No. 17-____

In the Supreme Court of the United States

PROVIDENT SAVINGS BANK, FSB,

Petitioner,

v.

GINA MCKEEN-CHAPLIN, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, AND ON BEHALF OF THE GENERAL PUBLIC,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Labor Standards Act (FLSA) exempts from its overtime requirements "any employee employed in a bona fide executive, *administrative*, or professional capacity." 29 U.S.C. § 213(a)(1) (emphasis added). The Department of Labor, which is authorized to enforce the FLSA, has issued regulations clarifying the scope of that exemption, including for employees in the financial services industry.

One class of employees that has been the subject of frequent litigation under the FLSA's exemption for "administrative" employees is mortgage underwriters, who analyze loan applications, determine borrower creditworthiness, and ultimately decide whether banks should make loans. Tens of thousands of mortgage underwriters work at banks across the country, and evaluate the millions of residential loan applications submitted each year. In this case, the Ninth Circuit held that the "administrative" exemption does not apply to such underwriters. In so holding, the Ninth Circuit expressly disagreed with the position of the Sixth Circuit (which has held that mortgage underwriters *are* exempt) and instead sided with the Second Circuit (which has held that mortgage underwriters are *not* exempt). App. 8a-10a.

The question presented is whether mortgage underwriters qualify as "administrative" employees under the FLSA, 29 U.S.C. § 213(a)(1).

RULE 29.6 STATEMENT

Provident Savings Bank, FSB is a wholly-owned subsidiary of Provident Financial Holdings, Inc., a publicly-traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Provident Savings Bank, FSB respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.1a-16a) is available at 862 F.3d 847. The opinion of the district court (*id.* at 17a-32a) is unreported, but available at 2015 WL 48763160 (E.D. Cal. Aug. 12, 2015).

JURISDICTION

The court of appeals entered its opinion on July 5, 2017. This petition is filed within 90 days of that opinion. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Fair Labor Standards Act (FLSA) and the Department of Labor's regulations are reproduced in an appendix to this petition. App. 33a-50a.

INTRODUCTION

This FLSA case presents a frequently-litigated question of enormous importance to a critical sector of the financial services industry: Whether mortgage underwriters qualify as "administrative" employees under a longstanding exemption from the FLSA's overtime pay requirements. 29 U.S.C. §§ 207(a)(1), 213(a)(1). The question has generated much confusion among the lower courts, resulting in an acknowledged circuit split now dividing the Second and Ninth

Circuits from the Sixth Circuit. The issue impacts thousands of banks, and tens of thousands of employees, nationwide. This Court should grant the petition and ensure that there is uniform law on this issue.

There are more than 7,000 banks and other financial institutions in the mortgage lending business in this country. Every year, those banks and other institutions receive more than 12 million mortgage loan applications from individuals, families, and businesses seeking money to purchase, refinance, or improve homes or other property. To process those applications, the banks and other institutions employ tens of thousands of mortgage underwriters nationwide. Underwriters assess the potential borrower's income, assets, and credit history and decide whether their respective institutions should risk its own financial capital by making the loan. Underwriters exercise significant independent judgment and authority in determining whether each loan application should be approved or denied. In doing so, they play a crucial role in managing their institution's overall exposure to risk and promoting its overall financial success.

The question in this case is whether the FLSA requires banks to compensate such mortgage underwriters with overtime pay—to the tune of one and one-half times their regular hourly rate—whenever an underwriter works more than 40 hours in a given week. The FLSA mandates such overtime pay as a general matter, but it contains an exception for employees who are "employed in a bona fide executive, *administrative*, or professional capacity." 29 U.S.C. §§ 207(a)(1), 213(a)(1) (emphasis added); *see also* 29

C.F.R. §§ 541.200-541.204. The issue here is whether mortgage underwriters qualify as "administrative" employees under that exemption.

The FLSA status of mortgage underwriters has been the subject of extensive litigation in the federal courts. In recent years, such underwriters have repeatedly filed FLSA collective actions alleging that they were unlawfully deprived of overtime pay by their employers. That litigation has generated a square and acknowledged circuit split. The Sixth Circuit has held that such underwriters qualify as "administrative" employees who are exempt from the FLSA overtime requirements. *Lutz v. Huntington Bancshares, Inc.*, 815 F.3d 988, 995 (6th Cir.), *cert. denied*, 137 S. Ct. 96 (2016). By contrast, the Second Circuit has held that underwriters are *not* "administrative" employees and thus are *not* exempt. *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529, 535 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2416 (2010). In this case, the Ninth Circuit expressly acknowledged that circuit split, and then deepened it by siding with the Second Circuit—and expressly disagreeing with the Sixth Circuit. App. 8a-10a.

That circuit split on an issue of undeniable national importance alone warrants certiorari. But the need for certiorari is even stronger because the position of the Ninth and Second Circuits position is plainly mistaken. The Department of Labor (DOL) has issued binding regulations providing that the "administrative" exemption applies to employees who "assist[] with the running or servicing of the business"—including "[e]mployees in the financial services industry" who "servic[e] . . . the employer's financial products" and "credit manager[s] who make[] and administer[] the

credit policy of the employer." 29 C.F.R. §§ 541.201(a), 541.203(b), 541.703(b)(7). Mortgage underwriters fit that regulatory definition to a tee. And, indeed, when DOL promulgated the relevant regulations in 2004, it issued a regulatory impact notice making clear its view that "underwriters" *do* generally qualify as exempt "administrative" employees.[1]

This case is both a timely and ideal vehicle for resolving the acknowledged circuit conflict on this issue and holding that mortgage underwriters are not subject to the FLSA's overtime requirement. The petition for certiorari should be granted.

STATEMENT OF THE CASE

A. The FLSA Overtime Requirements And DOL's Implementing Regulations

1. Congress enacted the FLSA in 1938 to "protect all covered workers from substandard wages and oppressive working hours." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2121 (2016) (citation omitted). Among other things, the FLSA generally requires employers to pay all employees a minimum wage and to provide overtime compensation to any employees who work more than 40 hours in any particular week. 29 U.S.C. §§ 206, 207(a). Such overtime compensation must be "not less than one and one-half times the regular rate" of the employee's pay. *Id.* § 207(a)(1).

[1] *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule*, 69 Fed. Reg. 22,122, 22,198-200, 22,240-48 (Apr. 23, 2004); *see also infra* at 9.

Congress's basic purpose in enacting the FLSA was to mitigate harsh "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). But Congress recognized that such conditions do not affect all workers, and it accordingly exempted certain categories of employees from the wage and overtime requirements.

