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 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; and

(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"), and are deeply affected by the square split between the Second and Ninth Circuits over the scope of the FLSA's outside sales exemption. Moreover, the Chamber's members must comply with a host of other statutory requirements that are subject to interpretation by federal agencies. These laws best serve the interests of employees and employers alike when their application is uniform, stable, and clear. This case provides the Court with

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[1] No counsel for a party wrote this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. 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 petitioner and respondents received timely notice of *amicus*'s intent to file the brief, and consented to it.

an opportunity to clarify both the scope of the FLSA's outside sales exemption and, more broadly, the circumstances in which an agency may fundamentally reinterpret a statute without notice and comment. The Chamber therefore has a strong interest in review by this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, which involves the overtime-exempt status of pharmaceutical sales representatives, presents a timely opportunity for the Court to resolve a square circuit split on two questions of national importance. By way of background, the FLSA exempts workers who are employed "in the capacity of outside salesman" from the overtime pay requirements of the Act. 29 U.S.C § 213(a)(1). The statute in turn defines the terms "sale" and "sell" to 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)").

The DOL has issued regulations that offer a non-exclusive definition of what is included in the term "sales," but then refer back to the statutory defintion. They thus elaborate upon, but fail to limit, the scope of the outside sales exemption under the FLSA. Specifically, 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:

> (i) making sales within the meaning of [29 U.S.C. § 203(k)]

29 C.F.R. § 541.501(a). The regulations then note 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 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. § 541.500(b) (emphases added).

As explained by the parties, the Ninth Circuit and the Second Circuit disagree whether pharmaceutical sales representatives qualify for the foregoing outside salesperson exemption, and, in particular, whether they are engaged in "making sales." And in answering these questions, the circuits have also split over the scope of *Auer* deference.

On the one hand, the Second Circuit has given "'controlling' deference" to a Department of Labor ("DOL") *amicus* brief that interpreted the agency's regulations related to the outside salesperson exemption. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 149 (2d Cir. 2010) ("*In re Novartis*") (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Specifically, in the *amicus* brief that the DOL submitted in the *Novartis* case, the agency—for the first time—took the position that pharmaceutical sales representatives do not make "sales," and are thus ineligible for the outside sales exemption, because they cannot "lawfully transfer ownership" of

a drug, "take an order for its purchase" or "obtain from the physician a binding commitment to prescribe." *Id.* at 154. Applying solely the definition urged by the DOL's brief, the Second Circuit found that pharmaceutical sales representatives do not qualify for the FLSA's outside salesperson exemption. *Id.* 153.

On the other hand, the Ninth Circuit, in the decision below, found that pharmaceutical sales representative are engaged in "making sales" and that they do qualify for exempt status. Further, it held that the DOL's *amicus*-brief interpretation of the outside salesperson exemption regulation was not entitled to *Auer* deference because the regulation's explanation of the term sales essentially "parrot[s]" statutory language. *Christopher v. Smithkline Beecham Corp.*, 635 F.3d 383, 394 (9th Cir. 2011) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006)). That is, the regulation ultimately "cross-references back to the language of Section 3(k) of the Act—the very language purportedly being defined." *Id.* Accordingly, the regulation "clarifies nothing" and is "not an example of the DOL employing its expertise to elucidate meaning to which [courts] owe *Auer* deference." *Id.* (internal quotation marks omitted). Interpreting the statute directly, the Ninth Circuit examined the structure of the pharmaceutical industry and the purpose of the outside sales exemption. *Id.* at 395-98. It then concluded that the exemption applied to pharmaceutical sales representatives because "[e]ven though [they] lack some hallmarks of the classic salesman, the great bulk of their activities are the same, as is the overarching purpose of obtaining a commitment to purchase (prescribe) something." *Id.* at 398.

The Chamber believes the Ninth Circuit decision below is correct, both in terms of its substantive outcome and the level of deference that it afforded the DOL's *amicus* brief in this case. Nevertheless, the Chamber files this brief to emphasize that the foregoing split is of sufficient importance and urgency that prompt review by the Court is warranted in this case.

