11-204



No. 11-

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 UNITES STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

**Michael R. Pruitt**
**(Counsel of Record)**
**Otto S. Shill, III**
**Jackson White**
**40 North Center Street, Suite 200**
**Mesa, Arizona 85201**
**mpruitt@jacksonwhitelaw.com**
**480-464-1111**

**Attorneys for Petitioners**

Blank Page

# PETITION FOR A WRIT OF CERTIORARI

## QUESTIONS PRESENTED

The outside sales exemption of the Fair Labor Standards Act exempts from the overtime requirements of the Act "any employee employed . . . in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary . . .)." 29 U.S.C. § 213(a)(1). The Secretary of Labor has implemented various regulations that "define and delimit" the outside sales exemption and, filing as *amici* in this and other related matters, has interpreted these regulations to find the exemption inapplicable to pharmaceutical sales representatives. A split exists between the Second and Ninth Circuits concerning whether this interpretation is owed deference and whether the outside sales exemption of the Fair Labor Standards Act applies to pharmaceutical sales representatives.

The questions presented are:

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

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

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Statutes**



**Other Authorities**

**Regulations**

Blank Page

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Michael Shane Christopher and Frank Buchanan respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-36a) is reported at 635 F.3d 383 (9th Cir. 2011). The order of the district court granting respondent's motion for summary judgment (App., *infra*, 37a-47a) is unreported but is available at 2009 WL 4051075, and the order of the district court denying petitioners' Motion to Alter or Amend Judgment (App., *infra*, 48a-52a) is also unreported but is available at 2010 WL 396300.

## JURISDICTION

The judgment of the court of appeals was entered on February 14, 2011. A petition for Panel Rehearing and for Rehearing En Banc was denied on May 17, 2011 (App., *infra*, 53a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Department of Labor's regulation outlining the "General rule for outside sales employees" provides in pertinent part:

(a) The term "employee employed in the capacity of outside salesman" in section 13(a)(1) of the Act shall mean any employee:

(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.

(b) The term "primary duty" is defined at § 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work.

. . .

29 C.F.R. § 541.500(a) & (b).

Section 3(k) of the Fair Labor Standards Act provides 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).

The Department of Labor's regulation at 29 C.F.R. § 541.501(b) provides that: "Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of intangible 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."

A related Department of Labor regulation entitled "Promotion work" provides in pertinent part that: "Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. An employee who does not satisfy the requirements of this subpart may still qualify as an exempt employee under other subparts of this rule." 29 C.F.R. § 541.503(a).

Other pertinent provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, and pertinent regulations of the Department of Labor promulgated thereunder, 29 C.F.R. §§ 541.500 – 541.503, are set forth in the appendix to this petition (App., *infra*, 54a-63a).

## STATEMENT

This petition presents a recurring issue of national importance, on which circuit courts of appeals are split, as to the deference owed to an interpretation by the Department of Labor of its own regulations promulgated under the Fair Labor Standards Act ("FLSA"). In enacting the Fair Labor Standards Act of 1938 to protect American workers,

Congress expressly delegated authority to administer the Act to the Department of Labor ("DOL"). As a result of Congress's delegation of authority, the DOL has acquired over seventy years of experience interpreting and administering the FLSA, promulgating regulations thereunder, and considering the statute's application to diverse positions across the broad spectrum of employment settings in this country.

Petitioners are two among approximately 90,000 pharmaceutical sales representatives ("PSRs") employed within the American pharmaceutical industry[1] to visit physicians' offices and encourage physicians to prescribe their employer's products to their patients. Petitioners filed suit under the FLSA seeking overtime pay on behalf of a nationwide class of PSRs employed by Respondent SmithKline Beecham, Corp., dba GlaxoSmithKline ("GSK"). Numerous similar suits have been filed throughout the country by PSRs performing identical business functions for various pharmaceutical companies.[2]

---

[1] *See* App., *infra* 8a, n. 10.