As relevant here, the FLSA provides that those requirements do not apply to "any employee employed in a bona fide *executive*, *administrative*, or *professional* capacity." 29 U.S.C. § 213(a)(1) (emphasis added). DOL has explained that this exception—sometimes referred to as the "white-collar" exception—reflects Congress's belief that such white-collar employees "typically earn[] salaries well above the minimum wage" and "enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay." *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule*, 69 Fed. Reg. 22,122, 22,123-24 (Apr. 23, 2004) (2004 Final Rule) (discussing FLSA's legislative history).

2. Congress did not define what it means for an employee to work in an "executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Instead, Congress granted DOL the authority to "define[] and delimit[]" those key terms "from time to time by regulations." *Id.*; *see also, e.g.*, *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

Different versions of DOL's regulations have been in effect since the late 1930s. In general, they have limited the white-collar exemption to employees who (1) receive a predetermined and fixed salary that is above a specified amount, and (2) primarily perform certain specified kinds of managerial, administrative, or professional tasks. *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule*, 68 Fed. Reg. 15,560, 15,560-62 (Mar. 31, 2003) (2003 Proposed Rule). In 2003 and 2004, DOL promulgated a new version of its regulations clarifying the scope of the white-collar exemption. *See generally* 2004 Final Rule, 69 Fed. Reg. at 22,122-74; 2003 Proposed Rule, 68 Fed. Reg. at 15,560-97.

3. The issue in this case is whether the FLSA's exemption for "administrative" employees covers mortgage underwriters. The 2004 Final Rule sheds light on that issue by (1) setting forth a three-prong definition of the term "administrative"; (2) giving examples of categories of exempt employees; and (3) incorporating a regulatory impact analysis that directly addresses how particular occupations—including "underwriters"—will be treated under the regulations.

a. The 2004 Final Rule states that an employee is subject to the "administrative" exemption when three conditions—known as the "salary test" and the "duties tests"—are satisfied. *See* 29 C.F.R. § 541.200(a)(1), (2).

First, under the salary test, the employee must be compensated "on a salary or fee basis of not less than

$455 per week," not including "board, lodging or other facilities." *Id.* § 541.200(a)(1).[2]

Second, the employee's "primary duty" must be "the performance of *office or non-manual work directly related to the management or general business operations of the employer* or the employer's customers." *Id.* § 541.200(a)(2) (emphasis added). An employee's work qualifies under that standard when it is "directly related to *assisting with the running or servicing of the business*, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." *Id.* § 541.201(a) (emphasis added); *id.* § 541.201(b) (also providing illustrative examples of such work, including tax, finance, accounting, auditing, quality control, purchasing, marketing, legal and regulatory compliance, "and similar activities").

Third, the employee's "primary duty" must also "include[] the exercise of discretion and independent judgment with respect to matters of significance." *Id.* § 541.200(a)(3). The regulations explain that "[i]n general, the exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." *Id.* § 541.202(a); *see also id.* § 541.202(b) (identifying factors relevant to this requirement); *id.* § 541.202(c) (clarifying that the exercise of discretion

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[2] In 2016, the Department of Labor promulgated a regulation to modify the salary test effective December 1, 2016, *see* 81 Fed. Reg. 32,391, 32,549 (May 23, 2016), but that regulation has recently been set aside as unlawful. *Nevada v. United States Dep't of Labor*, No. 4:16-CV-731, 2017 WL 3837230, at *9 (E.D. Tex. Aug. 31, 2017).

and independent judgment encompasses "recommendations for action" that are "reviewed at a higher level").

b. The 2004 Final Rule then gives particular examples of employees who qualify as exempt "administrative" employees. For example, the regulations provide:

> *Employees in the financial services industry* generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products.

Id. § 541.203(b) (emphasis added).

The regulations indicate that the FLSA "administrative" exemption also applies to "[p]urchasing agents with authority to bind the company on significant purchases," *id.* § 541.203(f), as well as to "credit manager[s] who make[] and administer[] the credit policy of the employer, establish[] credit limits for customers, authorize[] the shipment of orders on credit, and make[] decisions on whether to exceed credit limits," *id.* § 541.703(b)(7).

c. DOL's 2004 Final Rule also includes a regulatory impact analysis measuring the effect of the regulations on the economy. *See* 69 Fed. Reg. at 22,191-233. As part of that analysis, "experienced" personnel from DOL's Wage and Hour Division reviewed nearly 500 generic job categories and exercised their "expert judgment" to estimate the likelihood that employees within those categories would fall within the FLSA's white-collar exemption. *Id.* at 22,198-200, 22,240-48.

Notably, DOL staff classified "underwriters" as having a "High Probability of Exemption"—*i.e.*, a probability between 90% and 100%. *Id.* at 22,200, 22,244. Taking into account that classification and various other factors, DOL ultimately estimated that 94% of salaried underwriters would qualify as exempt from the FLSA's overtime requirement. *Id.* at 22,248.[3]

B. Mortgage Underwriters And Provident's Mortgage Business

Residential mortgages are not only critical to the housing industry and home ownership in the United States generally, but key to the financial services

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[3] DOL's regulatory impact analysis refers to "underwriters" generally, and does not distinguish among loan underwriters and insurance underwriters. But both types of underwriters perform the same basic function—analyzing a potential customer's risk under established guidelines and determining whether their employers should assume that risk—and courts have recognized that the same analysis applies to both occupations. *See, e.g.*, *Hanis v. Metropolitan Life Ins. Co.*, No. 14-1107-CV-W-FJG, 2016 WL 5660344, at *8 (W.D. Mo. Sept. 29, 2016) (holding that insurance underwriters are FLSA-exempt "administrative" employees based on Sixth Circuit's analysis of mortgage underwriters in *Lutz*); *infra* at 26 n.9.

sector in this country. According to the Federal Reserve, there are close to 7,000 banks and other financial institutions (collectively, banks) that issue residential loans in the United States. Neil Bhutta & Daniel R. Ringo, *Residential Mortgage Lending from 2004 to 2015: Evidence from the Home Mortgage Disclosure Act Data*, Vol. 102 No. 6, at 21 (Nov. 2016) (*Residential Mortgage Lending*), https://www.federalreserve.gov/pubs/bulletin/2016/pdf/2015_HMDA.pdf. Each year, such banks receive more than 12 million residential mortgage loan applications. *Id.* at 4.

