No. 11-204

IN THE

Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER AND FRANK BUCHANAN,
Petitioners,

v.

SMITHKLINE BEECHAM CORP., D/B/A GLAXOSMITHKLINE,
Respondent.

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

BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*. The brief supports the Respondent and urges affirmance of the decision below.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 major U.S. corporations that collectively employ roughly 20 million workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment practices and equal employment opportunity policies.

All of EEAC's members are employers subject to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended, the Department of Labor's (DOL) implementing regulations at 29 C.F.R. pt. 541, as well as other federal workplace protection and nondiscrimination laws. The fair and consistent implementation of these laws and regulations is of paramount concern to all employers, including EEAC's members. Equally important to its membership, however, is the opportunity to participate in the notice-and-comment rulemaking process mandated by the Administrative Procedure Act (APA), 5 U.S.C. § 553, when the Department of Labor, or any federal agency, seeks to modify its regulations using its Congressionally-delegated authority.

The question presented regarding what, if any, deference should be accorded to a Labor Department regulatory interpretation contained nowhere other than an *amicus curiae* brief therefore is of significant importance to EEAC. The Ninth Circuit properly held that, under the circumstances, the Secretary of

Labor's interpretation of the regulatory definition of "sale," which was expressed solely in two *amicus curiae* briefs, was not entitled to any judicial deference. Since 1976, EEAC has filed numerous *amicus curiae* briefs with this Court and the lower courts exploring similar issues.[2] Because of its experience in these matters, EEAC is well-situated to brief the Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioners Michael Christopher and Frank Buchanan were formerly employed by Respondent SmithKline Beecham Corp., d/b/a GlaxoSmithKline (GSK), as pharmaceutical sales representatives (PSRs), where they were responsible for selling GSK products to physicians. JA 170; *see also* JA 85 (PSR is "[r]esponsible for sales of assigned products in assigned territory"). Under federal law, physicians are the only individuals permitted to write prescriptions for GSK products, and thus the only people who may order GSK products. Pet. App. 2a-4a; JA 133. Christopher's employment was terminated in May of 2007, and Buchanan left the company after he accepted a PSR position at another pharmaceutical company. *See* Ninth Circuit Supplemental Excerpts of Record (SER) 94-100, 200; Pet. App. 2a.

Petitioners then filed a class action in the United States District Court for the District of Arizona, alleging that GSK had improperly classified PSRs as

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[2] *See, e.g., Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002); *Edelman v. Lynchburg Coll.*, 535 U.S. 106 (2002); *United Space Alliance, LLC v. Solis*, 2011 U.S. Dist. LEXIS 130938 (D.D.C. Nov. 14, 2011).

exempt employees under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, and seeking overtime pay for the hours they worked each week outside of normal business hours. Because federal law prohibited PSRs from directly transferring GSK products to doctors and patients, Petitioners argued they were not engaged in "sales," as that term is defined under the FLSA, and thus not covered by the FLSA's "outside salesman" exemption. Pet. App. 41a-42a.

The district court rejected Petitioners' argument and granted summary judgment in favor of GSK. The court held that because the FLSA and the Department of Labor (DOL) define the term "somewhat loosely," PSRs need only engage in a sale "in some sense" in order to be covered by the exemption. Pet. App. 43a-44a. In so holding, the court declined to accord deference to an uninvited *amicus curiae* brief that had been filed by the Labor Department in a completely separate litigation, *In re Novartis Wage & Hour Litigation*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011), which at that time was pending before the Second Circuit. DOL Br. as *Amicus Curiae*, *Novartis Wage & Hour Litig.*, No. 09-4376 (Oct. 13, 2009) (Novartis Br.). In the *Novartis* brief, which Petitioner's submitted as "supplemental authority" to the district court, DOL argued that a "sale" for the purposes of the FLSA's outside sales exemption required a "consummated transaction directly involving the employee for whom the exemption is sought." Novartis Br. 11.

Following the district court's decision, Petitioners moved to amend the judgment, arguing that the court failed to grant "controlling deference" under *Auer v. Robbins*, 519 U.S. 452 (1997), to the DOL's *amicus*

curiae brief in *Novartis*. Pet. App. 49a. The court denied the motion, rejecting DOL's position as "absurd" and defying "common sense," holding that PSRs "make sales the way that sales are made in the pharmaceutical industry." Pet. App. 51a-52a.

