court request.<sup>140</sup> Prior to the Clinton administration, the DOL focused the resources of the Office of Solicitor on direct enforcement efforts, in which the agency filed suit as a plaintiff on behalf of employees.<sup>141</sup> Attorneys were simply too busy with their own litigation dockets to monitor and become embroiled in private litigation as an amicus.<sup>142</sup>

Under President Clinton, the DOL once again began to submit amicus curiae briefs in private FLSA litigation with greater frequency, filing twenty-two amicus briefs. The Clinton administration's amicus activity was an extension of beefed up wage and hour enforcement efforts on behalf of low-wage workers, which focused largely on the misclassification of employees in certain industries as exempt from the FLSA. These cases included, for example, *Heath v. Perdue Farms, Inc.*,<sup>143</sup> which held that chicken catchers had been misclassified as independent contractors and

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139. The statutes enforced by the DOL are too numerous to list here, but the most well known and actively litigated include the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651–678 (2006), which establishes health and safety standards; the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1461 (2006), which regulates employers who offer pension or welfare benefits to employees; the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601–2654 (2006), which provides up to twelve weeks of unpaid job-protected leave to certain employees for serious medical conditions or after the birth or adoption of a child; and a host of other employment laws dealing with unemployment, whistleblowers, labor management, mine safety, workers' compensation, veterans, and standards for particular types of occupations and government contracts. For information about laws enforced by the DOL, see *Summary of the Major Laws of the Department of Labor*, U.S. DEP'T OF LABOR, <http://www.dol.gov/opa/aboutdol/lawsprog.htm> (last visited June 14, 2013). In addition, at one time the Equal Pay Act of 1963, 29 U.S.C. §§ 206(d) (2006), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006), were enforced by the DOL because these laws are subsections of the FLSA. They were eventually transferred to the EEOC for enforcement.

140. Telephone Interview with Leif Jorgenson, former Appellate Counsel for the DOL Office of the Solicitor (Sept. 14, 2011) (notes on file with author).

141. *Id.*

142. *Id.*

143. 87 F. Supp. 2d 452 (D. Md. 2000).

were entitled to overtime;<sup>144</sup> *Caro-Galvan v. Curtis Richardson, Inc.*,<sup>145</sup> which held that migrant farmworkers were engaged in seasonal work and were protected by the FLSA,<sup>146</sup> and *Torres-Lopez v. May*,<sup>147</sup> and *Antenor v. D&S Farms*,<sup>148</sup> which held that the growers and labor contractors were joint employers under the FLSA.<sup>149</sup> The DOL also filed amicus briefs in several cases involving the same issue as in *Auer*: whether docking salaried employees' pay caused the loss of the "white collar" exemption.<sup>150</sup>

During the Bush administration the number of DOL amicus filings in FLSA cases increased to twenty-three.<sup>151</sup> Many of these briefs—for the first time in the DOL's history—were filed on behalf of *employers* rather than employees. The Bush DOL submitted ten amicus briefs in favor of employers in FLSA cases<sup>152</sup> and twelve in favor of employees.<sup>153</sup> One brief

144. *Id.* at 454, 457–59, 463.

145. 993 F.2d 1500 (11th Cir. 1993).

146. *Id.* at 1507, 1513–14.

147. 111 F.3d 633 (9th Cir. 1997).

148. 88 F.3d 925 (11th Cir. 1996).

149. *Id.* at 937–38; *Torres-Lopez*, 111 F.3d at 642–44.

150. *See, e.g.*, *Klem v. Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000); *Belcher v. Shoney's, Inc.*, 30 F. Supp. 2d 1010, 1011 (M.D. Tenn. 1998).

151. *See infra* Appendix.

152. *See* Brief for the United States as Amicus Curiae Supporting Petitioners, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (No. 06-593), 2007 WL 579234; Brief for the United States as Amicus Curiae Supporting Respondent, *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003) (No. 02-337), 2003 WL 1192669; Brief of the Secretary of Labor as Amicus Curiae Supporting Appellants, *Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345 (4th Cir. 2008) (No. 06-1259), 2006 WL 1911678; Brief for the Secretary of Labor as Amicus Curiae in Support of Defendant-Appellee's Petition for Panel Rehearing, *Pirant v. U.S. Postal Serv.*, 542 F.3d 202 (7th Cir. 2008) (No. 07-1055); Brief for the Secretary of Labor as Amicus Curiae in Support of Defendant-Appellant, *Buckner v. Fla. Habilitation Network, Inc.*, 489 F.3d 1151 (11th Cir. 2007) (No. 06-11032); Brief for the Secretary of Labor as Amicus Curiae in Support of Defendants-Appellees, *Cook v. Diana Hays & Options, Inc.*, 212 F. App'x 295, 296 (5th Cir. 2006) (No. 06-30856); Brief of the Secretary of Labor as Amicus Curiae, *Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48 (2nd Cir. 2006); Brief for the Secretary of Labor as Amicus Curiae, *Gieg v. DDR, Inc.*, 407 F.3d 1038 (9th Cir. 2005) (No. 03-35619); Brief for the Secretary of Labor as Amicus Curiae in Support of Defendant-Appellee *Delta Recycling Corp.* Supporting Affirmance of the District Court, *Niland v. Delta Recycling Corp.*, 377 F.3d 1244 (11th Cir. 2004) (No. 03-14553), 2004 WL 2445519; Amicus Brief, *Harris v. Superior Court*, 171 P.3d 545 (Cal. 2007) (No. S156555), 2008 WL 6083951.

153. *See* Brief for the United States as Amicus Curiae, *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005); Amicus Curiae Brief at 1, 8–9, *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132 (2d Cir. 2008) (No. 06-4137); Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants at 1–2, *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361 (3d Cir. 2007) (No. 06-3502), 2008 WL 5788178; Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellants at 1–2, *Senger v. City of Aberdeen, S.D.*, 466 F.3d 670 (8th Cir. 2006) (No. 05-3803); Brief for the Secretary of Labor as Amicus Curiae in Support of the Plaintiffs-Appellees at 2–3, *Belt v. EmCare, Inc.*, 444 F.3d 403 (5th Cir. 2006) (No. 05-40370); Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellant *Megan McLaughlin* at 1–2, *McLaughlin v. Bos. Harbor Cruise Lines, Inc.*, 419 F.3d 47 (1st Cir. 2005) (No. 04-1519), 2004

supported employees on one issue, and the employer on another.<sup>154</sup> Prior to this time, the DOL had filed amicus briefs favoring an employer's position only three times, and that was typically in response to court requests for the agency's views.<sup>155</sup> In contrast, the Bush DOL became an advocate for employers on its own initiative, using a bold, coordinated opinion letter and amicus brief strategy to narrow the scope of many FLSA provisions and, in some instances, to overturn prior DOL interpretations that had favored workers. The Bush DOL's double-barreled opinion letter and amicus approach to limit FLSA protections is analyzed below in Part II.F.1.

Whereas the Bush DOL favored business interests, the Obama DOL increased both direct enforcement efforts and amicus activity in FLSA cases. In just three years, the Obama administration submitted more FLSA amicus briefs—forty-three as of December 31, 2012—than the Bush administration submitted in eight years (twenty-three). The Obama administration filed amicus briefs favoring an employer's position in two FLSA cases, at the request of the court.<sup>156</sup>

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WL 5663334; Brief for the Secretary of Labor as Amicus Curiae Supporting Petition for Panel Rehearing and Petition for Rehearing En Banc at 1–2, *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004) (Nos. 02-1679, 02-1739), 2003 WL 23678322; Brief for the Secretary of Labor as Amicus Curiae at 1–2, *O'Brien v. Town of Agawam*, 350 F.3d 279 (1st Cir. 2003) (No. 03-1685), 2004 WL 5660200; Brief for the Secretary of Labor as Amicus Curiae Supporting Appellants at 7–10, *Bailey v. Gulf Coast Transp., Inc.*, 280 F.3d 1333 (11th Cir. 2002) (No. 01-12379), 2001 WL 34120388; Brief for the Secretary of Labor as Amicus Curiae at 9–11, *Intracomm, Inc. v. Bajaj*, 492 F.3d 285 (4th Cir. 2007) (No. 06-1516), 2007 WL 1285885; Brief of the Secretary of Labor as Amicus in the Disposition of Plaintiffs' Motion for Summary Judgment at 14–20, *Mullins v. City of New York*, 554 F. Supp. 2d 483 (S.D.N.Y. 2008) (1: 04-cv-2979); Secretary of Labor's Brief as Amicus Curiae in Support of Plaintiffs' Motion for Partial Summary Judgment at 1, *Dege v. Hutchinson Tech., Inc.*, No. 06-3754 (DWF/RLE), 2007 WL 3275111 (D. Minn. Nov. 2, 2007) (No. 06-3754).

154. See Brief for the Secretary of Labor as Amicus Curiae at 26–27, *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003) (Nos. 02-35042, 02-35110), 2002 WL 32154024, at \*26–27.

155. The first amicus on behalf of an employer, by the Truman administration in *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948), argued that the FLSA did not apply to employees working on a United States military base outside the sovereign territory of the United States. See Brief for the United States as Amicus Curiae at 5–8, *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1940) (No. 22), 1948 WL 47165 at \*5–8. In *Robinson v. Barrow-Penn & Co.*, 194 Va. 632 (1953), the DOL's brief argued that the Motor Carrier Act applied to the plaintiff truck drivers, precluding overtime pay under the FLSA. In *Auer*, upon Court request, the Clinton DOL submitted a brief that favored the employer given the facts at issue, but the underlying standard favored employees in other cases. See Brief for the United States as Amicus Curiae at 1, 8–11, *Auer v. Robbins*, 519 U.S. 452 (1997) (No. 95-897), 1996 WL 595843, at \*1, \*8–11.

156. See Brief for the Secretary of Labor as Amicus Curiae at 1, 17–18, *Parth v. Pomona Valley Hosp. Med. Ctr.*, 630 F.3d 794 (9th Cir. 2010) (No. 08-55022) (arguing that only bona fide wage rate changes not designed to flout overtime requirements were permissible and that the rate change at issue satisfied that standard); *Gallo v. Essex Cnty. Sheriff's Dep't*, No. 10-10260-DPW, 2011 WL 1155385, at \*6 n.6, 7 (D. Mass. Mar. 24, 2011) (arguing that county sheriff's office was immune from private FLSA action).

The zeal with which the Bush and Obama administrations used amicus briefs to advocate on behalf of certain favored groups—industry under President Bush and workers under President Obama—caused wild flip-flops in the DOL’s position on certain issues during a short period of time. In the process, the DOL lost credibility with some courts, which refused to defer to certain inconsistent DOL positions from the Clinton (which favored employees), to the Bush (which changed some pro-employee positions to favor industry), to the Obama administrations (which tried to restore interpretations back to pro-employee, pre-Bush interpretations).<sup>157</sup>

The Article returns to an analysis of the amicus activity of these administrations, and the chaos and confusion it caused on some issues, in Part II.F, *infra*.

C. Courts Are Likely to Rule Consistently with the DOL’s Amicus Position

Lower courts are likely to rule consistently with the position in the DOL’s amicus brief, even if the court does not explicitly refer to a particular deference doctrine or to the DOL’s brief. The DOL’s amicus position prevailed at an overall rate of 66% (185 out of 281 cases), and lost 34% of the time (96 out of 281 cases).<sup>158</sup>

The agency’s position prevailed most frequently in federal district courts (76% of cases), then state courts (69%), then federal courts of appeal (65%) and the U.S. Supreme Court (64%). Table 2 shows the rate at which the agency’s position prevailed at each court level.

Table 2: Overall Rate that Court Favored DOL Amicus Position: By Court Level

Court Level	DOL Position Favored		DOL Position Failed		Total Cases
U.S. Supreme Court	64%	23	36%	13	36
Federal Circuit	65%	123	35%	67	190
Federal District	76%	13	24%	4	17
State Appellate	69%	25	31%	11	36
<b>Total</b>	<b>66%</b>	<b>186</b>	<b>34%</b>	<b>95</b>	<b>283</b>

157. See, e.g., *Sandifer v. United States Steel Corp.*, 678 F.3d 590, 598–99 (7th Cir. 2012) (refusing to defer to DOL’s amicus position on compensability of donning and doffing protective clothing because of inconsistent interpretations among Clinton, Bush, and Obama administrations and citing other courts of appeal “that have come together in spurning . . . ‘the gyrating agency letters on the subject.’”) (citations omitted).