The banks employ tens of thousands of individuals—mortgage underwriters—who are responsible for evaluating those applications. Such underwriters exercise discretion when deciding whether to approve or deny loans under their own individual authority, recommend approvals to more senior bank officials, and, relatedly, decide whether the banks should place any particular conditions on the loans. Mortgage underwriters are also responsible for ensuring that banks comply with various regulations designed to protect borrowers and avoid systemic risks to the financial system through large-scale defaults. *See, e.g.*, 12 C.F.R. pt. 1026 (Truth in Lending Act—Regulation Z). Ultimately, banks issue more than seven million home loans every year in this country. *Residential Mortgage Lending* at 4.

Petitioner Provident Savings Bank, FSB (Provident) is an independent community bank headquartered in Riverside, California. Provident has been in the financial services business for more than 60 years, and it has branches across California. Its principal business entails making mortgage loans to

consumers who wish to purchase or refinance their homes. App. 2a. Provident then resells funded loans on the secondary loan market to third-party investors. *Id.* at 2a-3a, 19a-21a.

Provident's mortgage loan transactions typically begin when a potential borrower confers with a Provident loan officer or outside broker and identifies a particular loan product that may be of interest. *Id.* at 2a-3a. The potential borrower submits a loan application and related documentation, both of which are sent to a Provident loan processor. *Id.* at 3a. The processor runs a credit check, assembles a loan file, and inputs the borrower's information into an automated underwriting system, which generates a preliminary decision on whether the borrower is approved or denied for the loan. *Id.*

The borrower's file is then passed on to a Provident mortgage underwriter. The underwriter is charged with "ultimately decid[ing] whether Provident will accept the requested loan." *Id.* To make that decision, the underwriter "verifies the information put into the automated system" and "compares the borrower's information" to guidelines established for each type of loan by Provident and outside investors in the secondary market such as Fannie Mae, Freddie Mac, and the Fair Housing Administration. *Id.* at 2a-3a. The underwriter is "responsible" for "thoroughly analyzing complex customer loan applications," "determining borrower creditworthiness," *id.* at 3a, and assessing "'whether the particular loan [to the particular borrower] falls within the level of risk Provident is willing to accept,'" *id.* at 20a (citation omitted). In doing so, the underwriter conducts a detailed review of "the borrower's income, assets,

debts and investments." *Id.* at 20a (emphasis added) (citation omitted).

At the end of this analysis, the underwriter has several options. If the proposed loan satisfies the applicable guidelines, the underwriter can either approve the loan or—if she is nonetheless concerned about aspects of the borrower's qualifications—she can impose "additional conditions beyond those the guidelines require." *Id.*; *see also id.* at 3a, 28a-29a. In the latter case, the underwriter can "refuse to approve the loan until the borrower satisfies those conditions." *Id.* at 3a. Either way, it is undisputed that Provident's underwriters have the authority to bind Provident to make loans "with a single signature"—"staff" underwriters can do so with "loans of up to $500,000," and "senior" underwriters "can approve loans of up to $650,000." Pls.' Statement of Undisputed Facts (SUF) 4, Dist. Ct. ECF No. 76-1.

If the loan at issue does *not* satisfy the applicable guidelines, the underwriter also has options. She can reject the borrower's application outright or, alternatively, suggest a "counteroffer"—to be communicated through the loan officer or broker—proposing a different type of loan for which the borrower *is* qualified. App. 3a. In addition, the underwriter can choose to "request that Provident make exceptions . . . by approving a loan that does not satisfy the guidelines." *Id.* at 3a, 20a-21a.

C. Respondent's Complaint And The District Court's Decision

Respondent Gina McKeen-Chaplin briefly worked as a mortgage underwriter at Provident from May to October 2012. SER 295. Consistent with its then-

current practice for all such underwriters, Provident treated respondent as an "administrative" employee exempt from the FLSA's overtime requirements. Respondent was paid an annual salary of $84,000 (with the potential for an additional bonus), but she did not receive extra overtime pay when she worked more than 40 hours in a given week. *See id.* at 13-14.

In December 2012, respondent filed this FLSA collective action against Provident, asserting claims on behalf of herself and a class of other current and former mortgage underwriters. *Id.* at 294-309. In August 2013, the district court preliminarily certified her proposed class. The only real dispute in the case was whether the underwriters qualified as "administrative" employees for purposes of the FLSA's exemption. After discovery, the parties filed cross-motions for summary judgment addressing that issue. App. 4a.

In August 2015, the district court granted Provident's motion for summary judgment. App. 17a-32a. After setting out the "Uncontroverted Facts" surrounding the duties performed by Provident's mortgage underwriters (as summarized above, *supra* at 10-12), the court concluded that the underwriters are exempt "administrative" employees. App. 19a-29a.

First, the district court noted that it was undisputed that Provident's underwriters satisfied the salary test for "administrative" employees set forth in DOL's regulations. *Id.* at 22a.

Second, the district court held that the underwriters' work in "determining whether a particular loan falls within the level of risk Provident is willing to accept" is "directly related to Provident's general business operations." *Id.* at 26a. In reaching that conclusion, the court analogized the underwriters'

duties to the work performed by "quality control" employees specifically addressed by 29 C.F.R. § 541.201(b). *Id.*

Third, the district court held that the underwriters' primary duties include the exercise of discretion and independent judgment in deciding whether or not to approve, deny, condition, or make a counter-offer with respect to loan applications. *Id.* at 27a-29a. In particular, the district court emphasized the "uncontroverted fact[]" that "underwriters could place 'conditions' on a loan application that [already] satisfied Provident's guidelines, and could decline to approve a loan unless or until the borrower satisfied those conditions." *Id.* at 28a. It also highlighted the undisputed point that underwriters could request that Provident make exceptions and approve loans for borrowers who did not satisfy the guidelines. *Id.* at 29a. The court explained that "[p]erformance of these duties required the exercise of discretion and independent judgment" because (1) "they 'involved the comparison and the evaluation of possible courses of conduct,'" and (2) they "concerned matters of significance since they could influence whether Provident would approve a loan." *Id.* (quoting 29 C.F.R. § 541.202).

D. The Ninth Circuit's Decision

The Ninth Circuit reversed. The court held that mortgage underwriters are *not* exempt "administrative" employees, and it therefore remanded the case with instructions to enter judgment in favor of respondent and her fellow underwriters. App. 15a-16a.