Petitioners appealed to the U.S. Court of Appeals for the Ninth Circuit. There, DOL filed a second *amicus curiae* brief, again uninvited, that largely tracked the brief it filed in the *Novartis* litigation. In concluding that PSRs were covered by the outside sales exemption, the Ninth Circuit held that, rather than using its expertise to clarify the definition of "sales," in crafting its regulations, DOL did "'little more than restate the terms of the statute itself,'" and as such, the DOL's novel interpretation of "sales" in its *amicus curiae* brief was not entitled to any deference. Pet. App. 23a (quoting *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006)). To hold otherwise, the court reasoned, would "sanction bypassing of the Administrative Procedures Act and notice-and-comment rulemaking." Pet. App. 24a. The Ninth Circuit denied Petitioners' request for rehearing *en banc*. Pet. App. 53a. This Court granted Petition for a Writ of Certiorari on Nov. 28, 2011.

SUMMARY OF ARGUMENT

In *Auer v. Robbins*, 519 U.S. 452 (1997), this Court granted "controlling" deference to the Secretary's interpretation—expressed through an *amicus* brief—of the DOL's regulatory "salary basis" test, because it was not "plainly erroneous or inconsistent with the regulation" and there was "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment . . . ." *Auer*, 519 U.S. at 461-62. The Secretary's interpretation in the present case of what is and is not a "sale" under the FLSA,

expressed solely through uninvited *amicus curiae* briefs, does not satisfy the *Auer* standard and therefore is not entitled to judicial deference.

The Secretary's interpretation of "sale," first expressed as *amicus curiae* in *In re Novartis Wage & Hour Litigation*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011), is erroneous and inconsistent with the FLSA and DOL's implementing regulations at 29 C.F.R. pt. 541, and is a *post hoc* rationalization that "does not reflect the agency's fair and considered judgment . . ." on the definition of "making sales." *Auer*, 519 U.S. at 461-62. The Secretary's current practice of actively participating as *amicus curiae* in wage and hour litigation around the country solely to advance the department's own novel and unchecked interpretations of the FLSA is a far cry from the narrow circumstances that led the Court to granting deference in *Auer*.[3]

Were the Court to extend *Auer* deference to the Secretary's *amicus* brief under these circumstances, it would result in a judicially-sanctioned end-run around the APA-mandated notice-and-comment rulemaking process, depriving the public of the opportunity to provide invaluable input on how "sales" are conducted in various industries throughout the country. *See* 5 U.S.C. § 553.

Complex laws and regulatory schemes such as those found under the FLSA present numerous challenges for employers. From the employer's perspective, it is imperative that companies be able to rely upon the text of the regulations, without fear that

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[3] U.S. Dep't of Labor, Ofc. of the Solicitor, *Overtime Security Amicus Program, available at* http://www.dol.gov/sol/541amicus.htm (last visited Mar. 22, 2012).

with every change in administration, an agency will seek to effectuate a change in enforcement policy simply by inserting itself into a litigation as *amicus curiae*.

ARGUMENT

I. THE LABOR DEPARTMENT'S NEW INTERPRETATION OF ITS OWN "OUTSIDE SALES" REGULATION, COMMUNICATED SOLELY THROUGH POLICY ARGUMENTS RAISED IN TWO UNINVITED FEDERAL APPEALS COURT *AMICUS CURIAE* BRIEFS, IS NOT ENTITLED TO JUDICIAL DEFERENCE

The Secretary's new interpretation of a "sale" under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, which has been expressed solely through *amicus curiae* briefs filed in the proceedings below and in *In re Novartis Wage & Hour Litigation*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011), is not entitled to any deference, much less controlling deference under this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997). It is inconsistent with the plain text of the FLSA and DOL's existing regulations, and has been formulated solely for purposes of advancing through litigation an interpretation that she was either unable or unwilling to achieve through the Department's Congressionally-delegated rulemaking authority.

