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

## BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA (PhRMA) AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT


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## INTEREST OF *AMICUS CURIAE*[1]

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's mission is to advocate in support of public policies that encourage the discovery of life-saving and life-enhancing new medicines by pharmaceutical and biotechnology research companies. PhRMA closely monitors legal issues that impact the pharmaceutical industry and has frequently participated in cases before this Court.

This petition is extremely important to the pharmaceutical industry. The decision below created a split between the Second and Ninth Circuits over whether pharmaceutical sales representatives ("PSRs") are exempt from overtime pay under the "outside sales" exemption of the Fair Labor Standards Act of 1938 ("FLSA" or "the Act"), 29 U.S.C. § 201 *et seq.* Until this circuit split is resolved, PhRMA members are exposed both to potentially staggering retrospective liability and to uncertainty over whether they must undertake

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[1] Counsel for all parties have been given notice as required by Rule 37.2(a) and 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.

major restructuring that would have significant consequences for the industry and its employees.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Pharmaceutical companies employ tens of thousands of PSRs, and throughout the 70 years since the enactment of the FLSA, the settled understanding has been that PSRs are exempt from overtime pay. Two years ago, however, the Department of Labor announced that PSRs were not covered by the FLSA's "outside sales" exemption because, according to the Department's newly-minted interpretation, "sales" require the employee to actually and personally transfer title to goods. As the Ninth Circuit explained in the decision below, this interpretation "transform[ed] what since [the early days of the FLSA had] been recognized as a multi-factor review of an employee's functions into a single, stagnant inquiry." Pet. App. 35a. It also departed without warning from the Department's longstanding acquiescence in the treatment of PSRs as exempt employees.

Rather than initiate a rulemaking to consider prospective changes to the regulatory definition of "sales," the Department simply filed an *amicus* brief announcing its new position. It neither acknowledged the novelty of that position nor attempted to justify upsetting well-settled expectations. Yet the Department claimed that its new position was entitled to "controlling" deference under *Auer v. Robbins*, 519 U.S. 452 (1997).

The Ninth Circuit correctly held that the Department's *amicus*-brief position was not entitled to deference because the regulation that the Department was purporting to interpret merely restated the statute's language and because the Department's position was an unexplained departure from the practical, functional understanding of "sales" that the Department had espoused for 70 years. The Ninth Circuit then concluded that under the statute and regulations, PSRs are exempt "outside sales" employees. This created a split with the Second Circuit, which had held some months earlier that the Department's *amicus*-brief position was owed "controlling" deference under *Auer*. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 153–54 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011).

This circuit split raises a particularly acute need for review due to its practical impact. In addition to threatening massive unforeseen liability, the split creates rampant uncertainty concerning longstanding sales practices and the potential need for major restructuring of the industry's operations. PSRs generally work with little direct supervision, manage their own schedules, and receive substantial performance-based incentive compensation. Pharmaceutical companies could not shift to treating PSRs as non-exempt while keeping these aspects of their jobs unchanged. A shift to non-exempt treatment would impose substantial costs on both pharmaceutical companies and PSRs themselves. For these reasons, even though the decision below is correct, PhRMA submits that it is critical for this

Court to grant review and definitively resolve the issue it presents.

In addition, certiorari is especially appropriate here because underlying the split are two important, unresolved questions regarding the proper scope of *Auer* deference. First, to what extent is deference owed to an agency's interpretation of a regulation that restates or paraphrases statutory language with only minor elaborations or variations? And second, under what circumstances does an agency's change in position about the meaning of a regulation create unfair surprise that vitiates or lessens deference under *Auer*? These questions are important in their own right, even apart from the specific FLSA circuit split they have generated, and the lower courts' struggles with *Auer* make clear that guidance from this Court is needed.

## ARGUMENT

### I. REVIEW IS NEEDED TO RESOLVE A CLEAR CIRCUIT SPLIT ON A CRITICAL QUESTION AFFECTING THE ENTIRE PHARMACEUTICAL INDUSTRY.