[2] *E.g.*, *Kuzinski v. Schering Corp.*, 384 F. App'x 17 (2d Cir. 2010) (holding in plaintiffs' favor in connection with *Novartis* decision on same date), *cert. denied*, 131 S. Ct. 1567 (U.S. Feb.28, 2011) (No. 10-459); *Palacios v. Boehringer Ingelheim Pharm., Inc.*, 2011 WL 2837464 (S.D. Fla. July 12, 2011); *Harris v. Auxilium Pharm., Inc.*, 2010 WL 3817150 (S.D. Tex. 2010), *appeal docketed*, No. 11-20027 (5th Cir. Jan. 24, 2011); *Jackson v. Alpharma, Inc.*, 2010 WL 2869530 (D.N.J. 2010), *appeal docketed*, No. 10-3531 (3rd Cir. Aug. 26, 2010); *Jirak v. Abbott Labs., Inc.*, 716 F. Supp. 2d 740 (N.D. Ill. 2010); *Delgado v. Ortho-McNeil, Inc.*, 2009 WL 2781525 (C.D. Cal. Feb. 6, 2009), *appeal docketed*, No. 09-55225 (9th Cir. Feb. 11, 2009); *Schaefer-LaRose v. Eli Lilly & Co., Inc.*, 663 F. Supp. 2d 674 (S.D. Ind. 2009), *appeal docketed*, No. 10-3855 (7th Cir. Dec. 13,

The pharmaceutical industry uniformly considers its PSRs exempt from the overtime provisions of the FLSA as outside sales employees.

Because Congress delegated administrative authority to the Department of Labor to define and delimit the scope of FLSA exemptions, the DOL's regulations and reasonable interpretations thereof "are legally binding." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 164 (2007); *Auer v. Robbins*, 519 U.S. 452 (1997). The overtime exemptions are affirmative defenses as to which the employer bears the burden of proof. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). FLSA exemptions are construed narrowly against the employer in order to further the remedial purposes of the Act. *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945).

Filing as *amicus curiae* in this matter (App., *infra*,64a-90a) and in the Second Circuit, the Department of Labor set forth its interpretation of the relevant regulations pertaining to the outside

---

2010); *Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F. Supp. 2d 254 (D. Conn. 2008); *Kaiser v. Daiichi Sankyo, Inc.*, No. 1:10-cv-918 (S.D. Ohio filed Dec. 21, 2010); *Shatto v. Astrazeneca Pharm., LP*, No. 1:10-cv-1519WTL-MJD (S.D. Ind. filed Nov. 23, 2010); *Bethune v. Bristol-Myers Squibb Co.*, No. 10-CIV-08700 (S.D.N.Y. filed Nov. 18, 2010); *Heldman v. King Pharm., Inc.*, No. 3-10-1001 (M.D. Tenn. filed Oct. 22, 2010); *Jones v. Takeda Pharm. N. Am., Inc.*, No. 1:10-cv-06240 (N.D. Ill. filed Sep. 29, 2010); *Camp v. Lupin Pharm., Inc.*, No. 3:2010cv01403 (D. Conn. filed Sep. 2, 2010); *Quinn v. Endo Pharm., Inc.*, No. 1:2010cv11230 (D. Mass. filed July 22, 2010); *Curley v. Astellas US LLC*, No. 1:10-cv-05240-WHP (S.D.N.Y. filed Jul. 9, 2010); *Evavold v. Sanofi-Aventis US Inc.*, No. 09-cv-05529 (D.N.J. filed Oct. 19, 2009); *Coultrip v. Pfizer, Inc.*, No. 06-cv-09952-AKH (S.D.N.Y. filed Oct. 19, 2006).

sales exemption, along with its conclusion that PSRs are non-exempt and therefore entitled to overtime pay. The Second Circuit deferred to this interpretation by the DOL in the matter of *In re Novartis Wage & Hour Litigation*, 611 F.3d 141, 149 (2d Cir. 2010) ("*Novartis*"). The Ninth Circuit, however, declined to defer to the DOL's position. The Ninth Circuit's decision created a circuit split not only on the underlying issue of applying the exemption to PSRs, but also on the issue of deference owed to the DOL's interpretation of its regulations.

