No. 17-371

In The
Supreme Court of the United States

PROVIDENT SAVINGS BANK, FSB,
*Petitioner*,

v.

GINA MCKEEN-CHAPLIN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED.

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

# BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER


Warren Postman
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H St., NW
Washington, DC 20062
(202) 463-5747

Kevin Carroll
Managing Director and Associate General Counsel
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Ave., NW
Washington, DC 20001
(202) 962-7300

Pratik A. Shah
*Counsel of Record*
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000
pshah@akingump.com

*Counsel for Amici Curiae*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES:**

**STATUTES:**

**OTHER AUTHORITIES:**

In The
Supreme Court of the United States

NO. 17-371

PROVIDENT SAVINGS BANK, FSB,
*Petitioner*,
v.
GINA MCKEEN-CHAPLIN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED.

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

# BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

## INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members

[1] This brief is filed with the written consent of all parties through universal letters of consent on file with the Clerk. No counsel for either party authored this brief in whole or in part, nor did any party or other person or entity other than *amici curiae*, its members, or its counsel make a monetary contribution to the brief's preparation or submission. Counsel of record for both parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief.

and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country.

The Securities Industry and Financial Markets Association (SIFMA) is the voice of the U.S. securities industry, representing the interests of hundreds of securities firms, banks, and financial asset managers across the United States. SIFMA's mission is to support a strong financial sector while promoting investor opportunity, capital formation, job creation, economic growth, and the cultivation of public trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

*Amici*'s member firms employ tens of millions of people, many of whom are classified as "exempt" from overtime pay requirements under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. The exempt status of employees has been subject to growing litigation over the last few decades, with FLSA cases more than tripling between 2000 and 2009. This increase in litigation has led to uncertainty among employers as to whether they are properly classifying their employees. The Ninth Circuit decision that is the subject of this petition promises to worsen that problem by deepening an entrenched circuit split over whether mortgage underwriters qualify as "administrative" employees exempt from overtime pay requirements. The national employers represented by the *amici* here

thus face both conflicting rules for identical jobs in different circuits and a likely increase in litigation as plaintiffs seek to apply the Ninth Circuit's constricted interpretation of the FLSA exemption for administrative employees outside the mortgage-lending context.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The FLSA exempts from overtime pay requirements employees that work in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. §§ 207(a)(1), 213(a)(1). The Department of Labor's ("DOL") regulations provide that this exemption—specifically, its carve-out for "administrative" employees—covers workers who "assist[] with the running or servicing of [a] business," including "financial services industry" employees who "servic[e] *** the employer's financial products" and employees who "make[] and administer[] the credit policy of the employer." 29 C.F.R. §§ 541.201(a), 541.203(b), 541.703(b)(7).

Even though mortgage underwriters are all but identical to the financial service industry employees described in DOL's regulations, the Ninth Circuit rejected Petitioner Provident Savings Bank's claim that mortgage underwriters are properly classified as administrative employees exempt from overtime pay requirements. That erroneous conclusion, unmoored from the regulations that have traditionally defined the scope of FLSA exemptions, deepened an existing circuit conflict. The Sixth Circuit has held that mortgage underwriters *are* exempt from overtime pay

requirements, *see Lutz v. Huntington Bancshares, Inc.*, 815 F.3d 988, 995 (6th Cir.), *cert. denied*, 137 S. Ct. 96 (2016), while the Second Circuit, like the Ninth Circuit, has reached the opposite conclusion, *see Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529, 535 (2d Cir. 2009).

This circuit conflict generates significant uncertainty and inefficiency for national employers. For *amici*'s members that employ mortgage underwriters in jurisdictions on both sides of the split, the divergence compels them to choose between two untenable approaches to employee compensation: they can either set up distinct work and pay structures for employees with identical job responsibilities based purely on their location—an approach with obvious efficiency and fairness costs—or they can pay all mortgage underwriters overtime, thereby incurring additional compensation and administrative burdens in jurisdictions where courts have explicitly held that mortgage underwriters are not entitled to overtime. Making matters worse, the Ninth Circuit's pinched conception of the administrative exemption has the potential to be applied *outside* the mortgage-lending context, leaving employers in other sectors uncertain how to classify employees whose primary responsibilities are to service or administer the company's business.

