No. 15-1346

In the Supreme Court of the United States

GEICO GENERAL INSURANCE CO. AND GOVERNMENT EMPLOYEES INSURANCE CO.,
Petitioners,

v.

SAMUEL CALDERON, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") and the National Federation of Independent Business Small Business Legal Center (the "NFIB") respectfully submit this brief as *amici curiae* in support of Petitioners GEICO General Insurance Company and Government Employees Insurance Company (together, "GEICO").

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. The NFIB is the nation's leading

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both Petitioners and Respondents have consented to the filing of this brief. Copies of Petitioners' and Respondents' consents are filed herewith.

small business association, representing approximately 325,000 members across the country. To that end, the Chamber and NFIB regularly file *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

GEICO's petition raises two issues that are exceptionally important to the business community: (1) whether insurance fraud investigators are administrative employees exempt from the overtime-pay requirement of the Fair Labor Standards Act ("FLSA" or "Act"), and (2) whether exemptions to the FLSA must be narrowly construed and established by clear-and-convincing evidence. The businesses represented by the Chamber and the NFIB employ tens of millions of people, many of whom are classified as "exempt" from overtime pay under the FLSA. These employers dedicate considerable time, energy, and resources to achieving compliance with the myriad statutes governing the workplace, including the FLSA, while at the same time maintaining and creating much-needed jobs. Accordingly, these members have a substantial interest in the proper and clear interpretation of the administrative exemption under the FLSA. Such statutory interpretation must be predictable and evenhanded—without courts unjustifiably putting a thumb on the scales at

the outset of the interpretive process. This case affords the Court an opportunity to clarify the law regarding the administrative exemption by rejecting the unwarranted canon that FLSA exemptions must be narrowly construed.

SUMMARY OF ARGUMENT

The undersigned *amici* urge this Court to grant GEICO's petition. First, the Fourth Circuit's decision creates a square conflict regarding the exempt status of claims investigators and adopts a novel and legally flawed standard for applying the administrative exemption. If left to stand, it will impose significant costs on employers and employees. Instead of engaging in the case-specific assessment envisioned by Congress regarding whether an employee's duties meet the requirement for the administrative exemption, it imposed a restrictive rule based on the presence *vel non* of "supervisory responsibility." This analytical shift is not grounded in statutory text, legislative history, or judicial precedent, and the uncertainty created by the Fourth Circuit's decision will undermine the benefits of exempt status to both employers and employees, inviting costly litigation.

Second, this Court should grant GEICO's petition to reject the untenable canon that FLSA exemptions must be narrowly construed. From

time to time, this Court has discussed the canon "that remedial statutes should be liberally construed" to effectuate their remedial purpose. *SEC v. CM Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943). In 1945, this Court went a step further by stating that, because the FLSA was "designed to extend the frontiers of social progress," exemptions to such "humanitarian and remedial legislation" should "be narrowly construed." *AH Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (citation and internal quotation marks omitted). The canon that exemptions to remedial statutes must be narrowly construed is deeply flawed.

There is no basis in either law or logic to infer that Congress means more (or less) than it says in a statute, simply because the legislation might be described as "remedial." *See, e.g.,* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 581-86 (1990). Indeed, the canon that remedial statutes should be liberally construed rests on a flawed foundation: the misconception that Members of Congress draft statutes to pursue a single objective without compromise or moderation. Further, the liberal-construction canon is insupportable because it is "indeterminate, as to both when it applies and what it achieves." *Id.* at 586. There is no reason for courts to assume

that Congress intends so-called "remedial" statutes to extend more broadly than their text, structure, and purpose indicate.

Moreover, the liberal-construction canon's supposed corollary—that courts should assume Congress is less than sincere when it includes explicit exemptions to a "remedial" statute—is doubly flawed, particularly in the FLSA context. The numerous exemptions to the so-called "remedial" provisions of the Act clearly demonstrate that Congress did not intend the Act to impose limitless burdens on employers. GEICO's petition presents this Court with the opportunity to make clear that exemptions to the FLSA should be construed neither narrowly nor broadly; rather, they should be construed correctly.