There is now a stark circuit split over whether PSRs qualify for the FLSA's outside sales exemption. That question is of critical importance to the pharmaceutical industry and the tens of thousands of PSRs it employs across all 50 states. Allowing the law in this area to remain unclear would have severe, adverse consequences for the industry and for PSRs themselves.

### A. Lower Courts Have Disagreed About Whether PSRs Qualify for the FLSA's Outside Sales Exemption.

PSRs are the pharmaceutical industry's "90,000-person sales force." Pet. App. 26a. Their sales efforts are directed toward physicians because a patient, the "ultimate user" of a prescription drug, cannot purchase that drug "without first obtaining a physician's authorization," *id.* at 3a, and so it is the physician who actually "selects the medication" that is purchased by or for the patient, *id.* at 26a. The PSR's goal is therefore to obtain "a non-binding commitment from the physician to prescribe the PSR's assigned product when medically appropriate." *Id.* at 27a. Regulations and ethical guidelines make this "the absolute maximum commitment" a PSR can obtain from a physician. *Id.* Rather than being strictly limited to 40 hours per week with overtime pay for additional hours worked, PSRs generally are given significant control over their schedules and can receive substantial performance-based incentive compensation.

The FLSA requires that certain employees receive time-and-a-half overtime pay for hours worked in excess of 40 per week, 29 U.S.C. § 207(a)(1), but exempts, *inter alia*, "any employee employed … in the capacity of outside salesman," *id.* § 213(a)(1). The Secretary of Labor has promulgated regulations that, as relevant here, define "outside salesman" as any employee (1) "[w]hose primary duty is … making sales within the meaning of section 3(k) of the Act," and (2) "[w]ho 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. Section 3(k), in turn, provides that "'[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k).

Pharmaceutical companies treat their PSRs as exempt employees and have done so since the position originated more than 70 years ago. Because no one disputes that PSRs are regularly engaged away from their employers' places of business, whether they fall within the outside sales exemption turns on whether their traditional primary duty — obtaining commitments from physicians to prescribe certain drugs when medically appropriate — constitutes "making sales within the meaning of section 3(k)." Until a few years ago, few seriously doubted that it did.

That all changed in October 2009, when the Secretary of Labor announced a new, bright-line rule that a consummated transaction was necessary for a "sale" and declared that under that rule, PSRs do not make "sales" because they do not actually and personally transfer title to the drugs they are selling. *See* Pet. App. 35a. The Secretary announced this new rule, not through rulemaking or any other process providing for notice and public participation, but rather through an uninvited *amicus* brief in the Second Circuit. The Secretary's position departs without explanation from over 70 years of unbroken acquiescence in the industry's classification of PSRs as exempt. It also disregards the Department's longstanding "sensible" and practical approach to the outside sales exemption — an approach still reflected in numerous extant regulations, *see infra*

pp. 19–22 — in favor of a "rigid, formalistic interpretation" that pulls the rug out from under pharmaceutical companies and their well-settled expectations. Pet. App. 28a. Nonetheless, the Secretary argues that courts must defer to her new position.

In the decision below, the Ninth Circuit rejected that argument. After concluding that the Secretary's position did not merit deference, the court held that PSRs *do* make sales within the meaning of the FLSA and are therefore exempt outside salespersons. It reasoned that in light of "the structure and realities of the heavily regulated pharmaceutical industry … [i]n this industry, the 'sale' is the exchange of non-binding commitments between the PSR and the physician." Pet. App. 25a–26a. The Second Circuit, however, came to the opposite conclusion. It held that the Secretary's position was "not plainly erroneous" and was therefore "entitled to 'controlling' deference." *Novartis*, 611 F.3d at 153–54.

Thus, there is now a clear circuit split on the question whether PSRs qualify as outside salespersons. This split casts a shadow over the entire pharmaceutical industry because, as the Ninth Circuit noted, regardless of which company they work for, regulatory and ethical barriers prevent PSRs who call on physicians who write prescriptions for drugs that patients fill through a pharmacist from transferring title to those drugs to those physicians. *See* Pet. App. 8a. The split

extends to the federal district courts, which have issued similarly conflicting rulings.[2]

### B. Continuing Uncertainty About Whether PSRs Are Exempt Outside Salespersons Will Have Severe Consequences For The Pharmaceutical Industry And PSRs Themselves.

