No. 00-____

IN THE

Supreme Court of the United States

BRIAN SNAPP,

Petitioner,

v.

UNLIMITED CONCEPTS, INC.,
d/b/a Ramshackle's Cafe, and GLEN GERKIN,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Labor Standards Act (FLSA) provides, *inter alia*, that an employer who violates its anti-retaliation provision "shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of [the anti-retaliation provision], including, without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional amount as liquidated damages." 29 U.S.C. § 216(b). The question presented is: Did the Eleventh Circuit err in holding, in open and acknowledged conflict with the Seventh Circuit, that the relief available for violation of the FLSA's anti-retaliation provision does not include punitive damages?

PARTIES TO THE PROCEEDINGS BELOW

The plaintiff-appellant below, and petitioner in this court, is Brian Snapp.

The defendants-appellees in the Middle District of Florida and in the Eleventh Circuit, and respondents in this Court, are Unlimited Concepts, Inc., doing business as Ramshackle's Cafe, and Glen Gerkin.

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Page

Cases

Statutes

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Petitioner Brian Snapp respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

This case was tried before a jury in the United States District Court for the Middle District of Florida and resulted in a verdict for petitioner awarding both compensatory and punitive damages. The district court subsequently granted defendants' motion for judgment as a matter of law, vacating the punitive damages award. The district court's order is unpublished and is attached as Appendix B. The opinion of the Eleventh Circuit affirming the denial of punitive

damages is reported at 208 F.3d 928 and is attached as Appendix A. The Eleventh Circuit's denial of the petition for rehearing *en banc* is unreported and is attached as Appendix C.

JURISDICTION

The Eleventh Circuit entered its judgment on April 5, 2000 and denied the petition for rehearing *en banc* on August 3, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The anti-retaliation provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3), makes it unlawful to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." The damages provision applicable to violations of the anti-retaliation provision provides that "[a]ny employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, *including without limitation* employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." 29 U.S.C. § 216(b) (emphasis added). Sections 215 and 216 are set out in their entirety as Appendix D.

STATEMENT OF THE CASE[1]

Petitioner Brian Snapp was formerly employed as a waiter by respondent Unlimited Concepts, Inc., which was doing business as the Ramshackle's Cafe. Believing that his pay did not comply with the FLSA's minimum wage and overtime provisions, petitioner complained in writing to the Department of Labor. When petitioner's boss, respondent Glen Gerkin, discovered that petitioner had contacted the Department, Gerkin fired petitioner. Petitioner thereafter sued respondents for violations of the FLSA's minimum wage, overtime, and anti-retaliation provisions.

The case was tried to a jury, which found respondents guilty of violating the overtime and anti-retaliation provisions of the FLSA. The jury awarded petitioner $200 in overtime wages, $1000 in lost wages due to the retaliatory discharge, and $35,000 in punitive damages on the retaliation claim. The jury also recommended that respondent Gerkin be individually liable for thirty percent of the punitive damages.

Following the verdict, the district court partially granted respondents' motion for judgment as a matter of law, holding that punitive damages were not available under 29 U.S.C. § 216(b) in suits for retaliation under of the FLSA. The court thus vacated the $35,000 punitive damage award, left intact the $1,200 in compensatory damages, and then awarded liquidated damages in an equal amount, raising the total damage award to $2,400, which was assessed entirely against respondent Unlimited Concepts. Petitioner Snapp appealed.

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[1] Unless otherwise noted, the facts are taken from the Eleventh Circuit's opinion, attached as Appendix A.