The Ninth Circuit rested its decision on the "administrative/production dichotomy," an analytical

framework that courts and DOL sometimes use when assessing whether an employee's work "directly relate[s] to assisting with the running or servicing of the business" for purposes of 29 C.F.R. § 541.201(a). *Id.* at 7a. The court explained that the dichotomy is dispositive—and an employee is plainly not an exempt administrative employee—if his duties "fall[] squarely on the production side of the line." *Id.* at 8a (citation omitted). The court held that an employee counts as a non-exempt production employee when his duties "go to the heart of [the employer's] marketplace offerings" instead of "to the internal administration of [the employer's] business." *Id.* at 7a; *see also id.* at 16a (noting that applicability of exemption turns on whether "[the employee's] primary duty goes to the heart of internal administration—rather than marketplace offerings").

The Ninth Circuit acknowledged that "in the last decade, two of our sister Circuits have assessed whether mortgage underwriters qualify for FLSA's administrative exemption and have come to opposite conclusions." *Id.* at 8a. It explained that in *Davis*, the Second Circuit held that "the job of underwriter . . . falls under the category of *production* [. . .] work." *Id.* at 8a-9a (emphasis added) (quoting *Davis*, 687 F.3d at 535). The Ninth Circuit contrasted that holding with the Sixth Circuit's decision in *Lutz*, which held that underwriters "are exempt *administrators*" because they "'perform work that services the Bank's business, something ancillary to [the Bank's] principal production activity.'" *Id.* at 9a (alteration in original) (emphasis added) (quoting *Lutz*, 815 F.3d at 995).

The Ninth Circuit expressly embraced the Second Circuit's analysis in *Davis*. *Id.* at 8a-9a. It explained that far from "assessing or determining Provident's business interests," mortgage underwriters merely "assess whether, given the guidelines provided to them from above, the particular loan at issue falls within the range of risk Provident has determined it is willing to take." *Id.* at 9a. The court ultimately concluded that because Provident's underwriters "are most accurately considered employees responsible for production, not administrators who manage, guide, and administer the business," they do not qualify for the FLSA's "administrative" exemption. *Id.* at 13a.

The Ninth Circuit bolstered its ruling by citing a 2010 DOL letter stating that mortgage loan officers responsible for selling loans to borrowers are not subject to the FLSA's "administrative" exemption. *Id.* at 12a-13a (discussing U.S. Dep't of Labor Wage & Hour Div., Opinion Letter (Mar. 24, 2010), 2010 WL 1822423 (2010 DOL Letter), which reversed a 2006 DOL letter concluding that loan officers *are* exempt, *see Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204-05 (2015). The court acknowledged that mortgage underwriters "are distinct from mortgage loan officers" in various ways, "most significantly" because their "primary duty is not making sales" on behalf of the bank. App. 13a. But it nonetheless held that underwriters "are not so distinct [from loan officers] as to be lifted from the production side into the ranks of administrators." *Id.*

The Ninth Circuit also rejected Provident's arguments that mortgage underwriters are exempt in light of the DOL regulations expressly identifying "financial-services industry" employees and employees

performing "quality control" functions as exempt. *Id.* at 10a-14a (discussing 29 C.F.R. §§ 541.201(b) and 541.203(b)). And throughout its opinion, the court repeatedly declared that "the law requires that we construe the administrative exemption narrowly against the employer." *Id.* at 15a; *see also id.* at 5a.

REASONS FOR GRANTING THE WRIT

This case is an ideal candidate for certiorari. The Ninth Circuit acknowledged that its decision deepens an existing circuit conflict over whether mortgage underwriters qualify as "administrative" employees exempt from the FLSA's overtime requirements. That issue is frequently litigated and has enormous practical and financial consequences for thousands of banks and tens of thousands of underwriters across the country. Moreover, the Ninth Circuit's decision is wrong: It conflicts with both the text of DOL's regulations and DOL's contemporaneous view that underwriters are indeed exempt. The petition for certiorari should be granted.

A. The Decision Below Deepens An Acknowledged Circuit Conflict

This case implicates a clear circuit conflict. In the decision below, the Ninth Circuit directly acknowledged that the Second and Sixth Circuits have recently "assessed whether mortgage underwriters qualify for FLSA's administrative exemption and have come to opposite conclusions." App. at 8a (emphasis added). The Ninth Circuit adopted the reasoning and conclusion of the Second Circuit's decision in *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2416 (2010), and it rejected the Sixth Circuit's analysis in *Lutz v. Huntington*

Bancshares, Inc., 815 F.3d 988 (6th Cir.), *cert. denied*, 137 S. Ct. 96 (2016). App. 8a-10a. Certiorari is warranted to resolve that conflict and ensure that the FLSA is applied the same way across the country.

1. In *Davis*, the Second Circuit addressed the same issue presented here—whether mortgage underwriters qualify as FLSA-exempt "administrative" employees. 587 F.3d at 530. As in this case, the *Davis* underwriters "evaluated whether to issue loans to individual loan applicants" by considering the applicant's income, credit history, and other characteristics in light of a "detailed set of guidelines" prescribed by the bank. *Id.* The underwriters were expected to approve loans that satisfied the guidelines, but they had "some ability to make exceptions or variances to implement appropriate compensating factors" if the guidelines were not satisfied. *Id.* at 531.

The Second Circuit held that mortgage underwriters are *not* exempt "administrative" employees. *Id.* at 531-37. It explained that DOL regulations and relevant precedent recognize the importance of the "administrative/production dichotomy" to determining whether the employee's work is "directly related to management policies or general business operations" under the operative DOL regulation. *Id.* at 532. It noted that "[e]mployment may thus be classified as belonging in the administrative category, which falls squarely within the administrative exception, or as production/sales work, which does not." *Id.* at 531-32. It reasoned that underwriters' core job function involves "the 'production' of loans—the fundamental services provided by the bank." *Id.* at 534. And it concluded

that "the job of underwriter ... falls under the category of production rather than of administrative work." *Id.* at 535.

In the Ninth Circuit, respondent argued that *Davis* "provides compelling legal analysis of nearly identical facts," and she invited the court to "adopt *Davis*'s holding and analysis." CA9 Resp't Br. 43; *see also id.* at 2, 25, 41-45, 60 (further endorsing *Davis*); CA9 Resp't Reply Br. 2, 7, 11 n.4 (same). The Ninth Circuit accepted that invitation wholeheartedly. The court agreed "that the Second Circuit's analysis in *Davis* should apply," and it quoted from—and embraced—*Davis*'s explanation of why underwriters do not qualify as "administrative" employees. App. 9a-10a.

2. Unlike the Second and Ninth Circuits, the Sixth Circuit has expressly held that mortgage underwriters *are* FLSA-exempt "administrative" employees. *See Lutz*, 815 F.3d at 990-98.

