No. 09-0437

In The United States Court Of Appeals For The Second Circuit

IN RE NOVARTIS WAGE AND HOUR LITIGATION

On Appeal from the United States District Court
for the Southern District of New York

BRIEF *AMICUS CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING APPELLEE AND AFFIRMANCE

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INTERESTS OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

1. The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents over three million businesses and business organizations of every size and in every industry sector and geographic region of the country. The Chamber has been a voice for the business community for more than ninety years. To fulfill this role, the Chamber frequently files *amicus curiae* briefs in the Supreme Court of the United States, in this Court, and in other courts around the country in cases of vital concern to American business.

2. The Chamber's members are subject to federal, state, and local laws regarding the wages paid and hours worked by their employees. These laws are best able to serve the needs of employees and employers alike when the rules that govern their application are well-defined and easily understood. Accordingly, the Chamber's members and their employees have a keen interest in cases like this one in which important, recurring questions regarding the meaning and application of wage and hour law are posed.

3. This case concerns the application of the federal Fair Labor Standards Act ("FLSA") to Pharmaceutical Sales Representatives (or "PSRs") employed by Novartis Pharmaceutical Corporation. Federal law prohibits pharmaceutical

manufacturers from selling their products directly to the customers who use them, and those customers (patients) are rarely in a position to consider meaningfully and independently the benefits and risks associated with the drugs they consume. In this sales model, the physician — and not the patient — decides whether to prescribe drugs at all, and if so determines which drugs the patient will take. The physician makes this prescription decision based on her own medical judgment, informed by her own study of the scientific literature and, to some material degree, on information about the available options obtained from PSRs employed by the pharmaceutical companies.

PSRs thus make sales calls on physicians — the meaningful decision-makers in their market — in order to identify and overcome obstacles to greater physician use of their employer's products and to persuade the physicians to write prescriptions where medically appropriate, which effectively operate as purchase orders. At the close of this process, the PSR "closes" the sales call by seeking the physician's commitment to prescribe. The PSRs are rewarded for doing so with commissions based directly on their own efforts. Once the prescription/purchase decision is made by the physician, as a practical matter the purchase decision is made; the patient simply redeems the prescription/"purchase order" at a pharmacy, formally concluding the sales process.

4. As the district court held in this case, the PSRs who engage in this long established, industry-wide, but unconventional approach to sales fit comfortably within the "outside sales" and administrative exemptions to the mandatory overtime pay requirements found in federal Fair Labor Standards Act (FLSA).[1]

Plaintiffs and their *amicus*, the United States Department of Labor ("DOL"), embrace a more constricted and unnatural application of the relevant statutory language. According to DOL, Plaintiffs are not exempt because they do not make "actual sales," DOL Br. at 5, 10, an extra-statutory phrase said by DOL to mean a "consummated transaction directly involving the employee for whom the exemption is sought." *Id.* at 11. DOL would have that newly invented phrase — "actual sales" — supplant the far more inclusive definition of the word "sales" chosen by Congress in 1938.

After 71 years of experience under the FLSA, DOL's change of heart regarding the meaning of the word "sales" makes its debut in its *amicus* brief in this case. DOL's chosen replacement for Congress's definition is irreconcilable

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[1] The Chamber agrees with the district court's conclusion that the Novartis PSRs are also exempt under the "administrative" exemption and endorses without reservation the arguments made by Novartis in support of that decision. To avoid duplication of effort, however, the Chamber does not address that conclusion in this brief.

with both the statutory language and with seven decades of DOL guidance on the application of the exemption.

5. DOL's anti-textual approach to the outside sales exemption is particularly troubling to the Chamber and its members because the Agency insists that this construction is entitled to "controlling" deference from this Court. When an agency turns its back on the pertinent statutory language, however, as DOL has done here, its views are not entitled to deference of any sort. Profound concerns are raised for American business by DOL's new analysis, untethered as it is to the language of the statute or to its prior pronouncements on the meaning of that text. The Chamber's members seek leave to file this brief in the hope that it will assist the Court principally by placing DOL's new, adventurous positions in the proper statutory and historical context, a matter of vital importance that has understandably played a less prominent role in the briefs of the parties. All parties have consented to the filing of this brief.