The questions presented are exceedingly important to a major national industry and, indeed, to the entire business community. Pharmaceutical sales representatives have been treated as overtime-exempt by their employers, the courts, and the DOL for decades. As such, the DOL's recent and sudden endorsement of Petitioners' claims has served to confound settled expectations of both employers and employees in the pharmaceutical industry and has helped unleash a flood of nationwide collective actions. Unless the Second Circuit's erroneous holding in *In re Novartis* is rejected, such suits could potentially lead to billions of dollars in unexpected liability. Further, they could force the industry to abandon pay practices that have existed—virtually unchallenged—since before the Second World War and that represent the most appropriate compensation method for pharmaceutical sales representatives given their job responsibilities. More broadly, review in this case also offers a valuable opportunity for the Court to clarify when and how an agency may seek to impose major, retroactive policy changes outside the notice and comment process.

Two additional factors make it particularly appropriate that the Court resolve the questions presented promptly, by granting review in this case.

First, because plaintiffs' attorneys will likely avoid filing future cases in the Ninth Circuit and instead file in the Second Circuit, allowing further percolation would provide little benefit and instead invite only forum shopping. This forum shopping would be especially prejudicial given that most pharmaceutical manufacturers operate nationwide, and could therefore be subjected to nationwide liability based solely on collective action suits in the Second Circuit. Second, because the DOL's position has triggered a flood of new cases challenging years of past conduct, immediate resolution is necessary to avoid the imposition of extensive retroactive liability. Each of these factors justify speedy resolution of the square split presented in this case.

Finally, granting review in this case would provide the Court with an opportunity to reject the oft-repeated, but entirely unjustified trope that exemptions to the FLSA must be narrowly construed against employers. As Justice Scalia has rightly suggested, this sort of "interpretive canon" lacks any principled justification. Yet a number of courts analyzing the outside salesperson exemption regularly rely on it. Although such reliance may not be an independent basis for certiorari, the opportunity to redress it provides an additional benefit to review in this case.

ARGUMENT

I. The Questions Presented Are Of National Importance.

The questions presented are of major significance to the pharmaceutical industry and, indeed, the entire national business community.

A. The Second Circuit's rule would expose pharmaceutical manufacturers to billions of dollars of unwarranted and retroactive liability.

Respondents have long compensated pharmaceutical sales representatives on an exempt (overtime ineligible) basis. As the Ninth Circuit noted, the pharmaceutical sales representatives in this case received a fixed salary that is generally supplemented by bonuses tied to sales made in an employee's assigned geographical region. 635 F.3d at 386-87. This exempt compensation model is well-established and was well-accepted by employers and employees alike throughout the industry. Indeed, over the course of 70 years following the passage of the FLSA, suits such as this one were virtually unknown. No court had ever held that pharmaceutical sales representatives were subject to the overtime requirements of the FLSA. And the DOL's guidance regarding the outside sales exemption suggested a functional, purposive approach wholly supportive of the proposition that pharmaceutical sales representatives are engaged in making sales for purposes of the outside salesperson exemption.[2]

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[2] *See* 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"), *available at* http://tinyurl.com/3qpcwx5 (stating that the DOL's outside sales exemption should 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)"); 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004) (recognizing that the exemption applies when employees "'*in some sense* make a sale'") (quoting Stein Report at 46) (emphasis in original).

Beginning in late 2006 and early 2007, however, plaintiffs' attorneys began filing putative collective action suits alleging that the exempt compensation model used to compensate pharmaceutical sales representatives violated the overtime requirements of the FLSA and/or analogous state laws. *See, e.g.*, *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459 (S.D.N.Y. 2008); *Barnick v. Wyeth*, 522 F. Supp. 2d 1257 (C.D. Cal. 2007). Initially, the majority of district courts to review such claims rejected them.[3] However, in October 2009, the DOL filed its *amicus* brief in *In re Novartis*. In its brief, the DOL abandoned 70 years of practice, and departed from its longstanding endorsement of a flexible, purposive approach to the concept of "sales" in favor of a rigid and formalistic requirement that outside salespeople obtain binding commitments and make direct, "actual sales." Brief for the Secretary of Labor as *Amicus Curiae* at 10, *In re Novartis*, 611 F.3d 141.