In *Lutz*, the Sixth Circuit addressed mortgage underwriters who—like those in *Davis* and in this case—evaluated loan applications in light of established guidelines and decided whether the bank should ultimately make each loan. *Id.* at 990-91. The court noted the administrative/production dichotomy, but it explained that the underwriters' work is properly classified as "administrative" because they "assist in the running and servicing of the Bank's business by making decisions about when [the Bank] should take on certain kinds of credit risk, something that is ancillary to the Bank's principal production activity of selling loans." *Id.* at 993 (applying 29 C.F.R. § 541.201(a); *see also id.* at 994 ("[T]he underwriter services the Bank by advising [the Bank] on whether it should accept the credit risk posed by a customer."). The Sixth Circuit's

conclusion that underwriters fall on the administrative side of the dichotomy—and are thus FLSA-exempt—squarely conflicts with the contrary holdings of the Second and Ninth Circuits. *See* App. 8a-10a; *Davis*, 587 F.3d at 535.

The Sixth Circuit's analysis in *Lutz* also diverges from those circuits in other ways. For one thing, the Sixth Circuit relied on the fact that the work performed by mortgage underwriters "resemble[s] those duties of administratively exempt employees in the financial-services industry"—a category expressly identified as exempt in DOL's regulations. *Lutz*, 815 F.3d at 994-95; *see* 29 C.F.R. § 541.203(b). By contrast, the Ninth Circuit expressly rejected Provident's argument that the financial-services regulation supports treating underwriters as exempt. App. 13a-14a.

Moreover, although the Sixth Circuit acknowledged DOL's 2010 letter treating mortgage *loan officers* as non-exempt, it explained that the letter "does not offer meaningful guidance" with respect to mortgage *underwriters*, who perform very different functions. *Lutz*, 815 F.3d at 994 n.2. By contrast, the Ninth Circuit's decision relied on the 2010 DOL letter and dismissed the significance of any difference in job duties between loan officers and underwriters. App. 13a.

Finally, *Lutz* expressly confronted—and rejected—the Second Circuit's analysis in *Davis*. 815 F.3d at 995-96. The Sixth Circuit explained that although "*Davis* is factually similar," the Second Circuit's holding there is "inconsistent with the precedent of this circuit." *Id.* at 995. The Sixth Circuit explained that "[i]n this circuit, the focus is on whether an employee helps run or

service a business—not whether that employee's duties merely touch on a production activity." *Id.* The Ninth Circuit's decision in this case expressly acknowledged *Lutz*'s "disagree[ment] with the Second Circuit." App. 9a. And at respondent's urging, the court rejected *Lutz* in favor of *Davis*. *Id.* at 9a-10a; CA9 Resp't Reply Br. 14-15.[4]

3. The circuit split over whether mortgage underwriters qualify for the FLSA's "administrative" exemption is thus undeniable. Indeed, commentators, practitioners, and news outlets have repeatedly noted the square conflict between the Sixth Circuit (on the one hand) and the Second and Ninth Circuits (on the other).[5] As one set of observers has noted, the Ninth

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[4] Numerous district courts have independently reached the same basic conclusion in cases involving the same or similar facts. *See, e.g.*, App. 21a-29a; *Lutz v. Huntington Bancshares Inc.*, No. 2:12-cv-01091, 2014 WL 2890170, at *6-*20 (S.D. Ohio June 25, 2014); *Whalen v. J.P. Morgan Chase & Co.*, 569 F. Supp. 2d 327, 330-33 (W.D.N.Y. 2008) (later reversed in *Davis*); *Havey v. Homebound Mortg., Inc.*, No. 2:03-CV-313, 2005 WL 1719061, at *2-*7 (D. Vt. July 21, 2005); *see also Maddox v. Continental Cas. Co.*, No. CV 11-2451-JFW (PLAx), 2011 WL 6825483, at *4-*7 (C.D. Cal. Dec. 22, 2011) (insurance underwriter); *Edwards v. Audubon Ins. Grp., Inc.*, No. 3:02-CV-1618-WS, 2004 WL 3119911, at *3-*7 (S.D. Miss. Aug. 31, 2004) (insurance underwriter).

[5] *See, e.g.*, Practical Law Litigation Speedread, *FLSA's Administrative Exemption: Ninth Circuit* (Aug. 1, 2017); 3 *Emp. Coord. Compensation* §§ 3:38, 3:86 (Aug. 2017, Westlaw); Freeland Cooper, *Mortgage Loan Underwriters Aren't Exempt 'Administrative' Employees*, 27 No. 20 Cal. Emp. L. Letter 11 (2017); Practical Law Labor & Employment, *FLSA's Administrative Exemption Does Not Apply to Mortgage Underwriters: Ninth Circuit* (July 11, 2017); Daniel Wiessner, *9th Circuit deepens split on OT pay for mortgage underwriters*, Reuters Legal (July 5, 2017); Ronald Miller, *Mortgage underwriters not exempt from overtime under administrative*

Circuit's decision in this case deepens the preexisting split of authority, "creates more questions than answers for employers seeking to classify their workforce," and thus "calls out for Supreme Court review."[6] The only way to ensure that the FLSA is applied fairly and evenhandedly across the country is thus for this Court to grant review and resolve the confusion itself.

B. The Question Presented Is Important And This Case Is An Excellent Vehicle

The clear and deepening split of authority over the FLSA status of mortgage underwriters is more than sufficient to justify certiorari. But here the case for review is bolstered by the undeniable importance of the question presented to banks and underwriters alike. That question is frequently litigated in FLSA collective actions, especially in recent years. And this case offers a clean vehicle in which to settle the issue.

1. Whether the FLSA entitles mortgage underwriters to overtime pay has practical and economic significance in the daily lives of tens of thousands of underwriters—and in the operations of thousands of banks—across the country. The issue is especially significant for banks with branches in multiple States, insofar as the circuit conflict now

employee exemption, Wolters Kluwer Employment Law Daily (July 7, 2017), http://www.employmentlawdaily.com/index.php/news/mortgage-underwriters-not-exempt-from-overtime-under-administrative-exemption/; Gerald E. Rosen *et al.*, *Rutter Group Practice Guide: Federal Employment Litigation*, ch. 6-B, § 6:255 (June 2017 update).

[6] John Giovannone *et al.*, *Making A Mountain Of The Administrative/Production Dichotomy* (July 31, 2017), http://www.wagehourlitigation.com.

subjects their identically-situated employees to different rules.