158. This calculation was based on 281 cases for which both the DOL’s amicus position and the court ruling are available. It excludes those cases in which the court did not reach a decision (due to settlement or withdrawal of the case), cases still pending appeal, and cases for which the DOL amicus briefs are no longer available.

For more modern administrations for which complete amicus data sets are available, Table 3 shows the rate at which courts ruled in favor of the DOL's amicus position:

Table 3: Rate at which Courts Ruled Consistently with DOL's Amicus Position

Administration	Ruling Consistent with DOL Position		Ruling Against DOL Position		Totals
	Percent	No. Cases	Percent	No. Cases	
Clinton	65%	13	35%	7	20
Bush	74%	17	26%	6	23
Obama	56%	19	44%	15	34
<b>Totals</b>	<b>64%</b>	<b>49</b>	<b>36%</b>	<b>28</b>	<b>77</b>

During the Clinton administration, when the DOL became a more frequent amicus filer, courts followed the position argued by the agency in 65% of cases and against it in 35% of cases. The Bush administration was the most successful, with its position prevailing in 74% of cases and failing in 26%. Among the cases from the Obama administration which have been decided, courts sided with the DOL's position in 56% of cases, and against it in 44%.

The more important question for purposes of evaluating the agency amicus strategy is the impact of deference arguments on the outcome of the case. The next section analyzes the frequency with which the DOL has asserted deference principles in its amicus briefs and judicial responses to those arguments.

#### D. Deference Arguments Asserted in DOL Amicus Briefs

For most of the FLSA's history up until the Clinton administration, many DOL amicus curiae briefs noted—typically in a footnote—that the interpretations by the Wage and Hour Administrator should be given “great weight” under *United States v. American Trucking Association*,<sup>159</sup> in which the U.S. Supreme Court stated that the interpretations of the Motor Carrier Act by the Interstate Commerce Commission and the DOL Wage and Hour Division “are entitled to great weight.”<sup>160</sup> The DOL amicus briefs that cited *American Trucking* pointed out, however, that the Wage and Hour Administrator's interpretations “are not, and do not purport to be, binding.”<sup>161</sup> In *Skidmore* itself, the DOL's brief simply provided a very

159. 310 U.S. 534 (1940).

160. *Id.* at 549.

161. DOL Amicus Brief in *Miller Hatcheries, Inc. v. I.A. Boyer*, 131 F.2d 283 (8th Cir. 1942),

technical review of the FLSA and the agency's prior positions on the issue of waiting time. Nowhere did the agency request that the Court defer, or even "respect," the agency's interpretations.

After *Skidmore*, the DOL's amicus briefs typically requested that the Wage and Hour Administrator's position be given great weight or respect, but, with a few exceptions, did not request formal deference until the Clinton administration. In two early cases, the DOL argued that its interpretation of its own regulations should be entitled to controlling weight pursuant to *Bowles v. Seminole Rock & Sand Co.*, a pre-cursor to the *Auer* decision.<sup>162</sup> The only pre-Clinton administration brief that asserted *Chevron* deference was *Dybach v. State of Florida Department of Corrections*,<sup>163</sup> during the administration of President George H.W. Bush. The DOL's brief argued that its regulation defining the professional exemption was entitled to deference under *Chevron* and that the plaintiff probation officer did not fall under the exemption.<sup>164</sup> The court noted that it was ultimately responsible for interpreting the language of statutes and cited *Chevron* in deferring to the DOL's application of the professional exemption.<sup>165</sup>

The Clinton administration—during which *Auer* was decided—was the first to consistently request judicial deference to the agency's position in its amicus briefs, arguing for some type of deference in twelve out of twenty-two briefs.<sup>166</sup> Only one brief requested *Skidmore* review alone, with ten briefs asserting more controlling deference under *Auer*, *Chevron* or a combination thereof. In the amicus brief submitted in *Auer* itself, the DOL asserted deference under *Martin v. OSHRC*,<sup>167</sup> in which the Court, without citing *Chevron*, had granted substantial deference to the Occupational Safety and Health Review's Commission interpretation of its own regulations.<sup>168</sup>

The Bush DOL argued for deference—and typically controlling deference—in all but five of its twenty-three amicus briefs. The Bush DOL invoked *Chevron* seven times, *Auer* three times, and *Chevron/Auer* in

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at 4 (on file with the U.S. Dep't of Labor).

162. *Bogash v. Baltimore Cigarette Serv., Inc.*, 193 F.2d 291 (4th Cir. 1951); *Berlin v. Eimer & Amend*, 66 N.E.2d 584 (N.Y. 1946).

163. 942 F.2d 1562 (11th Cir. 1991).

164. Brief of U.S. Dep't of Labor as Amicus Curiae, *Dybach*, 942 F.2d 1561 (No. 90-3238) (on file with author).

165. 942 F.2d at 1565.

166. Brief of U.S. Dep't of Labor as Amicus Curie at 22–23 n.7, *Gray v. Swanney-McDonald, Inc.*, 436 F.2d 652 (9th Cir. 1971) (Nos. 24476, 24504) (citing *Skidmore v. Swift*, 323 U.S. 134 (1944); Brief of U.S. Dep't of Labor as Amicus Curiae, *Baird v. Wagoner Trans. Co.*, 425 F.2d 407 (6th Cir. 1970) (Nos. 19570-1) (citing *Boutell v. Walling*, 327 U.S. 463, 470–71 (1946); *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 549 (1940).

167. 499 U.S. 144, 151 (1991).

168. Brief for the United States as Amicus Curiae, *Auer v. Robbins*, 519 U.S. 452 (1997) (No. 95-897), 1996 WL 595843.

combination two times. It relied on *Skidmore* six times. The Obama DOL invoked *Auer* seven times, *Chevron* seven times, a *Chevron/Auer* combination three times, and *Skidmore* fourteen times.

The breakdown of the type of deference asserted by the DOL in its amicus briefs, and the rate at which the court ruled consistently with the agency's position in those cases, is reflected below in Table 4:

Table 4: Type of Deference Argued in DOL Amicus Briefs (From Clinton to Obama)<sup>169</sup>

Type of Deference Argued	Number of Briefs	Rate at which courts ruled consistently with DOL position	
		Number of Cases	Percent
<i>Auer</i>	17	8	47%
<i>Chevron</i>	14	11	79%
<i>Chevron/Auer</i>	7	3	43%
<i>Skidmore</i>	17	10	47%

In examining the overall success rate of formal deference arguments from Clinton through Obama, the most successful, not surprising given its controlling weight, has been *Chevron* (79% success rate), followed by *Auer* (47% success rate) and *Skidmore* (47%). But, as described in the next section, courts typically do not identify the deference regime on which they relying, if any, when ruling in favor of a position advocated by the DOL.

In seventeen cases during the Clinton, Bush and Obama administrations, the DOL did not assert a particular deference doctrine in its amicus brief. These tended to be procedural issues rather than substantive interpretive issues. For example, in *Bruer v. Jim's Concrete of Brevard*,<sup>170</sup> the agency explained that a FLSA action filed in state court may be removed to federal court and a unanimous Court agreed. In *Niland v. Delta Recycling Corp.*,<sup>171</sup> the DOL clarified that an employee who had accepted back pay as part of a DOL supervised audit of FLSA violations had waived his right to later sue for the same violation.<sup>172</sup> Other briefs involved class certification or supplemental jurisdiction issues,<sup>173</sup> a current

169. This table excludes cases that are still pending or in which the court did not rule on the merits for other reasons (such as a settlement).

170. See Brief for the United States as Amicus Curiae Supporting Respondent, *Bruer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003) (No. 02-337), 2003 WL 1192669, at \*3-4.

171. 377 F.3d 1244 (11th Cir. 2004).

172. See Brief for the Secretary of Labor as Amicus Curiae in Support of Defendant-Appellee *Delta Recycling Corp.* Supporting Affirmance of the District Court at 11-12, *Niland v. Delta Recycling Corp.*, 377 F.3d 1244 (11th Cir. 2004) (No. 03-14553), 2004 WL 2445519.

173. Class actions are not permitted under the FLSA. Instead, every employee who wants to



cutting-edge issue in FLSA litigation but one for which the agency lacks a long enforcement record.<sup>174</sup> The only procedural brief that was not successful was the Bush DOL's argument on behalf of an employer that an arbitrator in a FLSA case had manifestly disregarded the law by allowing a FLSA claim for back wages to proceed as an opt out class action rather than an opt in collective action required for FLSA court proceedings.<sup>175</sup> The Clinton amicus briefs that did not cite to some type of deference—all of which were successful—involved employee misclassification issues,<sup>176</sup> with one brief arguing that plaintiffs may proceed anonymously in FLSA actions.<sup>177</sup>

### E. Court Response to Amicus Arguments

Even prior to *Skidmore*, some courts expressed the need to respect the DOL's amicus position in FLSA cases. The Supreme Court had pronounced a similar standard more than a century before *Skidmore* in *Edwards' Lessee v. Darby*,<sup>178</sup> stating: "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."<sup>179</sup> Some courts relied on this

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join the case must affirmatively "opt in" to the action. 29 U.S.C. § 216(b) (2006). Two Obama administration amicus briefs argued that a FLSA collective action can proceed together with a state wage law class claim. See Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants at 1, 6–8, *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971 (7th Cir. 2011) (No. 09-3029), 2009 WL 6504100; Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees at 1, 5–7, *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234 (2d Cir. 2011) (No. 10-1884), 2011 WL 1246654. Another concerned the calculation of overtime wages on a representative basis in a FLSA collective action. See Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees at 1, 10–11, *Baden-Winterwood v. Life Time Fitness, Inc.*, 566 F.3d 618 (6th Cir. 2009) (Nos. 10-4269, 10-4361).

174. Unlike private right of action cases, in cases filed by the Secretary employees cannot opt in individually. See 29 U.S.C. § 216(b) (2006) ("The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor . . .").

175. See *Long John Silver's Rest., Inc. v. Cole*, 514 F.3d 345 (4th Cir. 2008); Brief of the Secretary of Labor as Amicus Curiae Supporting Appellants at 8–9, *Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345 (4th Cir. 2008) (No. 06-1259).

176. See *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1070–73 (9th Cir. 2000) (holding plaintiffs in FLSA case may proceed anonymously); *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997) (holding grower was joint employer of farm workers); *Antenor v. D&S Farms*, 88 F.3d 925 (11th Cir. 1996) (same); *Cara-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500 (11th Cir. 1993) (holding employees were engaged in seasonal agricultural work and were therefore protected by the FLSA).

177. See Brief of the Secretary of Labor as Amicus Curiae at 1–3, *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000) (No. 99-16713).

178. 25 U.S. (12 Wheat.) 206 (1827).

179. *Id.* at 210.

concept in pre-*Skidmore* FLSA cases.<sup>180</sup> For example, in *Umthun v. Day & Zimmerman*<sup>181</sup>—decided one month before *Skidmore*—the Iowa Supreme Court wrote: “This construction of the statute by the administrative department charged with its enforcement, although not binding on us, should be given our respectful consideration.”<sup>182</sup> After *Skidmore*, a handful of courts explicitly discussed the need to give “respect” or “great weight” to the agency’s interpretations.<sup>183</sup> But just a year after *Skidmore*, the Supreme Court refused to defer to the DOL’s position in *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*.<sup>184</sup>

*Jewell Ridge* concerned the compensability of the time that coal miners spent in underground travel from mine to mine.<sup>185</sup> In 1940, in response to various wage investigations by the DOL, coal mining companies and unions jointly sent a letter to the Wage and Hour Administrator arguing that such travel time should not be compensated.<sup>186</sup> They pleaded that “such a change ‘would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States.’”<sup>187</sup> In response, the DOL issued an opinion letter blessing the practice of excluding travel time as the custom and practice in coal mining collective bargaining agreements.<sup>188</sup>

In a 5-4 decision, the Court rejected the DOL’s interpretation as “legally untenable” and therefore “lack[ing] the usual respect to be accorded the Administrator’s rulings, interpretations and opinions” under *Skidmore*.<sup>189</sup> The Court found that the miners’ underground travel satisfied the test for “work time” under the FLSA.<sup>190</sup> The Court based its rejection of the DOL’s acceptance of the industry-union compromise on the

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180. See, e.g., *Missel v. Overnight Motor Transp. Co.*, 126 F.2d 98 (4th Cir. 1942) (relying on *United States v. American Trucking Ass’n*); *Bumpus v. Continental Baking Co.*, 124 F.2d 549, 552 (6th Cir. 1941) (citing *Edwards’ Lessee v. Darby*).