The need to resolve the circuit conflict is all the more urgent in light of the glaring flaws in the Ninth Circuit's analysis. In addition to the errors Provident addresses in its petition (which *amici* wholeheartedly agree warrant reversal), the Ninth Circuit relied on an outdated and misguided canon of statutory

construction calling for FLSA exemptions to be read narrowly. That canon is a corollary to the canon sometimes articulated by this Court that so-called remedial statutes are to be liberally construed. *See, e.g.*, *SEC v. CM Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943).

Both canons are deeply flawed and the FLSA "narrow construction" canon is ripe for repudiation. Indeed, this Court has explicitly declined to apply that canon in two recent cases. *See Sandifer v. United States Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014) (finding it unnecessary to "disapprove [the canon] to resolve the *** case"); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 164 n.21 (2012) (finding the canon inapposite when interpreting a "general definition that applies throughout the FLSA"). Moreover, Justice Thomas (joined by Justice Alito) pointed out that the canon "appears to 'res[t] on an elemental misunderstanding of the legislative process,' viz., 'that Congress intend[s] statutes to extend as far as possible in service of a singular objective." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2131 (2016) (alterations in original) (quoting U.S. Chamber of Commerce Br. 7). Because "[t]here is no basis to infer that Congress means anything beyond what a statute plainly says simply because the legislation in question could be classified as 'remedial,'" *id.*, this Court should grant Provident's petition and reverse the Ninth Circuit's erroneous conclusion that mortgage underwriters do not qualify as exempt "administrative" employees.

## ARGUMENT

### I. THE DIVISION IN THE CIRCUITS CREATES CONFUSION AND INEFFICIENCY FOR NATIONAL EMPLOYERS

As Provident's petition explains, there are more than 7,000 banks and other financial institutions engaged in mortgage lending across the United States. The circuit conflict over the exempt status of mortgage underwriters sows confusion and uncertainty among employers in that industry—particularly those who maintain nationwide businesses and employ mortgage underwriters in jurisdictions on both sides of the split. Moreover, the Ninth Circuit's flawed approach has the potential to be applied *outside* the mortgage-lending context—a development that would worsen an already untenable situation for employers.

**1.** An entity employing mortgage underwriters in circuits that do and do not recognize them as exempt from overtime has two options, neither of which is efficient for the business or fair to employees. First, the employer could choose to operate different compensation systems depending on where employees are located. In the Second and Ninth Circuits, which do not recognize mortgage underwriters as exempt from overtime pay requirements, the employer would be forced to monitor the employees' hours and either ensure that they did not work in excess of 40 hours per week or pay them overtime. In the Sixth Circuit (and any other circuit that follows its lead in the future), the

employer would not be required to pay overtime and could thus structure its work and pay system to afford employees greater flexibility. In other words, in light of the circuit conflict, employers would treat employees with identical job responsibilities differently depending on the accident of their location. Such a patchwork compensation system is expensive to administer, unfair to employees, and disruptive of corporate efforts to create a consistent culture throughout their organizations.

Alternatively, an employer could decide to operate a common system for all mortgage underwriters regardless of where they are located. Given the rule in the Second and Ninth Circuits, employers taking this approach would be compelled to treat *all* mortgage underwriters as non-exempt, even in states where the courts have explicitly determined that they are not entitled to overtime. In addition to the added costs of overtime, employers would be forced to shoulder the administrative burden of policing underwriters' hours so as to ensure that employees are compensated for all hours worked, as well as to maintain some certainty regarding employee pay. In order to defray those costs, employers could be forced to lower salaries and other forms of base compensation, to the detriment of employees—particularly those who do not incur overtime. *See* James Sherk, *Salaried Overtime Requirements: Employers Will Offset Them with Lower Pay*, THE HERITAGE FOUNDATION BACKGROUNDER (July 2, 2015).

