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 CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

(1) Whether deference is owed to the Secretary of Labor's interpretation of the Fair Labor Standards Act's outside sales exemption and related regulations.

(2) Whether the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Many of the Chamber's members, including numerous members in the pharmaceutical industry, are subject to the Fair Labor Standards Act ("FLSA" or "Act"). Moreover, the Chamber's members must comply with a host of other statutory requirements that are subject to interpretation by federal agencies, and have a strong interest in those requirements remaining stable and clear. That stability and clarity, in turn, would be threatened by the approach to agency deference urged by Petitioners and the Government.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Counsel of record for both petitioners and respondent received timely notice of amicus' intent to file the brief, and consented to it.

INTRODUCTION AND SUMMARY OF ARGUMENT

Like any statute, the FLSA embodies a balance of legislative priorities. On the one hand, the Act protects the "health, efficiency, and general well-being of workers," *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (quoting 29 U.S.C. § 202(a)), by requiring employers to provide certain employees with benefits such as overtime pay, 26 U.S.C. §§ 206, 207. On the other hand, the Act includes numerous exemptions recognizing that FLSA protections are unnecessary and even ill-advised where employers and employees alike would benefit from alternative compensation practices. *See* 29 U.S.C. § 213(a)(1); *see also Nicholson v. World Bus. Network, Inc.*, 105 F.3d 1361, 1363 (11th Cir. 1997) ("The chief financial officer of a company, for instance, would be less likely to [need statutory-required overtime pay] than a janitor or assembly linesman.").

One such exemption is for workers "employed … in the capacity of outside salesman." 29 U.S.C. § 213(a)(1). As explained by one oft-cited analysis, this exemption reflects a practical assessment by Congress that, for multiple reasons, outside salespeople are among those less likely to benefit from a compensation structure premised on, and limited by, hourly overtime pay:

> There are no restrictions respecting the time [an outside salesperson] 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 … and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily devised 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 Act itself does not define the term "outside salesman." The statute does define the terms "sale" and "sell," and it defines them broadly. The Act provides that they include:

> [A]ny sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

29 U.S.C. § 203(k) ("Section 3(k)").

For its part, the Department of Labor ("DOL") has issued regulations that offer a broad definition of an "outside salesman" that invokes the statute's expansive definition of the term "sale." The regulations provide that an "outside salesman" is an employee who customarily and regularly works away from his or her employer's place of business and:

> Whose primary duty is:
>
> (1) *making sales* within the meaning of [29 U.S.C. § 203(k)].

29 C.F.R. § 541.501(a) (emphasis added). The regulations go on to note:

> 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.

Id. § 541.501(b) (emphases added).

Consistent with the foregoing provisions, longstanding DOL guidance states that the outside sales exemption should be read to cover those who "*in a practical sense*, … are salesmen in that their *activities are of the same nature* as those of persons making sales within the meaning of section 3(k)." DOL, Wage and Hour and Public Contracts Divisions, *Report and Recommendations of the Presiding Officer* (Harold Stein) at Hearings Preliminary to Redefinition at 45 (Oct. 10, 1940) ("Stein Report") (emphasis added).

Under the "practical" approach espoused by both the Act and the regulations, pharmaceutical sales representatives fit comfortably within the outside sales exemption (as they have for decades). Indeed, pharmaceutical sales representatives are among the last of the door-to-door salespeople, and they "share many more similarities than differences with their colleagues in other sales fields." *Christopher v. Smithkline Beecham Corp.*, 635 F.3d 383, 400-01 (9th Cir. 2011). Their core job function is to persuade doctors to commit to perform the act that brings about a purchase of their employers' products. As a result, pharmaceutical sales representatives' primary duty is "making sales." *Id.*

Petitioners and the Government advance a three-part argument that pharmaceutical sales

representatives now are ineligible for the outside sales exemption. *First*, they appear to assert (or, more accurately, assume) that DOL's regulations impose a rigid and narrow exemption, under which an employee must not simply "make sales," but instead must deal *directly* with a buyer and *personally* transfer title or obtain a binding commitment. *Second*, they claim that the DOL's litigation position as *amicus curiae* should be given controlling deference. *Third*, they assert that all "exemptions from [the FLSA] must be construed narrowly." Pet.Br. 11, 36; Govt.Br. 26-27.

These arguments fail at every step.

First, the text as well as the self-evident purpose of the outside sales exemption calls for a flexible definition, under which an employee is overtime exempt if he functions in the capacity of an outside salesperson. Petitioners' and the Government's attempts to rigidly limit the exemption find no support in the text of Section 3(k) or the DOL's regulations and would undercut the purposes of the Act.