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[3] *Delgado v. Ortho-McNeil, Inc.*, No. 07 Civ. 263, 2009 WL 2781525, at *5 (C.D. Cal. Feb. 6, 2009); *Yacoubian v. Ortho-McNeil Pharm., Inc.*, No. 07 Civ. 00127, 2009 WL 3326632, at *6 (C.D. Cal. Feb. 6, 2009); *Baum v. Astrazeneca LP*, 605 F. Supp. 2d 669, 685-86 (W.D. Pa. 2009) (treating analogous state law requirements as coterminous with FLSA and rejecting state law claims based on interpretation of FLSA); *Brody v. AstraZeneca Pharms.*, No. 06 Civ. 6862, 2008 WL 6953957, at *6-9 (C.D. Cal. June 11, 2008) (same); *Menes v. Roche Labs., Inc.*, No. 07 Civ. 01444, 2008 WL 6600518, at *2 (C.D. Cal. Jan. 7, 2008) (same); *Barnick*, 522 F. Supp. 2d at 1265 (same); *D'Este v. Bayer Corp.*, No. 07 Civ. 3206, 2007 WL 6913682, at *4 (C.D. Cal. Oct. 9, 2007) (same). *But see Ruggeri v. Boehringer Ingelheim Pharms., Inc.*, 585 F. Supp. 2d 254, 272 (D. Conn. 2008); *Amendola*, 558 F. Supp. 2d at 472.

Not surprisingly, the DOL's new position has been followed by a flood of additional collective action suits claiming a right to overtime pay on behalf of pharmaceutical sales representatives throughout the nation.[4] These suits pose the risk of crushing liability. There are tens of thousands of well-paid pharmaceutical sales representatives throughout the industry. *IMS Health Inc. v. Mills*, 616 F.3d 7, 14 (1st Cir. 2010) (noting that the industry employs some "90,000 pharmaceutical sales representatives [who] make weekly or monthly one-on-one visits to prescribers nationwide"). Accordingly, the potential liability created by these suits reaches into the *billions* of dollars.

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[4] *See, e.g.*, *Fisher v. Shionogi Pharma, Inc.*, No. 11 Civ. 571 (E.D. Ark July 19, 2011); *Brown v. Novo Nordisk, Inc.*, No. 11 Civ. 1702 (E.D. Cal. June 22, 2011); *Gonzales v. Eisai, Inc.*, No. 11 Civ. 2250 (N.D. Cal May 6, 2011); *Rader v. Astrazeneca Pharm., LP Corporation et al.*, No. 11 Civ. 138 (S.D. Miss. March 7, 2011); *Malveaux v. Astrazeneca Pharm. LP*, No. 11 Civ. 286 (M.D. Fla. Feb. 10, 2011); *Forte v Sanofi-Aventis US, Inc.*, No. No. 11 Civ. 17 (W.D. Tex. Jan. 6, 2011) (case transferred to D. N.J., No. 11 Civ. 5374); *Kaiser v. Daiichi Sankyo, Inc.*, No. 10 Civ. 918 (S.D. Ohio Dec. 21 2010) (case transferred to D. N.J., No. 11 Civ. 2414); *Koslofsky v. Santarus, Inc.*, No. 10 Civ. 9160 (S.D.N.Y. Dec. 8 2010); *Bethume v. Bristol-Myers Squibb*, No. 10 Civ. 8700 (S.D.N.Y Nov. 18, 2010) (case transferred to D. N.J., No. 11 Civ. 3864); *Heldman v. King Pharm., Inc.*, No. 10 Civ. 1001 (M.D. Tenn. Oct. 22, 2010); *Jones v. Takeda Pharm. NA, Inc. et al.*, No. 10 Civ. 6240 (N.D. Ill. Sept. 29, 2010); *Batchkoff v. Boehringer Ingelheim Pharm., Inc.*, No. 10 Civ. 4830 (N.D. Cal. Sept. 24, 2010); *Martinez et al. v. Forest Labs Inc.*, No. 10 Civ. 6032 (S.D.N.Y. Aug. 11, 2010); *Quinn v. Endo Pharm.*, No. 10 Civ. 11230 (D. Mass. July 22, 2010); *Burdine v. Covidien Inc.*, No. 10 Civ. 194 (E.D. Tenn. July 20, 2010); *Raimundi* v. *Astellas US, LLC et al.*, No. 10 Civ. 5240 (S.D.N.Y. July 9, 2010); *Bentson v. Pfizer, Inc.*, No. 10 Civ. 7680 (N.D. Ill. Feb. 2, 2010); *Evavold v. Sanofi-Aventis US, Inc.*, No. 09 Civ. 5529 (D. N.J. Oct. 29, 2009).