Stare decisis presents no obstacle to disapproving the canon because *amici* are unaware of any decision in which the canon represented an essential part of this Court's holding. At the same time, the canon is not simply an ill-advised yet harmless turn of phrase; rather, lower court opinions indicate that this canon has distorted the process of interpreting the FLSA. Indeed, this is borne out by the Fourth Circuit's decision in resolving what it viewed as a "very close" case. Pet. 24 (quoting Pet. App. 37a). This Court should grant certiorari in or-

der to "correct course" and make clear that the canon "has no proper place in [its] jurisprudence." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 548 (2005).

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE FOURTH CIRCUIT'S DECISION, WHICH GIVES RISE TO A CIRCUIT SPLIT, WILL IMPOSE SIGNIFICANT COSTS ON EMPLOYERS AND EMPLOYEES ALIKE

Courts have long struggled with the scope of the administrative exemption. The legislative history sheds no light; a search of the extensive 1937 congressional hearings on the FLSA, the 1937-38 congressional debates, and the Senate and House committee reports of those years yields nothing as to the scope of the exclusion of administrative employees. *See* MARC LINDER, 'TIME AND A HALF'S THE AMERICAN WAY': A HISTORY OF THE EXCLUSION OF WHITE-COLLAR WORKERS FROM OVERTIME REGULATION, 1868-2004, at 385-86 (2004); *see also* U.S. Gov't Accountability Office, GAO/HEHS-99-164, *White-Collar Exemptions in the Modern Work Place* 5 n.4 (1999) ("The legislative history for the FLSA contains no explanation for the [white-collar] exemption.").

However, the Fourth Circuit's requirement that employees exercise "supervisory responsibility" to qualify for the exemption oversimplifies what should be a fact-intensive inquiry. *See, e.g.,* 69 Fed. Reg. 22,122, 22,144 (Apr. 23, 2004) ("there must be a case-by-case assessment to determine whether the employee's duties meet the requirement for [the administrative] exemption."). Indeed, as discussed in depth in GEICO's petition, the conclusion of the Fourth Circuit that because the investigators at issue in this appeal have "no supervisory responsibility," their work was "too far removed from their employer's management or general business operations" to count as administrative work conflicts with settled law as recognized by numerous other circuits and the Department of Labor ("DOL"). Pet. 10-11, 16-18. It also conflicts markedly with the settled expectations of employers and employees across the country.

As noted by Petitioners, the Sixth Circuit was the first Court of Appeals to consider whether the FLSA's administrative exemption applies to fraud investigators, and if its sound analysis were applied to this case, GEICO would prevail. *See Foster v. Nationwide Mut Ins. Co.*, 710 F.3d 640, 641, 646 (6th Cir. 2013) ("[T]he [Special Investigators'] investigative work that drives the claims adjusting decisions with re-

spect to suspicious claims is . . . directly related to assisting with the servicing of Nationwide's business."). The decision below squarely conflicts with that decision. *See* Pet. 13-16.

The Sixth Circuit also held that technical writers were exempt from overtime regulations in *Renfro v. Indiana Michigan Power Co.*, 497 F.3d 573 (6th Cir. 2007). In a decision entirely silent as to whether or not the technical writers supervised other employees, the court described their duties as "support[ing] the plant's maintenance department by developing written procedures on how to maintain equipment." *Id.* at 574. The technical writers "create[d] new procedures, change[d] existing procedures as needed, and review[ed] plant documents for their impact on established procedures." *Id.*

Instead of assessing whether the technical writers supervised other employees, the court's analysis correctly focused on "whether the technical writers' primary duty-writing procedures . . . *require[ ] that they exercise sufficient discretion and independent judgment* to exempt them from the FLSA's overtime requirements." *Id.* at 576-77 (emphasis added). In order "[t]o determine whether an employee, constrained by guidelines and procedures, actually exercises any discretion or independent judgment, [the court] consider[ed] whether those guidelines and

procedures *contemplate independent judgment calls* or allow for deviations." *Id.* at 577 (emphasis added). After doing so, the court concluded that "it [was] apparent to [it] that any reasonable juror would conclude that the technical writers actually exercise discretion and independent judgment." *Id.* at 578 (internal quotation marks and citations omitted).