**1. The Outside Sales Employee Exemption.**

By regulatory definition, employees falling within the outside sales exemption necessarily "make sales." 29 C.F.R. § 541.500(a). The FLSA articulates that a "sale" "includes any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition." 29 U.S.C. § 203(k). Regulations pertaining to the exemption further describe "sales" as including "transfer of title" to property, 29 C.F.R. § 541.501(b), and explain that promotional work "incidental to sales made, or to be made, by someone else" does not qualify as sales, *id.* § 541.503(a). In short, the regulations provide that employees who merely promote goods and services cannot qualify for the exemption; rather, only those who "sell" goods and services are exempt. *See id.*

Consistent with the FLSA definition and this regulatory scheme, the DOL has declined repeatedly over several decades to apply the exemption to promoters who do not make their own sales. In 1940, stating that "exemptions [have] been asked" for "sales promotion men and missionary men," the DOL

concluded that "it would be an unwarrantable extension" of the exemption "to describe as a salesman anyone who does not in some sense make a sale" and that "sales promotion and missionary men are persons who normally make no sales at all." Wage and Hour Division, U.S. Department of Labor, *Executive, Administrative, Professional . . . Outside Salesman Redefined, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearing Preliminary to Redefinition* 46-47 (Oct. 10, 1940) ("Stein Report").

Since that time, the DOL has found the exemption inapplicable to: workers engaged in "soliciting promises of future charitable donations or 'selling the concept' of donating to a charity," WH Opinion Letter, 2006 WL 1698305 (May 26, 2006); college recruiters "engaged in identifying qualified customers, i.e., students, and inducing their application to the college, which in turn decides whether to make a contractual offer of its educational services to the applicant," WH Opinion Letter, 1998 WL 852683 (Feb. 19, 1998); and individuals employed to encourage, or "sell the concept" of, donating tissue and organs, WH Opinion Letter, 1994 WL 1004855 (Aug. 19, 1994). Courts likewise have found the exemption inapplicable to employees who merely promote in furtherance of another's sales. *See e.g. Clements v. Serco, Inc.*, 530 F.3d 1224 (10th Cir. 2008) (selling the idea of joining the army, without obtaining binding commitments, does not qualify as making sales); *Wirtz v. Keystone Readers Services, Inc.*, 418 F.2d 249, 260 (5th Cir. 1969) (employees who "pave the way" for magazine subscription orders ultimately taken by other employees do not make their own sales).

### 2. The Question of Pharmaceutical Sales Representatives Making "Sales."

Consistent with its regulations and prior pronouncements regarding the exemption, the DOL views PSRs as promoters who do not make their own sales. App., *infra*, 77a. A PSR's role is to promote pharmaceuticals to physicians in an effort to influence their prescribing habits. In furtherance of this goal, PSRs visit physicians' offices, seek out opportunities to promote the employer's products by discussing the products with physicians, provide samples of the products to physicians, and sometimes ask physicians for non-binding "commitments" to prescribe the products where medically appropriate. App., *infra,* 4a-6a. Industry standards prevent PSRs from obtaining any kind of binding commitment from the physicians they visit. App., *infra,* 27a.

Neither physicians nor patients can purchase or order pharmaceuticals from a PSR. PSRs do not negotiate prices or contracts for pharmaceutical products with anyone. App., *infra,* 5a. Actual sales of pharmaceutical products occur when hospitals, pharmacies and wholesalers purchase the products from the pharmaceutical company. App. *infra,* 4a. In short, there is no direct link between a PSR's promotional efforts directed to a physician and the actual purchase of a pharmaceutical product from the PSR's employer.

As such, the position of Petitioners, and of the DOL, is that the outside sales employee exemption does not apply to PSRs, because they do not make their own sales.

**3. The Second Circuit's Decision in *Novartis*.**

In an amicus brief filed in the Second Circuit, the DOL articulated its position that PSRs' duties do not fall within the exemption because they do not "make sales." *See Novartis*, 611 F.3d at 149. The Chamber of Commerce, filing as *amicus curiae* supporting the pharmaceutical company, argued that the regulatory sales definition merely "parrots" the statutory sales definition and that, as such, the DOL's interpretation thereof is entitled to no deference under this Court's decision in *Gonzales v. Oregon*, 546 U.S. 243 (2006). *Novartis*, 611 F.3d at 149. Under *Gonzales*, an agency is not entitled to controlling deference on its interpretation of a regulation that merely "parrots" Congress's statutory language, because "an 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*, 546 U.S. at 257.