Such liability, moreover, would be entirely inconsistent with the purposes of the FLSA and reflect nothing more than an unjustified windfall for the plaintiffs and their attorneys. Simply put, the FLSA was not designed to mandate overtime pay for highly professional and highly compensated employees such as pharmaceutical sales representatives. *Cf. Nicholson v. World Bus. Network, Inc.*, 105 F. 3d 1361, 1363 (11th Cir. 1997) ("The goal of ameliorating the uglier side of a modern economy did not imply that all workers were equally needful of protection. The chief financial officer of a company, for instance, would be less likely to be exploited than a janitor or assembly linesman."); *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510 (7th Cir. 2007) (noting the FLSA's purpose "to increase the welfare of low-paid workers"). 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." 635 F.3d at 388 (internal quotation marks omitted).[5] Indeed, the pharmaceutical sales representetive 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 October 15, 2011).

Moreover, the pharmaceutical sales representatives in this case not only exhibit all of the key traits of the traditional travelling salesperson, they receive a proxy for overtime pay in the form of sales-based bonuses. 635 F.3d at 388 (plaintiffs "receive bonuses *in lieu of overtime* as an incentive to

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[5] *See also* Economic Research Institute, Pharmaceutical Sales Representative Salary Survey Data, http://tinyurl.com/3qftmae.

increase their efforts.") (emphasis added). Thus, to the extent that they worked long hours, they did so not "out of desperation," *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987), but instead based on an incentive to increase their bonus. Of course, had these individuals been entitled to overtime payments in the past, it is highly likely that "either [their] base pay . . . , or the commission rate, or both, would [have] decline[d], to offset the overtime premium." *Id.* Nonetheless, although Petitioners are presumably not willing to return any of the base pay or bonuses they received over the past several years, they now seek retroactively to impose an additional, duplicative obligation on their employers to pay overtime. Imposing an overtime obligation in this case would in no way further the goals of the FLSA: to protect employees from economic coercion while respecting the ability of employers and well-compensated employees to adopt mutually beneficial compensation practices. Rather, it would simply impose a massive retroactive burden on employers that was not contemplated by any party.

B. The Second Circuit's rule would force an inefficient and impractical compensation model on a major national industry.

The rule adopted by the Second Circuit would not only engraft retroactive obligations on pharmaceutical manufacturers; it would also force them to fundamentally restructure their compensation of pharmaceutical sales representatives going forward. As the foregoing suggests, there is good reason that pharmaceutical sales representatives have long been compensated on

an exempt basis rather than by the hour: they (like other travelling salespersons) work flexible hours outside their employer's office and their performance is best measured by their impact on sales.

These practicalities, of course, are the very reason for the outside sales exemption. As explained by one oft-cited analysis:

> The reasons for excluding an outside salesman are fairly apparent. Such [a] 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 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) (emphasis added); *see also Delgado v. Ortho-McNeil, Inc.*, No. 07 Civ. 263, 2009 WL 2781525, at *4 (C.D. Cal. Feb. 6, 2009) ("The Tenth Circuit's holding in *Jewel Tea* is obviously driven by the common-sense notion that it is impractical to make outside salespeople hourly employees due to the lack of supervision and structure in their jobs,

and because they generate additional incentive income, usually through commission, instead of overtime.").