The Eleventh Circuit affirmed. The court recognized the contrary holding by the Seventh Circuit, per Judge Easterbrook, in *Travis* v. *Gary Community Mental Health Center, Inc.*, 921 F.2d 108 (CA7 1990), cert. denied, 502 U.S. 812 (1991), and expressly "disagree[d] with the Seventh Circuit's conclusion that punitive damages are available under section 216(b)." *Snapp*, 208 F.3d at 933. Despite recognizing that the statutory authorization of "legal or equitable relief" provided a "broad formulation," and despite the statute's inclusion of examples in § 216(b) "without limitation," the Eleventh Circuit nonetheless held that each example of relief – employment, reinstatement, promotion, wages lost, liquidated damages – was compensatory in nature and purported to apply the principle of *ejusdem generis* to limit the available "legal" relief to compensatory damages. 208 F.3d at 934. The court further argued that because § 216(a) included the possibility of fines and imprisonment in section 216(a), "Congress has already covered punitive sanctions … and there is simply no reason to carry the punitive element over from section 216(a) to section 216(b)." 208 F.3d at 935.[2] The Eleventh Circuit also offered the argument, without supporting authority, that punitive damages, if allowed, "would flow inexorably from any finding" of retaliation, and such inevitability would upset a remedial scheme that "did not intend punitive sanctions to be imposed in all retaliation cases." 208 F.3d at 936.

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[2] Judge Carnes specially concurred in order to "disagree with … the proposition that Congress' provision for criminal penalties, see 29 U.S.C. § 216(a), indicates an intent to exclude punitive damages. Tellingly, the majority opinion cites no authority for that counter-intuitive proposition. The provision of criminal penalties means Congress thought compliance with the statute sufficiently important that willful violation of it should subject the culprit to the possibility of criminal prosecution and penalties upon conviction. That hardly forecloses punitive damages." 208 F.3d at 239-40 (Carnes, J., specially concurring). Judge Carnes agreed, however, with other portions of the court's opinion and with the result. *Id*. at 940.

Petitioner sought rehearing *en banc*, which was denied without comment. This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Eleventh Circuit's decision directly and avowedly conflicts with the decision of the Seventh Circuit in *Travis* and with district court decisions from other circuits. The question presented raises an important national issue affecting myriad persons and entities subject to and protected by the FLSA and has significant consequences for the interpretation of damages provisions in numerous other statutes.

I. THIS CASE PRESENTS AN EXPRESS CIRCUIT SPLIT OVER WHETHER PUNITIVE DAMAGES ARE AVAILABLE IN RETALIATION SUITS UNDER THE FLSA.

The Eleventh Circuit's decision in this case expressly rejects the conflicting decision of the Seventh Circuit in *Travis*. See *Snapp*, 208 F.3d at 933 ("We disagree with the Seventh Circuit's conclusion that punitive damages are available under section 216(b)"); *id.* at 935 ("We disagree with the Seventh Circuit's contention that Congress has 'left [the issue of appropriate remedies in retaliation cases] to the courts.' *Travis*, 921 F.2d at 111.") (alteration in CA11 original). The Eleventh Circuit's denial of rehearing *en banc* demonstrates that it is firm in its resolve concerning the split it created. The Seventh Circuit is similarly firm in its convictions regarding the availability of punitive damages in retaliation cases, having denied rehearing *en banc* in *Travis*, and continuing to apply that decision in subsequent cases. See *Shea* v. *Galaxie Lumber & Constr. Co.*, 152 F.3d 729, 735-36 (CA7 1998) (citing *Travis* and reinstating jury award of punitive damages for FLSA retaliation claim); *Moskowitz* v. *Trustees of Purdue Univ.*, 5 F.3d 279, 284 (CA7 1993) (Posner, J.) ("*Travis* and *Soto* rely on a specific amendment to the provision of

the Fair Labor Standards Act regarding retaliation, an amendment that appears to make clear that Congress meant to enlarge the remedies available for such misconduct beyond those standardly available for FLSA (and ADEA) violations."); *Soto* v. *Adams Elevator Equip. Co.*, 941 F.2d 543, 551 (CA7 1991) (applying *Travis* to Equal Pay Act retaliation claim, which utilizes the same FLSA damages provisions). Given the knowing creation of an express and firm split by the Eleventh Circuit, this Court's intervention will be required if the division in the courts of appeals is to be resolved.