181. 16 N.W.2d 258 (Iowa 1944).

182. *Id.* at 259 (citation omitted).

183. See *Fred Wolferman, Inc. v. Gustafson*, 169 F.2d 759, 763 (8th Cir. 1948); *Anderson v. Manhattan Lighterage Corp.*, 148 F.2d 971, 973 (2d Cir. 1945) (granting *Skidmore*-like deference without citing *Skidmore*).

184. 325 U.S. 161, 169 (1945).

185. *Id.* at 162.

186. *Id.* at 183.

187. *Id.* at 183–85 (Jackson, J., dissenting) (describing letter to Administrator by coal companies and unions).

188. See *id.* at 187–88 (citing 3 Wage and Hour Rep. 332, 333). The Administrator’s Letter stated that “working time on a ‘face to face’ basis in the bituminous coal mining industry would not be unreasonable.” *Id.*

189. *Id.* at 169 (majority opinion).

190. *Id.* at 166. Specifically, the travel time in the mines 1) involved physical or mental exertion; 2) that was controlled or required by the employer; and 3) was pursued necessarily and primarily for the benefit of the employer and his business. See *id.* at 163–66.

remedial purpose of the statute, stating that the FLSA was not designed to “allow an employer to claim all of an employee’s time while compensating him only for a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act.”<sup>191</sup>

Justice Robert Jackson dissented, blasting the majority’s refusal to defer to the DOL. After describing the Administrator’s opinion letter, he stated: “We have admonished lower courts that they must give heed to these interpretations. The District Court in this case did so, only to find them brushed aside here as of no importance.”<sup>192</sup>

Thus, since the New Deal, the Court has sent mixed signals about the degree of weight to give to the DOL’s amicus positions. Perhaps given this confusion, most courts simply do not address deference principles at all. In the vast majority of the cases in this study, courts did not cite or discuss a deference framework, even when they ruled consistently with the DOL’s position. Some courts mentioned the DOL’s amicus brief or characterized it as “quite informative” in reaching a decision, but did not discuss deference principles.<sup>193</sup>

Only nineteen cases in the database deferred to the DOL’s amicus position with a citation to controlling deference under *Auer* or *Chevron*. *Chevron* has been cited as a reason for deferring to the DOL’s interpretation seven times.<sup>194</sup> Since *Auer* was decided, twelve cases have cited or relied on it in deferring to the DOL’s interpretation.<sup>195</sup> In *Long Island Care at Home, Ltd. v. Coke*, the Court cited both *Chevron* and *Auer* in unanimously deferring to the DOL’s informal interpretations that were

191. *Id.* at 167 (quoting *Tennessee Coal Co. v. Muscoda Local*, 321 U.S. 590, 602 (1944) (internal quotation marks omitted)).

192. *Id.* at 188 (Jackson, J., dissenting) (citations omitted).

193. *See, e.g.*, *Schmidtke v. Conesa*, 141 F.2d 634, 635–36 (1st Cir. 1944) (referring to amicus brief in reaching decision); *Tidewater Optical Co. v. Wittkamp*, 19 S.E.2d 897, 899 (Va. 1942) (referring to DOL amicus brief as “quite informative” about purpose of the FLSA). William Eskridge has characterized cases in which courts follow the agency but do not identify a deference framework as “consultative deference.” William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1473–74 (2008).

194. *See, e.g.*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171–74 (2007); *Buckner v. Fla. Habilitation Network, Inc.*, 489 F.3d 1151, 1155–56 (11th Cir. 2007); *Senger v. City of Aberdeen*, 466 F.3d 670, 672–74 (8th Cir. 2006); *Kosakow v. New Rochelle Med. Assocs., P.C.*, 274 F.3d 706 (2nd Cir. 2001); *see also Dybach v. State of Fla. Dep’t of Corr.*, 942 F.2d 1562, 1565 (11th Cir. 1991) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

195. *See, e.g.*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007); *Fast v. Applebee’s Int’l, Inc.*, 638 F.3d 872, 878–79 (8th Cir. 2011); *Ramos-Barrientos v. Bland*, 661 F.3d 587, 590 (11th Cir. 2011); *Polycarpe v. E&S Landscaping Serv., Inc.*, 616 F.3d 1217, 1225 (11th Cir. 2010); *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 149 (2d Cir. 2010); *Intracomm, Inc. v. Bajaj*, 492 F.3d 285, 293 (4th Cir. 2007); *Belt v. EmCare, Inc.*, 444 F.3d 403, 405 (5th Cir. 2006); *Takacs v. Hahn Auto. Corp.*, 246 F.3d 776, 782 (6th Cir. 2001); *Yourman v. Giuliani*, 229 F.3d 124, 128 (2d Cir. 2000).

developed during pending litigation.<sup>196</sup> Twelve cases cited the “great weight” standard from *Skidmore*, *Christensen*, or *Mead*.<sup>197</sup>

Courts did not identify a deference principle in the vast majority (more than 80%) of the cases in which they ruled consistently with the DOL's amicus position. Given that courts often do not refer to the agency's amicus brief or pinpoint a controlling deference framework, it is difficult to conclude with any certainty whether judges are relying on, or even reading, agency amicus briefs or are simply convinced by one of the parties. Prior surveys of federal judges, however, have indicated that judges find amicus briefs by government agencies to be “moderately” or “very helpful” in resolving disputes.<sup>198</sup> Administrative law scholars also have concluded based on empirical analysis that government amicus curiae briefs have an impact on the Supreme Court.<sup>199</sup>

When President Bush took over the DOL, *Auer* empowered the agency to exploit amicus arguments to narrow the FLSA's protections and expand its exemptions. Eight years later, the Obama DOL used amicus briefs to reinvigorate FLSA enforcement on behalf of workers. The next section explains how the Bush and Obama DOLs used amicus strategies more aggressively than any administration since Roosevelt to accomplish their policy priorities. The juxtaposition of these two administrations shows the exceptional power of the agency amicus strategy of policy making in the courts. In the long run, however, political flip-flops from administration to administration in the enforcement of the FLSA will harm the presumption that the agency is operating in good faith, and with special technical expertise, to execute Congress's remedial intent when it passed the FLSA.

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196. *Long Island Care at Home*, 551 U.S. at 171–74.

197. *See, e.g.*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335–36 (2011); *Minor v. Bostwick Labs., Inc.*, 669 F.3d 428, 428–39 (4th Cir. 2012); *Perez v. Mountaire Farms, Inc.* 650 F.3d 350, 371 (4th Cir. 2011); *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 149 (2d Cir. 2008); *McLaughlin v. Boston Harbor Cruise Lines, Inc.*, 419 F.3d 47, 50 (1st Cir. 2005); *Anderson v. Perdue Farms, Inc.*, 604 F. Supp. 2d 1339, 1354–55 (M.D. Ala. 2009); *see also* *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 286 (1st Cir. 2004) (citing *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)).

198. One survey of federal judges found that “[a]micus curiae briefs offered by governmental entities were favored at all levels of the federal bench.” Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 697 (2008). Three Supreme Court respondents found agency amicus briefs to be “very helpful to the Court.” *Id.* In addition, “the Circuit and District Court respondents ranked the government as the most helpful amicus curiae, with 96.3% of Circuit Court and 86.4% of District Court respondents indicating that the government is either moderately or very helpful.” *Id.* (citation omitted).

199. *Kearney & Merrill*, *supra* note 14, at 828–30.

## F. *Bush and Obama Use Deference Frameworks to Establish FLSA Policy in the Courts*

### 1. Bush Used a Coordinated Opinion Letter and Amicus Strategy to Undermine FLSA Coverage

Armed with the power of *Auer*, although somewhat tempered by *Christensen* and *Mead*, President George W. Bush came to office and appointed former management-side litigators to lead the DOL's Office of Solicitor and Wage and Hour Division. President Bush first appointed Eugene Scalia to be the Solicitor of Labor through a recess appointment, but he was not confirmed due to controversy surrounding his nomination.<sup>200</sup> Howard Radzely, a former clerk to Justice Scalia who spent his career representing employers, then took the helm.<sup>201</sup> As historian Nelson Lichtenstein wrote: "The Scalia nomination was characteristic of Bush's approach to the nation's labor standards regime: put an ideological fox in the regulatory henhouse, and then watch the fireworks explode."<sup>202</sup> Legal scholar Susan Bisom-Rapp writes that the Bush DOL "was a model of industry capture."<sup>203</sup>

Early in the Bush administration, the DOL used formal rulemaking to amend the regulations regarding the professional, executive, and administrative exemptions to overtime pay.<sup>204</sup> Its proposed revisions were subjected to intense criticism, prompting more than 75,000 public comments and a threat from Congress "to deny funding for any DOL action that would exempt employees currently eligible for overtime pay."<sup>205</sup> In the end, the administration was forced to compromise or

200. Audrey Hudson, *Justice's Son Resigns from Labor Position*, WASH. TIMES, Jan. 8, 2003, at A5 (noting that Scalia was recess-appointed Solicitor of Labor in January 2001, named Acting Solicitor in November 2002 when the recess appointment expired, and resigned in January 2003 before his confirmation hearing).

201. 149 CONG. REC. S16214 (daily ed. Dec. 9, 2003) (noting the Senate's confirmation of Howard Radzely); see also *Nomination of Howard M. Radzely, Hearing Before the S. Comm. on Health, Educ., Labor, & Pensions*, 108th Cong., 1st Sess. 1 (2003) (statement of Sen. Gregg).

202. Nelson Lichtenstein, *Ideology and Interest on the Social Policy Home Front*, in *THE PRESIDENCY OF GEORGE W. BUSH: A FIRST HISTORICAL ASSESSMENT* 169, 177 (Julian E. Zelizer ed., 2010).

203. Susan Bisom-Rapp, *What We Learn in Troubled Times: Deregulation and Safe Work in the New Economy*, 55 WAYNE L. REV. 1197, 1202 (2009). Professor Bisom-Rapp was referring to the Occupational Safety and Health Administration, a division of the DOL. *Id.* ("The agency withdrew numerous proposed regulations, delayed others, modified warnings based on industry pressure, and emasculated its cooperative programming.")

204. See, e.g., *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 68 Fed. Reg. 15,559, 15,560 (proposed Mar. 31, 2003) (to be codified at 29 C.F.R. pt. 541).

205. Regan C. Rowan, Comment, *Solving the Bluish Collar Problem: An Analysis of the DOL's Modernization of the Exemptions to the Fair Labor Standards Act*, 7 U. PA. J. LAB. & EMP. L. 119, 122 n.23 (2004) (describing controversy over proposed amendments); see also William J. Kilberg & Jason C. Schwartz, *Saga of Reform: Regulation of Worker Overtime*, 8 BRIEFLY 4, 18

abandon many of its proposals in the final promulgated regulations.<sup>206</sup>

In the judicial arena, the Bush administration used amicus briefs to limit the reach of worker protection statutes in a more subtle manner that avoided public scrutiny and compromises. The Bush DOL utilized a coordinated opinion letter and amicus strategy that was bolder and different from prior administrations in at least three ways. First, in the midst of litigation pending in the federal courts, the Wage and Hour Administrator—a political appointee—issued opinion letters requested by industry trade groups of which the defendants in the pending FLSA litigation were members. These opinion letters were sometimes issued on the heels of a court judgment that had favored employees. Second, the new opinion letters often withdrew prior opinion letters—sometimes spanning multiple prior administrations—and set forth in great detail a new, inconsistent interpretation.<sup>207</sup> Third, the new interpretation typically favored industry rather than workers, running contrary to long-standing FLSA doctrine that the exemptions must be narrowly construed against employers<sup>208</sup> and that the Act must be construed liberally to accomplish its remedial purpose.<sup>209</sup>

Even more troubling, the Bush DOL then appeared as an amicus in private litigation matters and urged the court to grant “great deference” to the new opinion letter and reverse prior court rulings that had favored

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(2004), available at [http://www.gibsondunn.com/fstore/documents/pubs/sept04-sagareformregof overtimekilbergschwartz.pdf](http://www.gibsondunn.com/fstore/documents/pubs/sept04-sagareformregofovertimekilbergschwartz.pdf) (“The proposed changes drew intense criticism and were portrayed as an effort by business groups and their Republican allies to deprive middle and lower income Americans of their overtime payments—to make them work harder for less money.”).