The Second Circuit's rule, however, would force just such an "incompatible" hourly compensation model on the industry. Yet these costs would not come with any countervailing benefits to employers or employees; after all, without any change in the supply of or demand for pharmaceutical sales representatives, there is no reason to believe that an hourly-compensation model would alter net compensation to employees. Rather, "either the base pay . . . , or the commission rate, or both, would decline, to offset the overtime premium." *Mechmet*, 825 F.2d at 1176.

This pointless inefficiency demonstrates precisely why the Second Circuit's cramped and formalistic reading of the outside sales exemption is inconsistent with the FLSA's purpose and is thus wrong on the merits. More importantly at this stage, the imposition of such inefficiency on a major national industry also demonstrates the importance of granting certiorari in this case.

C. The rigid, formalistic approach taken by the Second Circuit and the DOL threatens other industries with similarly unwarranted liability.

Although the plaintiffs' bar is currently focused on suits against pharmaceutical manufacturers, it is only a matter of time before the Second Circuit's and the DOL's rigid, formalistic approach is turned on other employers.

As explained above, the outside sales exemption is an inherently *practical* provision, intended to allow

employers to avoid obstacles inherent in monitoring the work hours of out-of-office sales employees and to tailor compensation to performance. In refusing to apply the outside salesperson exemption to pharmaceutical sales representatives, however, the Second Circuit (and the DOL's *amicus* brief) elevated formalisms over substance. This approach is inconsistent with the analysis used by other Courts of Appeals and will invite further suits seeking retroactive overtime pay for employees who function in all relevant respects as outside salespeople, yet do not "lawfully transfer ownership" of a product, "take an order for its purchase" or "obtain from [a customer] a binding commitment to [purchase]." *In re Novartis*, 611 F.3d at 154.

For example, in *Gregory v. First Title of America, Inc.*, 555 F.3d 1300, 1308-09 (11th Cir. 2009) (per curiam), a "marketing executive" sued the title insurance company for which she worked, alleging that she was entitled to overtime under the FLSA for her work "inducing realtors, brokers and lenders to begin referring their customers—the end user—on to [her employer] for title insurance services." *Id.* at 1303. The plaintiff argued she was not an outside salesperson because: "she never actually consummated a sale with any person or business," "she never directly sold [her employer's product] to anyone because she was not licensed to do so" and the agents with which she dealt could not make a binding commitment because "the end user of the title insurance has the right to change title insurance companies and shop elsewhere at any given moment." *Id.* at 1303-04 & n.4 These arguments, of course, are precisely the arguments made by Petitioners and the

DOL below, and accepted by the Second Circuit in *In re Novartis*.

Yet the Eleventh Circuit (like the Ninth Circuit below) disagreed. It emphasized that the outside sales exemption should be interpreted in keeping with "the animating spirit" of the FLSA, and that the DOL's own outside sales regulation requires that "'an employee has *in some sense* made a sale.'" *Id.* at 1308 (quoting 69 Fed. Reg. at 162-63). The court then reasoned that the plaintiff had made "a sale in some sense," because "[s]he obtained commitments to buy . . . and, most importantly, was credited with the sale." *Id.* at 1309. Furthermore, "[s]he was hired for her prior sales experience," her "income was directly tied to the number of orders that she brought in" and "[a]ll of her efforts were directed towards the consummation of her own sales and not towards stimulating sales for [her employer] in general." *Id.*

As illustrated by *Gregory*, the Second Circuit's decision in *In re Novartis* does not simply conflict with the decision below. Rather, it is also in tension with the analysis of other Courts of Appeals and invites further litigation against other industries with "unconventionally" structured sales practices. *See also Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1085, 1089 (D. Minn. 1981) (explaining that "[b]ecause of the manner in which cardiac pacemakers reach the ultimate consumer, the cardiac patient," it is "normally the prescribing physicians who determine the kinds of pacemakers that will be inventoried by the hospitals where they perform implantations" and "the marketing activities of the manufacturers are principally directed at the prescribing physicians"); *Delgado*, 2009 WL 2781525,

at *4 (discussing *Medtronic*, noting the similarities between the medical device industry and the pharmaceutical industry, and concluding that pharmaceutical sales representatives fit within the FLSA's outside sales exemption).