In addition to the square and acknowledged split between the Seventh and Eleventh Circuits, the Ninth Circuit has indicated its agreement with the *Travis* decision. See *Williamson* v. *General Dynamics Corp.*, 208 F.3d 1144, 1153 (CA9) (holding that the FLSA provided broader remedies than state law and hence would not be construed to preemptively narrow remedies available under state law based on its recognition that "Congress amended section 216(b) to allow plaintiffs who prove retaliation under section 215(a)(3) to obtain 'legal and equitable relief' under state law" and "[a]t least one other circuit has interpreted this relief to include compensatory, punitive, and emotional distress damages. See, e.g., [*Moskowitz* and *Travis*]."), cert. denied, -- S. Ct. -- (2000); *Lambert* v. *Ackerley*, 180 F.3d 997, 1011 (CA9 1999) (*en banc*) (noting that "[a]lthough the Seventh Circuit's reasoning [in *Travis*] is persuasive, we do not reach the question because the defendants have waived the issue"), cert. denied, 120 S. Ct. 936 (2000); see also *Contreras* v. *Corinthinan Vigor Insurance Brokerage, Inc.*, 25 F. Supp.2d 1053, 1059-60 (N.D. Cal. 1998) ("there is ample reason to believe [the Ninth Circuit] would agree with the reasoning of the Seventh Circuit" in awarding punitive damages under the FLSA).

The First Circuit, with then-Judge Breyer on the panel, has also indicated its agreement with *Travis*, citing it to support the availability of punitive damages under the similarly worded language of the anti-retaliation provision of the Occupational Safety and Health Act, 29 U.S.C. § 660(c)(2). *Reich* v. *Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1190, 1192 (CA1 1994) (in retaliation suit brought by Secretary of Labor, statute providing for "all appropriate relief including rehiring or reinstatement of the employee to his former position with backpay" did not limit the available relief to the included examples and authorized recovery of punitive damages).

In addition to the circuit conflict, district courts in several circuits have reached conflicting results on whether punitive damages are available in retaliation suits under the FLSA. Compare *Contreras*, 25 F. Supp.2d at 1059-60 (N.D. Cal. 1998) (following *Travis* and allowing recovery of punitive damages for violation of the FLSA's retaliation provision), *O'Brien* v. *Dekalb-Clinton Counties Ambulance Dist.*, 1996 WL 565817, *6 (W.D.Mo. 1996) (following *Travis* and allowing claim for punitive damages for retaliation under FLSA), and *Martin* v. *American Int'l Knitters Corp.*, 1992 WL 108832, *2 (N. Mariana Islands 1992) ("if the Secretary of Labor seeks legal or equitable relief for violation of § 215(c)(3), she has available to her the full range of remedies available to an employee under § 216(b), including a claim for punitive damages," citing *Travis*), with *Lanza* v. *Sugarland Run Homeowners Association, Inc.*, 97 F. Supp.2d 737, 739 n.6, 740 (E.D. Va. 2000) (recognizing the split between the Eleventh and Seventh Circuits as well as the split among district courts having considered the issue and siding with Eleventh Circuit in rejecting punitive damages under § 216(b)).

II. THE ELEVENTH CIRCUIT'S DECISION IS AN INCORRECT AND DESTRUCTIVE INTERPRETATION OF THE FLSA.

In addition to conflicting with a decision in the Seventh Circuit, the Eleventh Circuit's decision flies in the face of the plain language of the statute, its purposes, and numerous decisions of this Court regarding statutory construction.

The most troubling error by the Eleventh Circuit was in applying the *ejusdem generis* principle in spite of the plain language of the statute, which states that the examples were included "without limitation." Instead of obeying this express language, the Eleventh Circuit used those examples to imply the limitation that damages must only be compensatory in nature. Aside from being error as to the language of § 216(b), this disregard for statutory language is troubling because the same "including, without limitation" language appears in numerous other statutes. See, e.g., 18 U.S.C. § 1031(d) (Ch. 47 – Fraud and False Statements: "Nothing in this section shall preclude a court from imposing any other sentences available under this title, *including without limitation* a fine up to twice the amount of the gross loss or gross gain involved in the offense pursuant to 18 U.S.C. section 3571(d).") (emphasis added).[3] Congress' repeated use of