Pharmaceutical companies have structured their sales operations in reliance on their uniform understanding that PSRs are exempt. If the circuit split is not resolved, companies may be forced to undertake major restructuring that would be difficult and costly both for the industry and for PSRs themselves, whose jobs may be rendered far less attractive.

PhRMA's members can take little comfort from the Ninth Circuit's well-reasoned decision so long as there is directly conflicting authority from the Second Circuit. Most companies have operations and employ PSRs nationwide, and it is not practical for them to radically alter their employment classifications and practices on a circuit-by-circuit basis to comply with conflicting judicial

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[2] *See, e.g.*, *Jirak v. Abbott Labs., Inc.*, 716 F. Supp. 2d 740 (N.D. Ill. 2010) (exemption does not apply), *appeal docketed*, No. 11-1980 (7th Cir. Apr. 28, 2011); *Schaefer-LaRose v. Eli Lilly & Co.*, 663 F. Supp. 2d 674 (S.D. Ind. 2009) (exemption applies), *appeal docketed*, No. 10-3855 (7th Cir. Dec. 13, 2010); *Harris v. Auxilium Pharm., Inc.*, No. 07-3938, 2010 WL 3817150 (S.D. Tex. Sept. 28, 2010) (exemption does not apply), *appeal docketed*, No. 11-20151 (5th Cir. Jan. 24, 2011); *Delgado v. Ortho-McNeil, Inc.*, No. 07-00263, 2009 WL 2781525 (C.D. Cal. Feb. 2, 2009) (exemption applies), *appeal docketed*, No. 09-55225 (9th Cir. Feb. 11, 2009).

pronouncements. In any event, such circuit-by-circuit restructuring would not solve the problem of forum-shopping. The Ninth Circuit's decision has not even prevented plaintiffs' attorneys from attempting to include PSRs who live and work within the Ninth Circuit in proposed nationwide classes in new cases filed within the Second Circuit. *See, e.g.*, Complaint at 6, *Reissner v. Boehringer Ingelheim Pharm., Inc.*, No. 11-1576 (D. Conn. Oct. 13, 2011) (class action on behalf of "[a]ll PSR employees who worked for Defendant nationwide within the last three years").

Dozens of FLSA cases have been filed in recent years against pharmaceutical companies, almost all cast as class actions. The potential amount of retrospective liability from these cases is staggering; plaintiffs' counsel in one suit involving just 2,500 PSRs estimated that damages from that suit alone could reach $100 million. *See* Mark Hamblett, *2nd Circuit Finds Novartis Drug Reps Not Exempt From Overtime Law* (July 7, 2010), http://www.law.com/jsp/article.jsp?id=1202463314353. If so, the industry as a whole faces potential liability in the billions of dollars.

For all these reasons, as a practical matter, any reclassification of PSRs would likely have to occur on a nationwide basis. Reclassification would be costly and painful for all concerned because key aspects of PSRs' jobs, as they are currently structured, are fundamentally incompatible with treating PSRs as hourly employees.

*First*, PSRs generally operate with little direct supervision. As one court explained, PSRs "spend

the great majority of their time out of the office. They are not generally subject to direct supervision while they go about their business. They do not report to work first thing in the morning and clock in. They have a large degree of autonomy, which would make it more difficult to make them accountable for every minute of their day." *Delgado v. Ortho-McNeil, Inc.*, No. 07-00263, 2009 WL 2781525, at *5 (C.D. Cal. Feb. 6, 2009), *appeal docketed*, No. 09-55225 (9th Cir. Feb. 11, 2009). Pharmaceutical companies ordinarily give PSRs wide freedom to structure their schedules as they see fit. This was exemplified by one plaintiff who "worked without direct hour-to-hour, day-by-day supervision" and was never "told … how many hours she should work in any given week." *Schaefer-LaRose v. Eli Lilly & Co.*, 663 F. Supp. 2d 674, 679, 688 (S.D. Ind. 2009).