As noted, there are close to 7,000 banks and other financial institutions currently issuing residential mortgage loans in the United States. *Residential Mortgage Lending* at 21; *see supra* at 9-10. Each year, such banks receive more than 12 million residential mortgage loan applications and—under the guidance of mortgage underwriters—they ultimately issue more than 7 million home loans. *Residential Mortgage Lending* at 4. Assuming that each underwriter processes roughly 10 residential applications each week, *see* ER 587-90, that means there are tens of thousands of underwriters working on such mortgages throughout the United States. Those numbers do not account for the work performed by thousands of additional underwriters who evaluate applications for non-residential mortgages.

It is obviously important for all of these underwriters and their employers to know—with certainty—whether or not they are entitled to overtime pay under the FLSA. It is unfair and inefficient to expect them to bargain over salary and benefits without also knowing whether the FLSA requires overtime pay. After all, underwriters can sometimes work long hours, and overtime pay is potentially a significant component of their overall compensation. And employers must know whether to factor mandatory overtime pay into their expected labor costs. Employers also need to know whether they must establish the cumbersome policies and procedures necessary to keep accurate records of every hour each underwriter works each week. *See* 29 C.F.R.

§ 516.2 (setting forth FLSA recordkeeping requirements).

Over the years, DOL has emphasized the importance of clarity with respect to the scope of the FLSA's white-collar exemption. In 2003, DOL lamented that the exemption had "engendered considerable confusion over the years regarding who is, and who is not, exempt." 2003 Proposed Rule, 68 Fed. Reg. at 15,560. When DOL issued revised regulations the following year, it explained that the changes were necessary because the "[t]he existing regulations are very difficult for the average worker or small business owner to understand." 2004 Final Rule, 69 Fed. Reg. at 22,122. Indeed, DOL confessed that the existing rules were "so confusing, complex and outdated that often employment lawyers and even [DOL] Wage and Hour Division investigators, ha[d] difficulty determining whether employees qualify for the exemption." *Id.*

But despite DOL's best efforts, the uncertainty has persisted. *See supra* at 17-22. A recent report by the Government Accountability Office noted that even after the 2004 regulations, "there is still significant confusion among employers about which workers should be classified as exempt." U.S. Gov't Accountability Office, *Fair Labor Standards Act: The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance* 11-12 (2013) (*GAO Report*). The GAO recognized the harm caused by such uncertainty, and its principal recommendation was thus for DOL to "develop a systematic approach for identifying areas of confusion" about the FLSA and "improv[e] the guidance it provides to employers and workers." *Id.* at 23.

The DOL and GAO are right: Clarity over the FLSA's scope is essential. That is especially true with respect to the specific question presented in this case, which directly and tangibly affects so many banks and mortgage underwriters nationwide.

2. Given the stakes, it is unsurprising that the FLSA's application to mortgage underwriters has been an especially hot topic of litigation, especially in recent years. The past quarter century has seen a general explosion in FLSA litigation, with total FLSA filings rising 583% between 1991 and 2016.[7] A recent GAO study found that 95% of FLSA cases involve allegations that the employer failed to pay overtime, and 16% involve allegations that the employee was improperly classified as FLSA-exempt. *GAO Report* 14-16. Indeed, in 2013 respondent's counsel boasted that their law firm had *itself* already "litigated *ten* FLSA cases on behalf of mortgage underwriters." *Latham v. Branch Banking & Tr. Co.*, No. 1:12-cv-00007, 2014 WL 464236, at *1 (M.D.N.C. Jan. 14, 2014) (emphasis added).

The Ninth Circuit's ruling here will only accelerate the trend. Mortgage underwriters within the Ninth Circuit—and there are many of them[8]—will likely

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[7] *See* Federal Judicial Caseload Statistics Table C-2 (2016), http://www.uscourts.gov/sites/default/files/data_tables/fjcs_c2_0331.2016.pdf (noting 9,063 FLSA filings in 2016); *GAO Report* 7 (noting 1,327 FLSA filings in 1991).

[8] *See* Consumer Financial Protection Bureau, *The Home Mortgage Disclosure Act: Mortgage volume*, https://www.consumerfinance.gov/data-research/hmda/ (last accessed Aug. 25, 2017) (providing 2015 state-by-state data for residential mortgage origination volume showing that nearly one-quarter of all residential mortgage loans are originated within the Ninth Circuit).

jump to file claims under the newly-favorable circuit precedent. And underwriters elsewhere will try to piggyback on the Ninth Circuit's analysis and establish similar precedent in their own jurisdictions.

By granting certiorari, this Court can stem the rising tide in FLSA mortgage-underwriter cases and avoid unnecessary litigation—regardless of how the Court ultimately decides the merits. If Provident (and the Sixth Circuit) are proven right that underwriters are exempt from the FLSA, then the flood of cases will dry up entirely. And if respondent (and the Second and Ninth Circuits) prevail, then underwriters and employers across the country can understand their legal rights and obligations and bargain over the terms of employment with the benefit of that knowledge. Either way, clarifying the rules of the road will help unclog the judicial system and avoid millions of dollars in legal expenses.[9]

3. This case presents an ideal vehicle for resolving the question presented and clarifying the

[9] This case focuses on the FLSA status of *mortgage* underwriters. But the resolution of that question will also shed light on the FLSA status of *insurance* underwriters. Such employees "[r]eview individual applications for insurance to evaluate degree of risk involved and determine acceptance of applications," and they therefore perform essentially the same risk-management functions for insurance companies that mortgage underwriters perform for banks. O*NET OnLine, *Summary Report for: 13-2053.00—Insurance Underwriters* (2016), https://www.onetonline.org/link/summary/13-2053.00. DOL's Bureau of Labor Statistics reports that there are more than 90,000 insurance underwriters now working in the United States. *See* Bureau of Labor Statistics, *Occupational Employment and Wages, May 2016: 13-2053 Insurance Underwriters*, https://www.bls.gov/oes/current/oes132053.htm#nat (last updated Mar. 31, 2017).

FLSA status of mortgage underwriters. The key facts relating to the underwriters' duties are either undisputed or were resolved the same way by both lower courts. *See* App. 2a-3a, 19a-21a. And the duties of the underwriters here are customary within the mortgage industry as a whole. The core disagreement over whether underwriters qualify as FLSA-exempt "administrative" employees is cleanly presented; indeed, that legal issue was the *only* issue contested below. Moreover, resolution of that question—in either direction—would entirely dispose of respondent's claims. The Court can use this case to settle that important issue once and for all.

C. The Decision Below Is Wrong

Certiorari is also warranted because the Ninth Circuit's decision is mistaken. Mortgage underwriters assist with the "running" and "servicing" of their bank's business by assessing whether the bank should risk its own money by making loans to particular borrowers, and they therefore plainly qualify as exempt "administrative" employees under the FLSA and DOL's regulations. 29 C.F.R. § 541.201(a). The Ninth Circuit's contrary conclusion rests on multiple legal errors and should not stand.