[3] See also 16 U.S.C. § 1532(8) (Ch. 35 – Endangered Species: "The term 'fish or wildlife' means any member of the animal kingdom, *including without limitation* any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.") (emphasis added); 16 U.S.C. § 1540(h) (Ch. 35 – Endangered Species: "Nothing in this chapter shall be construed as superseding or limiting in any manner the functions and responsibilities of the Secretary of the Treasury under the Tariff Act of 1930 [19 U.S.C.A. § 1202 et seq.], *including, without limitation*, section 527 of that Act (19 U.S.C. 1527), relating to the importation of wildlife taken, killed, possessed, or exported to the United States in violation of the laws or regulations of a foreign country.") (emphasis added); 22 U.S.C. § 290g-7 (Ch. 7, Subch. XXII – African Development Fund: "The agreement, *including without limitation* articles 41 through 50, shall have full force and effect in the United States, its territories and possessions, and the Commonwealth of Puerto Rico, upon the acceptance of participation by the United States

this language is an obvious and effective means of countering any inclination to apply the *ejus-dem generis* principle, and ignoring such language – as the Eleventh Circuit did here – would regularly lead to absurd results and undermine congressional intent. As this Court said in a related context, courts should "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992). In *Franklin*, this Court considered what remedies were available for an implied right of action. Lacking any express limits on remedies, the Court held that the "general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." 503 U.S. at 70-71. That general rule would seem to be all the more applicable where both the cause of action is expressly authorized and the damages are likewise authorized in broad and unlimited language such as "legal or equitable relief." Such language should not be limited absent "clear direction to the contrary." The clear direction in this case is hardly to the contrary, and in fact plainly supports the finding that the broad description of relief is "without limitation."

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in, and the entry into force of, the Fund.") (emphasis added); 25 U.S.C. § 1725(h) (Ch. 19, Subch. II – Maine Indian Claims Settlement: "no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also(2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, *including, without limitation*, laws of the State relating to land use or environmental matters, shall apply within the State.") (emphasis added, footnote omitted); 39 U.S.C. § 401(6) (The Postal Service shall have the general power "to construct, operate, lease, and maintain buildings, facilities, equipment, and other improvements on any property owned or controlled by it, *including, without limitation*, any property or interest therein transferred to it under section 2002 of this title") (emphasis added).

Even aside from the plain language basis for rejecting application of *ejusdem generis*, the structure of § 216(b) simply does not lend itself to the common formulation of that principle. The principle is typically applied to lists of items that are concluded with a broad catch-all meant not to be definitive in its own right, but rather to address mistaken exclusions from the defining list that preceded it. See *Norfolk & Western R. Co.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991) ("Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration."). The relevant terms to which the principle applies are not mere examples, but are themselves the defining items covered by the statute. *United States* v. *Aguilar*, 515 U.S. 593, 615 (1995) (Scalia, J., concurring in part and dissenting in part) ("But the rule of *ejusdem generis*, which 'limits general terms which follow specific ones to matters similar to those specified,' * * * has no application here. Although something of a catchall, the omnibus clause is not a general or collective term following a list of specific items to which a particular statutory command is applicable (e.g., 'fishing rods, nets, hooks, bobbers, sinkers, and other equipment'). Rather, it is one of the several distinct and independent prohibitions contained in § 1503[.]") (citations omitted).

In the FLSA, the broad language "legal or equitable relief" does not come as the catch-all tail to an otherwise operative list of covered items, but rather is the central and exclusive operative component of the statutory authorization. The examples "include[ed] without limitation" are merely that – examples, not the defining limits of the far broader phrase. In construing the structurally similar provision that an interstate carrier in an approved consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to

let [it] carry out the transaction," 49 U.S.C. § 11341(a), this Court squarely rejected use of the *ejusdem generis* principle to limit a broad operative phrase followed by examples:

> [T]he otherwise general term "all other law" "includ[es]" (but is not limited to) "State and municipal law." This shows that "all other law" refers to more than laws related to antitrust. Also, the fact that "all other law" entails more than "the antitrust laws," but is not limited to "State and municipal law," reinforces the conclusion, inherent in the word "all," that the phrase "all other law" includes federal law other than the antitrust laws.