*Second*, most PSRs are eligible to receive substantial performance-based incentive compensation. Many pharmaceutical companies track the number of prescriptions issued by physicians and use those sales figures as a factor in determining PSRs' incentive compensation. *See id.* at 686–88. Thus, "[t]he object of [PSRs'] harder work [is not] to garner overtime, it [is] to generate sales." *Delgado*, 2009 WL 2781525, at *3.

These are the very job characteristics that led Congress to exclude outside salespersons from the overtime requirement. As the Tenth Circuit explained in a seminal case interpreting the outside sales exemption just a few years after it was created:

> The reasons for excluding an outside salesman are fairly apparent. Such salesman, to a great extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.

*Jewel Tea Co. v. Williams*, 118 F.2d 202, 207–08 (10th Cir. 1941).

The fundamental incompatibility of the outside salesperson's job with the FLSA's overtime pay requirement points to the difficulty of reclassifying PSRs without radically transforming their job descriptions. Simply put, "[i]t is impractical to make [PSRs] hourly employees due to the lack of supervision and structure in their jobs, and because they generate additional incentive income … instead of overtime." *Yacoubian v. Ortho-McNeil Pharm.,*

*Inc.*, No. 07-00127, 2009 WL 3326632, at *4 (C.D. Cal. Feb. 6, 2009).[3]

Not only would reclassifying PSRs impose major costs on pharmaceutical companies, it would also have a severe impact on the lives of tens of thousands of PSRs nationwide. PSRs are well-paid, highly-trained sales employees. The vast majority of them have never asked to be classified as hourly workers under the FLSA, and for good reason: Most PSRs enjoy the benefits associated with their exempt classification, including the ability to operate with minimal day-to-day supervision, set their own schedules, and manage their territories. It is telling in this respect that so many of the named plaintiffs in FLSA actions against pharmaceutical companies are *former*, not current, PSRs. Yet the freedom and autonomy prized by many PSRs will have to be curtailed significantly if pharmaceutical companies must treat PSRs as non-exempt and pay them on a strict hourly basis.

Likewise, many PSRs value the industry's traditional, incentive-based compensation structure. Besides giving them a sense of ownership and investment in their work, this compensation regime enhances PSRs' well-being in a more concrete way: It enables many successful PSRs to earn highly

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[3] The autonomy, incentive compensation, and other factors that make PSRs prototypical outside salespersons may also bring PSRs within other FLSA exemptions not implicated by the petition here. *See, e.g.*, 29 C.F.R. § 541.200 (exemption for administrative employees); *id.* § 541.601 (exemption for highly compensated employees); *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010).

competitive salaries, often reaching six figures. If, however, a persistent circuit split compels pharmaceutical companies to reclassify PSRs and pay them overtime, this incentive-based compensation structure will likely have to be replaced with a more rigid, hours-based system. It is far from clear that PSRs — especially skilled and motivated ones — would be better off.[4]

In light of the detailed analysis given this issue by two courts of appeals and numerous district courts, there is little to be gained by awaiting further development. On the other hand, delay in resolving this stark circuit split would leave the pharmaceutical industry in a continuing state of uncertainty regarding its exposure to potentially staggering retrospective liability and its potential need to undertake major, nationwide restructuring that would carry substantial costs for both pharmaceutical companies and PSRs themselves. Because the current circuit split leaves the industry in an untenable position, the Court should grant review now.

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[4] Moreover, the transformation of PSRs' jobs by eliminating or curtailing the attractive elements of autonomy and incentive-based compensation may well affect the industry's ability to recruit highly qualified and motivated individuals for these positions.