The Second Circuit noted that the regulatory scheme pertaining to the outside sales exemption elaborates on the sales definition contained in the FLSA by articulating that sales of commodities "include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." *Novartis*, 611 F.3d at 151. The Second Circuit also observed that the regulations create a distinction between sales and promotional work. *Id.* It found that these regulations, defining and delimiting the outside sales exemption by articulating what types of efforts qualify employees

for the exemption, "do far more" than simply paraphrasing or parroting the FLSA's sales definition. *Id.* at 153.

Considering the work performed by PSRs in the context of these regulations, the Second Circuit concluded:

> In sum, where the employee promotes a pharmaceutical product to a physician but can transfer to the physician nothing more than free samples and cannot lawfully transfer ownership of any quantity of the drug in exchange for anything of value, cannot lawfully take an order for its purchase, and cannot lawfully even obtain from the physician a binding commitment to prescribe it, we conclude that it is not plainly erroneous to conclude that the employee has not in any sense, within the meaning of the statute or the regulations, made a sale.

*Novartis*, 611 F.3d at 154. Thus, finding the DOL's interpretation of its defining and delimiting regulations neither erroneous nor inconsistent with the FLSA, the Second Circuit granted it controlling deference under *Auer v. Robbins*, and held that PSRs do not make sales and therefore are not outside salesmen. *Novartis*, 611 F.3d at 154-55.

Thereafter, Novartis petitioned this Court for a writ of certiorari, but the petition was denied. *Novartis Pharm. Corp. v. Lopes*, 131 S.Ct. 1568 (2011).

**4. The Ninth Circuit's Refusal to Defer to the Department of Labor.**

With the same question before the Ninth Circuit, the DOL again filed an *amicus curiae* brief indicating that, per its interpretation of the regulations, PSRs do not fall within the outside sales exemption. The Ninth Circuit, however, expressly rejected the Second Circuit's analysis on deference as well as the DOL's interpretation, concluding that it owes "no deference" to the DOL's interpretation. App., *infra,* 17a. The Ninth Circuit relied heavily on *Gonzales* in arriving at this conclusion. Focusing on the reference in 29 C.F.R. § 541.501 to the statutory definition of "sale," the court opined that the term "sales" remain "very undefined, very un-delimited" by the regulation. The panel found in *Gonzales* what it deemed "an analogous situation" in which the administering agency "fail[ed] to add specificity to the statutory scheme." App., *infra,* 22a-23a. Characterizing the DOL's amicus brief interpretation of the regulatory scheme as merely a "reinterpretation" of the statute itself, and furthermore, as "plainly erroneous and inconsistent" with the regulations, the Ninth Circuit declined to defer to the agency. App., *infra,* 23a-24a.

The panel therefore undertook its own analysis of the exemption, concluding that PSRs "make sales" and qualify for the exemption based primarily on what the panel termed "the structure and realities of the heavily regulated pharmaceutical industry." App., *infra,* 25a. The panel reasoned that although limitations imposed on the pharmaceutical industry prevent PSRs from making traditional "sales," similarities between the job duties of PSRs and of the

"classical salesman" support a finding that PSRs "make sales" within the meaning of the exemption. App., *infra*, 28a-31a.

## REASONS FOR GRANTING THE PETITION

### I. THIS CASE PRESENTS A CIRCUIT SPLIT ON IMPORTANT QUESTIONS OF NATIONAL APPLICATION.

The Ninth Circuit acknowledged its split with the Second Circuit on the issue of deference to the DOL and the underlying issue of applying the outside sales exemption to PSRs. App., *infra*, 17a. While the PSRs in the Second and Ninth Circuit cases worked in different parts of the country for different employer pharmaceutical companies, their positions were essentially identical; indeed, the Ninth Circuit panel observed that "PSRs carry out the same business function regardless of which drug manufacturers they represent." App., *infra*, 8a. As such, the question of whether the exemption applies to PSRs is one that affects the operations of an entire industry, not just the specific parties in this matter.