206. See Kilberg & Schwartz, *supra* note 205, at 20–29 (describing how “the final rule is a compromise product”).

207. See, e.g., Brief for the Secretary of Labor as Amicus Curiae at 22–23 app. A, *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003) (Nos. 02-35042, 02-35110) (withdrawing three earlier opinion letters and requesting *Skidmore* deference for new, contradictory opinion letter); *Dougherty v. Teva Pharm. USA*, 2007 WL 1165068 (E.D. Pa. Apr. 9, 2007) (DOL invoked *Chevron* deference for amicus interpretation of regulation which contradicted 1994 opinion letter); Brief of the Secretary of Labor as Amicus Curiae in Support of Defendant’s Motion to Reconsider the August 30, 2006 Order Denying Defendant’s Motion for Judgment on the Pleadings and/or Summary Judgment at 10–13, *Dougherty v. Teva Pharm. USA, Inc.*, No. 05-2336, 2007 WL 1165068 (E.D. Pa. Apr. 9, 2007) (No. 05-02336) (invoking *Chevron* deference for amicus interpretation of regulation which contradicted 1994 opinion letter).

208. Employers bear the burden of proving the applicability of an exemption. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 196–97 (1974).

209. See *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (“To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.”); *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959) (stating that the FLSA “has been construed liberally to apply to the furthest reaches consistent with congressional direction”); *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (“FLSA exemptions are to be ‘narrowly construed against . . . employers’ and are to be withheld except as to persons ‘plainly and unmistakably within their terms and spirit.’”) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).

employees.<sup>210</sup> The DOL either filed an amicus at the district court level supporting the employer's request for reconsideration in light of the new opinion letter or participated as an amicus in the court of appeals. The subsections below provide examples of the Bush DOL's strategy of using opinion letters, together with amicus filings, to support regulated interests in narrowing the coverage of the FLSA.

a. *Alvarez v. IBP, Inc.*

Consider *Alvarez v. IBP, Inc.*,<sup>211</sup> an overtime case against a meatpacking company.<sup>212</sup> This well-known case ultimately made its way to the Supreme Court, which held that the time that meatpacking employees spent walking between the location where they don and doff protective gear to their work stations should be included in the calculation of hours worked under the FLSA.<sup>213</sup> The DOL's amicus activity in this case at the lower court level, however, is less well known and provides the earliest example of the Bush DOL using an opinion letter and amicus brief, along with deference arguments, in an attempt to narrow FLSA coverage.

On September 14, 2001, the district court held that IBP had willfully violated the FLSA by not including the time that workers spent donning and doffing protective gear and walking to their work stations.<sup>214</sup> The court also rejected IBP's defense that the union workers at the plant were not entitled to compensation for donning and doffing under 29 U.S.C. § 203(o), which provides that an employer does not have to pay for time spent "changing clothes or washing at the beginning or end of each work day" if such time is excluded from working time "by the express terms of or by custom or practice under a bona fide collective-bargaining agreement."<sup>215</sup> Eight months after the court ruled against IBP, the DOL issued an opinion letter to the American Meat Institute,<sup>216</sup> of which IBP was a member, that withdrew three prior DOL opinion letters from 1997, 1998, and 2001 that had consistently found that donning and doffing time

210. Examples include the DOL's amicus briefs in *Alvarez v. IBP, Inc.*, *Geig v. DDR, Inc.* and in *Long Island Care at Home, Ltd. v. Coke*, described in the following subsections.

211. No. CT-98-5005-RHW, 2001 WL 34897841 (E.D. Wash. Sept. 14, 2001).

212. *Id.* at \*1.

213. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005).

214. *Alvarez v. IBP, Inc.*, No. CT-98-5005-RHW, 2001 WL 34897841, at \*10 (E.D. Wash. Sept. 14, 2001).

215. *Id.* at \*2 n.2. The collective bargaining agreements at the plant had a provision for clothes changing time in 1976 and again for the years 1979-1982, but the provision had been eliminated in 1982. *Id.* at \*15.

216. According to its own brief in *Tum v. Barber Foods, Inc.*, the AMI "is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey and processed meat products." Brief of the National Chicken Council and American Meat Institute as Amici Curiae Supporting Respondent at 2, *Tum v. Barber Foods, Inc.*, No. 04-66 (1st Cir. Aug. 1, 2005), 2005 WL 1841384, at \*2.

is compensable time that may not be waived for union workers in a collective bargaining agreement.<sup>217</sup>

In the appeal of *Alvarez* to the Ninth Circuit, the DOL supported the employees on the compensability of donning and doffing time. Nevertheless, this pro-employee position was undermined by the DOL's argument that the court should defer to its new opinion letter—issued after the district court's adverse ruling against the employer—that applied § 203(o) to the clothes-changing and washing activities of union employees in the meatpacking industry.<sup>218</sup> In other words, the DOL argued that the time may be compensable for nonunion workers, but not for the union workers in the case before the court. The Ninth Circuit Court of Appeals rejected the DOL's "new, inconsistent interpretation,"<sup>219</sup> finding that it directly conflicted with the 1997 opinion letter and was not entitled to deference because of that inconsistency.<sup>220</sup> The Supreme Court did not consider the § 203(o) issue.

#### b. *Gieg v. DDR, Inc.*

The Bush DOL was more successful in achieving a pro-business victory with an amicus strategy in *Gieg v. DDR, Inc.*,<sup>221</sup> which consolidated three cases in which district courts had held that finance and insurance managers of retail automobile dealerships were entitled to overtime pay under the FLSA.<sup>222</sup> After the employees won their motions for summary judgment in district court (indeed, only three days after the plaintiff won in *Gieg*), the DOL issued an opinion letter to the National Automobile Dealers Association (NADA) stating that a finance and insurance salesperson employed by a retail automobile dealership was exempt from overtime.<sup>223</sup>

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217. Letter from Tammy D. McCutchen, Administrator of the DOL Wage and Hour Division to Samuel D. Walker, counsel for the American Meat Institute (June 6, 2002) (attached as Addendum A to the DOL's amicus brief). Under § 203(o), the employer does not have to pay for time spent "changing clothes or washing at the beginning or end of each workday" if such time is excluded from working time "by the express terms [of] or by custom or practice under a bona fide collective-bargaining agreement." *Id.*

218. Brief for the Sec'y of Labor as Amicus Curiae at 22, *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003) (Nos. 02-35042 and 02-35110), 2002 WL 32154024.

219. *Alvarez*, 339 F.3d 894, 905–06 n.9.

220. *Id.* (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." (alteration in original))).

221. 407 F.3d 1038 (9th Cir. 2005).

222. *Id.* at 1041. The consolidated cases consisted of *Wickersham v. Haselwood Buick-Pontiac Co.*, No. C01-5557FDB, 2002 WL 32152269 (W.D. Wash. Aug. 16, 2002); *Geig v. Haselwood Buick-Pontiac Co.*, No. Civ. 98-1563-HA, 2003 WL 21087602 (D. Or. Mar. 14, 2003); and *Chaloupka v. SLT/TAG Inc.*, No. Civ. 02-743-HU, Civ. 02-1053-HU, 2003 WL 23540259 (D. Or. July 14, 2003).

223. Opinion Letter from Tammy D. McCutchen, Wage and Hour Administrator to Douglas I.



The DOL then filed amicus briefs supporting the employers on a motion for reconsideration in the district courts and on appeal to the Ninth Circuit. Other federal district courts had declined to follow the new opinion letter in unrelated cases involving the same legal issue,<sup>224</sup> with one judge finding that the letter was “inconsistent with, and in fact, ignore[d], regulations” concerning the exemption.<sup>225</sup> The court found that the opinion letter lacked the power to persuade because it had been solicited “by those associated with defendants.”<sup>226</sup>

In its amicus brief in *Gieg* in the Ninth Circuit, the DOL set forth the *Skidmore* framework, under which agency interpretations are entitled to respect, but then cited a Ninth Circuit case to argue that the court should give the new opinion letter “great deference,”<sup>227</sup> which is more akin to the *Chevron* standard. Although the Ninth Circuit did not explicitly address the deference issue, it ruled consistently with the DOL’s position and reversed the decisions that had favored the employees.<sup>228</sup> The Bush DOL had therefore succeeded in using its opinion letter and amicus advocacy to change a pro-employee policy to one that favored the automobile dealer industry.

#### c. Long Island Care at Home, Ltd. v. Coke

The Bush DOL also used an amicus strategy to support pro-employer positions on the question of whether in-home companionship workers who work for home healthcare companies were entitled to overtime, with an ultimate victory in the U.S. Supreme Court in *Long Island Care at Home, Ltd. v. Coke*.<sup>229</sup> Other scholars have described *Long Island Care at Home* as an example of the Court’s proper regard for the APA and appropriate application of *Chevron*.<sup>230</sup> A closer examination of the behind-the-scenes opinion letter, advisory memorandum, and amicus litigation strategy used by the agency shows something more politically charged at work.

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Greenhas, NADA (Mar. 17, 2003), available at [http://www.dol.gov/whd/opinion/FLSA/2003/2003\\_03\\_17\\_1\\_FLSA.pdf](http://www.dol.gov/whd/opinion/FLSA/2003/2003_03_17_1_FLSA.pdf).

224. Cases declining to follow the new opinion letter include *Wickersham*, *Gieg*, and *Chaloupka*.

225. *Chaloupka*, 2003 WL 23540259, at \*3.

226. *See id.* at \*3–4.

227. Brief for the Secretary of Labor as Amicus Curiae at 15, *Gieg v. DDR, Inc.*, 407 F.3d 1038 (9th Cir. 2005) (Nos. 03-35707 and 03-36619). The DOL cited *Biggs v. Wilson*, 1 F.3d 1537, 1543 (9th Cir. 1993), *cert. denied*, 510 U.S. 1081 (1994), which afforded “great deference” to a decades-old opinion letters from 1961, 1968, and 1973 that stated that employers must pay employees on regular paydays and cannot hold wages and “make up the difference at the end of the month.”

228. *Gieg*, 407 F.3d 138, 1053.

229. 551 U.S. 158 (2007).

230. *See, e.g.*, Foote, *supra* note 6, at 721 (stating that “*Long Island Care at Home* is highly reminiscent of the approach that was taken by the Court in pre-*Chevron* cases during the formative years of the APA”).

The dispute centered on a 1974 amendment to the FLSA to expand coverage to “domestic service workers.”<sup>231</sup> Congress exempted from domestic service coverage only those engaged in casual home activities, such as babysitting or “companionship services,” as “defined and delimited” by the DOL.<sup>232</sup> Shortly thereafter, the DOL engaged in notice-and-comment rulemaking to define the scope of the new provision.<sup>233</sup> The promulgated regulations had an apparent internal inconsistency. One regulation, entitled “General Regulations” defined exempt domestic service workers as those employed “in or about a private home . . . of the person by whom he or she is employed.”<sup>234</sup> The General Regulation was passed through notice-and-comment rulemaking and provided that only those workers employed directly by the homeowner—not a third party company—were exempt from overtime.<sup>235</sup> Another interpretive regulation, labeled “Third Party Employment” and not passed through rulemaking, stated that the exemption included companionship workers who “are employed by an employer or agency other than the family or household using their services.”<sup>236</sup> This “third-party regulation” suggested that home health workers, regardless of the employer, are not entitled to overtime.<sup>237</sup>

Despite this regulatory inconsistency, the DOL had long interpreted these provisions to mean that home health workers employed by third-party businesses were entitled to overtime pay.<sup>238</sup> The DOL had considered making a change to the third-party regulation on three occasions over a fifteen-year period, but had not ultimately changed the regulation nor changed its interpretation that home health care workers working for private companies were protected by the FLSA.<sup>239</sup>

The Bush administration modified the DOL's long-standing policy in favor of coverage to one that exempted home healthcare workers employed

231. Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, § 7(b)(1), (2), 88 Stat. 55, 62 (adding home health care workers to minimum wage, 29 U.S.C. § 206(f), and overtime, *id.* § 207(l) standards).

232. 29 U.S.C. § 213(a)(15) (2006).

233. Extension to Domestic Service Employees, 40 Fed. Reg. 7404 (Feb. 20, 1975) (to be codified at 29 C.F.R. pts. 516, 552).

234. 29 C.F.R. § 552.3 (1975).

235. *See id.*

236. *Id.* § 552.109(a).

237. *See id.*

238. *See* D. Sweeney, DOL Opinion Letter, Home Health Aides/Companionship Exemption, 6A LRR, Wages and Hours Manual 99:8205 (Jan. 6, 1999), available at 1999 WL 1002349 (explaining that employees of third-party employer qualify for the exemption only if they are also jointly employed “by the family or household using their services”); Application of the Fair Labor Standards Act to Domestic Service, 58 Fed. Reg. 69,311 (proposed Dec. 30, 1993) (to be codified at 29 C.F.R. pt. 552).