Second, where, as here, an agency's regulations at most clarify only that certain situations are *included* in the coverage of a statutory provision, but offer no guidance as to the outer limits of the statute, an agency's litigation position regarding those limits is not entitled to deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). In such a situation, the rationale for applying *Auer* deference is lacking because the agency has not engaged with the public or brought its expertise to bear on the relevant question of the contours of the statute. Moreover, granting controlling deference on issues not remotely

addressed during a rulemaking would perversely invite agencies to avoid clear and comprehensive regulations accompanied by notice and comment and instead adopt major policy changes *via* amicus brief.

Third, although courts routinely state that exceptions to the FLSA should be narrowly construed, that canon does withstand scrutiny as a means of assessing congressional intent. Rather, the numerous exemptions to the Act make clear that Congress sought to limit the FLSA in order to benefit employers and employees alike.

Accordingly, this Court should hold that Section 3(k) and the DOL's related regulations set out a functional and flexible definition of outside salesperson that encompasses pharmaceutical sales representatives; that the DOL's litigation position in this case is not entitled to *Auer* deference; and that the "anti-employer" narrow construction canon has no place in a proper interpretation of the FLSA.

I. A FUNCTIONAL DEFINITION OF THE OUTSIDE SALES EXEMPTION IS NECESSARY TO EFFECTUATE CONGRESSIONAL INTENT, AND PHARMACEUTICAL SALES REPRESENTATIVES FALL WITHIN THAT DEFINITION.

The text, structure, and self-evident purpose of Section 3(k) and the DOL's regulations indicate that the outside sale exemption must be defined flexibly and broadly to encompass those employees who "in some sense make a sale." Stein Report at 46. Under such an approach, the activities of a pharmaceutical sales representative fit comfortably within the outside sales exemption.

A. The Text, Structure, And Purpose Of The Outside Sales Exemption Require A Broad, Functional Approach.

Numerous factors support a functional reading of the outside sales exemption that looks to the activities and structure of an employee's position.

First, the text of the statute itself is expansive. Congress extended the exemption to "any employee employed … *in the capacity* of outside salesman." 29 U.S.C. § 213(a)(1) (emphasis added). This wording is significant since Congress could more simply have exempted "any employee employed *as* an outside salesman," yet instead chose wording that connotes a broader, functional analysis. *See* Random House Dictionary of the English Language 219 (unabridged ed. 1973) (defining "capacity" as "position; *function*; [or] relation") (emphasis added); *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001) (noting the "cardinal principle of statutory construction" that the courts should "give effect, if possible, to every clause and word of a statute") (internal quotation marks omitted). Moreover, the term "sales" is defined broadly in the Act to "*include*[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition*." 29 U.S.C. § 203(k) (emphasis added).

Second, the DOL's regulations do nothing to limit the breadth of the outside sales exemption. The regulations instead provide that an outside salesperson must have as their primary duty "[m]aking sales within the meaning of [29 U.S.C. § 203(k)]." 29 C.F.R. § 541.501(a). The verb "to make" simply means "to produce; cause to exist; [or] bring about." *See* Random House Dictionary of the

English Language 866 (unabridged ed. 1973). Thus, an employee clearly falls within the DOL's regulations if his or her primary duty is making personal calls on the decisionmakers in sales transactions in order to produce or bring about sales, or cause them to exist.

Moreover, the regulations broadly construe the term "sales":

> 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."

Id. § 541.501(b). Thus, although the regulations specify two circumstances that might involve "sales" (transfer of "title to tangible property" and "tangible and valuable evidences of intangible property"), the regulations simply refer back to the statute as defining the limits of that term.

DOL's guidance regarding the outside sales exemption has likewise suggested a broad, functional approach: In a longstanding guidance issued in 1940, the DOL stated that the outside sales exemption should be read to cover those who "in a practical sense, … are salesmen in that their activities are of the same nature as those of persons making sales within the meaning of section 3(k)." Stein Report at 45; *see also* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004) ("Outside Sales and Computer

Employees") ("Defining and Delimiting") (recognizing that the exemption applies when employees "'*in some sense* make a sale'") (quoting Stein Report at 46) (emphasis in original)).