This is a question of national application. Both *Novartis* and *Christopher*, along with a multitude of similar cases across the country, seek overtime pay under a federal law on behalf of a nationwide class of employees. With potential representatives of nationwide classes available to file in any seemingly friendly jurisdiction, national uniformity on the question is critical.

Beyond the question of whether PSRs qualify as outside sales employees, however, is the even more potentially far-reaching issue of the deference owed

to an administering agency. Given the Second Circuit's deference to the DOL on the issue, the Ninth Circuit's decision creates a split among the circuits on how and where *Gonzales* applies to limit deference owed to an administering agency. This conflict between the circuits leaves confusion as to appropriate application of *Gonzales* in administrative deference cases.

These recurring issues are ripe for resolution, and this case offers the best vehicle for resolving them. This Court denied certiorari when sought by the pharmaceutical company in *Novartis*; however, at the time certiorari was requested, no circuit split yet existed on the question. The Ninth Circuit decided *Christopher* while Novartis's petition for a writ of certiorari was pending. At the time the Court denied certiorari, it was aware that Petitioners were preparing a petition for reconsideration in the Ninth Circuit. Petitioners' petition for Panel Rehearing and Rehearing En Banc was denied. Unless this Court intervenes, the question of whether PSRs are exempt from the overtime requirement as outside sales employees will remain simply a matter of the jurisdiction in which they file suit. A fundamental split between the circuits on the question of deference owed to agency interpretations of regulations likewise remains unresolved without this Court's intervention.

## II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH PRECEDENT IN THIS COURT AND WITH THE PURPOSES AND REQUIREMENTS OF THE FLSA.

### A. Determining Deference to Administrative Agencies under *Auer* and *Gonzales*.

The Ninth Circuit's opinion dramatically affects the landscape of administrative deference under *Auer* and *Gonzales*. The Ninth Circuit expressed concern that deferring to the DOL in this instance would amount to an expansion of *Auer*, *see* App., *infra* 24a, but in fact, its refusal to defer amounts to a vast expansion of *Gonzales*. Before the Ninth Circuit's decision in *Christopher*, *Gonzales* formed a straightforward exception to *Auer* deference, preventing an administrative agency from improperly creating "rules" outside of the notice-and-comment rulemaking process where the agency's regulations do nothing more than echo the statute. *Gonzales*, in short, furthers the principle that an agency may authoritatively interpret its own regulations that reflect its considerable experience and that were formed according to proper notice-and-comment rulemaking procedures, but may not authoritatively interpret the statute itself outside that process. After *Christopher*, however, *Gonzales* may stand for much more.

*Gonzales* was a federalism case in which the U. S. Attorney General, having no explicit authority to promulgate rules on the issue, attempted to overrule state-level regulations. This Court held that *Auer* deference need not be afforded to an agency interpretation of a regulatory scheme which merely

"parrots" the statute. The "parroting" regulation at issue in *Gonzales* merely "repeat[ed] two statutory phrases and attempt[ed] to summarize the others. It [gave] little or no instruction on a central issue in this case." *Gonzales*, 546 U.S. at 257. Historically, however, *Gonzales* is inapplicable as long as the regulations offer some amount of interpretation beyond merely the language of the statute. *See, e.g., Sierra Club v. Johnson*, 436 F.3d 1269, 1283 n.5 (11th Cir. 2006) (declining to apply *Gonzales* where a statute and regulation have some identical language, but "the regulation does more"); *Haas v. Peake*, 525 F.3d 1168, 1187 (Fed. Cir. 2008) (similar); see also *U.S. v. W.R. Grace & Co.*, 429 F.3d 1224, 1241-45 (9th Cir. 2005) (deferring to agency interpretations even though regulations in part parroted statutory language).

With respect to the meaning of "sales" for purposes of the outside sales exemption in the FLSA, the regulations offer guidance that goes well beyond merely reiterating the statutory definition. For example, while the regulation at 29 C.F.R. § 541.501 does quote the Act's statutory definition of "sale," the quotation is preceded by an explanatory statement: "[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of intangible and valuable evidences of intangible property." Additionally, the promotional work regulation at § 541.503 further defines and delimits the type of work that qualifies as "sales" for purposes of the exemption.

In applying *Gonzales*, the Ninth Circuit panel dismissed the additional explanatory language in 29 C.F.R. § 541.501 regarding the "transfer of title to

tangible property" as merely "open-ended." It likewise downplayed the promotional work regulation, virtually ignoring the directly applicable language of § 503(a)[3] and instead contrasting PSRs' duties with an example of promotional work provided at § 503(c). App., *infra*, 31a. The example, the court concluded, is distinguishable from PSRs' work because the promoters in the example, who visit stores to arrange merchandise and consult with the manager regarding inventory, do not ask for the type of non-binding commitments that PSRs seek from physicians. *Id.* Nothing in the regulation, however, suggests that the example provided at § 503(c) is intended as the exclusive application of the promotional work regulation. Avoiding or dismissing all of the non-parroting regulatory language addressing the meaning of "sales" under the exemption, the court rested its application of *Gonzales* on the fact that the regulatory scheme in part quotes the FLSA's definition of "sales."

The panel's holding that parroting language "is present" in the regulations, App., *infra*, 23a, is insufficient to apply *Gonzales*, since non-parroting language is also "present." Under the Ninth Circuit's rationale in applying *Gonzales* to this case, any regulation that references or quotes some portion of the underlying statute is arguably a "parroting" regulation, even where the regulation also expands upon the statutory language. *See* App., *infra*, 21a.

---

[3] Indeed, to the extent that the promotional work regulation is unambiguously applicable to the work of PSRs, the panel should have accorded deference to that regulation under *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984), rather than virtually ignoring it.

(applying *Gonzales* simply because some parroting language "is present" in the outside sales regulations). As a result of the panel decision in this case, an administrative agency risks losing the authority to interpret any such regulation. Such a rule dramatically reduces administrative agencies' interpretive authority and upsets the balance formed by this Court's rulings in *Gonzales* and *Auer*.

### B. The Merits of the Department of Labor's Interpretation Under the Act.

In addition to creating confusion on the issue of administrative deference, the Ninth Circuit's interpretation of the outside sales exemption departs from decades of appropriately narrow construction of the exemption, with which the DOL's interpretation, in contrast, is consistent. The preamble to the 2004 regulations addressed the question of how technological advances affecting the manner in which orders for products are placed might affect the applicability of the outside sales exemption to employees selling or promoting those products. *See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22122, 22124 (Apr. 23, 2004). While the DOL agreed that technological advances should not remove from the exemption employees who "in some sense" make sales, it nevertheless emphasized that:

> [T]he Department does not intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain

> orders or contracts for services. An employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales. *See* 1940 Stein Report at 46 (outside sales exemption does not apply to an employee "who does not *in some sense* make a sale") (emphasis added). Extending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test.

69 Fed. Reg. at 22162. This language requiring that employees "in some sense" make sales in order to qualify for the exemption, much quoted by both opponents and proponents of applying the exemption to PSRs, is clearly intended to limit, not broaden, the coverage of the exemption. The DOL further articulated in the 2004 preamble its intent to include within the exemption's coverage only those employees who "'obtain a commitment to buy' from the customer and are credited with the sale." *Id.* at 22162-63.

Consistent with this principle, as discussed above, the DOL and the courts have, for decades, narrowly interpreted the "make sales" requirement of the exemption, excluding from its coverage a variety of promoters who merely pave the way for others' sales, including college recruiters, charitable solicitors, private army recruiters and student salesmen whose efforts lead to sales by others. *See* WH Opinion Letters, *supra*; *Wirtz*, 418 F.2d at 260; *Clements*, 530 F.3d 1224. Like these promoters, PSRs cannot be directly credited with any sale. While they may ask physicians for non-binding

"commitments" to prescribe, such commitments simply do not amount to "commitments to buy" as referenced in the preamble.[4] Indeed, physicians make such "commitments" without even necessarily knowing the product's price. Such commitments may lead to ultimate purchases of pharmaceutical products; however, such ultimate purchases do not involve the PSR whatsoever. In short, the "sale" is made by someone else. Thus, unlike typical exempt outside sales employees, a PSR does not receive commissions for "sales," since no "sale" or commitment can actually be "credited" to the PSR. PSR incentive compensation is linked not to the number of "commitments" obtained, but rather (in part) to actual market share, or products purchased within their territories, which may be influenced by many factors separate from the PSR's efforts (e.g. other marketing efforts, such as direct-to-consumer advertising). App., *infra*, 78a-79a. PSRs indeed may pave the way for ultimate sales of pharmaceuticals, but as such they are promoters, not salesmen.

The DOL's interpretation of its regulations, finding that "sales" requires some consummated transaction, comports with accepted rules of statutory construction as applied to the FLSA definition of "sales." Under § 203(k), "'[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." Of these options, the Ninth Circuit

---

[4] As an example, a physician might "commit" to a PSR to prescribe a particular pharmaceutical for appropriate patients, but then not see any patients requiring that pharmaceutical. In such circumstances, a commitment would not equate to any sale whatsoever.

panel fit PSRs' activities into the final term, "other disposition," finding it to be a broad catch-all category that encompasses meaning well beyond the other terms contained in the FLSA's definition of "sale." App., *infra*, 25a. This Court has explained, however, that under the *ejusdem generis* rule of statutory construction, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). Under the DOL's interpretation, "other disposition," like the terms that precede it, must require some consummated transaction. App., *infra*, 79a. The panel's interpretation to the contrary, however, amounts to an expansive interpretation, inconsistent with the principle that FLSA exemptions are to be construed narrowly. *See A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945).

The DOL's interpretation is neither "plainly erroneous" nor "inconsistent" with its regulation. *See Auer*, 519 U.S. at 461 (citations omitted). In substituting its judgment for the DOL's delegated authority to interpret the FLSA, the panel states summarily that it finds the DOL's amicus brief interpretation plainly erroneous and inconsistent with its regulations, App., *infra*, 24a, but the panel's analysis fails to indicate such plain error or inconsistency. The closest the panel comes to indicating some inconsistency between the DOL's regulations and amicus brief interpretation is the statement that "[w]e cannot square [the conclusion that PSRs are not salespeople] with Section 3(k)'s open-ended use of the word 'sale,' which includes

'other disposition[s]." App., *infra*, 28a. However, as discussed above, applying the rules of statutory construction to the term "other disposition" indicates that even that open-ended term involves a consummated transaction; accordingly, the DOL's interpretation to this effect is both reasonable and consistent with the text of the regulation. Furthermore, the DOL's interpretation takes into account not only the terms used in the statutory definition, but also places them in the context of the relevant defining and delimiting regulations, as discussed herein. The panel's disagreement with the DOL's interpretation is not enough to render that interpretation "plainly erroneous" or "inconsistent with the regulation," and does not justify simply adopting an alternate view of the regulation. *See e.g. Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) (where a regulation is subject to two "plausible" interpretations, the agency's interpretation is entitled to controlling deference).

To the extent that the regulations defining and delimiting the outside sales exemption are confusing or conflicting in the context of PSRs, it is within the DOL's delegated authority as the administering agency to resolve the question. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). The DOL's interpretation is reasonable and consistent with the plain language of its regulations and with the statutory definition of sales. It comports with past interpretations of the exemption by both the DOL and the courts and with accepted rules of statutory construction. The Second Circuit properly deferred to this reasonable and consistent interpretation by the administering agency. The Ninth Circuit's interpretation, in contrast, is broad and expansive,

retrofitting the exemption to an industry in which promoters simply cannot and do not make "sales." Since PSRs promote pharmaceutical products in furtherance of sales made by others, and since they do not in any sense sell or take orders for such products, they do not fit within the outside sales exemption. Certiorari is warranted to resolve the split on the DOL's regulatory interpretation and authority and to provide needed national uniformity of application of the FLSA across the pharmaceutical industry.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted.

Michael R. Pruitt,
(Counsel of Record)
Otto S. Shill, III
Jackson White
40 North Center Street, Suite 200
Mesa, Arizona 85201
mpruitt@jacksonwhitelaw.com
480-464-1111

Attorneys for Petitioners

August, 2011