239. *See* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 163–64 (2007) (citing 58 Fed. Reg. 69,310–69,312 (1993); 60 Fed. Reg. 46,798 (Sept. 8, 1995); 66 Fed. Reg. 5481, 5485 (Jan. 19, 2001); 67 Fed. Reg. 16,668 (Apr. 8, 2002)).

by third parties from the FLSA. In three circuit court cases, the DOL submitted amicus briefs arguing that the interpretive third-party regulation, together with its new opinion letter and amicus interpretation, were entitled to *Chevron* deference.<sup>240</sup> The Fifth and Eleventh Circuits sided with the agency's position.<sup>241</sup> The Second Circuit, however, held that only the General Regulation, under which the workers were entitled to overtime, was entitled to deference under *Chevron* because it was passed through notice-and-comment rulemaking.<sup>242</sup> The Second Circuit, applying *Skidmore* to the interpretive regulation, concluded that it was "unpersuasive in the context of the entire statutory and regulatory scheme."<sup>243</sup> The court found that the interpretive regulation contradicted Congress's purpose to expand coverage to domestic service employees,<sup>244</sup> and that it was "jarringly inconsistent" with other contemporaneous DOL regulations under which home health workers were entitled to overtime.<sup>245</sup> The court noted that the DOL had never adequately explained what accounted for the agency's "about-face" in its position.<sup>246</sup>

In response to the Second Circuit's ruling, and after the employer had sought certiorari in the Supreme Court, the DOL drafted an informal, internal "Wage and Hour Advisory Memorandum" defending its new pro-industry position.<sup>247</sup> The Solicitor General then requested that the Supreme Court vacate the Second Circuit's decision and remand the case so the circuit court could consider the Advisory Memorandum.<sup>248</sup> The Second Circuit remained unconvinced and again held the interpretive regulation unenforceable.<sup>249</sup>

The Supreme Court then granted the employer's petition for certiorari,<sup>250</sup> which was supported by the DOL as amicus.<sup>251</sup> A unanimous

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240. Brief for the Secretary Of Labor as Amicus Curiae in Support of Defendant-Appellant at 8, *Buckner v. Fla. Habilitation Network, Inc.*, 489 F.3d 1151 (11th Cir. 2007) (No. 06-11032-EE); Brief for the Secretary of Labor as Amicus Curiae in Support of Defendants-Appellants at 6, *Cook v. Hays*, 212 F. App'x 295 (5th Cir. 2006) (No. 06-30856); Brief for the Secretary of Labor as Amicus Curiae at 12–15, *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118 (2d Cir. 2004) (No. 03-7666), 2003 WL 24089825 at \*14.

241. See *Buckner v. Fla. Habilitation Network, Inc.*, 489 F.3d 1151, 1156 (11th Cir. 2007); *Cook v. Hays*, 212 F. App'x 295, 296–97 (5th Cir. 2006). The Eleventh Circuit ruled after the Supreme Court decided *Long Island Care at Home*.

242. 376 F.3d 118, 130–31 (2d Cir. 2004).

243. *Id.* at 122.

244. *Id.* at 133.

245. *Id.* at 133–34.

246. *Id.* at 134.

247. See Wage and Hour Advisory Memorandum No. 2005-1 (Dec. 1, 2005), available at <http://www.dol.gov/whd/FieldBulletins/AdvisoryMemoranda2005.pdf>.

248. *Long Island Care at Home, Ltd., v. Coke*, 551 U.S. 158, 164 (2007).

249. *Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48, 50, 52 (2d Cir. 2006) (per curiam).

250. *Long Island Care at Home*, 551 U.S. at 031.

251. Brief of Sec'y of Labor as Amicus Curiae at 1, *Coke v. Long Island Care at Home, Ltd.*,

Court afforded *Chevron* deference to the interpretive regulation and held that home health care workers employed by third parties were exempt from the FLSA.<sup>252</sup> It did not bother the Court that the agency's interpretation was "circuitous and inconsistent," crafted during pending litigation, and created a new exemption for workers whom the DOL had considered entitled to overtime for more than a decade.<sup>253</sup> Citing *Auer*, the Court stated: "Where, as here, an agency's course of action indicates that the interpretation of its own regulation reflects its considered views . . . we have accepted that interpretation as the agency's own, *even if the agency set those views forth in a legal brief.*"<sup>254</sup>

After *Long Island Care at Home*, the DOL publicly proclaimed amicus briefs as "a very powerful tool" to influence court interpretations.<sup>255</sup> The former Wage and Hour Administrator for the Bush administration suggested that *Long Island Care at Home* meant that opinion letters and other informal agency guidance are entitled to more than *Skidmore* deference, stating: "This is a stronger statement of what [*Skidmore*] deference means in the context of agency guidance, like an opinion letter. . . The [C]ourt is clear that courts should give deference so long as it is not a surprise."<sup>256</sup>

As seen in these cases, the Bush DOL exploited informal agency interpretations, such as opinion letters and amicus briefs, to change certain FLSA interpretations from pro-employee to pro-employer positions, asserting *Chevron* or *Auer* deference for the new, inconsistent interpretation. The Bush administration used similar amicus strategies to urge pro-industry interpretations for other worker protection statutes. For example, the DOL appeared as an amicus supporting corporations in arguing that employees of subsidiaries of publicly traded companies were not protected by the whistleblower provisions of the Sarbanes-Oxley Act.<sup>257</sup> The DOL argued that employers could require employees to waive

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267 F. Supp. 2d 332 (E.D.N.Y. 2003) (No. 03-7666), 2003 WL 24089825, at \*1.

252. *Long Island Care at Home, Ltd.*, 462 F.3d at 50, 52 (per curiam).

253. Triplett, *supra* note 103.

254. *Long Island Care at Home*, 551 U.S. at 171 (emphasis added) (citation omitted).

255. Michael R. Triplett, *DOL Focus on Amicus Briefs, Opinion Letters Pays Off With Increased Deference by Courts*, 217 Daily Lab. Rep. Online (BNA) B-1 (Nov. 9, 2007) (reporting comments by Paul L. Frieden, head of the appellate litigation department of the DOL Solicitor's Office at the American Bar Association's Labor and Employment Section meeting on November 8, 2007).

256. Michael R. Triplett, *Justices Rule 9-0 that Home Health Workers Employed by Third Parties Not Owed Overtime*, 112 Daily Lab. Rep. Online (BNA) AA-1 (June 12, 2007).

257. *See, e.g.*, Brief of Dep't of Labor as Amicus Curiae, *In re Ambrose v. U.S. Foodservice Inc.*, No. 06-096, 2007 WL 7139500 (U.S. Dep't of Labor SAROX Sept. 28, 2007) (arguing that employee of subsidiary of publicly traded company was not covered by SOX whistleblower provision); Brief of Dep't of Labor as Amicus Curiae, *In re Ede v. Swatch Group*, No. 05-053, 2007 WL 7143175 (U.S. Dep't of Labor SAROX, June 27, 2007) (arguing that SOX does not apply to workers exclusively located outside the United States).

their rights under the Family and Medical Leave Act.<sup>258</sup> The DOL also submitted amicus briefs in various circuits supporting industry positions that the Employee Retirement Income Security Act (ERISA) preempted attempts by local and state governments to require employers to provide health insurance benefits to employees.<sup>259</sup> Outside of the DOL, the Food and Drug Administration during the Bush administration used an amicus approach to change tort law to provide drug and device manufacturers with greater preemption protection,<sup>260</sup> culminating in a victory in *Riegel v. Medtronic, Inc.*<sup>261</sup>

At the same time that the Bush DOL tried to narrow the coverage of worker protection statutes through its amicus advocacy, its affirmative FLSA enforcement efforts dropped. In the period from 1997 to 2007, the number of “enforcement actions decreased by more than a third, from approximately 47,000 actions in 1997 to just under 30,000 in 2007.”<sup>262</sup> Most of these cases were initiated by worker complaints rather than

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258. See, e.g., Brief of Dep’t of Labor as Amicus Curiae in Support of Defendant-Appellee’s Petition for Rehearing en banc at \*2, *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007) (No. 04-1525), 2005 WL 6718391 at \*2–3 (arguing that DOL regulation stating “[e]mployees cannot waive, nor may employer induce employees to waive, their rights under the FMLA” applies only to prospective waiver of rights, not settlement of private claims); Brief of Dep’t of Labor as Amicus Curiae in Support of Defendant-Appellee’s Petition for Panel Rehearing and Rehearing en banc at 1, *Harrell v. U.S. Postal Service*, 445 F.3d 913 (7th Cir. 2006) (No. 03-4204) (arguing that employers have the right under the FMLA to apply additional return to work provisions in a collective bargaining agreement); Brief of Dep’t of Labor as Amicus Curiae in Support of Defendant’s Motion to Reconsider the Aug. 30, 2006 Order Denying Defendant’s Motion for Judgment on the Pleadings and/or Summary Judgment at 10, *Dougherty v. Teva Pharm. USA*, No. 05-2336, 2007 WL 1165068 (E.D. Pa., Apr. 9, 2007) (arguing that DOL’s interpretation of the FMLA non-waiver provision should be afforded *Chevron* deference). The Bush DOL also argued for a narrow interpretation of the term “worksites” under the FMLA regulations, 29 C.F.R. § 825.111(a)(3)—under which employers are covered if they employ at least fifty employees within seventy-five miles of an employee’s worksite—so that the employee in question would not be covered by the FMLA after she was injured in a car accident. Brief of Dep’t of Labor as Amicus Curiae, *Harbert v. Healthcare Servs. Group, Inc.*, 391 F.3d 1140 (10th Cir. 2004) (No. 03-1156), 2003 WL 24213885, at \*2–5.

259. See, e.g., Brief of the Sec’y of Labor as Amicus Curiae Supporting Plaintiff-Appellee and Requesting Affirmance at 7–13, *Retail Industry Leaders Ass’n v. Fielder*, 475 F.3d 180 (4th Cir. 2007) (Nos. 06-1840, 06-1901), 2006 WL 3336531, at \*7–13.

260. Two attorneys examined the Food and Drug Administration’s amicus strategy during the Bush administration to change tort law to provide drug and device manufacturers with greater preemption protection. See Mark C. Levy & Gregory J. Wartman, *Amicus Curiae Efforts to Reform Product Liability at the Food and Drug Administration: FDA’s Influence on Federal Preemption of Class III Medical Devices and Pharmaceuticals*, 60 FOOD & DRUG L.J. 495 (2005).

261. 552 U.S. 312 (2008) (holding that state law tort claims against a medical device manufacturer were preempted by federal law).

262. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-962T, FAIR LABOR STANDARDS ACT: BETTER USE OF AVAILABLE RESOURCES AND CONSISTENT REPORTING COULD IMPROVE COMPLIANCE 5 (2008).

proactive agency enforcement.<sup>263</sup> The number of enforcement actions initiated by the agency fell by 45% over the same ten-year period, “from approximately 13,000 in 1997 to approximately 7000 in 2007.”<sup>264</sup>

## 2. The Obama DOL Increased the Use of Amicus Briefs as an Enforcement Approach

The Obama DOL made the revival of FLSA enforcement a top priority. For example, the DOL “hired about 300 additional investigators to probe wage theft complaints.”<sup>265</sup> It signed agreements with states and the Internal Revenue Service to share information “to crack down on businesses that cheat workers out of their wages.”<sup>266</sup> In fiscal year 2011, the Wage and Hour Division collected nearly \$225 million in back wages, which was “the largest amount collected in a single fiscal year in the Division’s history.”<sup>267</sup>

A central part of the Obama DOL’s efforts to reinvigorate FLSA enforcement on behalf of misclassified and low-wage workers included the filing of amicus briefs. Through its first term (ending December 31, 2012), the Obama administration had submitted forty-three amicus briefs in FLSA cases. It was equally, if not more, active in filing amicus briefs in cases involving ERISA and other labor statutes enforced by the DOL.<sup>268</sup>

During its first term, the Obama DOL’s amicus efforts in FLSA cases were focused on several recurrent issues. First, the DOL argued that oral complaints of wage violations to an employer are protected by the FLSA’s anti-retaliation provisions under a long-standing agency position. These arguments ultimately prevailed in *Kasten v. Saint-Gobain Performance Plastics Corp.*<sup>269</sup> Second, the DOL filed amicus briefs in cases involving low-wage and immigrant workers. For example, in *Josendis v. Wall to Wall Residence Repairs, Inc.*,<sup>270</sup> the DOL submitted an amicus brief arguing that undocumented workers are entitled to the FLSA’s

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263. *Id.*

264. *Id.*

265. Sam Hananel, *Labor Dept. Expands Enforcement of Wage Violations*, WALL ST. J., Sept. 19, 2011, <http://online.wsj.com/article/AP1a153b15fbd44922854b2aff6f272223.html>.