Auer addresses the circumstances under which a federal agency's interpretation of its own, ambiguous regulation, expressed solely in an *amicus curiae* brief, is entitled to judicial deference. There, the Court invited the Secretary of Labor to file an *amicus curiae* brief regarding the application of the Labor

Department's "salary basis" test, a regulatory mechanism created by the DOL to determine whether an employee is "exempt" from the FLSA's minimum wage and overtime requirements. *Auer*, 519 U.S. at 461.

In according "controlling" deference to the Secretary's *amicus* arguments, the Court held that "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). In reaching its decision, the Court also found persuasive the fact that there was "simply no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462. Judged against that standard, the Secretary's *amicus curiae* briefs in the proceedings below and before this Court fall short of the mark.

A. The Labor Department's Interpretation Of "Sales," As Expressed In Its *Amicus Curiae* Briefs, Is Plainly Erroneous And Inconsistent With The FLSA And Existing Regulations

The Secretary's current policy interpretation, that "[a]n employee does not make a 'sale' for purposes of the 'outside salesman' exemption *unless he actually transfers title* to the property at issue," is inherently inconsistent with the broad, open-ended definition of "sale" found in the FLSA and DOL's existing regulations. Brief for the United States as *Amicus Curiae* Supporting Petitioners (U.S. Br.), 12-13 (emphasis

added). Moreover, it directly contradicts the Secretary's previous statements that under the FLSA, a sale must have been completed only "in some sense." 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004).

In *Auer*, the dispute centered on a provision of the "salary basis" test, which the Secretary created in DOL's regulations. Here, at issue is the definition of "making sales" for purposes of the "outside sales" administrative exemption, an element DOL has failed to define with any adequacy. The FLSA states that "sale" or "sell" *includes* any sale, exchange, contract to sell, consignment for sale, shipment for sale, or *other disposition*." 29 U.S.C. § 203(k) (emphasis added). Congress did not expound on the meaning of "other disposition," however.

The FLSA delegates to the Secretary the authority and responsibility to define what it means to be employed in the "capacity of outside salesmen," as that term is used in the FLSA. *Id.* at § 213(a)(1). The Secretary has exercised that authority in a "[g]eneral rule for outside sales employees", which defines an outside salesman as one:

> (1) Whose primary duty is:
>
> (i) making sales within the meaning of section 3(k) of the Act, or
>
> (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> (2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

29 C.F.R. § 541.500(a).

DOL has further defined "[s]ales within the meaning of section 3(k) of the Act" to:

> *[I]nclude* the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that "sale" or "sell" *includes* any sale, exchange, contract to sell, consignment for sale, shipment for sale, or *other disposition*.

29 C.F.R. § 541.501(b) (emphasis added).

In sum, DOL has relied on more than 70 years of expertise in this area to define "sales" simply as including a transfer of title of tangible and intangible property. As this Court has made clear, however, an agency's interpretation of its own, ambiguous rules is not entitled to deference where the construction in question does little more than restate or "parrot" the language from the statute. *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006). In *Gonzales*, the Court declined to extend *Auer* deference to the Secretary's interpretation of a regulation, where the regulation simply "repeat[ed] two statutory phrases and attempt[ed] to summarize the others." *Id.* at 257. Just as in *Gonzales*, the DOL here is not entitled to "special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Id.* Because DOL has done little more than "parrot" Congress's own words in crafting its definition of "making sales," under *Gonzales* the novel interpretation of that definition set forth in the Secretary's *amicus curiae* brief is not entitled to *Auer* deference.

The position staked out by the Secretary in her *amicus curiae* brief purports to answer the question

of what constitutes a "sale" under the FLSA by stating, "[a]n employee does not make a "sale" for purposes of the "outside salesman" exemption *unless he actually transfers title* to the property at issue." U.S. Br. at 12-13 (emphasis added). The Secretary's drastic change in position, from "*including*" a transfer in title to *requiring* one finds no support in the FLSA or DOL's regulations. Had the Secretary sought to promulgate such a narrow rule, she certainly could have crafted language to accomplish that goal when the rule was last revised in 2004. 69 Fed. Reg. 22,122 (2004). Having failed to do so, the Secretary cannot now circumvent the APA-mandated notice-and-comment rulemaking process to achieve her goals.

B. The Labor Department's Interpretation Of "Sales," As Expressed In Its *Amicus Curiae* Briefs, Is A *Post Hoc* Rationalization And Does Not Reflect The Fair And Considered Judgment Of The Department Of Labor

In *Auer*, the Court made clear that the deference afforded to the Secretary's *amicus* brief was appropriate under the circumstances, because the Secretary's position could in no way be considered a "*post hoc* rationalization." *Auer*, 519 U.S. at 462 (citation omitted). There, the Court expressly *invited* the Secretary to file an *amicus* brief regarding the DOL-created "salary-basis" test. *Id.* at 461. Here, not only were the DOL's views not solicited by this or any other Court, but they do not purport to represent any cogent interpretation of existing law or regulation. While the Court's precedent does not suggest *either* of these factors alone is a prerequisite to *Auer* deference, we respectfully submit that collectively, these

differences belie any argument that the Secretary's *amicus* brief represents "fair and considered judgment" of the Labor Department. *Id.* at 462.

In both *Novartis* and in the proceedings below, the DOL inserted itself into each appeal as *amicus curiae*, advancing for the first time an incredibly narrow definition of what is and is not a "sale" under the FLSA. While the Court has not limited *Auer* deference to the views of an agency as expressed in an "invitation" brief, the Department's "uninvited" views below, coupled with its active and aggressive national *amicus* program, cast significant doubt on its motives. *See, e.g., Auer*, 519 U.S. at 461-62 (*amicus* brief filed at Court's invitation); *Chase Bank USA v. McCoy*, 131 S. Ct. 871, 880-82 (2011) (Court extended *Auer* deference to the Federal Reserve Board position in *amicus* brief, which was filed at the Court's invitation); *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2259-60 (2011) (*Auer* deference extended to Federal Communications Commission's position in *amicus* brief filed at the invitation of the U.S. Court of Appeals for the Sixth Circuit).

The *Auer* Court also found persuasive the fact that the salary basis test was *created* by the DOL in the FLSA's implementing regulations. The Court held that "*[b]ecause* the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (citation omitted) (emphasis added). Indeed, while the FLSA is entirely silent with respect to a "salary basis" test, it explicitly defines the terms "sale" and "sell," 29 U.S.C. § 203(k), and in 70 years, the DOL has done little to elaborate on that definition. The Secretary's attempt

now to define what is and is not a "sale" under the FLSA, solely for the purpose of this litigation, should not be given deference.

II. ACCORDING DEFERENCE TO THE LABOR DEPARTMENT'S RADICALLY NEW POLICY INTERPRETATION OF A WELL-SETTLED REGULATION WOULD PERMIT THE AGENCY TO CIRCUMVENT THE ADMINISTRATIVE PROCEDURE ACT, THUS DEPRIVING STAKEHOLDERS OF IMPORTANT DUE PROCESS PROTECTIONS

Auer deference under any circumstance presents significant challenges for both employers and the courts, but an extension of such deference under the circumstances present here would irreparably damage the rulemaking process upon which both agencies and employers rely. An expansion of the *Auer* doctrine would permit agencies to alter significantly employers' compliance obligations simply by announcing a change in enforcement philosophy through an *amicus curiae* brief filed with any one of the nation's more than 100 federal judicial district and circuit courts. For employers, sanctioning such conduct would discourage agency transparency and encourage abuse. In addition to providing no meaningful opportunity for comment, *Auer* deference also deprives employers of advance notice of an agency's change in position, thus denying companies the due process protections afforded by the APA.

Extending *Auer* deference to the Secretary's *amicus curiae* brief would result in a judicially-sanctioned end-run around the APA-mandated notice-and-comment rulemaking process. This Court instructs that *Auer* deference is appropriate so long as the Secretary's

position does not create an "unfair surprise," or "*de facto* a new regulation." *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) (*Auer* deference was appropriate because a change in the Labor Department's interpretation did not create an "unfair surprise," where the notice-and-comment rulemaking had interceded the DOL's change in interpretation and the agency's opinion was first expressed in a Department memorandum); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (*Auer* deference was not appropriate where the Secretary's opinion reflected an FLSA prohibition that did not exist in the text of the law or DOL regulations, and would have created "*de facto* a new regulation").

Were the Court to extend deference to the Secretary's newfound belief that there can be no sale "unless" there is a transfer of title, it would create both an "unfair surprise" to employers and "*de facto* a new regulation" by which employers must abide. The DOL, of course, could exercise its Congressionally-delegated authority to engage the public in the APA-mandated notice-and-comment rulemaking process to explore the DOL's narrow interpretation of the FLSA. When DOL last undertook that exercise, however, it concluded simply that the employee must make a sale "in some sense." 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004). If there is to be a change in that rule, one that would potentially affect millions of sales workers in the United States, the APA mandates that the public be given the opportunity to be heard. 5 U.S.C. § 553.

In its 2004 final rule, the DOL stated that it received "few comments" on the DOL's "making sales" definition. 69 Fed. Reg. at 22,161. As evidenced by the litigation in this area over the last two

years, had the public known in advance of DOL's intention to adopt such a strict, narrow interpretation of "making sales," it is fair to say that there would have been a significant volume of commentary on this issue. Because the DOL has circumvented the APA in reaching its current interpretation of "sale," the Court should disregard the views expressed in its *amicus curiae* brief altogether. *See Auer*, 519 U.S. at 459 ("A court may certainly be asked by parties in respondents' position to disregard an agency regulation that is contrary to the substantive requirements of the law, or one that appears on the public record to have been issued in violation of procedural prerequisites, such as the "notice and comment" requirements of the APA, 5 U.S.C. § 553").

Further, according *Auer* deference under the circumstances would encourage the DOL and other federal agencies to act as regulatory "watchdogs," appearing as *amicus curiae* in cases solely to advance their novel interpretation of inherently and intentionally ambiguous regulations, without the consideration or benefit of public notice and comment. Shortly after being confirmed, the Solicitor of Labor announced her intention to "reinvigorate" the Department's *amicus* program, through which "interested parties" could inform the DOL of private cases involving potential violations of DOL's regulations. U.S. Dep't of Labor, Ofc. of the Solicitor, *Overtime Security Amicus Program*.[4] After reviewing these cases, the DOL then decides which cases are "appropriate" to "share with courts the Department's view of the proper application" of DOL regulations. *Id*.

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[4] *Available at* http://www.dol.gov/sol/541amicus.htm (last visited Mar. 22, 2012).

Auer cannot reasonably be read as endorsing a system by which federal agencies actively monitor court dockets for potential cases, and then simply insert themselves into the litigation as *amicus curiae*, knowing the opinions stated in the brief will be given the full force of the law so long as they are not "plainly erroneous or inconsistent" with existing regulations. The Secretary essentially concedes as much here, stating that "[u]ntil the recent set of private actions brought by employees, the Department had not addressed the applicability of the "outside salesman" exemption to PSRs." U.S. Br. at 34.

The DOL, of course, is entitled to express its opinion through *amicus* briefs. Those opinions, however, cannot and should not be given "controlling" deference merely because they are not "plainly erroneous or inconsistent." Having no incentive to modify an ambiguous regulation through appropriate notice and comment procedures, there is absolutely nothing to stop the next administration from reversing course in a future *amicus* brief. We urge this Court to end the vicious cycle before it begins.

Finally, an extension of *Auer* under these circumstances would encourage federal agencies to draft ambiguous rules during the notice and comment period, while at the same time discouraging them from correcting existing, ambiguous rules. Both outcomes present damaging implications for notice-and-comment rulemaking and would allow policy changes through an *amicus* brief that the Secretary otherwise was unwilling or unable to advance through notice and comment rulemaking.

While it may seem intuitive to defer, at least in some sense, to an agency's interpretation of its regulations, granting "controlling" deference to regulatory

interpretations expressed solely through an *amicus curiae* brief tramples on the "fundamental principles of separation of powers," leaving the agency—or, more properly, the agency's drafting attorney—with both legislative and executive powers. *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring). Moreover, unlike the *Chevron* deference afforded to an agency's regulatory interpretations of vague statutes, which *discourages* Congress from enacting vague statutes in the first place, the *Auer* doctrine "*encourages* the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases." *Id*. (emphasis added). Nothing demonstrates that principle more clearly than the current case.

CONCLUSION

Accordingly, the *amicus curiae* Equal Employment Advisory Council respectfully requests that the decision of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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