ARGUMENT

As it relates to the "outside sales" exemption, the determinative question in this case is whether Novartis's Pharmaceutical Sales Representatives make "sales" as that term is defined by Section 3(k) the Fair Labor Standards Act. 29 U.S.C. § 203(k); DOL Br. at 8. DOL's case for reversing the decision below

proceeds from this simple, declarative sentence in its *amicus* brief about the statutory definition:

> [T]he FLSA defines "sale" as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."[2]

The statute says no such thing. The statute does *not* define the word sale "***as***" the activities provided in that list; it defines "sale" to "***include***" those activities. DOL's brief has *deleted* "includes," a statutory term of *inclusion* — one that expressly and unambiguously opens the category to activities *not* listed — and replaced it with "as," a word of *exclusion* — a term that *closes* the list of qualifying activities and denies the existence of any others. DOL's decision to replace *Congress's* chosen term ("includes") with *DOL's* chosen term ("as") eloquently betrays the results-driven character of the Agency's argument.

I. THE VIEWS EXPRESSED IN DOL'S BRIEF ARE ENTITLED TO NO DEFERENCE

A. When An Agency Provides In A Brief An "Interpretation" Of A Regulation That Merely "Parrots" The Underlying Statute, That Interpretation Is Entitled To No Deference

Because Congress has ceded to the Secretary of Labor the authority to "define and delimit" the outside sales exemption, DOL contends that its regulation regarding the definition of the word "sale" is entitled to deference

[2] DOL Br. at 8.

under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). DOL Br. at 7. This is the relevant text of DOL's regulation regarding the definition of "sale" in Section 3(k) of the FLSA:

> Section 541.500 requires that the employee be engaged in: . . . [m]aking sales within the meaning of section 3(k) of the Act . . . . 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.[3]

This language is unquestionably controlling on the Court, but it does nothing to explain or expand on Congress's definition; it merely parrots the language of the statute and brings the Court back, full circle, to the language Congress selected. Saying that the regulation is entitled to deference is nothing more than saying that the language of the statute controls in a case of statutory construction; it is mere tautology.

DOL's claim to *Chevron* deference for the views it expresses in its brief about 29 C.F.R. § 541.501 is precluded by *Gonzales v. Oregon*, 546 U.S. 243 (2006). In that case, the Attorney General claimed *Chevron* deference for his interpretation of a DOJ regulation offered in its brief in that case. The Supreme

[3] 29 C.F.R. § 541.501(a)-(b).

Court rejected that claim because the regulation at issue merely "repeat[ed] two [of the key] statutory phrases and attempt[ed] to summarize the others. [The regulation gave] little or no instruction on a central issue in this case [*i.e.*, *how* to interpret the key statutory phrases]. Since the regulation [gave] no indication how to decide this issue, the Attorney General's effort to [articulate an answer to that question in its *amicus* brief] cannot be considered an interpretation of the regulation." *Gonzales*, 546 U.S. at 257. The Court further observed that:

> [T]he existence of a parroting regulation does not change the fact that the [determinative] question . . . is not the meaning of the regulation but the meaning of the statute. 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.

Id. That is all DOL has done here.

B. The Agency Has Not Fairly And Reasonably Construed The Statute

This Court has held that a "*reasonable* agency determination, when advanced in an *amicus* brief that is not a '*post hoc* rationalizatio[n]' *may* be entitled to *some* deference on account of the 'specialized experience' and information available to the agency." *Connecticut Office of Prot. & Advocacy for Persons With Disabilities v. Hartford Bd. of Educ.*, 464 F.3d at 239 (2d Cir. 2006) (emphasis added) (citations omitted). To obtain this deference, therefore, DOL must establish that its interpretation is both "reasonable," *id.*, and "fair

and considered." *Cirdiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 208 (2d Cir. 2009) (citation omitted). The position articulated in DOL's *amicus* brief is none of those things.

First, DOL's brief does not construe the statute (or even its regulation, which merely quotes the statute) at all; it *reworks* the statutory definition by deleting the troublesome word "includes" and substituting in its place the friendlier alternative "as," thus attempting to close the door to the more expansive definition of "sale" that Congress expressly provided. Treating the statutory language in this way can never be termed "reasonable" or "fair."

Had DOL considered "fairly" and "reasonably" *the statute that Congress actually wrote*, it could not have reached its current, exceptionally cramped construction. Indeed, it would be difficult to imagine how Congress might have crafted a more sweeping, inclusive definition than the one it employed:

> "Sale" or "sell" *includes any* sale, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition.*

29 U.S.C. § 203(k) (emphasis added).[4]

[4] AS DOL's regulation makes plain, the exemption applies to those who are "[m]aking sales within the meaning" of 29 U.S.C. § 203(k). *See* 29 C.F.R. § 541.501(a)(1). Thus, for present purposes the breadth of the exemption is effectively co-terminus with the definition of sales.

This self-referential and partially circular definition — defining "sale" to "include," among other things, "any sale" — makes unmistakable Congress' desire to sweep broadly in defining the sorts of activities that would qualify for exemption. It *begins* with the sort of "actual sale" DOL now purports to require, *i.e.*, it begins with "any sale," including any fully "consummated transaction directly involving the employee for whom the exemption is sought," DOL Br. at 11, but goes on from there to provide an open-ended list of other permutations that would *not* be included in the phrase "any sale" but nonetheless must *also* be included within the statutory definition: *any* other "exchange, contract to sell, consignment for sale, shipment for sale, or *other disposition*." *Id.* at 8.

Especially given the use of the word "including" to introduce the list, Congress's selection of the definitional phrase "or other disposition" casts — and must have been intended to cast — an exceptionally broad net, designed to bring within the scope of the definition a range of sales activities that Congress could not envision at the time it acted. Thus, contrary to DOL's new construction, Congress unmistakably intended to include within the definition of "sales" varied activities that would *not* qualify as a prototypical, "actual sale" or a fully "consummated transaction directly involving the employee for whom the exemption is sought." It manifestly intended to include other activities that

are *not* identifiably a "sale, exchange, contract to sell, consignment for sale, [or] shipment for sale" but nonetheless bear indicia of sales activity.

If the FLSA's definition of "sale" were limited to "actual sales" or "contracts to sell" as DOL contends, the balance of the statutory definition — everything following the word "sale" in the definition itself, including the phrase "other dispositions" — would be superfluous. But interpreting the statutory term in this way is not an option; the Court is obliged "to give effect, if possible, to every clause and word of [the] statute." *U.S. v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008) (*quoting Duncan v. Walker*, 533 U.S. 167, 174 (2001)). To read the exemption as narrowly as Plaintiffs and DOL suggest would do violence to Congress's evident desire to be as inclusive and flexible as possible in defining its conception of sales.[5]

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[5] *Cf. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004) (variability in industry-specific methods through which "orders are taken and processed should not preclude the exemption for employees whose primary duty is making sales.").

C. DOL's Newly Invented Term — "Actual Sales" — Has Earned No Deference

An agency interpretation may earn "some" deference through consistent interpretation,[6] and DOL claims just such a history of uniform construction. DOL Br. at 16.[7] That claim is groundless as well.

Although DOL now insists that the term "sale" has a fixed, finite, and extraordinarily limited definition, it has previously, expressly acknowledged that "the term 'sale' does *not* always have a fixed or invariable meaning." DOL

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[6] *See, e.g., Estate of Landers v. Leavitt*, 545 F.3d 98 (2d Cir. 2008); *Lin v. United States*, 459 F.3d 255 (2d Cir. 2006) (the "inconsistency of the positions the BIA has taken through the years" militated against deferring to its current interpretation of a provision of the INA) (*quoting with approval INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)).

[7] As evidence of this supposedly "consistent" treatment, DOL cites two Wage and Hour Opinion Letters, but neither uses the term "actual sales" or espouses anything close to the definition DOL advances here — final consummation of direct sales by the subject sales rep personally. In DOL Opinion Letter FLSA 2006-16, 2006 WL 1698305 (May 22, 2006), DOL said that "selling the concept" of donating to charity did not qualify as sales, but PSRs do not "sell the concept" of pharmacology; they seek to obtain commitments to prescribe specific drugs for specific patient types — or even specific patients (albeit unknown by name to the PSR) — so that the PSR can collect commissions based on those very prescriptions. The cited DOL Opinion Letter of 1994, 1994 WL 1004855 (Aug. 19, 1994) is even further afield. There, the "tissue recovery coordinators" at issue spent 70% of their time evangelizing to hospitals on "the merits and benefits of tissue donation" and "also [were] responsible for the coordinating of the teams for tissue recovery, the surgical removal of the tissue culture, wrapping and labeling of the donated tissue; the transporting and shipping and packaging of the tissue and blood to the processing facility or lab." *Id.* Under any reasonable construction of the word "sales," these individuals would not qualify for the exemption.

Op. Letter, FLSA 2005-6, 2005 WL 330605 (Jan. 7, 2005) (emphasis added). Indeed, for seventy years, DOL has repeatedly and consistently urged that the word "sale" be construed "in a practical" manner[8] — that the pertinent question is not whether the employee at issue "directly consummates" a money-for-product exchange, but whether he or she is "engaged in activities *directed toward* the consummation of his own sales."[9]

Thus, until now, DOL has always recognized the application of the exemption whenever the employer can demonstrate "that the employee, *in some sense*, has made sales." 69 Fed. Reg. at 22,162 (Apr. 23, 2004); 1940 Report at 46 ("salesman [must] in some sense make a sale"). Conversely, DOL has previously explained, the "outside sales exemption does not apply to an employee 'who does not *in some sense* make a sale." 69 Fed. Reg. at 22,162.[10] The italics here — "*in some sense*" — belong to the DOL; until now, DOL has understood that the statutory definition of "sales" was intended to sweep up all

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[8] The quotation originally comes from a report issued in 1940 called "Executive, Administrative, Professional . . . Outside Salesman Redefined," U.S. DOL, Wage and Hour and Public Contracts Divisions, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct. 10, 1940) ("1940 Report"), at 45-46.

[9] *See* U.S. DOL, Wage and Hour and Public Contracts Divisions, Report and Recommendations on Proposed Revisions of Regulations of the Presiding Officer (Harry Weiss), Part 541 (June 30, 1949) (hereafter "1949 Report"), at 83.

[10] 1940 Report at 46.

of the possible permutations of the sales environment, excluding only purely marketing and advertising work. *Id.* at 22,163. DOL's prior, repeated devotion to the italicized sales "*in some sense*" is irreconcilable with the Agency's newfound insistence on "direct," fully "consummated," "actual sales."

Similarly, DOL's brief castigates the district court for finding persuasive "in any way" the fact that Novartis "hired, trained, paid, and incentivized [its PSRs] as sales personnel." DOL Br. at 10 n.7. Yet for *70 years*, in instructing how courts might determine whether a particular employee qualifies for the exemption, DOL has decreed that "[a]mong the factors to be considered are: the employer's specifications as to qualifications for hiring, [whether the individual had or receives] sales training, [whether he] attend[ed] sales conferences, [the] method of payment [and the] description of [the position] in union contracts."[11]

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[11] 1940 Report at 51-52. For more than six decades, courts have routinely followed DOL's guidance, applying just these factors. *See, e.g.*, *Hodgson v. Klages Coal & Ice Co.*, 435 F.2d 377, 382-84 (6th Cir. 1970); *Wirtz v. Charleston Coca-Cola Bottling Co.*, 356 F.2d 428, 429-30 (4th Cir. 1966); *Wirtz v. Atlanta Life Ins. Co.*, 311 F.2d 646, 648 (6th Cir. 1963); *Jewel Tea Co. v. Williams*, 118 F.2d 202, 208 (10th Cir. 1941); *Palmieri v. Nynex Long Distance Co.*, No. Civ. 04-138PS, 2005 WL 767170, at *11-14 (D. Me. Mar. 28, 2005); *Olivo v. GMAC Mortgage Corp.*, 374 F. Supp. 2d 545, 550 (E.D. Mich. 2004); *Nielson v. Devry, Inc.*, 302 F. Supp. 2d 747, 756-58 (W.D. Mich. 2003); *Fields v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 971, 975 (W.D. Tenn. 2003); *Hodgson v. Krispy Kreme Doughnut Co.*, 346 F. Supp. 1102, 1104-07 (M.D.N.C. 1972); *Bradford v. Gaylord Prods.*, 77 F. Supp. 1002, 1004-05 (N.D. Ill. 1948).

Similarly, DOL currently insists that the circuitous route through which drug sales must occur is simply "irrelevant" to the exemption question because only "direct" sales consummated by the individual in question count. DOL Br. at 10 n.6. PSRs, DOL maintains, do not make any "actual sale[s]" because the only "actual sales" occurring in the industry "take place between the [company] and pharmacies." *Id.* at 5.

But previously, DOL has taken a more practical approach, piercing the form of a transaction to find its core. For 60 years it has been DOL's position that an "employee is performing sales work *regardless* of the fact that the order [taken by the employee] is filled by [a] jobber rather than directly by his own employer." 1949 Report at 83. "Direct" consummation of a transaction by the sales representatives has never been the *sine qua non* of a sale.

Indeed, DOL's previous focus on the real world is exemplified by one of the Opinion Letters DOL cites in its brief. *See* DOL Op. Letter, FLSA 2005-6, 2005 WL 330605 (Jan. 7, 2005). In that instance, the sales representatives at issue worked for one entity as car salesmen. Because of rules imposed by the auto manufacturers, however, the company that employed the salesmen could not sell to its customers directly, and thus, the salesmen's job was to "close" a sale on cars that were, in actuality, sold to the customer by another company — a middle-man to whom the auto manufacturers would sell. These salesmen *did*

not fully, directly consummate the transaction; they could not do so because of external rules over which they had no control. Nonetheless, "it [was] clear" to DOL under these facts that — as a practical matter — the sales representatives were calling on their own customers, even though the "transaction" was "consummated" by a third party. On these facts, DOL concluded that these employees were exempt outside salesmen.

D. Setting Aside DOL's Change Of Heart, PSRs Are Outside Sales Persons

Under the rules DOL has always urged — until today — there is no doubt that PSRs engage in sales activities. They target specific customers (physicians, rather than television audiences or magazine readers) with specific products, in some instances for specific types of patients,[12] in order to persuade each individual physician to make a commitment to prescribe — the functional equivalent of a purchase order — later to be redeemed at a fulfillment center (a drug store). The PSR is not interested in "stimulating the sales of his company generally" (1949 Report at 83) as a marketing employee might at convention or an employee in the advertising department might in writing copy for a

[12] Although PSRs are not allowed access to patient names or records, 45 C.F.R. § 164.508, they *do* discuss with doctors the efficacy of various treatment options for specific types of patients with certain histories. Thus, the PSR's activities are often directed not just at specific physicians, but also at specific types of patients of those physicians.

magazine ad; the PSR in Connecticut has no real interest in whether physicians in Wyoming or Rhode Island write more prescriptions. Rather, the PSR wants to sell the *specific* drugs he is assigned to sell to *specific* physician accounts in *his* territory so that prescriptions will be written and credited to *his* account and increase *his* commissions.[13] Although the PSR's sales model is admittedly unconventional — because of government mandate, not industry convenience — it does, at a minimum, involve an "other disposition" that is "in some sense sales," and thus the approach falls squarely within the text of the FLSA's exemption language and is consistent with DOL's prior understanding of that language.

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[13] These activities, of course, are conducted in a manner that is fully consistent with the physician's own non-delegable duty to ensure that, in the physician's judgment, any prescription written is medically appropriate. For example, the nation's leading pharmaceutical companies have voluntarily adopted a rigorous code of conduct for pharmaceutical sales called the PhRMA Code which ensures compliance with this inviolable characteristic of the physician/PSR relationship. That Code repeatedly has been cited by the Department of Health and Human Services' Office of Inspector General as an important tool "for reviewing and structuring these relationships." *OIG Compliance Program Guidance for Pharmaceutical Manufacturers*, 68 Fed. Reg. 23,731, 23,737 (May 5, 2003); *see also Draft OIG Compliance Program Guidance for Pharmaceutical Manufacturers*, 67 Fed. Reg. 62,057, 62,063 (Oct. 3, 2002) (Code is "useful guidance for evaluating relationships with physicians and other health care professionals").

E. PSRs Have All The Attributes DOL Has Previously Recognized As Characteristic Of The Exempt Outside Sales Person

If there were any doubt about Congress's intent in adopting such an all-inclusive definition of "sales," one need only look at the practical, real-world considerations that lead to it. As the Department of Labor has previously explained, the outside sales rep exemption was

> premised on the belief that [outside sales persons] typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay. Further, the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium.

69 Fed. Reg. 22,122, 22,124.

The outside sales rep is, by definition, usually working beyond the supervisory reach of his or her supervisor. Management cannot realistically limit, or even monitor, the hours the salesperson works. Therefore, the employer could not meaningfully verify an employee's claim that he or she is due overtime compensation. Moreover, the sales rep has every incentive to work harder and longer because his compensation is tied to his own initiative in

ways that are not true for the ordinary hourly employee. And the typical outside sales rep makes far more than the minimum wage.

This describes the PSR perfectly. Although not all pharmaceutical companies structure their sales forces in precisely the same way, PSRs are virtually indistinguishable from any other group of outside sales people. Pharmaceutical companies fill the positions with individuals that have sales experience, whether in the pharmaceutical industry or elsewhere.[14] Once hired, they are given sales-related titles and get in-depth sales training on sales techniques and how to close a sale. They are then assigned sales territories where they are to achieve sales quotas or goals, and their compensation is determined to a substantial degree based on how well they meet those goals.[15] They spend their time traveling their territories to see decision-makers (primarily doctors in private practice, hospitals, and clinics), attempting to overcome barriers to sale.

The differences between pharmaceutical sales and more "traditional" sales models stem from pervasive government regulation, not from industry

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[14] *See, e.g.*, "Experienced hires." http://us.gsk.com/html/career/jobsearch.html (last visited Nov. 5, 2009); "Pharmaceutical careers, jobs, recruitment." http://www.astrazeneca-us.com/content/careers/search_jobs (last visited Nov. 5, 2009).

[15] *See generally* M. Goldberg and B. Davenport, *In Sales We Trust*, Pharmaceutical Executive (Jan. 1, 2005).

marketing decisions. The drugs at issue cannot be purchased without a prescription, and thus pharmaceutical companies cannot directly engage end-users.[16] That does not mean that PSRs do not sell; it means that they sell to the only effective decision-maker — the physician — who then authorizes the end-user to receive the product.

The typical patient[17] knows little about the science underlying a course of treatment or the efficacy, interactions or contraindications of any particular drug unless he or she learns it from the doctor. In the great run of cases, the patient simply accepts the doctor's prescription drug of choice. Just as a typical patient does not select — and has no real basis for selecting — among various brands of pacemakers, or sutures, or artificial limbs (leaving the doctor, for all intents and purposes, to make the purchasing decision on the patient's behalf),[18] the

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[16] Pharmaceutical companies can and do *market* or promote their drugs indirectly to end users through television advertisements and other forms of marketing. Most sizeable pharmaceutical companies have significant marketing and promotions departments; those employees are not involved in this suit.

[17] In many settings — such as hospitals, clinics, and urgent care centers — the end-user may not even be aware that he or she has "purchased" a drug or that it is being administered. The customer, in fact, may be unconscious when the "purchase" decision is made by the attending physician. The drug is not really "sold" to such an individual in any recognizable or generally understood way; there is no sales call, no discussion of advantages *vis à vis* competitors, indeed, no volitional act on the part of the customer.

[18] *Cf. Medtronic, Inc. v. Benda*, 689 F.2d 645, 648 (7th Cir. 1982) ("physicians were the 'real' purchasers of the pacemakers").

doctor makes the purchase decision as the patient's agent.[19] This sales model is atypical to be sure, but the PSR, at a minimum, undeniably makes "sales in some sense" to the only person permitted by federal law to make the purchase decision.

II. DENYING THE OUTSIDE SALES EXEMPTION TO PSRS WOULD VIOLATE THE "SPIRIT" OF THE FLSA

A. The "Strict Construction" Rule Relied Upon By DOL and Plaintiffs Has No Application Here

To counter the obviously open-ended and inclusive definition Congress wrote for the term "sale," Plaintiffs and DOL both insist that all FLSA exemptions must be "narrowly construed against the employer" to vindicate the "spirit" of the Act. DOL Br. at 7; *see* Pls' Br. at 44 (*quoting Arnold v. Ben Kanowsky,* 361 U.S. 388 (1960)). But this case turns on Congress's definition of the word "sale" — a term that is used at least 18 times in the FLSA[20] *outside* the exemption context. Any construction adopted for the term "sale" in section

[19] In other industries, manufacturers might attempt to stimulate interest in their products by advertising, but depend largely on retail sales staff to "close" the sale with the end user. Again, this model cannot work in the pharmaceutical industry, where the retailer — the pharmacist — has no contact with the end user until *after* the purchase decision has been made (*i.e.*, after the prescription is written). The pharmacist cannot second-guess the physician and recommend a different mode of treatment and, for all practical purposes, must dispense the drugs as directed by the doctor. Thus, if the pharmaceutical company is to have any influence on the drugs chosen for the patient, it must direct its attention to the doctor.

[20] *See*, *e.g.*, 29 U.S.C. §§ 206(e)(2), 207(b)(3), 207(m)(1) and 215(a).

203(k) will, of course, have *consequences* for the application of the outside sales exemption, but the definition of sales is not itself an exemption, its application is not limited to the exemption, and thus it is not subject to the "narrow construction" rule. *See Anderson v. Cagle's, Inc.*, 488 F.3d 945, 957 (11th Cir. 2007) (definition found in "§ 203(o) is not an exemption under the FLSA but is instead a definition that limits the scope of the FLSA's key minimum wage and maximum hour provisions," and as such is not subject to the "narrow construction" rule applicable to the exemptions found in section 213).

Thus, DOL's and Plaintiffs' exclusive focus on canons applicable to exemptions is misplaced. There is no suggestion — in the statute, in the regulations, or in the briefs of the parties — that Congress intended "sale" to mean something different in the exemption context than when that word is used in the many other places it appears in the FLSA.

And while courts have indeed given the exemptions themselves careful construction to prevent the exception from swallowing the Act's general rule, doing so here would run headlong into *other* rules of statutory construction —

for example that "identical words used in different parts of the same act are intended to have the same meaning."[21]

When faced with such "a duel of competing canons," the better approach is generally to resist any attempt "to resolve [the] tension between them" and try to find "a common-sense reading of the controlling provision, untilted by either" canon. *National Rifle Ass'n v. Bentsen*, 999 F.2d 772 (4th Cir. 1993). While it would surely be error to apply the outside sales exemption in circumstances that its language cannot support, "a legislative mandate to apply a liberal interpretation to an act will not justify the judicial creation of rights or liabilities under the guise of 'construction.'" *U.S. v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 27 (2d Cir. 1989).

Rather than analyze this case through the prism of any particular — or several competing — canons of construction, the Court should simply focus on the language selected by Congress as illuminated by "the whole law, and to its

[21] *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990); *Jiang v. Bureau of Citizenship & Immigration Servs.*, 520 F.3d 132, 135 n.5 (2d Cir. 2008) (Sotomayor, J.) (*citing U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 460 (1993)); *United States v. George*, 386 F.3d 383, 388 (2d Cir. 2004) (Sotomayor, J.) (same); *see also U.S. Nat'l Bank of Oregon*, 508 U.S. at 460 (requiring party to "rebut" the presumption that "identical words used in different parts of the same act are intended to have the same meaning"). Even when Congress has *failed* to provide a statutory definition for a specific term, that presumption should become all but irrebuttable where Congress has actually defined the term and failed to indicate a desire to have it applied differently in different places.

object and policy." *W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 88 (2d Cir. 2009) (citing *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990) (internal quotation marks omitted)). Both the statutory language and its "object and policy" support the decision below.

B. Exempting PSRs Comports Fully With Congress's Evident Design For The FLSA

The FLSA was enacted in 1938 as a centerpiece of President Franklin Roosevelt's New Deal program against the back-drop of economic crisis, massive unemployment, and oppressive labor conditions. In relevant part, it established a minimum living wage for covered workers and, through the mandatory overtime pay provisions, gave employers a powerful incentive to reduce unemployment by hiring additional workers rather than asking incumbent employees to work longer hours.[22] Congress declared that together, these measures were intended to redress Depression-era "labor conditions [that were] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a).[23]

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[22] *See generally Mechmet v. Four Seasons Hotels, Inc.*, 825 F.2d 1173, 1175-76 (7th Cir. 1987).

[23] *See also Havey v. Homebound Mortgage, Inc.*, 547 F.3d 158, 160 (2d Cir. 2008) (accord); Garrett Reid Krueger, *Straight-Time, Overtime and Salary Basis: Reform of the Fair Labor Standards Act*, 70 Wash. L. Rev. 1097, 1098

(continued...)

In his letter to Congress proposing the legislation, President Roosevelt declared that his "objective [was] to improve . . . the standard of living of those who are now undernourished, poorly clad, and ill-housed." S. Rep. No. 884, 75th Cong., 1st Sess. (1937). The Senate Report for the bill that ultimately became the FLSA emphasized that "[i]t is only those low-wage and long-working industrial workers, who are helpless victims of their own bargaining weakness, that the bill seeks to assist to obtain a minimum wage." *Id.*[24] Roosevelt specifically acknowledged the "wisdom of distinguishing labor conditions which are clearly oppressive" — the statute's target — from "those which are not as fair or as reasonable as they should be under [the] circumstances." *Id.* The bill established only "a few rudimentary standards," baselines so basic that "[f]ailure to observe them [would have to] be regarded as socially and economically oppressive and unwarranted under almost any circumstance." *Id.*

In 1949, when amendments to the FLSA were proposed, Congress again explained that "the objectives sought to be achieved by Congress when it

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(1995); *Statutory History Of The United States: Labor Organization,* 396 (Robert F. Koretz ed., 1970); John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 *Law & Contemp. Probs.* 464, 465-66 (1939)).

[24] The minimum wage and mandatory overtime requirements extend to the same workers.

enacted that act in 1938 [were to] promote economic justice and security *for the lowest paid of our wage earners*[,] to protect this Nation from the evils and dangers resulting from wages too low to buy the *bare necessities of life* and long hours of work injurious to health. [Thus, the Act closed] the channels of interstate commerce to goods produced under conditions which do not meet rudimentary standards of a civilized society." S. Rep. No. 640, 81st Cong., 1st Sess. (1949) (emphasis added); *see also id.* ("President Roosevelt . . . urged the enactment of [the FLSA] for those 'who toil in [the] factory'"); *see also Anderson v. Cagle's, Inc.*, 488 F.3d 945, 957 (11th Cir. 2007) (Congressional purpose was to eliminate "conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers") (*quoting* 29 U.S.C. § 202(a)).

PSRs are not "low-wage [or] long-working industrial workers," they are not "helpless victims of their own bargaining weakness," they do not suffer from "wages too low to buy the bare necessities of life," they face no "oppressive" working conditions or "long hours of work injurious to health." In fact, CNN/Money.com recently ranked the PSR position among the "Best Jobs in America" and reported *median* pay (base salary and commissions) to be

$105,000.[25] An entry level PSR can expect to make more than $66,000 a year in salaries and commissions[26] — more than six times the "poverty line" threshold.[27] Experienced PSRs often earn well into six figures.[28] These figures understate the PSR's true compensation, as they commonly (and increasingly) receive substantial non-cash benefits and incentives such as stock options, company cars or car allowances, computers and other technological devices, and company-paid vacations.

Of course, none of the foregoing would serve as a legitimate basis for a new, judicially created overtime exemption for highly compensated workers. Nor can such a review of legislative purpose, even when it seems so clear, artificially extend the statute's "outside sales representative" exemption beyond the reach of its language. Well-paid individuals do not necessarily become exempt for that reason alone, even though the record shows quite clearly that President Roosevelt and the 75th Congress would have exempted them had they

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[25] *See* "Best Jobs in America." http://money.cnn.com/magazines/moneymag/bestjobs/2009/snapshots/44.html (last visited Nov. 5, 2009).

[26] *See* Bob Davenport, Carrie Fisher, and Dylan Galaty. "Salesforce Suvey 2008." http://pharmexec/findpharma/com/pharmexec/article/articleDetail.jsp?id=48371 (last visited Nov. 5, 2009).

[27] *See* "The 2009 HHS Poverty Guidelines." http://aspe.hhs.gov/poverty/09poverty.shtml (last visited Nov. 5, 2009).

[28] Davenport, *supra*.

only considered the question. As always, the text of the statute is the final arbiter.

But it is equally true that DOL's artificially constricted reading of the exemption language cannot be justified by a desire to effectuate legislative "purpose." The available evidence — in the statute's own declaration of purpose and in the Act's legislative history — makes plain that the 75th Congress would have been shocked by the notion that the FLSA's "purpose" was to provide mandatory overtime pay for highly trained and highly compensated professional sales employees. Excluding PSRs from the scope of the exemption based on the confluence of a cramped and unnatural reading of the statutory term "sales" and the unique legal environment in this pervasively regulated industry would hand PSRs a windfall never contemplated by Congress and would make a mockery of the important societal goals the statute was designed to serve.

CONCLUSION

For the foregoing reasons, the district court's order granting summary judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i), undersigned counsel hereby certifies that the accompanying brief contains 6388 words, exclusive of the tables of authorities and contents, and this certificate of counsel.

NEAL D. MOLLEN

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify this 5th day of November 2009 that:

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Neal D. Mollen

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On November 5, 2009, I hereby certify that true and correct copies of the foregoing Brief Amicus Curiae of the Chamber of Commerce of the United States of America Supporting Appellee were served upon the following counsels of record, by overnight UPS delivery:

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