266. *Id.*

267. *Examining Regulatory and Enforcement Actions Under the Fair Labor Standards Act: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. and the Workforce*, 112th Cong. 8, 11 (2011) (Testimony of Nancy J. Leppink, Deputy Wage and Hour Administrator, U.S. Dep’t of Labor), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhr70971/pdf/CHRG-112hhr70971.pdf>.

268. During its first term, the Obama DOL filed more than fifty amicus briefs in ERISA cases, which are posted on the Office of the Solicitor website. See also Robert Steyer, *Critics Claim DOL Using Amicus Briefs to Steer by Pension Roadblocks*, PENSIONS & INVESTMENTS, July 25, 2011, <http://www.pionline.com/article/20110725/PRINTSUB/110729948>.

269. 131 S. Ct. 1325 (2011).

270. 662 F.3d 1292 (11th Cir. 2011).

protections.<sup>271</sup> In *Polycarpe v. E&S Landscaping Service, Inc.*,<sup>272</sup> the agency argued that landscapers who handled tools and materials that traveled in interstate commerce were protected by the FLSA.<sup>273</sup> The DOL has also weighed in on the proper calculation of minimum wages and overtime for tipped employees<sup>274</sup> and migrant workers.<sup>275</sup> Other cases involved the issue of the compensability of donning and doffing time for poultry workers.<sup>276</sup>

Even though the Obama DOL was a much more active amicus filer, it used a slightly more conservative approach to deference arguments in amicus briefs. The Obama DOL typically reserved the assertion of *Chevron* for those interpretations that had been venerable agency interpretations set forth in multiple opinion letters<sup>277</sup>—issued well before the pending litigation—or long-standing enforcement positions. For example, in *Kasten* and other cases involving the question of whether oral complaints of wage violations to an employer are protected by the FLSA’s anti-retaliation provisions, the DOL argued that its longstanding interpretation that such complaints are covered was entitled to *Chevron* deference.<sup>278</sup> Citing *Kasten*, the DOL urged deference for its view that a collective action under the FLSA, in which plaintiffs must “opt in” to the case, is not incompatible

271. Brief of Sec’y of Labor as Amicus Curiae, *Josendis*, 662 F.3d 1292 (No. 09-12266). The court ruled on alternative grounds that the employee was not covered by the FLSA and declined to rule on the issue that had been briefed by the DOL. *Id.* at 1320–21.

272. 616 F.3d 1217 (11th Cir. 2010).

273. *Id.* at 1225.

274. *See, e.g.*, Brief for the Sec’y of Labor as Amicus Curiae, *Fast v. Applebee’s Int’l, Inc.*, 638 F.3d 872 (8th Cir. 2011) (Nos. 10-1725, 10-1726); Brief for the Sec’y of Labor as Amicus Curiae, *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010) (No. 08-35718).

275. *See, e.g.*, Brief of the Sec’y of Labor as Amicus Curiae at 1, *Rivera v. Peri & Sons Farms, Inc.*, No. 11-17365 (9th Cir. Jan. 19, 2012); Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants at 6–8, *Ramos-Barrientos v. Bland*, 661 F.3d 587 (11th Cir. 2011) (No. 10-13412); Brief of the Sec’y of Labor as Amicus Curiae at 1, *Ojeda-Sanchez v. Bland Farms, LLC*, No. 11-13835, 2012 WL 6012964 (11th Cir. Nov. 9, 2011).

276. *See, e.g.*, Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants, *Lopez v. Tyson Foods*, 690 F.3d 869 (8th Cir. 2012) (No. 11-2344), 2011 WL 5357150; Brief for the Secretary of Labor as Amicus Curiae, *Anderson v. Perdue Farms, Inc.*, 604 F. Supp. 2d 1339 (M.D. Ala. 2009) (No. 1:06-cv-01000-MEF-WC); Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees, *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350 (4th Cir. 2011) (No. 09-1917), 2010 WL 1130344.

277. *See, e.g.*, Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants at 12, *Polycarpe v. E&S Landscaping Serv., Inc.*, 616 F.3d 1217 (11th Cir. 2010) (Nos. 08-15290, 08-15154) (invoking *Chevron* for opinion letters issued in 1982 and 1997); Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees, *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350 (4th Cir. 2011) (No. 09-1917), 2010 WL 1130344, at \*19–22 (asserting *Chevron* deference for opinion letters issued in 1973, 1993, 2001, 2006, and 2007).

278. *See, e.g.*, Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellant at 11–12, *Kasten v. Saint-Gobain Performance Plastics*, 131 S. Ct. 1325 (2011) (No. 08-2820), 2008 WL 5786344.

with an opt-out class action under Rule 23 of the Federal Rules of Civil Procedure.<sup>279</sup> The Obama DOL typically cited *Skidmore* and *Christensen* as the appropriate level of deference for opinion letters and other informal guidance,<sup>280</sup> and *Auer* for the agency's interpretations of its own ambiguous regulations in amicus briefs.<sup>281</sup>

In fact, the Obama DOL did away with opinion letters altogether, replacing them with more general guidance called "Administrator's Interpretations." The agency explained that the interpretations would be a "more efficient and productive use of resources" than individual opinion letters focused on narrow factual scenarios, for which "a slight difference in the assumed facts may result in a different outcome."<sup>282</sup>

Ironically, while the dismantling of certain FLSA protections was quietly accomplished by the Bush administration with an especially aggressive amicus strategy, the Obama administration was harshly criticized for attempting "regulation-by-amicus."<sup>283</sup> The backlash came in response to the Obama DOL's amicus briefs in cases involving pharmaceutical detailers in *Christopher*. This case was different from many of the other cases in which the Obama DOL appeared as an amicus. Whereas many of its amicus briefs were filed in cases involving low-wage workers, the pharmaceutical detailers in *Christopher* were more highly paid.<sup>284</sup> In addition, unlike most of the other cases in which the Obama DOL filed amicus briefs, the agency lacked an enforcement record on the issue of whether pharmaceutical detailers fell under the outside sales exemption.

The frequency with which the Obama and Bush administrations used

279. Consolidated Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants at 28, *Knepper v. Rite Aid*, 675 F.3d 249 (3d Cir. 2012) (Nos. 11-1684, 11-1685), 2011 WL 10007171, at \*28.

280. See, e.g., Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiff-Appellant at 15, 23, *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010) (No. 08-35718), 2009 WL 2609879 (citing *Skidmore* review standard for opinion letters); Brief for the Secretary of Labor as Amicus Curiae at 7, *Favors v. Apple Creek Mgmt. Co.*, No. 11-12277 (11th Cir. 2012), 2012 WL 2510387.

281. See *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156 (2012).

282. See Wage & Hour Division, Rulings and Interpretations (describing Administrator Interpretations), <http://www.dol.gov/whd/opinion/opinion.htm> (last visited Mar. 19, 2012).

283. See, e.g., Mark A. Hoffmann, *Overtime Ruling Favors Employers*, BUS. INS., June 25, 2012, at 3 (quoting Richard Alfred, chair of Seyfarth Shaw L.L.P.'s national wage and hour litigation practice); Lisa Schreter et al., *U.S. Supreme Court Holds Pharmaceutical Sales Representatives are Exempt Outside Sales Employees and Rebukes DOL's Efforts to Regulate Via Amicus Filings*, LITTLER, June 20, 2012, <http://www.littler.com/publication-press/publication/us-supreme-court-holds-pharmaceutical-sales-representatives-are-exempt>.

284. Compare *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2164 & n.7 (2012) (noting that the petitioners made \$72,000 and \$76,000 per year, and that the salaries of pharmaceutical detailers average in excess of \$90,000), with cases cited in notes 272–80 and accompanying text.



amicus filings to either aggrandize or abrogate worker protection statutes caused dramatic swings in the agency's interpretation of the law. Some of the Obama DOL's attempts to restore FLSA interpretations to pre-Bush era policies were rejected by courts because of the inconsistent agency positions. For example, in *Castellanos-Contreras v. Decatur Hotels, LLC*,<sup>285</sup> the Fifth Circuit refused to defer to the Obama DOL's position that employers may not deduct relocation and visa expenses from the wages of H2-B visa workers if their pay would fall below minimum wage.<sup>286</sup> The DOL's amicus brief argued that—except for a three-month period at the end of the Bush administration, which was changed through new written guidance shortly after President Obama took office—the agency had held this interpretation for at least fifty years.<sup>287</sup> Similarly, some courts criticized the “gyrating agency letters” on the issue of the compensability of clothes changing for union workers under 29 U.S.C. § 203(o).<sup>288</sup> The Clinton administration had a pro-employee interpretation, the Bush administration changed it to a pro-industry position, and the Obama administration returned to a pro-employee interpretation.<sup>289</sup>

This ping-pong effect is also evident in *Henry v. Quicken Loans, Inc.*,<sup>290</sup> a seven-year litigation saga that was filed while President Bush was in office but carried on into the Obama administration—with the agency flip-flopping on the appropriate interpretation of the administrative exemption during the life of the case.<sup>291</sup>

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285. 622 F.3d 393 (5th Cir. 2010).

286. *Id.* at 404.

287. En Banc Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees, *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010), (No. 07-30942), 2010 WL 3049082, at \*24.

288. *E.g.* *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 216 n.3 (4th Cir. 2009) (“[O]ur own view rests upon the language of the statute, not upon the gyrating agency letters on the subject.”).

289. These interpretive shifts occurred for other worker protection statutes as well. For example, the Bush administration had submitted amicus briefs arguing that employees of subsidiaries of publicly traded companies are not covered by the whistleblower provisions of the Sarbanes-Oxley Act. *See, e.g.*, Brief of U.S. Dep’t of Labor, *In re Ambrose v. U.S. Foodservice, Inc.*, No. 06-096, 2007 WL 7139500 (U.S. Dept. of Labor SAROX Sept. 28, 2007). Several years later, the Obama DOL submitted amicus briefs to the ARB arguing exactly the opposite: that such employees are protected by the whistleblower provision. *See* Brief of the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae, *Johnson v. Siemens Bldg. Tech., Inc.*, 273 F. App’x 543 (7th Cir. 2008), (No. 08-032). To overturn the Bush administration view, blessed by the Supreme Court, that home healthcare workers are not entitled to overtime, the Obama DOL proposed new regulations that would return to the pre-Bush era agency position that such workers are non-exempt. Application of the Fair Labor Standards Act to Domestic Service, 76 Fed. Reg. 81,190, 81,201 (proposed Dec. 27, 2011) (providing that all in-home healthcare workers employed by third parties would be entitled to minimum wage and overtime protection).

290. No. 04-CV-40346, 2009 WL 596232 (E.D. Mich. 2010).

291. *See* 29 C.F.R. § 541.200(a) (2005); *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010) (“The DOL’s position on this issue has changed repeatedly in the last twelve years, indicating

*Quicken Loans* concerned whether on-line mortgage bankers fell under the administrative exemption from overtime.<sup>292</sup> At the time the *Quicken Loans* litigation commenced, DOL guidance provided that loan officers were entitled to overtime.<sup>293</sup> During the litigation, Quicken Loans' counsel, Robert Davis—who had been the Solicitor of Labor under President George H.W. Bush—requested (in his “separate capacity” as counsel for the Mortgage Bankers Association) an opinion letter on the question of whether the administrative exemption from overtime applied to loan officers.<sup>294</sup> In response, the DOL—shifting gears from its prior interpretations—issued an opinion letter finding that the loan officers described would be exempt from the FLSA as administrative employees.<sup>295</sup> Quicken Loans then used the opinion letter to urge the court to give deference to the new interpretation under *Auer* and *Long Island Care at Home* and enter summary judgment in its favor.<sup>296</sup> The plaintiffs argued that the court should not give any deference to the new opinion letter because “it was drafted, negotiated, and obtained by Quicken and its litigation counsel through their political connections and partnership with the Mortgage Bankers Association.”<sup>297</sup>

During the Obama administration, however, the DOL withdrew the 2006 opinion letter and issued a new Administrator's Interpretation, AI 2010-1, which opined that “the typical job duties of a mortgage loan officer. . . [did] not qualify as bona fide administrative employees” exempt from the FLSA.<sup>298</sup> The district court—understandably confused by the

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that we should not defer to its interpretation.”).