Other courts have agreed that whether an employee qualifies for the administrative exemption does not turn on whether that employee has supervisory responsibility. For instance, in *Schaefer-Larose v. Eli Lilly & Co.*, 679 F.3d 560 (7th Cir. 2012), the Seventh Circuit concluded that the administrative exemption applied to pharmaceutical sales representatives. Although the plaintiffs argued that the exemption was designed for "employees who possessed greater authority with respect to strategic design, proposal writing, *supervision* or similar significant responsibilities," *id.* at 574 (emphasis added), the Seventh Circuit rejected that view, reasoning that the sales representatives were "servicing" the business rather than directly involved in the development and production of pharmaceutical products. *Id.* Whether the plaintiffs were supervisors or not was beside the point. *See also Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 871-73 (7th Cir. 2008) (holding

that the administrative exemption applied to automobile damage appraisers who investigated automobile accidents in the field, interviewed witnesses, physically inspected damage, and estimated repair costs using software).

The Seventh Circuit is far from alone; numerous other circuits have reached the same conclusion. *See, e.g., Heffelfinger v. Elec. Data Sys. Corp.*, 492 F. App'x 710, 713 (9th Cir. 2012) (holding that administrative exemption applied to IT workers who "maintain[ed] and manag[ed] the [Department of Defense's] personnel records management database" and "provided solutions to technical issues, which included leading and coordinating operational support and implementation activities for the DOD's database administration"); *Viola v. Comprehensive Health Mgmt., Inc.*, 441 F. App'x 660, 661-64 (11th Cir. 2011) (holding that administrative exemption applied to Senior Community Outreach Associate whose duties involved marketing and promotion of her employer through networking with local organizations, organizing community events, and developing a marketing strategy for enrollment events; since she was the only employee promoting the Medicare side of her employer in her area, no mention of supervisory duties); *Hines v. State Room, Inc.*, 665 F.3d 235, 242-44 (1st Cir. 2011) (holding employees who

secured and planned events for a banquet hall qualified for the administrative exemption despite "their lack of supervisory authority and their lack of policy-making authority"); *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 10 (1st Cir. 1997) ("However, the interpretations make it clear that the exemption is not to be limited solely to so-called 'management' personnel.").

Moreover, DOL regulations also recognize that a supervisory or managerial role is not required for the administrative exemption to apply. Indeed, the regulations explain that the administrative exemption would apply to "[a]n executive assistant or administrative assistant to a business owner or senior executive of a large business . . . if [she or he], without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance." 29 C.F.R. § 541.203(d). Likewise, the regulations state that insurance claims adjusters and financial advisors generally meet the duties requirement for the administrative exemption if their duties require independent judgment without suggesting in any way that supervisory or managerial authority is also required. *Id.* §§ 541.203(a), (b).

Based on this uniform authority, employers across the nation have long ordered their conduct on the premise that employees who per-

form administrative work calling for the exercise of discretion and independent judgment may be classified as exempt regardless of supervisory or managerial authority. The Fourth Circuit's marked departure from this settled approach creates a circuit split that must be resolved.

If the conflict is not resolved, the uncertainty created by the Fourth Circuit's decision will undermine the benefits of exempt status to both employers and employees and will invite costly litigation. Employers must know in advance how to classify employees. By diverging from the settled standard for applying the administrative exemption, the Fourth Circuit's decision has undermined the ability of employers who operate in multiple circuits to predict how their employees may be classified. This uncertainty will likely drive employers to err on the side of caution by treating employees as non-exempt. They cannot simply wait for costly litigation and risk incurring extensive overtime pay obligations they would not otherwise have allowed to be incurred. By incentivizing this overly cautious approach, the Fourth Circuit's decision creates inefficiencies and is patently contrary to Congress's intent.

When Congress passed the FLSA in 1938, it believed that in exchange for not being eligible

for overtime, exempt employees earned salaries well about the minimum wage, were provided above-average benefits, and had better opportunities for advancement.[2] This is still the case today. Exempt white-collar employees enjoy more generous paid leave benefits and also earn bonuses, commissions, profit-sharing, stock options, and other incentive pay at greater rates than non-exempt employees. *Id.* Indeed, employees see the move from a non-exempt to an exempt position as moving up the promotional ladder. *Id.*[3]

Moreover, exempt employees enjoy the stability and certainty of a guaranteed salary: if they work less than 40 hours in a week for some reason, they are not paid less. *See* 29 C.F.R. §

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[2] Chamber of Commerce of the United States, Comments on RIN 1235-AA11, Proposed Rule, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38516 (July 6, 2015) ("Chamber Comments") at 2, *available at* https://www.uschamber.com/sites/default/files/documents/files/u_s_chamber_-_comments_-_part_541_nprm.pdf.