Third, the broad language of the statutory and regulatory text is reinforced by the self-evident purpose of the outside sales exemption. The exemption reflects the commonsense understanding that overtime pay is "incompatible with the individual character of the work of an outside salesman." *Jewel Tea Co.*, 118 F.2d at 208. Outside salespeople must work flexible hours and operate beyond the supervision of their employers. Their performance, moreover, can be assessed with an objective measure—the sales in their territory—which allows the employer to reward hard work and skill rather than simply hours at the office. And because outside sales representatives benefit from the fruits of working longer hours in the form of incentive compensation, it is less likely that long hours will reflect exploitation rather than the free pursuit of self-interest.

Paying overtime in this context would be unnecessarily burdensome and inefficient. The employer would likely have to limit the number of hours an employee could work and would face serious practical obstacles in verifying those hours. And employees, in turn, would lose the flexibility of working at their own pace and on their own schedule, and the option of earning additional compensation by putting in longer hours.

In short, the exemption does not constitute some formalistic dispensation keyed to an employee personally bringing about a transfer in title. Rather,

it reflects a highly practical assessment, based on the *activities* and *employment structure* of outside salespeople, that such employees do not require the protection of (and could in fact be harmed by) overtime pay requirements.

B. Pharmaceutical Sales Representatives Perform The Activities Of An Outside Salesperson.

Pharmaceutical sales representatives work outside of an office and "spend much of their time traveling to the offices of, and working with, physicians within their assigned geographic territories." *Christopher*, 635 F.3d at 386. Specifically, they make sales calls on these physicians, the gatekeepers and decisionmakers with respect to their patients' prescription drug purchases, and it is the role of a pharmaceutical sales representative to importune and persuade the physicians to commit to select his or her employer's product for purchase in appropriate medical circumstances. *Id.* at 396 ("[I]t is patient's physician, who is vested with both a moral and legal duty to prescribe medication appropriately, who selects the medication and is the appropriate focus of our 'sell/buy' inquiry."); *see also* Cal. Bus. & Prof. Code § 4040(a)(1)-(2) defining "prescription" as "an oral, written, or electronic transmission *order* … [i]ssued by a physician" (emphasis added)); 29 Pa. Code § 27.1 (defining "prescription" as "[a] written, electronic or oral *order* issued by a licensed medical practitioner" (emphasis added)). Pharmaceutical companies do not direct or constrain the hours their sales representatives can or should work. *Christopher*, 635 F.3d at 386-87. And pharmaceutical sales

representatives generally receive "incentive-based compensation" to reward their longer hours. *Id.* at 387.

Pharmaceutical sales representatives thus perform the same core activities, and implicate the same practical considerations, as other traveling salespeople. Applying the outside sales exemption would accordingly serve the policies that animate the exemption. Namely, employers would be saved the burdens of limiting and verifying their employees' hours and would remain free to compensate their employees based on the quality of their work rather than merely hours logged.

In contrast, subjecting pharmaceutical sales representatives to FLSA's overtime requirements would be inconsistent with the purposes of the FLSA and reflect nothing more than an inefficient and unjustified windfall for the Petitioners. As the court below observed, far from being exploited, the plaintiffs in this case "instead earn salaries well above minimum wage—up to $100,000 a year." *Christopher*, 635 F.3d at 388 (internal quotation marks omitted). Indeed, the pharmaceutical sales representative position was recently chosen as one of the best American jobs. *See* Young and Restless—top 20 jobs, Money Magazine (2007) *available at* http://tinyurl.com/2nw4w9 (last visited March 14, 2012). Thus, to the extent that pharmaceutical sales representatives work long hours, they do so not "out of desperation," *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987), but rather based on an incentive to increase their compensation.

Accordingly, there is little reason to believe that requiring an hourly-compensation model would

increase compensation to pharmaceutical sales representatives going forward. Rather, "either the base pay …, or the commission rate, or both, would decline, to offset the overtime premium." *Mechmet*, 825 F.2d at 1176. Moreover, employers would likely be forced to limit the number of hours employees could work and could even *reduce* net compensation in order to account for the burdens of monitoring employee hours and the inefficiency of a position constrained from working flexible hours.

In short, application of the overtime pay requirements to pharmaceutical sales representatives would not benefit pharmaceutical sales representatives going forward; instead, Petitioners would simply receive a windfall in the form of overtime compensation over and above the "bonuses [they already received] *in lieu of overtime* as an incentive to increase their efforts." *Christopher*, 635 F.3d at 388 (internal quotation marks omitted; emphasis added).

II. THE FORMALISTIC LIMITS URGED BY PETITIONERS AND THE GOVERNMENT FIND NO SUPPORT IN THE STATUTORY OR REGULATORY TEXT AND WOULD UNDERMINE THE PURPOSE OF THE OUTSIDE SALES EXEMPTION.