D. This case provides an important opportunity to clarify the limits of *Auer* deference.

As explained above, in deciding whether to defer to the DOL's *amicus* brief interpreting the outside sales regulation, the Ninth Circuit below and the Second Circuit in *In re Novartis* disagreed over the scope of *Auer* deference. Both courts recognized the same background principles: as a general matter, an agency's interpretation of its own regulation is owed deference, even if reached without notice and comment, 635 F.3d at 392 (citing *Auer*, 519 U.S. at 457); however, "the existence of a parroting regulation" does not entitle an agency to deference when it interprets terms that are common to both a regulation and an underlying statute, *Gonzales*, 546 U.S. at 257; *see also id.* ("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.").

The Second Circuit, however, took an exceedingly narrow view of this parroting exception. It reasoned that the DOL's outside sales regulation did "far more than merely parrot the language of the FLSA," *In re Novartis*, 611 F.3d at 153, because it defined "sale" to include "a transfer of title" and noted that promotion work "may or may not be exempt outside sales work, depending upon the circumstances under which it is performed." *Id.* at

151, 153 (quoting 29 C.F.R. § 541.503(a)). Thus, because the DOL regulation merely listed one example of a transaction "include[d]" in the statutory definition of "sale" and added that *some* promotion work may be non-exempt, the Second Circuit gave controlling deference to the DOL's *amicus* brief.

In contrast, the Ninth Circuit below reasoned that the DOL was not entitled to *Auer* deference because, although the outside sales regulation offered examples of what was *included* in the definition of "sales," it ultimately "cross-reference[d] back to the language of Section 3(k) of the Act—the very language purportedly being defined" and thus "clarifie[d] nothing." 635 F.3d at 394.

This case accordingly offers a valuable opportunity for this Court to clarify the proper scope of *Auer* deference, allowing deference where warranted, but also ensuring appropriate checks on unpredictable and disruptive agency action. The premise of *Auer* deference is that courts will defer to agency positions when the agency has already applied "its expertise and experience" in promulgating the underlying regulation. *Gonzales*, 546 U.S. at 257. In such a situation, the agency has clarified and limited the scope of ambiguous statutory language, has provided notice and an opportunity for comment on this clarification, and has allowed an opportunity for judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. However, if the parroting exception is not rigorously enforced, agencies will be free to circumvent notice and comment requirements simply by promulgating vague regulations that restate, or only partially illustrate, statutory terms. Regulated

parties would have little basis to comment on, challenge, or even seek to understand the full meaning of such regulations.[6] Yet, the agency would then be entitled, under the Second Circuit's view, to controlling deference whenever it purported to "clarify" such regulations in an *amicus* brief. This would be the case even if the agency's "clarification" effected a major policy reversal. Such a rule would undermine the stability and predictability that is so critical to a healthy economic environment. It must be nipped in the bud.

II. This Case Is An Appropriate Vehicle And Further Percolation Is Not Warranted

A square split on the meaning of an important federal statute, which threatens to impose billions of dollars of retroactive damages and pointless inefficiency on the pharmaceutical industry and beyond, is ample justification for certiorari review by this Court. Moreover, at least two additional considerations make prompt review particularly appropriate in this case.

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[6] For similar reasons, this Court has recognized that *Auer* deference is warranted only if the regulation at issue is ambiguous. *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000). Likewise, deference is warranted only if an agency's views reflect its "fair and considered judgment," *Auer*, 519 U.S. at 462, rather than a "convenient litigating position" (something that may be evident where an agency departs from longstanding positions in an *amicus* brief). *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988). Granting certiorari in this case likewise would permit this Court to ensure predictability by clarifying these and other reasonable limits on *Auer* deference.