[3] *See also* Bruce R. Millman, *What Should Employers Do To Prepare for Coming White Collar Pay Change?*, N.Y. BUS. J., Aug. 26, 2015, *available at* http://www.bizjournals.com/newyork/news/2015/08/26/bruce-millman-dol-exempt-worker-overtime-proposal.html.

541.602(a). The Chamber's and NFIB's members with their vast experience managing private sector businesses know that limiting an employee's work hours also limits opportunities for advancement. Exempt employees understand this as well and therefore view reclassification to non-exempt status as a demotion, with attendant negative effects on morale. *See* Chamber Comments at 3.

Pressuring employers to steer clear of the administrative exemption creates great inefficiency. Once employers are required to pay overtime, they must limit and police the hours of non-exempt employees. That is costly in its own right, and also reduces the flexibility that can be afforded to exempt employees.[4] Further, where an employee is making above minimum wage, these costs are unlikely to have countervailing benefits for the employee, as the rational

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[4] *See, e.g.*, Secretary of Labor Thomas E. Perez, *The Most Important Family Value*, HUFFINGTON POST, May 27, 2014, *available at* http://www.huffingtonpost.com/thomas-e-perez/the-most-important-family_b_5397442.html) (discussing importance of workplace flexibility).

employer will reduce base compensation in order to account for any necessary overtime.[5]

Finally, the ambiguity and uncertainty resulting from the Fourth Circuit's decision will invite costly litigation. Litigation regarding the exempt status of employees has been growing over the last decade, with FLSA cases in 2015 reaching their highest level in over two decades.[6] By creating a newly-heightened standard for the administrative exemption, the Fourth Circuit's decision invites a further increase in litigation targeting any employers who do not avoid the exemption in the future, or who have previously classified employees as exempt in reliance on what was until recently settled law.

The Fourth Circuit's decision is particularly troubling for employers who operate nationally.

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[5] *See* James Sherk, *Salaried Overtime Requirements: Employers Will Offset Them with Lower Pay*, THE HERITAGE FOUNDATION BACKGROUNDER, July 2, 2015, *available at* http://www.heritage.org/research/reports/2015/07/salaried-overtime-requirements-employers-will-offset-them-with-lower-pay.

[6] *See* Ben James, *FLSA, FMLA Lawsuits Soaring, New Statistics Show*, LAW360, Mar. 11, 2015, *available at* http://www.law360.com/articles/630168/flsa-fmla-lawsuits-soaring-new-statistics-show.

They will find it difficult or impossible to have the same position classified as exempt in one state and non-exempt in another. Moreover, even where employers may be able to adjust exempt status on a state-by-state basis, plaintiffs' lawyers would still have the ability and the incentive to engage in forum shopping and bring a nationwide class action in the Fourth Circuit. None of this is in accordance with Congress's intention in enacting the FLSA. The Court should grant GEICO's Petition for a Writ of Certiorari.

II. GEICO'S PETITION PRESENTS AN OPPORTUNITY TO REJECT THE UNJUSTIFIABLE CANON THAT EXEMPTIONS TO THE FLSA MUST BE NARROWLY CONSTRUED

In *AH Phillips, Inc. v. Walling*, 324 U.S. 490 (1945), this Court articulated what came to be the canon that FLSA exemptions should be narrowly construed, stating 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. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed . . . ." *Id.* at 493 (citation and internal quotation marks omitted). The Court continued, "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." *Id.* This hostility towards exemptions to "remedial" statutes, in turn, arose from "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

But the canon that remedial statutes should be liberally construed is flawed, and its purported corollary—that courts should narrowly construe exemptions to remedial statutes—only exacerbates those inherent flaws.