Petitioners and the Government emphasize repeatedly that the DOL's regulations draw a distinction between outside sales work and promotional work, and provide that, in addition to outside sales work, promotional work that is "performed incidental to … an employee's own outside sales work" is also exempt, 29 C.F.R. § 541.503. *See* Pet.Br. 15-28; Govt.Br. 9-18.

Petitioners and the Government then argue that, because pharmaceutical sales representatives engage in promotional work that is not incidental to their own sales, pharmaceutical sales representatives cannot be considered outside salespeople.

Yet, when it comes to establishing the critical premise of this argument—that pharmaceutical sales representatives engage in promotional work rather than making their own sales—Petitioners and the Government proceed largely by *ipse dixit.* If one reads between the lines of Petitioners' and the Government's arguments, it appears that they believe pharmaceutical sales representatives do not engage in outside sales work because they fall outside certain categorical limits on that exemption. Namely, they appear to contend that an employee can qualify as an outside salesperson only if he or she deals directly with a buyer and personally causes a transfer of title or obtains a binding commitment. Pet.Br. 27; Govt.Br. 13. Yet these limits find no support in the text of the FLSA or the DOL's regulations, and are utterly disconnected from the purposes of the outside sales exemption. *Cf. Christopher*, 635 F.3d at 396 (concluding that the Petitioners' and Government's view "ignores the reality of the nature of the work of [pharmaceutical sales representatives], as it has been carried out for decades").

A. An Outside Salesperson Need Not Deal Directly With The Buyer.

Petitioners and the Government emphasize that physicians are not the ultimate purchasers of pharmaceuticals. *See* Pet.Br. 6 ("Physicians never place an order with petitioners …."); *Id.* at 19

("Physicians are not customers ...."); Govt.Br. 8 ("[T]he physicians with whom petitioners interacted were not the intended purchasers of the products in question."). This assertion would only be relevant, however, if an outside salespersons could not deal with the *agent* of a potential buyer. A doctor's decision to prescribe a drug is just one example of the many instances in which a fiduciary is entrusted with the task of choosing a product to be purchased by a principal. *See* Richard A. Lord, 23 Williston on Contracts § 62:12 (4th ed. 2011) ("[L]ike the attorney-client relationship, the physician-patient relationship is highly fiduciary in nature."); *see also Christopher*, 635 F.3d at 396 (noting that "[a] patient's physician …is vested with both a moral and legal duty to prescribe medication appropriately").

Not a single word in the FLSA or the DOL's regulations, however, limit the outside sales exemption to salespeople who deal directly with the buyer. Nor is it reasonable to assume such a limit, as salespeople routinely deal with agents of potential buyers. Indeed, this practice is the overwhelming norm in sales to an organization. Limiting the outside sales exemption to those salespeople who deal only with an ultimate purchaser would thus restrict the scope of the exemption beyond any plausible conception of outside sales.

Relatedly, Petitioners and the Government maintain that Petitioners cannot be outside salespeople because they do not themselves take orders. *See* Pet.Br. 13; Govt.Br. 5. Yet, there is again no basis in the Section 3(k) or the DOL's regulations to conclude that an outside salesperson must personally fill orders. Indeed, DOL has made

quite clear in its own guidance that this is *not* required. *See* DOL, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004) ("Exempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button."). And for good reason. The fact that a door-to-door encyclopedia salesman has an assistant take an order, or directs the customer to a website where the customer can place the order directly, does not make him any less an outside salesman.

Neither Petitioners nor the Government, moreover, offers any explanation of why an employee's direct dealings with a buyer are relevant to the purposes animating the outside sales exemption. Whether an outside salesperson deals directly with a buyer, or instead with a trusted agent who in turn encourages the buyer to make the ultimate purchasing decision, and whether or not the salesperson personally takes an order, the *activities* performed by the salesperson and the resulting impracticality of an hourly-overtime arrangement are the same.

B. An Outside Salesperson Need Not Obtain Binding Commitments.

Petitioners also emphasize that pharmaceutical sales representatives do not obtain "contracts to prescribe GSK products" or other binding commitments. Pet.Br. 6. That is, an employee "makes sales," in Petitioners' view, only where "the employee actually consummate[s] the sale himself, either by entering into a contractual exchange … or

at a minimum by obtaining a commitment to purchase." Pet.Br. 17. The Government takes an even stricter view: "An employee does not make a 'sale' for purposes of the 'outside salesman' exemption unless he actually transfers title to the property at issue." Govt.Br. 12-13.