## II. REVIEW IS ALSO WARRANTED BECAUSE OF THE IMPORTANCE OF THE *AUER* DEFERENCE ISSUE UNDERLYING THE SPLIT.

The circuit split over whether PSRs are exempt outside salespersons derives from confusion about the proper application of this Court's decision in *Auer*, which directs courts to defer to an agency's interpretation of its own regulations that is not "plainly erroneous or inconsistent with the regulation." 519 U.S. at 461. Without such deference, the Secretary's interpretation of "sales" as used in section 3(k) as including a rigid transfer-of-title requirement plainly could not prevail.

This case thus provides an opportunity for the Court to clarify two questions that the lower courts have struggled with in applying *Auer*: First, to what extent is deference owed to an agency's interpretation of a regulation that restates or paraphrases statutory language with minor elaborations or variations? And second, under what circumstances does an agency's change in position about the meaning of its regulations create unfair surprise that vitiates or lessens deference under *Auer*?

Both issues are vital to containing *Auer* deference within its proper limits. As Justice Scalia pointed out in urging the Court to revisit *Auer*, extending *Auer* deference uncritically has the potential to "promote[] arbitrary government" by "encourag[ing] the agency to enact vague rules which give it the power … to do what it pleases." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266

(2011) (concurring opinion). This case exemplifies the dangerous incentives that can be created by misapplying *Auer*. If an agency can get "controlling deference" to its desired position by simply promulgating a regulation that does little more than restate statutory language and then announcing a surprising new interpretation in the midst of pending litigation, agencies can hardly be expected to resist the temptation to proceed in that manner and dispense with the rulemaking process. The rulemaking process, however, protects critical interests in notice, predictability, and public participation. *See id.* Shortcuts amounting to ambush-by-*amicus*-brief should not be encouraged by extending "controlling deference."

### A. This Court Should Clarify That *Auer* Deference Does Not Apply When A Regulation Parrots Statutory Language With Only Minor Elaborations Or Variations.

This Court has stated that *Auer* does not apply when an agency interprets a regulation that "does little more than restate," "summarize," "paraphrase," or otherwise "parrot[]" statutory language. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). As the Court explained, *Auer* deference is appropriate only when an agency offers its views on the meaning of regulatory language that *the agency itself* selected "using its expertise and experience." *Id.* When regulatory language parrots a statute, "the question … is not the meaning of the regulation but the meaning of the statute." *Id.* An agency's interpretation of a statute carries no "special authority" when it is announced in an *amicus* brief, *id.*; rather, an agency must employ notice-and-

comment rulemaking or comparable procedures to obtain *Chevron* deference for its statutory interpretations. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000).

*Gonzales*' "parroting" rule provides an important check on agencies' ability to perform an end-run around notice-and-comment rulemaking. But as explained below, there is broad confusion among lower courts about the rule's proper application when a regulation borrows critical language from a statute but does not track the statute precisely.

The regulation at issue here provides:

> Sales within the meaning of section 3(k) of the Act include 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). The second sentence of the regulation simply repeats the statutory definition. The first sentence lists examples of transactions that are "include[d]" within the definition, but does not purport to define or limit the statutory language. Because the regulation falls back on the statutory definition of "sale," the Secretary's views regarding whether particular activities are "sales" tells us no more than what the Secretary thinks the *statute* means.

The Secretary may be able to obtain deference under *Chevron* — not *Auer* — to her view of what

the statute means, but only if she goes through notice-and-comment rulemaking and announces her view in a form that carries the force of law. *See Christensen*, 529 U.S. at 587. But under a proper application of *Gonzales*, the Secretary's view of what the statute means is not entitled to *Auer* deference. First, because Congress, not the Secretary, wrote the words at issue, the Secretary can make no claim to special insight into what the author of those words meant. Second, the Secretary can make no claim to deference to her policy judgments where she has avoided the process required to trigger deference to such judgments under *Chevron*. It would be perverse to afford "controlling deference" under *Auer* to a view announced in an *amicus* brief that unquestionably would not be eligible for deference under *Chevron* where the regulation that the agency purports to interpret does little more than track the statutory language.

The Second Circuit nonetheless concluded that section 541.501(b) did "far more than merely parrot the language of the FLSA" and that, therefore, the Secretary's interpretation of "sales" commanded "controlling" deference. *Novartis*, 611 F.3d at 153. The Ninth Circuit disagreed. Concluding that the regulation's first sentence was "open-ended" and the second sentence merely "direct[ed] employers, employees, and this court back to the language of the FLSA," the Ninth Circuit held that the Secretary's interpretation of "sales" was not entitled to *Auer* deference. Pet. App. 22a–23a.

Unfortunately, the Second Circuit is not alone in its misinterpretation of *Gonzales*; other courts of appeals have fallen into the same trap of reflexively

extending *Auer* deference based on minor variations or elaborations on statutory language contained in what are essentially "parroting" regulations. *See Massachusetts v. Sebelius*, 638 F.3d 24, 34 (1st Cir. 2011) (regulation's substitution of "claims for services" for statutory phrase "payment for services" meant that *Auer* deference applied); *Haas v. Peake*, 525 F.3d 1168, 1187 (Fed. Cir. 2008) (substitution of "duty or visitation in the Republic of Vietnam" for "serv[ice] in the Republic of Vietnam" meant that *Auer* deference applied); *Plateau Mining Corp. v. Fed. Mine Safety & Health Rev. Comm'n*, 519 F.3d 1176, 1193 (10th Cir. 2008) (omission of phrase "render harmless" from regulation that otherwise quoted statute verbatim meant that *Auer* deference applied); *Sierra Club v. Johnson*, 436 F.3d 1269, 1280–81 (11th Cir. 2006).

Other decisions, however, have applied *Gonzales* more rigorously. *See Groff v. United States*, 493 F.3d 1343, 1350 n.2 (Fed. Cir. 2007) (no *Auer* deference for agency's interpretation of regulation that restated statutory definition of "public safety officer" but also listed particular examples of officers falling within the statutory definition).

That the Second and Ninth Circuits considered the *same regulation* and came to opposite conclusions demonstrates the need for this Court to clarify when an agency's interpretation of statutory language, restated or paraphrased in a regulation, is entitled to *Auer* deference.

### B. This Court Should Clarify That *Auer* Deference Does Not Apply Where An Agency's Change In Position Upsets Settled Expectations.

The split here also reflects lower courts' confusion as to whether *Auer* deference is proper when an agency announces an interpretation of a regulation that upsets reasonable expectations.

#### 1. The Secretary's *Amicus* Brief Reflects an Unexplained Change in the Secretary's Interpretation of "Sales."

The Secretary's position that PSRs do not make "sales" within the meaning of section 3(k) depends on her newly-restrictive definition of "sale" that requires a fully consummated transaction. *See* Pet. App. 35a. That new understanding of "sale" was announced for the first time in an *amicus* brief in 2009. Even if one indulges the fiction that that position meaningfully constitutes an interpretation of regulatory language written by the Department — as opposed to an interpretation of statutory language not eligible for *Chevron* deference or simply a freestanding policy preference — the Secretary's new position is an about-face from the flexible, functional understanding of "sale" that the Department has espoused for decades.

In 1940, the Department promulgated regulations making clear that an "outside salesman" must make "sales within the meaning of section 3(k) of the Act." 29 C.F.R. § 541.5 (1940). Section 3(k), in turn, defined "sale" in flexible and expansive terms to "*include*[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, *or other*

*disposition*." 29 U.S.C. § 203(k) (emphases added). The Department underscored this non-technical approach by explaining that a "salesman [must] *in some sense* make a sale." Dep't of Labor, *Executive, Administrative, Professional, Outside Salesman Redefined* (Oct. 10, 1940) ("Stein Report") at 45–46 (emphasis added). Nothing in the regulatory or statutory language hinted at the hypertechnical reading now pressed by the Department.

In 1970, the Department reiterated this flexible understanding when it promulgated 29 C.F.R. § 779.241, addressing the same "statutory definition of the term 'sale' or 'sell'" in section 3(k) that is at issue here. In that regulation, the Department took a broad and explicitly practical approach that is the polar opposite of its new view:

> As long as the employee *in any way participates* in the sale of the goods he will be considered to be "selling" the goods, whether he physically handles them or not. Thus, if the employee performs any work that, *in a practical sense* is an essential *part* of consummating the "sale" of the particular goods, he will be considered to be "selling" the goods.

29 C.F.R. § 779.241 (emphases added). The Department's *amicus* brief did not even acknowledge, much less successfully explain away, this expansive understanding of a "sale" in its own still-extant regulation.

Next, in its 2004 rulemaking, the Department emphasized that it "did not intend any substantive changes" in the outside sales exemption. Defining

and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,161 (Apr. 23, 2004). Indeed, the Department explicitly reaffirmed the statement in the 1940 Stein Report that the employee need only make a sale "in some sense." *Id.* at 22,162.

The pharmaceutical industry's uniform treatment of PSRs as exempt employees is consistent with the Department's former, expansive understanding of "sales." Not only did the Department not contest that treatment, it positively encouraged it: The Department's own publication defined "pharmaceutical detailer" as an occupation that "[p]romotes use of and *sells* ethical drugs and other pharmaceutical products to physicians" — all in a section titled, "*Sales Occupations*, Chemicals, Drugs, and Sundries." Dep't of Labor, Dictionary of Occupational Titles § 262.157-010 (4th ed. 1991) (emphases added), *available at* http://www.oalj.dol.gov/libdot.htm.

The Department's longstanding acquiescence in the industry's treatment of PSRs confirms what the Department repeatedly said — that it was interpreting "sales" in a broad, functional manner. Any notion that the industry uniformly misread the regulation or misunderstood the Department's interpretation for 70 years and yet the Department never said anything, in any manner, to suggest it disagreed is simply too much to swallow. As Judge Posner explained, while it is "possible for an entire industry to be in violation of the Fair Labor Standards Act for a long time without the Labor Department noticing," the "more plausible

hypothesis is that the … industry has been left alone" because it was compliant. *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510–11 (7th Cir. 2007).[5]

### 2. There Is Uncertainty Over The Circumstances In Which Changes In Position Create Unfair Surprise And Undermine *Auer* Deference.

This Court has stated on many occasions that "an agency's interpretation of a … regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)) (internal quotation marks omitted); *see also, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993); *Watt v. Alaska*, 451 U.S. 259, 273 (1981). Likewise, the Court has warned that a new interpretation does not merit deference when it results in "unfair surprise." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007). And in recent decisions, this Court has continued to treat consistency as an important factor in the

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[5] The pharmaceutical industry was not alone in relying on the Department's practical, non-technical understanding of "sales" and will not be alone in suffering disruption and costs if this Court does not resolve this split. *See, e.g.*, *Gregory v. First Title of Am., Inc.*, 555 F.3d 1300, 1303, 1308–09 (11th Cir. 2009) (employee whose job was inducing realtors, brokers, and lenders to begin referring their customers to employer for title insurance services was exempt outside salesperson).

decision whether to afford *Auer* deference. *See Talk Am.*, 131 S. Ct. at 2263–65; *Chase Bank v. McCoy*, 131 S. Ct. 871, 881 (2011).

Consistency is important for at least two reasons. First, an unexplained departure from an agency's longstanding interpretation of its regulation "is likely to reflect the agency's reassessment of wise policy rather than a reassessment of what the agency itself originally meant," *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 682 (6th Cir. 2005), and an agency's policy views do not merit controlling *Auer* deference. Second, regulated entities structure their affairs on the assumption that an agency will not suddenly and without explanation abandon its long-held views. An agency may not "under the guise of interpreting a regulation, … create *de facto* a new regulation" and thereby circumvent the required notice and public participation. *Christensen*, 529 U.S. at 588.