This is particularly true in the Fourth Circuit, which stands alone among the courts of appeals in layering the clear-and-convincing-evidence standard on top of the narrow-construction canon. Because the application of these extra-textual rules was almost certainly outcome-determinative in what the Fourth Circuit thought was a "very close" case, the petition provides the Court with an ideal vehicle to consider their continuing vitality.

A. The Canon that a Remedial Statute Should Be Liberally Construed To Effectuate Its Purposes Is Fundamentally Flawed

This Court has accurately described the notion that a remedial statute must be broadly construed to advance its purposes as the "last redoubt of losing causes." *OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995). Indeed, it suffers from three severe flaws.

First, the liberal-construction canon rests on a fundamental misunderstanding of the legislative process. Both jurists and commentators have exposed the erroneous premise underlying this canon: that Congress intends statutes to extend as far as possible in service of a single objective. *See, e.g.,* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 21, 362-63 (2012); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 808-09 (1983). As Judge Posner succinctly explained, this canon "goes wrong by being unrealistic about legislative objectives." *Id.; see also Bushendorf v. Freightliner Corp.*, 13 F.3d 1024, 1026 (7th Cir. 1993) (Posner, J.) ("Remedial statutes like other statutes are typically compromises, and a court would upset the com-

promise if it nudged such a statute closer to the victim side of the line than the words and history and other indications of the statute's meaning pointed.").

In reality, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (*per curiam*); *see also OWCP*, 514 U.S. at 135-36. Rather, legislators inevitably balance a statute's reach with respect to one particular objective against various other objectives that they or their colleagues also value. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033-34 (2014) ("'Congress wrote the statute it wrote' – meaning, a statute going so far and no further."); *OWCP*, 514 U.S. at 135-36; *Rodriguez*, 480 U.S. at 525-26. Indeed, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez*, 480 U.S. at 525-26; *see also OWCP*, 514 U.S. at 136 ("Every statute purposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be."). Put simply, "[t]his Court has no roving license . . . to disregard clear language simply on the view that . . . Congress 'must have intended' something broader." *Bay Mills*, 134 S. Ct. at 2034.

It therefore follows that when courts analyze the balance struck by Congress in a remedial statute, the goal "should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right." Scalia, *Assorted Canards, supra* at 582; *see also* READING LAW, *supra* at 21, 362-63. Any other approach "would upset the compromise that the [remedial] statute was intended to embody." *Statutory Interpretation, supra* at 809; *see also Bay Mills*, 134 S. Ct. at 2034; *Rodriguez*, 480 U.S. at 526. 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" when interpreting a remedial statute. *Assorted Canards*, *supra* at 582.

Because the aim of statutory interpretation is to assess congressional intent, the rule of construing remedial statutes broadly reflects an assumption that Congress would have intended for some statutes to prohibit or require more than their text, structure, and purpose would otherwise indicate. But there is no reason to think that Congress is more or less timid in expressing its will through the text and structure of certain statutes, simply because those laws

might be "remedial" in some vague, undefined sense. Consequently, the Court has emphasized that "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez*, 480 U.S. at 526; *see also Bay Mills*, 134 S. Ct. at 2034.

A second defect infecting the liberal-construction canon is there is virtually no clarity about *when* the canon should apply. Indeed, "there is not the slightest agreement on what . . . the phrase 'remedial statutes'" means. *Assorted Canards*, *supra* at 583; *see also id.* at 586. Even accepting the liberal-construction canon on its own terms, courts are left to speculate about *when* the canon should apply. *See, e.g., Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1177-78 (7th Cir. 1987) ("[G]eneralizations about interpretation, such as that exemptions from remedial statutes should be narrowly construed, are at best tie-breakers (and not even that, if some offsetting 'canon of construction' is in play as normally there will be, *see* LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521-35 (1960)).") (Posner, J.); *Hale v. Marsh*, 808 F.2d 616, 621 (7th Cir. 1986) ("We know all about the canon of statutory construction that remedial statutes . . . should be construed liberally, but the canon

can make the difference only in a close case, which we do not conceive this to be. Otherwise, 'remedial' statutes would expand without limit.") (Posner, J.).

The term "remedial" has been defined as "intended for a remedy or for the removal or abatement . . . of an evil." *Assorted Canards*, *supra* at 583 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1920 (1961)). Similarly, BLACK'S LAW DICTIONARY defines the phrase "remedial statute" to mean (1) "[a]ny statute other than a private bill; a law providing a means to enforce rights or redress injuries" or (2) "[a] statute enacted to correct one or more defects, mistakes, or omissions." *Id.* at 1634 (10th ed. 2014). But these definitions only illustrate how unworkable the liberal-construction canon is: If courts must liberally construe any statute that aims to create a remedy or mitigate an evil, then *all* statutes are in some sense remedial, "since one can hardly conceive of a law that is not meant to solve some problem." *Assorted Canards*, *supra* at 583; *see also* READING LAW, *supra* at 364 ("Is any statute *not* remedial? Does any statute *not* seek to remedy an unjust or inconvenient situation?"); *Statutory Interpretation, supra* at 809; *Stomper v. Amalgamated Transit Union*, 27 F.3d 316, 320 (7th Cir. 1994) (Easterbrook, J.) ("Plaintiffs stress that the

LMRDA is a remedial measure and seek a liberal construction. This maxim is useless in deciding concrete cases. *Every* statute is remedial in the sense that it alters the law or favors one group over another."). And if the liberal-construction canon applies to *all* statutes, thus "leaving nothing to be construed straight down the middle," *Assorted Canards*, *supra* at 585, then the canon has little or no meaning.

The third flaw is that even if one could agree on a useful definition of what statutes are "remedial," the liberal-construction canon would remain hopelessly malleable and manipulable. After all, once one lets go of the conventional tools of statutory interpretation, there is no objective means of determining "[h]ow liberal is liberal." *Id.* at 582; *see also Stomper*, 27 F.3d at 320 ("Knowing that a law is remedial does not tell a court how far to go. Every statute has a stopping point, beyond which, Congress concluded, the costs of doing more are excessive—or beyond which the interest groups opposed to the law were able to block further progress. A court must determine not only the direction in which a law points but also how far to go in that direction.").

For all of these reasons, the liberal-construction canon is a flawed basis for assessing congressional intent.

B. The Notion that FLSA Exemptions Should Be Narrowly Construed Against Employers Exacerbates the Flaws Inherent in the Liberal-Construction Canon

The purported corollary of the liberal-construction canon—that exemptions to the FLSA should be narrowly construed—only exacerbates the inherent flaws in the liberal-construction canon discussed above. Even if one assumes that "remedial" statutes should be broadly construed, there is no basis whatsoever to conclude that Congress intends remedial statutes to be extended *in the face of an express exemption*. In such instances, by definition, Congress has explicitly stated that it does *not* wish the statute to be extended broadly. There is no reason to believe, in the abstract, that Congress in such situations does not mean what it says, or that it feels more strongly about the statute's prohibitions than its exemptions.

Indeed, one could just as easily say that *exemptions* to remedial statutes are themselves "remedial," as they are intended to remedy the otherwise excessive scope of more general provisions. Accordingly, if one took seriously the rule of broadly construing "remedial" provisions, there is at least as strong an argument that statutory *exemptions* should be read broadly.

Of course, such complexity and confusion can be avoided simply by interpreting the exemptions through the standard tools of statutory construction, without handicapping one outcome over another.

The practice of placing a thumb on the interpretive scale is particularly inappropriate in the context of the FLSA for two reasons:

First, Congress included so many exemptions to the so-called "remedial" provisions of the FLSA that it is particularly implausible to assume Congress had no concern for the FLSA's breadth. Like any statute, the FLSA embodies a balance of legislative priorities. On the one hand, the Act protects 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 employees with benefits such as overtime pay, *id.* §§ 206, 207. On the other hand, the Act includes numerous exemptions recognizing that FLSA protections are unnecessary and even ill-advised where employers and employees alike would benefit from alternative compensation practices. *See id.* § 213(a).

Specifically, Congress excluded from the FLSA's general protections over fifty categories

of employees, ranging from white collar workers, to fishermen and seamen, to employees of movie theaters or the maple syrup industry. It is thus implausible to suggest that Congress was shy about carving out exemptions or that it intended to disfavor employers at every turn. In fact, Congress amended the FLSA precisely "to curtail employee-protective interpretations of the FLSA." *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 958 (11th Cir. 2007). Consequently, construing the FLSA based on the assumption that Congress uniformly intended to disfavor employers "contravenes . . . the readily apparent intent" of Congress. *Id.*

Second, the argument that FLSA exemptions should be narrowly construed is animated by a desire to protect employees' wage and hour rights. *See AH Phillips*, 324 U.S. at 493. But this argument is misguided because, in many cases, the FLSA exemptions serve the interests of employees as well as employers. That the Act's exemptions do not inherently trench on employees' rights confirms that the exemptions should be interpreted fairly, not in an unduly narrow manner.

Congress believed that the best way to ensure "a fair day's pay" was to require overtime *in some circumstances. Id.* That said, Congress also believed (as demonstrated by the inclusion

of explicit exemptions) that alternative compensation arrangements could provide better and fairer pay in *other circumstances. 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 required overtime pay] than a janitor or assembly linesman."). Courts should draw the line between these two sets of circumstances by interpreting the text and purpose of the statutory exemption, not by "laying a judicial thumb on one or the other side of the scales." *Assorted Canards*, *supra* at 582.

C. *Stare Decisis* Presents No Obstacle To Rejecting the Canon that FLSA Exemptions Must Be Narrowly Construed

Although the Court has previously stated that FLSA exemptions should be narrowly construed, *see, e.g., AH Phillips*, 324 U.S. at 493, *stare decisis* presents no obstacle to rejecting that canon now. "[T]his Court is bound by holdings, not language." *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001); *see Lingle*, 544 U.S. at 545-46 ("We emphasize that our holding today—that the 'substantially advances' formula is not a valid takings test—does not require us to disturb any of our prior holdings. To be sure, we applied [this] inquiry in *Agins* itself . . . But in no case have we found a compensable taking

based on such an inquiry.") (internal citations and quotation marks omitted). *Amici* are not aware of any decision in which this canon was an essential part of the Court's holding.

For example the Court recited the canon in *Mitchell v. Ky. Finance Co.*, 359 U.S. 290 (1959), but it did so only in one line in the last paragraph of the opinion. *Id.* at 295. The Court described its holding in *Mitchell* as supported by "abundant pointed evidence"—including "detailed and explicit" legislative history (at a time when the Court placed great weight on such authority), *id.* at 293, 296, and so any interpretive presumption was irrelevant. The Court in *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960), likewise recited the canon in passing, but it did not need to rely on the canon because it found the answer to the interpretive question to be "clear." *Id.* at 393 ("It is clear that respondent does not meet at least two of the three standards . . . ."); *id.* at 391 ("clear legislative history"); *id.* at 394 ("clearly"); *id.* at 392.

Further, in recent years, this Court has twice declined to apply the canon that FLSA exemptions must be narrowly construed. In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), the Court concluded that FLSA's "overtime salesman" exemption did "not furnish a clear answer" to the question at issue,

but the Court nonetheless declined to apply the canon. *Id.* at 2170, 2172 n.21 (reasoning that the canon "is inapposite where . . . [the Court is] interpreting a general definition that applies throughout the FLSA"). In *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014), the Court again chose not to apply the canon. *Id.* at 879 n.7. Indeed, eight Justices joined an opinion that went out of its way to avoid reliance on the canon. *See id.* ("The Court has stated that 'exemptions' in the Fair Labor Standards Act 'are to be narrowly construed against the employers seeking to assert them.' *We need not disapprove that statement to resolve the present case.*") (emphasis added).

Finally, although this Court is not bound by its dicta regarding the narrow construction of FLSA exemptions, lower courts often perceive themselves to be. This perception creates a risk that lower courts will place a thumb on the scale in some cases. *See, e.g., Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1271 & n.3 (9th Cir. 2015) ("[W]e must apply the background rule that 'the FLSA is to be construed liberally in favor of employees; exemptions are narrowly construed against employers'"), *cert. granted*, 136 S. Ct. 890 (2016). As explained in GEICO's petition, the Fourth Circuit appears to have placed a particularly heavy thumb on this scale

in this case. This Court should take the opportunity presented by this petition to reject the notion that exemptions to remedial statutes must be narrowly construed, at least as applied to the FLSA.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, this Court should grant GEICO's Petition for a Writ of Certiorari.

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