292. *Quicken Loans*, 2009 WL 596232 at \*1.

293. See Letter from Daniel F. Sweeney, Office of Enforcement Policy, Fair Labor Standards Team, U.S. Dep't of Labor (May 17, 1999); Letter from Barbara R. Relerford, Office of Enforcement Policy, Fair Labor Standards Team, U.S. Dep't of Labor (Feb. 16, 2001).

294. Chad Halcom, *Labor Department's About-Face on OT Muddies Quicken Lawsuits*, CRAIN'S DETROIT BUS., July 4, 2010, <http://www.workforce.com/article/20100708/NEWS01/307089999#> (reporting that Davis represented both Quicken and the Mortgage Bankers Association and “obtained the original 2006 labor department opinion in response to a query for the association”).

295. Opinion Letter, FLSA2006-31 (Sept. 8, 2006), [http://www.dol.gov/whd/opinion/FLSA/2006/2006\\_09\\_08\\_31\\_FLSA.pdf](http://www.dol.gov/whd/opinion/FLSA/2006/2006_09_08_31_FLSA.pdf).

296. Report and Recommendation Denying Plaintiff's Motion for Partial Summary Judgment on Liability (DKT. #432) and Report and Recommendation Granting in Part and Denying in Part Defendants' Motion for Summary Judgment on the Merits (DKT. #434), 15 Wage & Hour Cas. 2d (BNA) 1168, at \*52 (E.D. Mich. July 16, 2009) (“Defendants now assert in their brief that, because the web mortgage bankers' duties are substantially similar to those of the typical mortgage loan officer hypothesized to the DOL the Court should defer to the DOL's September 2006 Opinion Letter and recommend summary judgment in their favor.”).

297. Plaintiffs' Motion for Reconsideration of Summary Judgment on Liability, Section 259 Good Faith, and Willfulness, Henry v. Quicken Loans, No. 2:04-CV 40346 (E.D. Mich. Dec. 30, 2010).

298. *Wage & Hour Division, Administrator's Interpretation No. 2010-1*, U.S. DEP'T OF LABOR (Mar. 24, 2010), available at

agency's interpretive cartwheels—invited the DOL to file an amicus brief addressing the degree of deference to be given to the new interpretation.<sup>299</sup> The DOL argued that its interpretation of its own ambiguous regulations regarding the administrative exemption was entitled to controlling deference under *Auer*.<sup>300</sup> Citing *Long Island Care at Home*, the DOL argued that “[a]n agency may change its interpretation of its own regulations, and the interpretation is still entitled to controlling deference, as long as the agency explains its change in position and the changed interpretation does not create unfair surprise.”<sup>301</sup> The agency argued that AI 2010-1 applied only prospectively, creating no unfair surprise, and therefore was entitled to deference under *Long Island Care at Home*.<sup>302</sup>

On the heels of the DOL's amicus filing, the American Bankers Association filed a competing amicus brief arguing that the new interpretation “marked a sudden and dramatic shift” in the agency's position and resulted in unfair surprise to the industry's employers.<sup>303</sup> The Mortgage Bankers Association then filed a separate suit against the DOL challenging the Administrator's Interpretation as a violation of the APA because it was a rule that should have been promulgated pursuant to notice-and-comment rulemaking.<sup>304</sup> Quicken Loans ultimately prevailed before the jury.<sup>305</sup>

The important cautionary tale from *Quicken Loans*, *Castellanos-Contreras*, and the § 203(o) cases described here is the long-term corrosive impact that dramatic swings in agency amicus positions from administration to administration will have on three levels: first, respect for the agency's technical expertise; second, compliance with informal agency positions; and third, protection for the statutory beneficiaries of the laws passed by Congress. As seen in these recent cases involving the DOL as an amicus, especially in *Christopher* and *Quicken Loans*, the DOL's amicus

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[http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010\\_1.htm](http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.htm).

299. Brief of Sec'y of Labor as Amicus Curiae, *Henry v. Quicken Loans*, 15 Wage & Hour Cas. 2d (BNA) 1168 (E.D. Mich. 2010), (No. 04-cv-40346).

300. *Id.* at 13.

301. *Id.* at 20 (citation omitted).

302. *Id.* at 26.

303. See Brief of Amici Curiae Mortgage Bankers Ass'n, American Bankers Ass'n, American Financial Services Ass'n, Consumer Mortgage Coalition, Housing Policy Council, Independent Community Bankers of America, and Community Mortgage Banking Project Regarding Level of Deference to be Accorded to Administrator's Interpretation No. 2010-1 at 1, *Henry v. Quicken Loans, Inc.*, 15 Wage & Hour Cas. 2d (BNA) 1168 (E.D. Mich. 2010) (No. 04-cv-40346).

304. See Complaint for Declaratory and Injunctive Relief at 10, *Mortgage Bankers Ass'n v. Solis*, 864 F. Supp.2d 193 (D.D.C. 2012) (No: 1:11-cv-00073). The MBA's website has a page dedicated to its lawsuit. See *DOL Overtime Compensation*, MORTG. BANKERS ASS'N, <http://www.mortgagebankers.org/DOL/OvertimeCompensation.htm> (last visited Mar. 14, 2013).

305. Leslie Selig Byrd et al., *Quicken Loans Wins Unexpected Overtime Victory*, Nat'l L. Rev., Mar. 22, 2011, <http://www.natlawreview.com/article/quicken-loans-wins-unexpected-overtime-victory>.

position itself—rather than the statutory text passed by Congress—is becoming the core of the litigation. The next Part analyzes these normative concerns.

### III. LEGAL AND NORMATIVE IMPLICATIONS OF THE AGENCY AMICUS STRATEGY

As seen in the analysis of the DOL's amicus activity relating to one statute over a span of seven decades, agency amicus briefs can have a substantial impact on the judicial interpretation of statutes. One's political perspective likely influences the assessment of whether such amicus activity as a tool of policy making on a particular issue is beneficial or harmful. Employers benefitted from the Bush administration's approach of trying to constrict the FLSA's reach and take a less aggressive approach to direct enforcement, and expressed outrage at the Obama DOL's more zealous advocacy for workers.<sup>306</sup> On the other hand, employee advocates complained about the support for industry during the Bush administration,<sup>307</sup> and applauded the crack down on employers who violate the FLSA under President Obama.

Even though political fluctuations are to be expected, the more aggressive amicus strategies of the Bush and Obama administrations have caused sharp inconsistencies in agency interpretations unlike any other time in the DOL's history. This Part explores the benefits and dangers of the agency amicus strategy and proposes a framework for evaluating agency amicus briefs.

#### A. *The Benefits and Dangers of the Agency Amicus Strategy*

For courts, agency amicus curiae briefs are helpful in sharing the expertise and experience of the agency in its enforcement of the statutory scheme passed by Congress. Courts often specifically request agency amicus participation to help them make sense of complex and technical laws.<sup>308</sup> This is embodied in the *Skidmore* principle, which invites the

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306. For example, the former Administrator of the Wage and Hour Division under Bush, who issued many of the opinion letters that were used in amicus advocacy on behalf of industry during the Bush administration, criticized the Obama administration's enforcement approach as overly "punitive." Ironically, she complained that the DOL "does not have an open or transparent process regarding its decisions to file *amicus* briefs" and that the DOL "has used *amicus* briefs to announce major enforcement policy changes." *Examining Regulatory and Enforcement Actions Under the Fair Labor Standards Act: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Education and the Workforce*, 112th Cong. 24, 30 (2011) (Statement of Tammy D. McCutchen, Esq.), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg70971/pdf/CHRG-112hhrg70971.pdf>.

307. See Catherine K. Ruckelshaus, *Labor's Wage War*, 35 *FORDHAM URB. L.J.* 373, 375–78 (2008).

308. See Watts, *supra* note 68, at 1034–35 (noting that the "Supreme Court regularly invited agencies to file amicus briefs" but lower federal courts rarely do so).

agency to share its “body of experience and informed judgment” to help guide courts and litigants.<sup>309</sup>

Amicus briefs also can be a more flexible, efficient form of advocacy than direct litigation. Amicus briefs are less costly than affirmative litigation, which can demand years of agency staff resources, and rulemaking, which involves expensive and time-consuming notice-and-comment procedures. As an amicus, the DOL can leave the intricacies and expense of factual development and discovery in the case to the litigants represented by private counsel, and use its resources to write one brief that sets forth the agency’s interpretation of ambiguities in the law.

Agency amicus briefs can also promote uniformity in statutory enforcement. If a recurring systemic issue emerges in FLSA litigation, the DOL can appear as an amicus in all of the relevant pending cases and point the courts towards the same result. As Justice Scalia once wrote, deferring to an agency’s amicus interpretation under *Auer* “makes the job of a reviewing court much easier, and since it usually produces affirmance of the agency’s view without conflict in the Circuits, it imparts (once the agency has spoken to clarify the regulation) certainty and predictability to the administrative process.”<sup>310</sup> The flexibility of the amicus brief helps to prevent “ossification” of the law by allowing the agency to adapt its interpretation to changing circumstances.<sup>311</sup>

Nevertheless, as seen by the dramatic interpretive swings in the DOL’s amicus activity from Presidents Bush to Obama, amicus policy making can result in sharper political fluctuations that are not subjected to public scrutiny or the compromises inherent in deliberative processes like rulemaking. Of course, one expects that the political direction of and policy choices made by administrative agencies will change with the election of a new President. But the Bush administration’s exploitation of amicus arguments to change policy to favor regulated industries and withdraw decades-old DOL interpretations—sometimes in the midst of litigation—went too far. When the DOL’s work becomes more politically charged, its credibility as the authoritative voice regarding labor standards is undermined.

Establishing exemptions from the protections of remedial legislation through amicus litigation rather than through more transparent, democratic processes threatens the normative principles of public participation, reasoned decision making, and accountability underlying our administrative state.<sup>312</sup> Indeed, these were the principles that motivated the

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309. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

310. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

311. *See United States v. Mead Corp.*, 533 U.S. 218, 247–49 (2001) (Scalia, J., dissenting) (arguing that restricting *Chevron*’s scope will ossify statutory law).

312. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996) (noting that APA notice

*Chevron* Court to defer to the agency's resolution—through rulemaking—of the clash of opposing interests. “[T]he agency considered the matter in a detailed and reasoned fashion.”<sup>313</sup> The political choice to narrow the scope of the statute was accomplished through a formal public process, not a covert amicus litigation strategy. Thus, *Chevron* respected the political choices made by the agency during the administrative lawmaking process, but it did not undermine the obligation of the courts to test agency decisions for reasonableness and procedural integrity.

Blind deference to an agency amicus interpretation under *Auer* contradicts the fundamental principle of separation of powers. Deferring to an agency's interpretation of its own vague regulations concentrates the lawmaking, enforcement, and review functions in one branch. The concentration of so much power in the hands of the agency is especially dangerous when abused to favor regulated industries rather than statutorily protected groups, undermining the remedial intent of Congress. Even Justice Scalia, the author of *Auer* and a sometimes ardent proponent of *Chevron* deference,<sup>314</sup> has recognized the separation of powers problems implicated by *Auer*:

[W]hile I have in the past uncritically accepted [*Auer*], I have become increasingly doubtful of its validity. On the surface, it seems to be a natural corollary—indeed, an *a fortiori* application—of the rule that we will defer to an agency's interpretation of the statute it is charged with implementing. But it is not. When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule's meaning. And though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law. *It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as*

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and comment procedures are “designed to assure due deliberation”).

313. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984).

314. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521. As other scholars have noted, *Chevron* has been a “Magna Carta” promoted by conservatives “to deregulate and to demand judicial acquiescence.” Eskridge & Baer, *supra* note 14, at 1087; see also Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 284, 312 (1986).

well.<sup>315</sup>

As seen in the DOL's interpretive shifts under Presidents Bush and Obama, *Auer* prompted an amicus approach to policy making that permitted immediate, inconsistent interpretive shifts with each administration. Over time, this will undermine public confidence in the agency's expertise and respect for the law. Agencies will be viewed as political puppets, captured by the interests groups that favor the President in power, rather than technical legal experts and career public servants faithfully executing congressional intent on behalf of statutory beneficiaries. When the interpretation of a remedial statute becomes a political football, courts are left confused rather than educated about the proper construction of the statute. And the ultimate losers will be the workers whom Congress aimed to protect with the FLSA.

That is not to say that the agency should refrain from filing amicus briefs in private litigation. As the agency entrusted by Congress with the power to enforce labor standards, it should not simply sit on the sidelines while systemic legal issues emerge in the courts. If the DOL exercises its amicus power in harmony with the remedial purpose of the FLSA, the agency can be a critical, effective voice on behalf of the workers who are protected by the FLSA.

#### B. *A Proposed Analytical Framework for Agency Amicus Briefs*

The doctrinal melee over the proper weight that reviewing courts should afford to arguments in agency amicus briefs results in part from the lack of recognition that agencies sometimes use affirmative amicus litigation strategies to mold the law—much like an interest group would—not simply to share their expertise with the court. This Article has named and examined the agency amicus strategy of policy making as it relates to the FLSA, under which government amicus advocacy has been prolific and important. The analysis offers several guiding principles for agency amicus activity.

First, agencies should define and make publicly available on their websites their amicus policy and strategy. This policy should include the process by which potential amicus participation will be evaluated, the enforcement priority areas and emerging legal issues on which the agency will focus, and how that strategy comports with the enabling remedial statute with which Congress has entrusted it to enforce. Articulating the agency's amicus priorities would enhance the transparency of the agency's amicus decision making process and provide guidance to litigants. It would also help prevent any "unfair surprise" to industry, as discussed in *Christopher*.

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315. *Talk Am. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2010) (Scalia, J., concurring) (citation omitted) (emphasis added).

Second, one consistent thread woven into the Supreme Court's decisions involving DOL amicus briefs from *Skidmore* through *Christopher* is that informal agency interpretations announced for the first time in an amicus brief should be scrutinized more carefully by courts to ensure compatibility with the statutory text. *Mead* and other cases have carved out another type of implied delegated authority for which a greater level of deference may be appropriate, in the absence of formal processes.<sup>316</sup> In the case of the FLSA or other remedial statutes, a long and consistent interpretation of the statute (as held in *Kasten*)<sup>317</sup> should be entitled to greater weight. Thus, amicus briefs that describe how the agency's prior positions and interpretations apply to the facts before the court—as the DOL's amicus briefs did in *Skidmore* and *Auer*—should likewise be afforded a higher degree of weight and respect.<sup>318</sup>

For all other types of informal agency interpretations and amicus arguments, the *Skidmore* rubric should apply. Although a vaguer standard, *Skidmore* requires that the court test agency amicus positions against the remedial purposes of the FLSA and other indicators of persuasiveness. This has included, “the degree of the agency's care, its consistency, formality, and relative expertness.”<sup>319</sup> If the key authority on which the agency relies is a recently-adopted opinion letter or “advisory memorandum”—especially if issued in response to an adverse judicial decision or requested by a regulated industry group—the court should not give the interpretation any deference at all. If the argument is announced for the first time in the amicus brief itself, the argument should be scrutinized more carefully to ensure compliance with remedial statutory purpose and to control for litigating positions and political overreaching.<sup>320</sup>

Of course, as administrative law scholars have recognized, clarifying the appropriate level of deference to give to an agency's interpretation may perhaps be a mere academic enterprise.<sup>321</sup> As the empirical analysis in this

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316. *Mead*, 533 U.S. at 230–31.

317. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335–36 (2011).

318. In addition to *Kasten*, the DOL's brief in *Skidmore*, which described the agency's prior enforcement activity that found waiting time compensable in other employment contexts, is an example. Brief on Behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, as Amicus Curiae at 6, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), 1944 WL 42828, at \*6–7.

319. 533 U.S. at 228 (footnotes omitted).

320. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988) (rejecting interpretation advanced for the first time in a litigation brief).

321. *See, e.g.*, Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 98 (2011) (arguing that studies about judicial review of agency action suggest that scholars “should spend less time engaging in debates about the alleged differences among the remarkably similar judicial review doctrines and about the circumstances in which each should be applied” and “focus instead on the three common elements of the doctrines: consistency with applicable statutes, consistency with available evidence, and quality of agency



Article shows, most courts rule in a manner consistent with the agency's interpretation, typically without defining the appropriate deference standard or referring to the agency's arguments at all. Other scholars have found that judges—especially Supreme Court Justices—are likely to rule based on their ideological preferences rather than dutifully sort through the texts of statutes and regulations to divine legislative intent.<sup>322</sup> In a study of workplace law cases, however, Professors James Brudney and Corey Ditslear found that the Justices' reliance on legislative history to review agency action led to less politicized results, at least among the more liberal members of the Court.<sup>323</sup>

Despite its mushiness, *Skidmore's* instruction that courts test any amicus position for “the power to persuade” provides the most respect for separation of powers, and congressional will in particular. A key component of *Skidmore* review, lacking in the *Christopher* majority opinion, must be whether the agency's interpretation comports with the “remedial and humanitarian purpose” of the law. This is more critical in the context of workplace laws and other remedial statutes designed to protect a less advantaged or powerful group (like lower-wage workers) from a more powerful group.<sup>324</sup> This purpose pulls strongly in favor of interpreting statutory coverage expansively and exemptions from the law narrowly.<sup>325</sup> Consistent with the principle of separation of powers, courts should err on the side of favoring agency interpretations that reinforce Congress's goal of worker protection and be highly skeptical of agency positions that undermine it.

This framework does not mean that all pro-employee amicus interpretations offered by the DOL must be accepted automatically by the courts. If the agency is urging a new interpretation that is not supported by prior agency interpretations or positions, courts should apply *Skidmore*—not *Auer* deference—and independently examine and interpret the FLSA's statutory text. Both the majority and dissent in *Christopher* followed this approach. But the majority's conclusion that the plaintiffs were exempt had

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reasoning.”); Raso & Eskridge, *supra* note 14, at 1817 (finding that “Justices apply deference doctrine inconsistently, responding to their ideological preferences, the policies underlying the major deference regimes, and the preferences of Congress and the President”).

322. Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L.J. 2193, 2193–30 (2009) (discussing studies that found “highly politicized” voting patterns in judicial review of agency action).

323. See James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 173 (2008).

324. The analysis may be different with less protective legislation, like criminal or immigration law, but should apply in other contexts involving in which Congress designed the law to protect a vulnerable or exploited group, such as consumers.

325. *Tenn. Coal*, 321 U.S. at 597; see also *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (“To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people.”).

to skirt around the well-established principle that courts should err on reading FLSA coverage broadly and exemptions strictly. The majority opinion reflected more concern for the potential “massive liability” on the pharmaceutical industry than for the overtime rights of the plaintiffs.<sup>326</sup> Such public policy concerns about the costs of compliance should be weighed by Congress, not the judiciary.

Indeed, the Supreme Court understood this important distinction in the early days of the FLSA. Just a year after *Skidmore*, the Court rejected a DOL interpretation, developed under pressure from the coal mining industry, that miners were not entitled to compensation for the time spent travelling in underground mines.<sup>327</sup> Finding such travel time compensable would have imposed massive liability on the coal mining industry, which led to a compromise between the mining industry and labor unions that it could be excluded. The Court found that argument “legally untenable” under the FLSA and therefore unworthy of respect.<sup>328</sup> *Jewell Ridge* ultimately prompted Congress to pass the Portal-to-Portal Act to limit the compensability of travel time and de minimus time.<sup>329</sup> But it was the province of the legislature—not the judiciary or the executive—to amend the statute to narrow its coverage. As eloquently stated by the Court in *Tennessee Coal*: “We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.”<sup>330</sup>

Courts should heed the early lessons offered by *Skidmore* and *Jewell Ridge*. To the extent that the agency is articulating an amicus argument—unsupported by rulemaking or prior agency interpretations—on behalf of a regulated entity rather than an individual falling within the statute’s protection, it should not be entitled to any deference or respect. Decisions to exempt regulated parties from remedial statutes should occur only through notice-and-comment rulemaking or democratic processes, not furtive litigation strategies or amicus briefs. To the extent this may ossify or bolster fair labor standards, it is a burden that regulated entities, not statutory beneficiaries, should bear.

If this standard had been applied in *Long Island Care at Home* and other cases in which the Bush DOL used amicus briefs to overturn pro-employee interpretations and elevate the interests of the regulated, the result in these cases may have been different. *Chevron* and *Auer*, however, allowed the Bush administration to hide behind a judicial presumption that the agency was enforcing the underlying purposes of the FLSA, while it systematically dismantled worker protections that had been built over

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326. *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2167 (2012).

327. *Jewell Ridge Coal Corp. v. Local 6167, United Mine Workers*, 325 U.S. 161, 170 (1945).

328. *Id.* at 169.

329. Portal to Portal Act of 1947, ch. 52, § 4, 61 Stat. 84.

330. *Tenn. Coal*, 321 U.S. at 597.

many decades. Courts should not permit agencies to use the powerful sword of amicus filings, sheathed under the guise of deference doctrine, to inflict such violence on the remedial goals of Congress.

#### CONCLUSION

As seen in the example of amicus activity in wage and hour cases, the DOL has used amicus strategies to emasculate and aggrandize its statutory mandate. Agency amicus briefs typically provide valuable interpretive guidance to courts about the statutory scheme under consideration. But they also risk improper manipulation in ways that undermine democratic lawmaking values and separation of powers. Although agency interpretations advanced for the first time in amicus briefs may be entitled to respect under *Skidmore*, they rarely qualify for *Chevron* deference.

Regardless of the purported deference regime argued, however, courts tend to rule consistently with the position advanced in agency amicus briefs. On the whole, this is desirable, so long as the agency is offering its expertise in a way that remains faithful to the public policy purpose established by Congress in the underlying statute. The powerful, stealth influence that agency amicus curiae briefs can have on courts requires that judges be more mindful of their responsibility to test agency interpretations against the remedial purposes of worker protection laws and the democratic values of transparency, public accountability, and reasoned decision making.

## Appendix

Amicus Curiae Briefs Submitted by the U.S. Department of Labor  
in Fair Labor Standards Act Cases by Presidential Administration**Roosevelt**

- 10 East 40th St. Bldg. v. Callus, 325 U.S. 578 (1945)  
 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199 (1947)  
 Acme Lumber Co. v. Shaw, 10 So.2d 285 (Ala. 1942)  
 Addison v. Holly Hill Fruit Prods., 322 U.S. 607 (1944)  
 Allesandro v. C.F. Smith Co., 136 F.2d 75 (6th Cir. 1943)  
 Anderson v. Manhattan Lighterage Corp., 148 F.2d 971  
 (2d Cir. 1945)  
 Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946)  
 Armour & Co v. Carpenter, 141 P.2d 797 (Okla. 1943)  
 Armour & Co. v. Wantock, 323 U.S. 126 (1944)  
 Atlantic Co. v. Broughton, 146 F.2d 480 (5th Cir. 1944)  
 Basik v. Gen. Motors Corp, 19 N.W.2d 142 (Mich. 1945)  
 Borden Co. v. Borella, 325 U.S. 679 (1945)  
 Borella v. Borden Co., 145 F.2d 63 (2d Cir. 1944)  
 Bowie v. Gonzalez, 117 F.2d 11 (1st Cir. 1941)  
 Bracey v. Luray, 138 F.2d 8 (4th Cir. 1943)  
 Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945)  
 Brown v. Bailey, 147 S.W.2d 105 (Tenn. 1941)  
 Bumpus v. Cont'l Baking Co., 124 F.2d 549 (6th Cir. 1941)  
 Burton v. Zimmerman, 131 F.2d 377 (4th Cir. 1942)  
 Castaing v. P.R. Am. Sugar Refinery, 145 F.2d 403 (1st Cir. 1944)  
 Chapman v. Home Ice Co. of Memphis, 136 F.2d 353 (6th Cir. 1943)  
 Colbeck v. Dairyland Creamery, 17 N.W.2d 262 (S.D. 1945)  
 Collins v. Kidd Dairy & Ice Co., 132 F.2d 79 (5th Cir. 1942)  
 Consol. Timber Co. v. Womack, 132 F.2d 101 (9th Cir. 1942)  
 Cont'l Baking Co. v. Bumpus, 316 U.S. 704 (1942)  
 Culver v. Bell & Loffland, 146 F.2d 29 (9th Cir. 1944)  
 Davila v. Porto Rico Ry. Light & Power Co., 143 F.2d 236 (1st Cir.)  
 Doyle v. Johnson Bros., 28 N.Y.S.2d 452 (City Ct. 1941)  
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