Norfolk & Western, 499 U.S. at 129. The Eleventh Circuit's application of *ejusdem generis* in this case, where the plain language of the statute is even clearer than in *Norfolk & Western*, thus is at odds not only with the statute itself, but also with this Court's teachings on when that canon is inappropriate.[4]

If there is any proper source for providing content to the type of legal relief that is available, it would be the source referred to by § 216(b) itself: The "purposes of section 215(a)(3)."

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[4] Even in the mechanical application of *ejusdem generis*, the Eleventh Circuit erred. One especially inconsistent portion of the court's decision is its treatment of liquidated damages. When seeking to characterize § 216(b) as purely compensatory, it observes that liquidated damages are meant to compensate for difficult-to-prove damages. 208 U.S. at 934 (citing *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 707 (1945)). That liquidated damages have a compensatory function is correct as far as it goes. But the court later notes the added deterrence effect of liquidated damages, again citing this Court's decision in *Brooklyn Savings Bank*. See 208 F.3d at 935 n.13. But *Brooklyn Savings Bank* went further:

> Although this right to sue is compensatory, it is nevertheless an enforcement provision. And not the least effective aspect of this remedy is the possibility that an employer who gambles on evading the Act will be liable for payment not only of the basic minimum originally due but also damages equal to the sum left unpaid. To permit an employer to secure a release from the worker who needs his wages promptly will tend to nullify *the deterrent effect which Congress plainly intended that Section 16(b) should have.*

324 U.S. at 709-10 (emphasis added; footnote omitted). The Eleventh Circuit failed to recognize, however, that if the inclusion of liquidated damages demonstrates congressional intent to deter at least in part through such damages, then the inclusion of such damages in § 216(b) entirely disproves the court's premise that "the evident purpose of section 216(b)" is exclusively "compensation" without room for damages which "punish and deter." 208 F.3d at 934.

Anti-retaliation provisions are designed to protect the exercise of statutory rights and to eliminate the fear employees may have in stepping forward to vindicate their own rights and congressional policy. See *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (Congress "chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. This ends the prohibition of § 15(a)(3) against discharges and other discriminatory practices was designed to serve. For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.); *EEOC* v. *White & Son Enterprises*, 881 F.2d 1006, 1011, 1013 (CA11 1989) ("The anti-retaliation provision of the FLSA was designed to prevent fear of economic retaliation by an employer against an employee who chose to voice such a grievance."; "[w]e acknowledge the punitive nature of liquidated damages" under the Equal Pay Act and related FLSA provisions); *Brock* v. *Richardson*, 812 F.2d 121, 123-24 (CA3 1987) ("the [Supreme] Court has made clear that the key to interpreting the [FLSA's] anti-retaliation provision is the need to prevent employees' 'fear of economic retaliation' for voicing grievances about substandard conditions."). In order to eliminate such fear of retaliation, the purpose of such provisions necessarily extends beyond simple compensation and includes deterrence as well. See *Brooklyn Savings*, 324 U.S. at 710 (discussing "the deterrent effect which Congress plainly intended that Section 16(b) should have"); cf. *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) ("The ADEA, in keeping with these purposes, contains a vital element found in both Title VII and the Fair Labor Standards Act: It grants an injured employee a right of action to obtain the authorized relief. 29 U.S.C. § 626(c). The private litigant who seeks redress for his or her injuries vindicates both the deterrence and the com-

pensation objectives of the ADEA.").[5] And there is little doubt that punitive damages are an "appropriate" form of legal relief to effectuate such a purpose, particularly in the context of a remedial statute that must be interpreted broadly. *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) (because the FLSA is a remedial statute, it "must not be interpreted or applied in a narrow, grudging manner").

III. THIS CASE PRESENTS AN IMPORTANT QUESTION IMPACTING NUMEROUS SIMILARLY WORDED STATUTES AND SHOULD BE RESOLVED BY THIS COURT.

The Eleventh Circuit's construction of § 216(b) as applied to retaliation suits has repercussions beyond the FLSA alone. Numerous other statutes contain damages provisions that could be impacted by the conflicting decision in this case. The most notable example is the Age Discrimination in Employment Act of 1967 (ADEA), which contains language that is quite similar to the language at issue here. See 29 U.S.C. § 626 ("In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section."). The Fifth Circuit in *Dean* v. *American Security Ins. Co.*, 559 F.2d 1036 (CA5 1977), cert. denied, 434 U.S.