In fact, this argument is largely an attempt to repackage the untenable claim that an outside salesperson must deal directly with a buyer and personally fill orders. In other words, Petitioners and the Government appear to believe that, if the encyclopedia salesman leaves a house without transferring title, he has not made a sale when the homeowner places an order the next day with an assistant or online. Once this unsupported claim is put aside, however, it is clear that pharmaceutical sales representatives, like the encyclopedia salesman, *do* cause the purchase of pharmaceuticals; *i.e.*, the purchase by the patient when he or she fills a prescription.

To be sure, Petitioners and the Government do not believe that pharmaceutical sales representatives should be credited with causing this sale. Pet.Br. 6; Govt.Br. 13. But the reasons they offer again find no support in the text or purpose of the outside sales exemption.

For example, Petitioners and the Government note that under the outside sales exemption employees must "mak[e]" sales, and they implicitly conclude that this must mean that an outside salesperson must *personally* consummate a transaction. Pet.Br. 12; Govt.Br. 30-31. But the conclusion does not follow. As noted, *supra* at 8, "to make" simply means "to produce; cause to exist; [or]

bring about." *See* Random House Dictionary of the English Language 866 (unabridged ed. 1973). It does not remotely suggest that the employee must directly exchange product for consideration, or otherwise "personally consummate" the sale. *Cf.* Defining and Delimiting, *supra* at 22,162 (noting that "technological changes in how orders are taken and processed should not preclude the exemption for employees whose primary duty is making sales"). And, as already described, such a limit on the sales exemption would be inconsistent with the common understanding of a salesperson.

Petitioners and the Government also contend that an outside salesperson must personally transfer title directly to a buyer because the regulations state that *promotional* work qualifies as overtime exempt only if it is in support of his or her *own* sales. Pet.Br. 3; Govt.Br. 14. This argument only begs the question of whether pharmaceutical sales representatives engage in sales. And, as noted, their work—directly and personally soliciting the physician/agents who act as decisionmakers in pharmaceutical sales transactions—is sales and pharmaceutical sales representatives clearly are "employed in the capacity of outside salesmen."[2]

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[2] The Government notes that, when the FLSA's regulations were amended in 2004, several commentators requested that the "distinction" between promotional work and sales work be "eliminated," and that the Chamber argued promotional activities are "an integral part of the sales process" even when they do not culminate in an "individual sale." Govt.Br. 4 (quoting Defining and Delimiting, *supra* at 22,162). But whether or not the outside salesperson exemption should be so extended has no bearing on the case before this Court. Pharmaceutical sales representatives have been properly considered overtime exempt for more than 70 years. *See*

Petitioners additionally suggest that pharmaceutical sales representatives do not make or cause pharmaceutical sales because they only provide information to doctors about their employer's products and doctors have a duty to prescribe products in the best interest of the patient. Pet.Br. 4 ("Petitioners' primary responsibility was to give physicians information provided by GSK so the physicians could use their own judgment in deciding whether to prescribe a GSK product."). It is not clear, however, why these facts are inconsistent with effective salesmanship; to the contrary, providing objective information that demonstrates how a product can benefit a buyer is a common and effective method of sales. Moreover, it is difficult to take seriously the suggestion that pharmaceutical sales representatives do not "cause" any increase in sales: Petitioners have accepted substantial bonus pay, and the industry expends billions of dollars each year, based on that very premise. *Christopher*, 635 F.3d at 387, n.4, 388, n.6.

In all events, whatever the precise point at which the Petitioners and the Government believe a salesperson can be considered to "make" sales, neither Petitioners nor the Government points to any language in the statutory or regulatory text suggesting that only those salespeople who personally obtain a binding commitment or directly consummate a transfer of title may be credited with a sale. Likewise, neither Petitioners nor the

(continued…)

Christopher, 635 F.3d at 399. No change to the FLSA's promotion regulations—or any other regulation—is necessary for this Court to reach the same conclusion.

Government attempts to explain why the purposes of the outside sales exemption would be served by limiting the exemption to only those salespeople who personally administer a change in title.

III. BECAUSE THE DOL'S OUTSIDE SALES REGULATIONS DO NOT LIMIT THE STATUTORY TERMS, THE DOL'S LITIGATION POSITION IS NOT ENTITLED TO DEFERENCE.

Petitioners and the Government invoke *Auer v. Robbins* for the proposition that the DOL's litigation position as *amicus curiae* in this and related cases is entitled to "controlling deference." This Court has already established, however, that "[a]n agency does not acquire 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." *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006); *see also* 29 C.F.R. § 541.501(a) (providing that the exemption applies to persons who work outside their employer's premises, "[m]aking *sales* within the meaning of" 29 U.S.C. § 203(k)). This "parroting exception" to *Auer* deference should apply here, lest agencies be allowed to circumvent the notice and comment process simply by promulgating broad regulations and then implementing major policy changes *via* amicus brief.