A. The current circuit split invites forum shopping.

Although Respondents have prevailed in the Ninth Circuit, they have little control over the venue in which plaintiffs' attorneys choose to file future collective action suits. And of course, in light of the decision in *In re Novartis*, future suits are far more likely to be filed in the Second Circuit. This opportunity for forum shopping is particularly troublesome in light of the structure of the pharmaceutical industry; because pharmaceutical manufacturers operate nationwide, they could likely be subject to nationwide collective actions in the Second Circuit, *even for classes that include members located in the Ninth Circuit.* Likewise, even if pharmaceutical manufacturers were to prevail in the additional cases already pending in other circuits, they could *still* be subject to nationwide collective actions in the Second Circuit. In light of these considerations, further percolation would bring little benefit and instead only encourage forum shopping.

Indeed, respondents' highly unusual position of supporting certiorari even though they *prevailed* below underscores the importance to pharmaceutical manufacturers of timely resolution by this Court of the questions presented.

B. Prompt resolution is necessary to prevent substantial retroactive liability.

The DOL's sudden departure from a flexible, purposive interpretation of the outside sales exemption has triggered a flood of cases seeking years of past overtime on behalf of pharmaceutical sales representatives. This Court has long

recognized that such retroactive liability is disfavored. *Cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Yet many of these cases will soon be litigated to judgment or, if they arise in the Second Circuit, perhaps settled. Were this Court to delay resolution of the questions presented, its decision could come too late to prevent these judgments and settlements. Prompt resolution by this Court is thus necessary to avoid substantial retroactive liability.

III. This Case Would Allow The Court To Reject The Unfounded Trope That Exemptions To The FLSA Must Be Narrowly Construed

Many of the cases addressing the outside sales exemption repeatedly emphasize that, "[b]ecause the FLSA is a 'remedial law,' exemptions to the overtime pay requirement are narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *In re Novartis*, 611 F.3d. at 150 (internal quotation marks omitted); *id.* at 153 (noting that the DOL's position was "consistent with the interpretive canon that exemptions to remedial statutes such as the FLSA are to be read narrowly").

Yet this oft-repeated trope is unsupportable. It is descended from the following statement of the Court in *AH Phillips, Inc. v. Walling*:

> 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. 490, 493 (1945) (internal quotation marks and citation omitted). This hostile view toward exemptions to "remedial" statutes is thus a corollary to "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, this "familiar canon" suffers from serious flaws. *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 581-86 (1990) ("*Assorted Canards*"). "[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). 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.*

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 intended 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.

Indeed, this case provides a particularly telling illustration. In examining close cases at the boundaries of the outside sales exemption, there is no principled basis to assume that Congress would have preferred requiring overtime over allowing compensation through a base salary plus performance bonuses. To be sure, Congress believed that the best way to ensure "a fair day's pay" was to require overtime in *some circumstances*. But Congress likewise believed (as demonstrated by the inclusion of an explicit exemption), that fixed salaries and performance bonuses would better provide fair 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.

The "anti-employer" canon, however, creates a real 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. *E.g. Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003) (holding that time spent changing into protective

outfits did not "plainly and unmistakably" qualify for the FLSA's exemption for time spent changing "clothing" and that "[a]bsent such a plain and clear . . . fit, [the canon] requires that we construe [the exemption] against the employer seeking to assert it"); *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"). Such an approach truly does "abuse the interpretative process and . . . frustrate the announced will of the people." *AH Phillips, Inc.,* 324 U.S. at 493.

The oft-repeated requirement that FLSA exemptions should be construed against the employer should accordingly be excised from the caselaw. And because this canon is derived from the statements of this Court, only this Court can perform the excision. To be sure, the use of such statements may not constitute an independent basis for certiorari. However, it is worth noting that an additional benefit to review in this case would be the opportunity for the Court to clarify that express exemptions to statutory requirements should be construed "neither liberally to expand nor strictly to constrict . . . but rather . . . precisely right." Scalia, *Assorted Canards*, *supra* at 582.

CONCLUSION

For the foregoing reasons and those stated by respondents, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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