1. Mortgage Underwriters Unambiguously Qualify As Exempt Under DOL's Regulations

a. Because the FLSA does not define "administrative," courts have looked to DOL's regulations in determining the scope of the exemption for "administrative" employees. *See* 29 U.S.C. § 213(a)(1) (authorizing DOL to "define[]" the key terms of the white-collar exemption). DOL's

regulations state that to qualify as an FLSA-exempt "administrative" employee, an employee must (1) earn at least $455 per week, (2) primarily perform "office or non-manual work directly related to the management or general business operations of the employer or the employer's customers," and (3) have a primary duty that includes "the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a) (effective until Dec. 1, 2016). The first requirement is not at issue here, as respondent earned a salary of $7,000 per month—well in excess of the threshold. *See* App. 6a; SER 13-14.

As to the second requirement, DOL's regulations state that an exempt employee "must perform work directly related to assisting with the running or servicing of the business." 29 C.F.R. § 541.201(a). The regulations distinguish those functions from "working on a manufacturing product line or selling a product in a retail or service establishment." *Id.*

Mortgage underwriters plainly satisfy DOL's second requirement for "administrative" employees. As explained above, the underwriters' core function is to facilitate the bank's determination whether to assume the risk of making loans to particular customers. *See supra* at 10-12. In most cases, underwriters themselves make the ultimate decision to accept or reject a particular loan application, and in some cases they make recommendations subject to further review. Either way, their work is "directly related" to a core business decision that the bank must make—whether or not to assume the risk by approving a given loan product to a given customer at a given time. 29 C.F.R. § 541.201(a). Their work therefore

directly "assist[s] with the running or servicing of the business." *Id.*; *see Lutz*, 815 F.3d at 993 ("[T]he underwriters exist primarily to service the Bank by advising whether it should accept the credit risk posed by its customers.").

Mortgage underwriters also satisfy DOL's third requirement for the "administrative" employee exemption: They exercise "discretion and independent judgment" with respect to "matters of significance." 29 C.F.R. § 541.200(a)(3). Among other things, as the district court explained, underwriters are responsible for deciding whether and when to seek exceptions from the guidelines by imposing additional conditions on an otherwise acceptable loan, making counteroffers, or advising the bank to issue loans that might otherwise not qualify. App. 27a-29a; *see Lutz*, 815 F.3d at 996-98. And it should go without saying that the decision to extend hundreds of thousands of dollars of credit to a potential borrower constitutes a "matter[] of significance." 29 C.F.R. § 541.200(a)(3).

b. For those reasons, mortgage underwriters qualify as FLSA-exempt "administrative" employees under a straightforward application of DOL's three-prong test. Other aspects of DOL's 2004 regulations reinforce that conclusion.

In particular, underwriters qualify as exempt under DOL's regulation specifically addressing "[e]mployees in the financial services industry." 29 C.F.R. § 541.203(b). Banks unambiguously offer "financial services," and mortgage underwriters perform the identified duties of (1) "collecting and analyzing information regarding [a] customer's income, assets, investments or debts"; (2) "determining which financial products best meet the customer's needs and financial

circumstances"; and (3) "servicing ... the employer's financial products." *Id.*; *see also Lutz*, 815 F.3d at 994-96 (relying on financial-services provision in holding that mortgage underwriters are FLSA-exempt).

Any doubt about that is resolved by DOL's regulatory impact analysis—which was issued as part of the 2004 Final Rule. The impact analysis directly addressed "underwriters" and concluded that they overwhelmingly are exempt. *See supra* at 9. As noted above, that determination was made by "experienced" DOL Wage & Hour Division personnel who considered the generic duties associated with each function and exercised "expert judgment" in assessing the probability of exemption. 2004 Final Rule, 69 Fed. Reg. at 22,198. Using that method, DOL treated "underwriters" as having a "High Probability of Exemption"—between 90 and 100%. *Id.* at 22,200, 22,244, 22,248. That conclusion makes sense only because DOL recognized—consistent with analysis above—that as a general matter underwriters satisfy the regulatory definition of "administrative" employee.

The duties of mortgage underwriters are also comparable to those performed by FLSA-exempt "credit manager[s]." *See* 29 C.F.R. § 541.703(b)(7). Just like credit managers, underwriters "administer[] the credit policy of the employer" by assessing the credit risks associated with particular customers and deciding whether the employer should assume those risks by agreeing to particular transactions. *Id.* Here, it is undisputed that Provident's underwriters have the authority to bind Provident to make loans of hundreds of thousands of dollars "with a single signature." Pls. SUF 4. DOL's regulations unambiguously state that credit managers are exempt from the FLSA due to the

nature of their work. *See* 29 C.F.R. § 541.703(b)(7). The same conclusion follows for underwriters, who perform essentially the same function. *See generally Whalen v. J.P. Morgan Chase & Co.*, 569 F. Supp. 2d 327, 330 (W.D.N.Y. 2008).[10]

2. The Ninth Circuit Misinterpreted And Misapplied The Regulations

The Ninth Circuit erred in holding that mortgage underwriters are *not* FLSA-exempt "administrative" employees because their duties "go to the heart of [the employer's] marketplace offerings." App. 7a; *see also id.* at 16a. Three features of that court's analysis are especially problematic.

a. Most fundamentally, the Ninth Circuit mistakenly applied the so-called "administrative-production dichotomy." *See id. at* 7a-10a. Rather than simply applying the regulatory definition governing who counts as an "*administrative*" employee, the court appeared to believe that any employee whose "duties go to the heart [of the employer's] marketplace offerings" necessarily qualify as *production* employees who are therefore not exempt. *Id.* at 7a. The court

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[10] In evaluating loans for *resale* to private lenders on the secondary market, Provident's underwriters also perform an important quality control function. *See supra* at 13-14. They also serve as a sort of purchasing agent, insofar as they make decisions about whether the bank should "purchase" particular IOUs from borrowers for purposes of eventual re-sale. DOL's regulations are explicit that employees who perform "quality control," engage in "purchasing," and serve as "[p]urchasing agents" qualify as exempt "administrative" employees. 29 C.F.R. §§ 541.201(b), 541.203(f). Those regulations confirm that Provident's underwriters are not subject to the FLSA's overtime requirements.

held that underwriters are non-administrative production employees because the loans within their purview constitute the marketplace offerings of the bank and thus "relate[] to the production side of the enterprise." *Id.* at 16a. That conclusion is flawed several times over.