Here, the Secretary's new, formalistic interpretation of "sales," announced not through notice-and-comment rulemaking but in an unsolicited *amicus* brief in a private lawsuit, upends 70 years of settled expectations for the entire pharmaceutical industry and tens of thousands of PSRs and threatens the industry with massive retrospective liability. As the Ninth Circuit recognized, courts should not afford any deference — let alone "controlling" deference — to such an "about-face regulation, expressed only in *ad hoc* amicus filings," that departs from "decades of DOL nonfeasance and the consistent message to

employers that a salesman is someone who 'in some sense' sells." Pet. App. 35a.[6]

Lower courts, however, have struggled to determine whether or to what extent *Auer* deference applies when an agency has changed its position about the meaning of its regulations or announced a new position that creates unfair surprise. Some courts have flatly declared that *Auer* deference is due only when the agency's "position is not inconsistent with [its] prior statements and actions regarding the disputed regulation." *Drake v. FAA*, 291 F.3d 59, 67 (D.C. Cir. 2002); *see also U.S. Steel Mining Co. v. Director, OWCP*, 386 F.3d 977, 986 (11th Cir. 2004) (*Auer* deference applies only to a "constant and unchanging" agency interpretation).[7]

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[6] Other industries may encounter similar problems given the Department of Labor's abandonment of its longstanding practice of issuing opinion letters offering employers advance guidance on the application of the FLSA, *see* Wage & Hour Div., U.S. Dep't of Labor, Final Rulings and Opinion Letters, http://www.dol.gov/WHD/opinion/opinion.htm (last visited Oct. 17, 2011), and simultaneous "reinvigorat[ion of] its *amicus*-brief practice," *see* Richard Renner, *Solicitor of Labor Patricia Smith Speaks About Policy*, http://www.whistleblowersblog.org/2010/06/articles/department-of-labor-1/solicitor-of-labor-patricia-smith-speaks-about-policy/ (June 25, 2010).

[7] Some courts of appeals have gone further and held that "the APA requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation." *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001); *see also, e.g.*, *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). Other courts have disagreed. *See United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1139 (10th Cir. 2010) (noting "circuit split" and citing cases). This divide further underscores

Other courts have been less explicit in describing consistency as a precondition to *Auer* deference but have noted the consistency (or not) of an agency's interpretation in justifying decisions to defer (or not). *See, e.g.*, *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 777 (5th Cir. 2010). Still other courts, citing *Coke*, have extended full *Auer* deference to any regulatory interpretation — even a novel or inconsistent interpretation — that the court did not believe resulted in "unfair surprise." *See Boose v. Tri-County Metro. Transp. Dist.*, 587 F.3d 997, 1005 n.13 (9th Cir. 2009); *Haas*, 525 F.3d at 1190.

Two cases exemplify lower courts' struggles with this issue. In *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007), the panel majority, citing *Thomas Jefferson*, declined to defer to a regulatory interpretation offered by the Department of Labor in an *amicus* brief in part because it was "inconsistent with what the DOL said it intended the regulation to mean at the time it was promulgated." *Id.* at 461. Meanwhile, the dissenting judge, citing *Coke*, was "unpersuaded by any suggestion that the inconsistencies in the DOL's interpretation of the regulation over time must lessen the level of deference." *Id.* at 464 (Duncan, J.). Similarly, in *Abbott Laboratories, Inc. v. United States*, 573 F.3d 1327 (Fed. Cir. 2009), the court first stated that "an agency's inconsistent interpretation of its regulation detracts from the deference we owe to that interpretation," *id.* at 1330, but then declared that

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the need for guidance on the impact of changes in an agency's regulatory interpretations.

"the fact that that the government 'may have interpreted these regulations differently at different times in their history' is of no import 'as long as interpretative changes create no unfair surprise,'" *id.* at 1333 (quoting *Coke*, 551 U.S. at 170–71). The court did not explain how inconsistency could "detract[] from … deference" while simultaneously being "of no import."

That the Second and Ninth Circuits reached diametrically opposite conclusions about the deference owed to the Secretary's newly-minted interpretation of "sales" confirms what the lower-court decisions discussed above illustrate — that there is a pressing need for this Court to clarify the proper scope of *Auer* deference when a shift in an agency's regulatory interpretation upsets settled expectations. This case is a clear opportunity to provide that much-needed guidance.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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