Notwithstanding the costs associated with classifying all mortgage underwriters as non-exempt,

even banks and financial institutions that do not operate in the Second and Ninth Circuits could ultimately be compelled to abide by those courts' holdings. As noted above, FLSA litigation, and litigation over the scope of FLSA's exemptions in particular, has exploded in recent years.[2] The deepening circuit split will only exacerbate this trend as plaintiffs are likely to bring cases in circuits that have not yet decided the issue in an effort to extend the Ninth and Second Circuit's reasoning to other jurisdictions. Facing costly litigation to determine the FLSA status of mortgage underwriters and at risk of incurring extensive payment obligations in the event that courts agree with the Second and Ninth Circuits, companies may opt for a conservative approach and simply pay overtime regardless of their employees' location. Accordingly, the Second and Ninth Circuit's erroneous interpretation of the FLSA threatens to have an outsized impact on the thousands of banks and other financial institutions that employ mortgage underwriters, no matter where they are located.

**2.** Compounding the problem, the flawed approach adopted by those courts may extend beyond

---

[2] During the twelve-month period ending March 31, 2016, plaintiffs filed 9,063 FLSA cases in the federal district courts, compared with 5,507 patent cases, 1,070 antitrust cases, and 1,053 securities cases. *See* Administrative Office of the United States Courts, Federal Judicial Caseload Statistics Table C-2 (2017); *see also* Pet. 25 (citing Administrative Office of the United States Courts, Federal Judicial Caseload Statistics Table C-2 (2016)).

the mortgage-lending context. In analyzing whether mortgage underwriters are exempt employees, the Ninth Circuit placed considerable weight on the "administrative/production dichotomy," observing that "the question is not whether an employee is essential to the business, but rather whether her primary duty goes to the heart of internal administration—rather than marketplace offerings." Pet. App. 16a. This freewheeling analysis—divorced from DOL's regulations and premised on an overly constricted notion of the exemption—has the potential to be applied to scores of other employees in and out of the financial industry. Indeed, because *all* of a company's activities are aimed at bringing its goods to the marketplace, it is difficult to see how the Ninth Circuit's test can be applied without all but eviscerating the exemption for administrative employees.

Consider, for example, a company that hires employees to negotiate terms and conditions for the sale of its products to retailers and distributors after a salesperson has already made the initial sale. Because such employees are not directly involved in manufacturing the company's products, a court operating under an appropriately narrow understanding of "production" might find such employees exempt from overtime. But because the employees' duties are related to "marketplace offerings" in some loose sense, they might be considered non-exempt under the Ninth Circuit's test.

The Ninth Circuit's approach could also have significant implications for the securities industry.

Many of *amicus* SIFMA's members offer "margin accounts," which allow clients to borrow money from the institution in order to purchase securities. SIFMA members hire employees who approve and monitor these accounts, exercising significant discretion in doing so. Although these employees have traditionally (and lawfully) been viewed as exempt from overtime pay requirements, whether their duties "go[] to the heart of internal administration *** rather than [to] marketplace offerings" is far from clear. Applying the Ninth Circuit's flawed test, a court might well accept a plaintiff's argument that margin accounts themselves are the firms' "marketplace offering," making the employees subject to the overtime pay requirement.

Beyond these hypotheticals, the circuit split is likely to extend to at least one area courts have already examined: insurance underwriters. These employees perform essentially the same risk-management function as mortgage underwriters and, not surprisingly, two district courts considering their FLSA status have followed the analyses of the courts of appeals on both sides of the current split. *Compare Hanis v. Metropolitan Life Ins. Co.*, No. 14-1107-CV-W-FJG, 2016 WL 5660344, at *8 (W.D. Mo. Sept. 29, 2016) (applying *Lutz*), *with Graves v. Chubb & Son, Inc.*, No. 3:12-CV-568 (JCH), 2014 WL 1289464, at *5-*6 (D. Conn. Mar. 31, 2014) (applying *Davis*). Although no court of appeals has addressed the question whether insurance underwriters are exempt from overtime pay requirements, it is reasonable to assume that the divide between the Second and Ninth Circuits on the one hand and the Sixth Circuit

on the other will extend to that issue if and when those courts are confronted with the question.