Indeed, as explained above, the DOL's regulations do not speak to the limiting principle that Petitioners and the Government propose in this case. Petitioners and the Government emphasize that the regulations make *promotional* work non-exempt. But this is a

red herring; Petitioners are responsible for making, *i.e.*, causing, *sales* of their products.

Petitioners' only other purported textual source for the principle that an outside salesperson must deal directly with the buyer and personally cause a transfer in title is the regulations' use of the word "mak[e]." Yet, that term does not remotely suggest such a limit. *See supra* at 8. To the contrary, and as noted, it suggests that the exemption applies to those, such as pharmaceutical sales representatives, who make in-person sales calls on decisionmakers in order to bring about sales of their employer's products.

Particularly against this backdrop, then, the failure of the DOL's regulations to provide any relevant specificity is dispositive. As the Court explained in *Gonzales*, *Auer* deference is based on the premise that, where regulations "g[i]ve specificity to a statutory scheme the [agency] was charged with enforcing," they bring the agency's "considerable experience and expertise" to bear on the disputed issue. 546 U.S. at 256. Where "the underlying regulation does little more than restate the terms of the statute itself," however, that premise is lacking. *Id.* at 257.

This Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), moreover, makes it particularly important that the Court limit *Auer* deference to situations in which an agency has genuinely brought its experience and expertise to bear on the relevant question. Under *Mead*, an agency may receive *Chevron* deference for its interpretation of a *statute* only when it engages in the sort of procedural formalities that indicate the

agency was exercising the authority "to make rules carrying the force of law." *Id.* at 226-27. Yet this limit could be easily circumvented if the agency could simply pass a regulation parroting the statute, and then invoke controlling deference under *Auer* to its interpretation of its own *regulation*.

This concern is amply illustrated here. Although the Government attempts in its *amicus* briefs to cram a novel statutory interpretation into the broad phrase "making sales," the fact remains that the DOL has not credibly brought its "considerable experience and expertise" to bear on the disputed question. *Gonzales*, 546 U.S. at 256. Giving "controlling deference" to such an interpretation would accordingly create a perverse incentive for agencies to promulgate only broad, vaguely worded regulations through notice and comment proceedings, leaving them free to implement significant policy changes under the guise of interpreting those regulations.

IV. THIS COURT SHOULD ABOLISH THE UNJUSTIFIABLE CANON THAT EXCEPTIONS TO THE FLSA MUST BE NARROWLY CONSTRUED.

"On occasion, a would-be doctrinal rule or test finds its way into [this Court's] case law through simple repetition of a phrase—however fortuitously coined." *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 531 (2005). When it becomes apparent, however, that such "repetition of a phrase" is "doctrinally untenable," this Court has properly stepped in to "correct course" and hold that the fortuitously coined, but inappropriate rule "has no proper place in [its] jurisprudence." *Id.* at 541, 544, 548 (emphasis omitted).

This case calls for just such a course correction. From time to time, this Court has stated "that remedial statutes should be liberally construed" to effectuate their remedial purpose. *SEC v. CM Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943). In 1945, however, this Court went one step further by stating that, because the FLSA was "designed to extend the frontiers of social progress," purposeful, explicit exemptions to such "humanitarian and remedial legislation" should "be narrowly construed." *AH Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (internal quotation marks and citation omitted). "[T]hrough simple repetition," *Lingle*, 544 U.S. at 531, this statement has produced a well-established "anti-employer" canon in FLSA cases. *See, e.g.*, *Solis v. Washington*, 656 F.3d 1079, 1083 (9th Cir. 2011) ("FLSA exemptions are to be narrowly construed against ... employers and are to be withheld except as to persons plainly and unmistakably within their terms and spirit.") (internal quotation marks omitted).

As Justice Scalia has observed, there is no logical basis to infer that Congress means more or less than it says in a statute, simply because the legislation might be described, in some vague sense, as "remedial." *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 581-86 (1990) ("Assorted Canards"). Thus, the proposition that Congress would wish the FLSA to impose greater burdens on employers than its text, structure, and purpose indicate is itself unsupportable. Moreover, the supposed corollary—that courts should assume Congress is less than sincere when it includes *explicit exemptions* to a "remedial" statute—is doubly flawed, particularly in

the context of the FLSA: The numerous exceptions to the so-called "remedial" provisions of the Act clearly demonstrate that Congress did *not* intend the Act to impose limitless burdens on employers. Moreover, the exemptions themselves promote the worker-protection purposes of the Act by allowing flexible employment arrangements that benefit employees as well as employers.