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[5] See also *Valerio* v. *Putnam Assocs. Inc.*, 173 F.3d 35, 43 (CA1 1999) ("A narrow construction of the anti-retaliation provision could create an atmosphere of intimidation and defeat the Act's purpose in § 215(a)(3) of preventing employees' attempts to secure their rights under the Act from taking on the character of 'a calculated risk.' * * * * Such circumstances would fail to 'foster a climate in which compliance with the substantive provisions of the Act would be enhanced.'") (citations omitted); *Love* v. *RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (CA10 1984) ("In [§ 215(a)(3)], Congress 'sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced' by recognizing that 'fear of economic retaliation might

1066 (1978), construed this language to exclude punitive damages, and the Eleventh Circuit in this case relied upon the *Dean* decision in holding that the "'legal relief' language in the ADEA is exactly the same as that found in the FLSA, and so we conclude that the FLSA should be interpreted similarly to preclude an award of punitive damages." 208 F.3d at 938. While the language of the statutes *now* is quite similar, *Dean* itself seems to have been based upon an analogy with the *pre*-1977 version of the FLSA, which did not contain the very language at issue in this case that was designed to expand the available relief for anti-retaliation claims under § 216(b). See 559 F.2d at 1037 (citing damages provisions applicable to wages and overtime, not retaliation). While the result in *Dean* is of questionable validity on its own and as applied to the *amended* § 216(b), it nonetheless shows the manner in which comparable language in the FLSA can affect language in other statutes and how such effects can reflect back onto the FLSA in clearly erroneous ways.[6]

Other statutes containing language that could be impacted by the decision below include: 15 U.S.C. § 2310(d)(1) (Ch. 50 – Consumer Product Warranties: "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other *legal and equitable relief* ") (emphasis added); 15 U.S.C. § 3414 (Ch. 60 – Natural Gas Policy: "In any action under paragraph (1) or (2), the court shall, upon a proper

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often operate to induce aggrieved employees quietly to accept substandard conditions.'") (quoting *Mitchell*).

[6] The plain error here is that *Dean* construed its language *in pari materia* with the pre-amended version of the FLSA, *Snapp* then construed the amended language *in pari materia* with the language in *Dean*, with the result that the amendment to § 216(b) was effectively eliminated by having commutatively construed it *in pari materia* with the very pre-amendment language that it was designed to enlarge.

showing, issue a temporary restraining order or preliminary or permanent injunction without bond. In any such action, the court may also issue a mandatory injunction commanding any person to comply with any applicable provision of law, rule, or order, or ordering *such other legal or equitable relief* as the court determines appropriate, including refund or restitution.") (emphasis added); and 29 U.S.C. § 1451(a)(1) (Ch. 18 – ERISA: "A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for *appropriate legal or equitable relief*, or both.") (emphasis added).

An especially comparable statute that could be impacted by this case is the Employee Polygraph Protection Act, which provides authority for both the Secretary of Labor and individuals to seek relief in terms nearly identical to those in the FLSA. 29 U.S.C. §§ 2005(b) & (c)(1) ("The Secretary may bring an action under this section to restrain violations of this chapter. * * * * In any action brought under this section, the district courts of the United States shall have jurisdiction, for cause shown, to issue temporary or permanent restraining orders and injunctions to require compliance with this chapter, including *such legal or equitable relief incident thereto as may be appropriate, including, but not limited to,* employment, reinstatement, promotion, and the payment of lost wages and benefits."; "An employer who violates this chapter shall be liable to the employee or prospective employee affected by such violation. Such employer shall be liable *for such legal or equitable relief as may be appropriate, including, but not limited to,* employment, reinstatement, promotion, and the payment of lost wages and benefits.") (emphasis added).

The recurrence of language similar to that in the FLSA illustrates that if the Eleventh Circuit's decision is allowed to stand, or if the split is not resolved, the confusion could impact a variety of statutes and undermine the protection of rights in many areas beyond the scope of the FLSA. Such potential impact heightens the importance of resolving the clear circuit split.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: November 1, 2000.

APPENDICES

APPENDIX A