In light of the existing confusion and the potential for greater uncertainty, this Court's intervention is necessary to resolve the circuit conflict and harmonize the lower courts' interpretations of the FLSA.

## II. THE NINTH CIRCUIT RELIED ON A FLAWED CANON CALLING FOR FLSA EXEMPTIONS TO BE CONSTRUED NARROWLY

In rejecting Provident's claim that mortgage underwriters are administrative employees and therefore exempt from the FLSA's overtime pay requirements, the Ninth Circuit relied on an outdated and unsound canon of statutory construction. The FLSA, the Ninth Circuit held, "is to be liberally construed to apply to the furthest reaches consistent with Congressional direction and exemptions are to be withheld except as to persons *plainly and unmistakably* within their terms and spirit." Pet. App. 5a (emphasis added) (citation and internal quotation marks omitted).

The canon on which the Ninth Circuit relied derives from dictum in this Court's decision in *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945). There, the Court observed that "[t]he [FLSA] was designed to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." *Id.* at 493 (citation and internal quotation marks omitted). Accordingly, "[a]ny exemption from such humanitarian and

remedial legislation must therefore be narrowly construed." *Id.*

In recent years, the viability of this canon has been called into doubt. In two cases interpreting the FLSA (including one in which the Court considered the meaning of an exemption found in section 213), the Court explicitly declined to apply it. *See Sandifer*, 134 S. Ct. at 879 n.7 (finding it unnecessary to "disapprove [the canon] to resolve the *** case"); *Christopher*, 567 U.S. at 164 n.21 (finding canon inapposite when interpreting a "general definition that applies throughout the FLSA"). And in *Encino Motorcars*, Justice Thomas (joined by Justice Alito) observed that the canon is simply "made-up." 136 S. Ct. at 2131. The Ninth's Circuit reliance on this outdated and unsound rule offers an additional reason to grant Provident's petition and reverse the erroneous decision below.[3]

**1.** In *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995), this Court described the rule that a remedial statute must be liberally construed to advance its purposes as the "last redoubt of losing causes." *Id.* at 135. Because "no legislation pursues its purposes at all costs,"

---

[3] *Stare decisis* presents no obstacle to rejecting the FLSA canon. "[T]his Court is bound by holdings, not language." *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001). *Amici* are not aware of any decision in which this canon was an essential part of the Court's holding. *See, e.g.*, *Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290 (1959) (reciting, but not relying on FLSA canon); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960) (same).

*Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (per curiam), the notion that so-called remedial statutes should be read as broadly as possible inevitably elides the compromises underscoring all legislation—particularly legislation (like the FLSA) that sets out a comprehensive scheme designed to balance competing interests. Put differently, the canon calling for broad construction of remedial statutes is fundamentally inconsistent with this Court's admonishment that it "has no roving license *** to disregard clear language simply on the view that *** Congress 'must have intended' something broader." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) (citation omitted).

As Justice Scalia explained, when interpreting statutes, the goal "should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right." Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 582 (1990). Divining congressional intent "may often be difficult, but [there is] no reason, *a priori*, to compound the difficulty, and render it even more unlikely that the precise meaning will be discerned, by laying a judicial thumb on one or the other side of the scales." *Id.* at 582.

Adding to the difficulties inherent in the "liberal construction" canon, it is unclear when the canon applies as "there is not the slightest agreement on what *** the phrase 'remedial statutes'" means. *Assorted Canards*, *supra*, at 583. Although "remedial" statutes have been understood as "intended for a remedy or for the removal or

abatement *** of an evil," *id.* (ellipses in original) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1920 (1961)), and "providing a means to enforce rights or redress injuries," BLACK'S LAW DICTIONARY (10th ed. 2014), those definitions provide more questions than answers. If courts were to construe liberally *all* statutes designed to mitigate evils or redress injuries, that would leave few laws *not* subject to broad interpretation "since one can hardly conceive of a law that is not meant to solve some problem." *Assorted Canards*, *supra*, at 583. With "nothing [left] to be construed straight down the middle," *id.* at 585, the canon has virtually no meaning.

Even if courts could determine *when* to apply the canon, they are nonetheless left adrift in determining *how* to apply it. Again, per Justice Scalia, there is no objective means of determining "[h]ow 'liberal' is liberal." *Assorted Canards*, *supra*, at 582. "[I]t is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 28 (1997). The result is that this canon "can be used, or not used, or half-used, almost *ad libitum*, depending mostly upon whether its use, or nonuse, or half-use, will assist in reaching the result the court wishes to achieve." *Assorted Canards*, *supra*, at 581-582. A tool so malleable that it can be fitted to any end is of little use in discerning statutory meaning.

**2.** While there is no basis in logic or law to broadly construe *any* "remedial" statute, it is

particularly egregious to do so with respect to a statute like the FLSA that sets out *express exceptions*. In such instances, Congress has made clear that it does not intend for the statute to apply broadly. Rather, Congress has indicated its intention that the statute not apply at all in the circumstances articulated. To place a thumb on the scale in favor of narrowing the exception Congress set out is to assume, without reason, that Congress felt more strongly about the prohibitions it established than the exceptions.

The FLSA exemplifies the problems with handicapping statutory construction by requiring a broad or narrow reading. Like any statute (and complex statutory schemes in particular), the FLSA is the product of legislative compromise and reflects a balance of legislative priorities. To be sure, the FLSA is intended to protect the "health, efficiency and general well-being of workers," *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (quoting 29 U.S.C. § 202(a)), by requiring employers to provide certain benefits, including overtime pay. But the FLSA also includes numerous exemptions, indicating that Congress recognized that the prohibitions and requirements it set out as a general matter are not universally appropriate and employers and employees alike would sometimes benefit from different rules. Moreover, on top of the exemptions included in the Act, Congress has amended the FLSA precisely to "curtail employee-protective interpretations." *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 958 (11th Cir. 2007). Hence, uniformly construing the FLSA to disfavor employers

"contravenes *** the readily apparent intent" of Congress. *Id.*

The notion that FLSA exemptions should be narrowly construed to find more employees subject to the overtime pay requirement is animated by a desire to protect employees' wage and hour rights—undoubtedly a central goal of the FLSA. *See A.H. Phillips*, 324 U.S. at 493. But, as noted above, "no legislation pursues its purposes at all costs," *Rodriguez*, 480 U.S. at 525-526. And Congress's use of exemptions demonstrates that legislators believed that employee rights were not always best served by the statute's general prohibitions and mandates like overtime pay. Rather, the use of exemptions reflects Congress's judgment that *in some circumstances* alternative compensation structures would be preferable. *See Nicholson v. World Bus. Network, Inc.*, 105 F.3d 1361, 1363 (11th Cir. 1997) ("The chief financial officer of a company, for instance, would be less likely to [need statutorily mandated overtime pay] than a janitor or assembly linesman."). Courts should respect that legislative judgment by interpreting the FLSA as Congress drafted it, not by "laying a judicial thumb on one or the other side of the scales." *Assorted Canards*, *supra*, at 582.

The Ninth Circuit's reliance on this misguided canon of statutory construction presents an additional reason to grant Provident's petition and reverse that court's deeply flawed decision.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

Warren Postman
Janet Galeria
U.S CHAMBER LITIGATION CENTER

Kevin Carroll
Managing Director and Associate General Counsel
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

Pratik A. Shah
*Counsel of Record*
AKIN GUMP STRAUSS HAUER & FELD LLP

October 11, 2017