The Court should accordingly abolish the canon that exemptions to remedial statutes should be narrowly construed, at least as applied to the FLSA. The validity of that canon is squarely presented in this case, as it describes the background standard for interpreting the outside sales exemption. Moreover, it has become apparent that the canon is not simply an ill-advised, yet harmless turn of phrase; rather, lower court opinions indicate that this unsupported trope has distorted the process of interpreting the FLSA. The Court should make clear that this rule "has no proper place in [its] jurisprudence." *Lingle*, 544 U.S. at 540.

A. The Canon That Congress Intended Exemptions to the FLSA To Be Narrowly Construed Is Patently Unjustified.

The FLSA "anti-employer" canon is descended from the following statement of the Court in *AH Phillips*:

> The Fair Labor Standards Act was designed to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work. Any exemption from such humanitarian and remedial legislation must therefore be

> narrowly construed .... To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

324 U.S. at 493 (internal quotation marks and citation omitted). This hostile view toward exemptions to "remedial" statutes, in turn, is an application of "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

As Justice Scalia has explained, however, even this "familiar canon" suffers from serious flaws. *See Assorted Canards*, *supra* at 581-86. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). And in deciding how Congress has struck the balance, the goal "should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right." Scalia, *Assorted Canards*, *supra* at 582. Of course "that may often be difficult, but [there is] no reason, *a priori*, to compound the difficulty, and render it even more unlikely that the precise meaning will be discerned, by laying a judicial thumb on one or the other side of the scales." *Id.*

Stated another way, since the purpose of all statutory interpretation is to assess congressional intent, the rule of construing remedial statutes

broadly reflects an assumption that Congress would have intended for some statutes to prohibit or require more than their text, structure, and purpose would otherwise indicate. Yet *all* statutes are in some sense remedial, "since one can hardly conceive of a law that is not meant to solve some problem." *Id.* at 583. And there is no reason to think that Congress is more or less timid in expressing its will through the text and structure of certain statutes, simply because those laws might be "remedial" in some narrower, undefined sense.

The corollary spawned in *AH Phillips*, however—that *exemptions* to the FLSA should be narrowly construed—only doubles down on these flaws. Even assuming that "remedial" statutes should be broadly construed, there is simply no basis to conclude that Congress intends remedial statutes to be extended *in the face of an express exemption*. In such instances, by definition, Congress has explicitly stated that it does *not* wish the statute to be extended broadly. And there is no reason to believe in the abstract that Congress in these situations does not mean what it says, or that it feels more strongly about the statute's prohibitions than its exemptions.

Indeed, one could just as easily say that *exemptions* to remedial statutes are themselves "remedial," as they are intended to remedy the otherwise excessive scope of more general provisions. Accordingly, if one took seriously the rule of liberally construing "remedial" provisions, there is at least as strong an argument that statutory exemptions should be read *broadly*. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the

general."). Of course, such complexity and confusion can be avoided entirely simply by interpreting the exemptions through the standard tools of statutory construction without handicapping one outcome over another by preordaining it more desirable.

Placing a thumb on the interpretive scale is particularly inappropriate in the context of the FLSA for two reasons. *First*, Congress included a host of exemptions to the so-called "remedial" provisions of the Act. Congress excluded from these protections over 50 categories of employees ranging from white collar workers, to fishermen and seamen, to employees of movie theaters or the maple syrup industry. *See* Brief of *Amicus Curiae* National Federation Independent Business, Appendix A. It is accordingly implausible to suggest that Congress was reluctant to carve out exceptions to the Act. In fact, many of these exemptions were enacted precisely "to countermand [broad] judicial interpretations of the FLSA." *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 957 (11th Cir. 2007). "Consequently, construing [FLSA exemptions] narrowly against employers … contravenes not only basic tenets of statutory construction but also the readily apparent intent of the legislators who approved the [exemptions'] language." *Id.* at 958.[3]

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[3] Nor can it be argued that the anti-employer canon should be retained because Congress has failed to expressly repudiate it. "It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." *Patterson v. McLean Credit Union*, 491 U.S. 164, 175, n.1 (1989) (quoting *Johnson v. Transportation Agency, Santa Clara Cnty.*, 480 U. S. 616, 671-672 (1987) (Scalia, J., dissenting)).

Second, in many cases, the exemptions to the FLSA serve the very same employee-protective goals as the more general provisions. Congress believed that the best way to ensure "a fair day's pay" was to require overtime in *some circumstances*. *AH Phillips, Inc.*, 324 U.S. at 493. But, Congress likewise believed (as demonstrated by the inclusion of explicit exemptions), that alternative compensation arrangements could provide better and fairer pay in *other circumstances*. Courts should draw the line between these two sets of circumstances by interpreting the text and purpose of the exemption set out in the FLSA, not by "laying a judicial thumb on one or the other side of the scales." Scalia, *Assorted Canards*, *supra* at 582.

This case is illustrative. As explained above, forced overtime would saddle pharmaceutical companies as well as their sales representatives with an inefficient and unfair compensation model, under which the representatives would be limited in the hours they could work and unable to earn extra pay for greater effort and better performance. *See supra* at 11; *see also Jewel Tea Co.*, 118 F.2d at 208 ("To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman."). Accordingly, while Petitioners themselves would obtain a windfall if they prevail in this suit, *supra* at 11-12, their narrow construction of the outside sales exemption would *undermine* rather than promote the interests of employees going forward. There is no basis to assume *a priori* that Congress would wish this result absent a "plain[] and unmistakable[]" statement to the contrary, *Solis*, 656

F.3d at 1083, simply because the FLSA might be deemed, in some vague sense, "remedial."

B. The Validity Of The Canon Is Squarely Encompassed Within The Second Question Presented And This Court Should Address It.

While this Court may be capable of resolving this case without addressing the validity of the canon, that issue is squarely presented in this case and prudential considerations strongly support resolving it.

The proper standard with which to interpret the outside sales exemption is a question that is "fairly included" in the question presented of whether the outside sales exemption applies to pharmaceutical sales representatives. Sup. Ct. R. 14(1)(a). Indeed, the lower courts have repeatedly cited the anti-employer canon at the outset of their analyses of the question presented in this case. *See, e.g.*, *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 150 (2d Cir. 2010); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 469 (S.D.N.Y. 2008); *Ruggeri v. Boehringer Ingelheim Pharm.*, 585 F. Supp. 2d 254, 261 (D. Conn. 2008).

Moreover, although this Court has previously endorsed the anti-employer canon, *e.g.*, *AH Phillips, Inc.*, 324 U.S. at 493, *stare decisis* presents no obstacle to rejecting it now. "[T]his Court is bound by holdings, not language." *See Alexander v. Sandoval*, 532 U.S. 275, 282 (2001). And *amicus curiae* is not aware of any decision in which the anti-employer canon was an essential part of this Court's holding. *Cf. Lingle*, 544 U.S. at 545-46 ("We emphasize that our holding today—that the 'substantially advances' formula is not a valid takings test—does not require

us to disturb any of our prior holdings. To be sure, we applied [this] inquiry in *Agins* itself …. But in no case have we found a compensable taking based on such an inquiry.").

Indeed, this Court's earlier endorsement of the anti-employer canon is one of the strongest reasons it should reject it now. Although this Court is not bound by language that is not part of its holdings, the lower courts clearly perceive themselves to be. There is strong evidence, moreover, that this perception creates real distortion of the FLSA.

As a general matter, the existence of the canon creates a risk that courts will pull up short of the careful analysis needed to decide close cases, defaulting instead to the canon as an easy tie breaker. And this effect is apparent in practice. For example, in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), the court held that protective outfits worn by employees of a meat processing plant did not count as "clothing" for purposes of FLSA's exemption for time spent donning and doffing clothing. *Id.* at 905. The employer cited dictionary definitions defining "clothing" to include "whatever is worn as covering for the human body." *Id.* Indeed, earlier in its opinion, the court itself referred to the protective outfits (perhaps unintentionally) as "specialized protective clothing." *Id.* at 897, 905. However, the court reasoned that the term "clothing" could not be read in this "expansive fashion" because "[t]he protective gear at issue [did] not plainly and unmistakably fit within [the FLSA's] 'clothing' term." Absent such a fit, the court reasoned, the anti-employer canon "*require[d]* that [it] construe [the exemption] against the employer seeking to assert it."

Id. at 905 (emphasis added); *see also Amendola*, 558 F. Supp. 2d at 472 (distinguishing cases that were factually identical but "d[id] not acknowledge that the FLSA's exemptions must be narrowly construed against employers").

This Court should therefore take the opportunity presented in this case to abolish the canon that exemptions to remedial statutes should be narrowly construed, at least as applied to the FLSA.

CONCLUSION

For the foregoing reasons and those stated by Respondent, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

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