For one thing, the "administrative/production dichotomy" is not a hard-and-fast rule. DOL's regulations note that the dichotomy is useful in making clear that employees who "work[] on a *manufacturing* production line" are not exempt from the FLSA. 29 C.F.R. § 541.201(a) (emphasis added). But it is far less useful when the employee at issue is a white-collar employee who does not "produc[e]" a product or service in any traditional sense. *Id.*; *see, e.g.*, *Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 872 (7th Cir. 2008) (noting limited utility of "the so-called production/administrative dichotomy—a concept that has an industrial age genesis"—in the modern economy).

For that reason, DOL has explained that it does not "believe that the dichotomy has ever been or should be a dispositive test for exemption." 2004 Final Rule, 69 Fed. Reg. at 22,141. On the contrary, DOL's view is that the dichotomy is generally "illustrative—but not dispositive," and that it is "only determinative if the work 'falls squarely on the production side of the line.'" *Id.* The Ninth Circuit paid lip service to that understanding, App. 8a, but it nonetheless applied the dichotomy as a rigid either/or rule when analyzing mortgage underwriters, *id.* at 7a-10a.

Here, of course, underwriters do *not* "squarely" fall on the production—as opposed to administrative—side of the line. As explained above, underwriters are

plainly covered by DOL's regulatory definition of "administrative." *See supra* at 27-31. Moreover, underwriters do not *produce* anything. Their core function is to assess the credit risks associated with borrowers and to decide whether the bank should approve or deny a particular loan. Even with respect to those loans, their role is to help the bank make and execute core business decisions about whether to make a given loan to a given borrower; they do not *produce* the loan in any meaningful sense.

In classifying the underwriters as production employees, the Ninth Circuit asserted that "Provident's mortgage underwriters do not decide if Provident *should* take on risk, but instead assess whether, given the guidelines provided to them from above, the particular loan at issue falls within the range of risk Provident has determined it is willing to take." App. 9a. Even if that characterization were fair, it would not support treating the underwriters' work as analogous to production, as opposed to administration. The fact that underwriters make loan decisions on a customer-by-customer basis does not detract from their key role in carrying out (and advising on) the bank's business operations.

In any event, the Ninth Circuit's characterization overlooks the undisputed ways in which Provident's underwriters in fact exercise significant judgment and discretion. And DOL has made clear that an employee who executes employer policies and relies on technical manuals or guidelines can nonetheless qualify for "administrative" status. *See* 2004 Final Rule, 69 Fed. Reg. at 22,141 (explaining that employees with "policy-executing responsibilities" are covered (quotation marks omitted)); *see also* 29 C.F.R. § 541.704.

Finally, the Ninth Circuit was wrong to conclude that an employee's duties "relate[] to the production side of the enterprise"—and thus entitle him to FLSA overtime pay—whenever they "go[]," in some general sense, "to the heart [of the employer's] marketplace offerings." App. 16a. Indeed, DOL's regulations themselves make clear that *many* exempt "administrative" employees perform tasks that are directly related to their company's "marketplace offerings."[11] The Ninth Circuit's vague test is inconsistent with those regulations and dramatically shrinks the scope of the "administrative" exemption in a way that neither Congress nor DOL intended.

b. The Ninth Circuit's analysis of various aspects of DOL's regulations and interpretive guidance was also flawed. The court did not address—let alone attempt to explain—how underwriters can be deemed non-exempt despite DOL's clear conclusion in the 2004 Final Rule's regulatory impact analysis that "underwriters" *are* exempt. *See supra* at 9, 30. And although the court *did* address the DOL regulation expressly applying the exemption to certain financial-services employees, it mistakenly concluded that

[11] *See, e.g.*, 29 C.F.R. § 541.201(b) (employees involved in "quality control," "purchasing," "procurement," "advertising," "marketing," "research," "legal and regulatory compliance"); *id.* § 541.203(a) (insurance claims adjusters); *id.* § 541.203(c) (employee who leads a team "negotiating a real estate transaction"); *id.* § 541.203(f) (purchasing agent); *id.* § 541.203(i) (retail buyer "who evaluates . . . reports on competitor prices [and] set[s] the employer's prices"); *id.* § 541.703(b)(7) (credit manager who is responsible for deciding whether to extend credit to particular customers for particular transactions and/or "check[s] the status of accounts to determine whether [a customer's] credit limit would be exceeded by the shipment of a new order").

mortgage underwriters cannot qualify for that exemption simply because they do not "advis[e]" a bank's customers or "promot[e]" the bank's financial products. App. 5a (quoting 29 C.F.R. § 541.203(b)). The fact that underwriters do not perform such duties does not change the fact that their core responsibilities fall squarely within the terms of DOL's financial-services provision. *See supra* at 29-30.

The Ninth Circuit also invoked DOL's 2010 letter deeming mortgage loan officers non-exempt. App. 13a. Even if that letter reflected a valid interpretation of DOL's regulations, it cannot seriously be disputed that the letter's analysis was driven almost entirely by DOL's conclusion that loan officers have a "primary duty of *making sales for their employer*." 2010 DOL Letter 9; *see generally id.* at 3-9. But this case involves mortgage underwriters (not loan officers), and it is undisputed that those underwriters do *not* engage in selling. App. 13a. If anything, the 2010 DOL letter's emphasis on the loan officers' selling responsibilities shows that DOL does not agree with the Ninth Circuit's view that an employee is a non-exempt production worker simply because his duties implicate the employer's "marketplace offerings" in some more general sense. *See id.* at 16a.

c. Finally, the Ninth Circuit erred by resting its entire analysis on its mistaken view that "the law requires that we construe the administrative exemption narrowly against the employer." *Id.* at 15a; *see also id.* at 5a. That principle flows directly from the discredited notion that courts must interpret "remedial" statutes broadly. This Court has rightly described that narrow-construction canon as the "last redoubt of losing causes." *Director, Office of Workers'*

Comp. Programs v. Newport News Shipbuilding, 514 U.S. 122, 135-36 (1995); *see generally* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 364-66 (2012) (describing canon as "incomprehensible," "superfluous," and "false").

Nothing in the FLSA's text or purpose justifies interpreting the "administrative" exemption with a heavy thumb on the scale against the employer. Perhaps for that reason, this Court has pointedly refused to apply the canon in recent FLSA cases. *See Sandifer v. United States Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 164 n.21 (2012); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2131 (2016) (Thomas, J. dissenting) (describing canon as "made-up"). The Ninth Circuit was wrong to allow the canon to infect its analysis here.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX