No. 11-204

In the Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER AND FRANK BUCHANAN,

Petitioners,

v.

SMITHKLINE BEECHAM CORP. D/B/A GLAXOSMITHKLINE,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

During most of the more than 70 years since enactment of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*., pharmaceutical companies have employed pharmaceutical sales representatives and, consistent with Department of Labor regulations first promulgated in 1940 and reaffirmed as recently as in 2004 defining the term "sales" broadly, classified those sales representatives as exempt from the FLSA's overtime pay requirements under the "outside sales" exemption, 29 U.S.C. § 213(a)(1). In 2009, the Department began filing *amicus* briefs in private civil litigation announcing its new position that sales representatives are not now and have never been exempt because they do not "sell" as that term is defined in Section 3(k) of the FLSA, 29 U.S.C. § 203(k). The United States Court of Appeals for the Ninth Circuit refused to defer to that abrupt change in position and held that sales representatives are exempt. 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.

PARTIES TO THE PROCEEDING

Petitioners Michael Shane Christopher and Frank Buchanan were the appellants in the court of appeals below. Respondent SmithKline Beecham Corp. d/b/a GlaxoSmithKline, now known as GlaxoSmithKline LLC, was the appellee in the court below.

RULE 29.6 STATEMENT

Respondent SmithKline Beecham Corporation, d/b/a GlaxoSmithKline, now known as GlaxoSmithKline LLC, is a wholly owned subsidiary of GlaxoSmithKline Holdings (Americas), Inc. All of Respondent's stock is owned by GlaxoSmithKline Holdings (Americas), Inc. The ultimate parent of both Respondent and GlaxoSmithKline Holdings (Americas), Inc., is GlaxoSmithKline plc, the shares of which are publicly traded on the London Stock Exchange and New York Stock Exchange. No person beneficially owns 10% or more of the outstanding shares of GlaxoSmithKline plc.

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INTRODUCTION

The Fair Labor Standards Act ("FLSA") requires employers to pay overtime compensation to certain employees who work more than 40 hours in a week. The Act includes a wide array of exemptions to that requirement, including "any employee employed … in the capacity of outside salesman." 29 U.S.C. § 213(a)(1). For more than 70 years, the Department of Labor ("DOL") took a flexible, pragmatic, and functional approach to the meaning of "sales" that considered the overall context in which the employee worked.

In 2009, DOL filed an uninvited *amicus* brief in which it made an abrupt about-face and asserted that there can be no sales without a formal transfer of title. As a result, DOL contends that pharmaceutical sales representatives ("PSRs") such as Petitioners are not covered by the outside salesman exemption, despite uniform industry practice treating PSRs as exempt. That novel interpretation is fundamentally unmoored from the text of the FLSA, the implementing regulations, and DOL's longstanding interpretation of those rules. The court of appeals held that DOL's new position is entitled to no deference, and that Respondent GlaxoSmithKline ("GSK") is entitled to summary judgment. That holding was plainly correct and should be affirmed.

STATEMENT OF THE CASE

A. The Fair Labor Standards Act and Outside Salesman Exemption

Enacted against the backdrop of economic crisis, massive unemployment, and oppressive labor

conditions, the FLSA was intended to address "labor conditions 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). One declared objective was "to improve … the standard of living of those who are now undernourished, poorly clad, and ill-housed." S. Rep. 75-884, at 3 (1937) (Message from President Roosevelt). Another was to "promote economic justice and security for the lowest paid of our wage earners" and 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." S. Rep. 81-640, at 1-2 (1949).

The FLSA pursued these objectives by establishing "a few rudimentary standards" so basic that "[f]ailure to observe them [would have to] be regarded as socially and economically oppressive and unwarranted under almost any circumstance." S. Rep. 75-884, at 3. The Act therefore proscribed the use of child labor, imposed a minimum wage for most jobs, and established a general rule that individuals working more than forty hours in a given workweek were entitled to time-and-one-half pay for those additional hours.

To avoid unintended effects on individuals or industries that were not engaged in the oppressive labor practices that prompted Congress to act, Congress made the general overtime rule subject to a wide array of exemptions, exceptions, and special applications. As relevant here, the "white-collar exemption" provides that the overtime requirements do not apply to "any employee employed in a bona fide executive, administrative, or professional

capacity … or in the capacity of outside salesman." 29 U.S.C. § 213(a)(1).

The reasons for exempting outside salesmen were "fairly apparent" from the start: Hourly standards "primarily devised for an employee on a fixed hourly wage" are incompatible with the "individual character of the work of an outside salesman" because 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." *Jewel Tea v. Williams*, 118 F.2d 202, 207-08 (10th Cir. 1941).

B. DOL's Regulations Interpreting the Exemption

In 1940, DOL promulgated rules providing that an "outside salesman" is an employee "[w]ho is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in [m]aking sales within the meaning of section 3(k) of the Act." 29 C.F.R. § 541.5(a) (1940). The current regulations are little changed, defining an "outside salesman" as one whose "primary duty" is "making sales within the meaning of section 3(k) of the Act" and "[w]ho is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. § 541.500(a). Section 3(k), in turn, defines "sale" in broad and flexible terms to "include[ ] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). The regulations thus quite naturally define an "outside salesman" as

one who operates outside the normal workplace and makes sales, as broadly defined in the statute.

Since promulgating its first regulations, DOL has emphasized the flexible, nonrestrictive manner in which Congress has defined "sales." DOL's earliest guidance explained that employees engage in exempt "sales" work whenever they "*in some sense* make a sale."[1] DOL's guidance several years later similarly noted that "[w]ith such variations in the methods of selling and promoting sales each case must be decided upon its facts" and that "the test in borderline cases is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling."[2] As recently as 2004, DOL emphasized that its approach to the outside sales exemption remained substantively the same as it was in 1940 and 1949 and that "much of the reasoning" of its earlier reports—including the notion that an employee need only make sales "in some sense"—"remains as relevant as ever."[3]

Between 1940 and 2009, consistent with the flexible definition of "sales" in Section 3(k) and the regulations, DOL applied a multi-factor, context-

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[1] DOL, "*Executive, Administrative, Professional … Outside Salesman" Redefined: Report and Recommendation* 46 (1940) ("Stein Report") (emphasis added).

[2] DOL, *Report on Proposed Revisions of Regulations* 83 (1949) ("Weiss Report").

[3] *Defining and Delimiting the Exemptions for … Outside Sales* [*Employees*], 69 Fed. Reg. 22,122, 22,124 (2004).

dependent test to determine when the outside sales exemption applies. That test considered, among other things, "the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; [and] method of payment." Stein Report 51-52; *see* Opinion Letter, 2005 WL 330605, at *2 (Jan. 7, 2005) (acknowledging that "'the term 'sale' does not always have a fixed or invariable meaning'").

That all changed abruptly in 2009 when DOL filed an *amicus* brief in the Second Circuit in a case regarding whether PSRs employed by Novartis were covered by the exemption.[4] Without even acknowledging the departure from its longstanding interpretation of "sales," DOL made an abrupt about-face and advanced precisely the sort of fixed and invariable definition of sales that it had previously rejected.

Under DOL's new and far-more-restrictive definition, a "sale" *required* a fully "consummated transaction directly involving the employee for whom the exemption is sought." Novartis Br. 11. Because of prescription drug requirements and other regulations, *see* 21 U.S.C. § 353(b)(1) (certain drugs may be "dispensed only upon a written prescription"), the large outside sales force of the pharmaceutical industry focuses on obtaining commitments from physicians. The salesmen do not consummate the physical transfer of products to those physicians because the products are actually

[4] DOL Br. as *Amicus Curiae*, *Novartis Wage & Hour Litig.*, No. 09-4376 (Oct. 13, 2009) ("Novartis Br.").

dispensed to patients through pharmacists based on the doctor's written prescription. According to DOL, the Novartis salesmen did not qualify for the exemption because they did not themselves "actually," irrevocably, and fully consummate any sales of Novartis products. Novartis Br. 5. The Second Circuit granted "'controlling' deference" to DOL's new interpretation of its regulations. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 149 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011).

C. Petitioners' Pharmaceutical Sales Representative Positions

Petitioners Michael Christopher and Frank Buchanan were employed by GSK as PSRs. The positions for which Petitioners applied were denominated as "sales" jobs, and Petitioners understood that GSK preferred candidates who had previous sales experience. JA 6-7, 53-54. When he applied to GSK, Buchanan was employed in a sales position at Qwest Communications. JA 206-08. And when Christopher applied, he was met with skepticism by the GSK recruiter because he lacked prior sales experience. JA 7.

GSK's job announcement identified the PSR's *first* "key responsibility" as "[s]ell[ing] products to [a] specific customer market according to the business plan." JA 170; *see* JA 85 (PSR is "[r]esponsible for sales of assigned products in assigned territory"). The customers who were the focus of PSRs' sales efforts were physicians—the only individuals authorized under federal law to write prescriptions for GSK products, and therefore the only people who could order GSK products and get them into the

hands of patients with a medical need. Pet.App.2a-4a; JA 133.

Petitioners were trained in and were expected to use customer-focused selling techniques to meet or exceed the sales goals and objectives they received from GSK. JA 95-96. GSK expected them to "[d]evelop and deliver informative sales presentations based on customer needs," to "[d]evelop creative sales strategies to reach hard-to-see doctors/hard-to-work accounts," and to "[p]ositively impact sales in [their] territory." JA 171.

Once hired, Petitioners received specialized training in sales skills. JA 24, 61-63. Petitioners were trained to identify key customers; ask questions to engage customers in meaningful and appropriate discussions about GSK products; and identify and resolve objections their customers might have to prescribing GSK products. And they were trained how to "close the sale"—*i.e.*, to ask for a commitment from their customer-physicians to prescribe, where medically appropriate and consistent with product labeling, those GSK products for which the PSR was responsible. JA 56-57, 96, 194-95, 235.

On the job, Petitioners did precisely what outside salespeople are expected to do. They did not work out of a GSK office; instead, they spent their time traveling to, visiting with, and seeking commitments from their physician-customers to prescribe GSK products for appropriate patients. JA 26-28, 75-76. Before going on sales calls, they examined data regarding the prescribing habits of

the doctors in their territories to see where they could gain new business or grow existing business. JA 47-48, 63-66, 72-73, 186-87, 261, 269. They targeted physicians they believed could appropriately prescribe more of the GSK products for which they were responsible, with the goal of increasing sales in their territory. JA 57-62, 72-73. Petitioners tailored their sales messages for each individual physician and asked for commitments to prescribe their assigned products for appropriate patients. JA 16, 19-23, 31-32, 57, 66-68, 70-71.

Petitioners were evaluated based on their sales techniques: their planning for each sales call; the degree to which they executed a persuasive sales presentation; and their success in "ask[ing] for the business" by seeking a commitment from physicians to prescribe, where medically appropriate, the GSK products they sold. JA 194-95, 235, 255. On supervisor "ride-alongs" (which occurred every month or two), a manager would accompany a PSR in the field in order to assess the employee's competence with respect to GSK's "Winning Practices." JA 77-79, 188-98, 258-74. Other than these ride-alongs, however, Petitioners carried out their daily work tasks independently, without any direct supervision other than a phone call or e-mail exchange with a manager roughly once a day. JA 16, 77-78.

Petitioners were also paid as salespeople. In addition to a fixed base salary, a significant portion of their total pay was contingent upon increasing sales within the territory by obtaining commitments from the physicians on whom they called to write more prescriptions for GSK products for appropriate

patients. JA 29-30, 276-79. Petitioners received incentive compensation each year—which comprised between 26% and 41% of their total annual compensation—based on their success in increasing sales volume and/or market share in their territory for the specific GSK products for which they were responsible. JA 29-30, 276-79. Both GSK and Petitioners recognized that Petitioners' individual efforts led directly to sales success in their respective territories. *See* JA 174-85, 265, 274.

D. Proceedings Below

GSK terminated Christopher's employment in May 2007, after an internal investigation revealed that he had violated GSK's code of conduct by reporting that he made sales calls with physicians with whom he did not meet face-to-face. *See* Ninth Circuit Supplemental Excerpts of Record ("SER") 94-100, 200. Buchanan left GSK for a PSR position at another pharmaceutical company. Pet.App.2a. Petitioners subsequently filed a putative class action in district court claiming that GSK had improperly classified PSRs as exempt employees. Petitioners argued that because federal law prohibited them from selling GSK products directly to patients, and because the physicians on whom they called did not purchase or inventory GSK's products, PSRs were not engaged in "sales" under the FLSA. Pet.App.41a-42a.

The district court rejected that argument. Looking to the flexible definition of "sale" in section 3(k) of the FLSA—and not, as Petitioners had urged, to a dictionary definition—the court concluded that the FLSA and DOL define the term "somewhat

loosely," and that an employee need only engage in a sale "in some sense" in order to be covered by the exemption. Pet.App.43a-44a. The court held that Petitioners' physician-focused sales activity undoubtedly constituted sales "in some sense"—*i.e.*, in the only sense relevant in the highly regulated pharmaceutical industry—and qualified as "sales" under Section 3(k). Indeed, the court emphasized that PSRs "obtain[] a non-binding commitment from the physician to prescribe the PSR's assigned product." Pet.App.46a. The court determined that Petitioners "plainly and unmistakably fit within the terms and spirit of the exemption," *id.*, and thus granted GSK's motion for summary judgment.

While that motion was pending, Petitioners submitted DOL's *Novartis amicus* brief as "supplemental authority." JA 3. Following entry of summary judgment, Petitioners moved to amend the judgment, arguing that the court failed to grant "controlling deference" to that brief under *Auer v. Robbins*, 519 U.S. 452 (1997). Pet.App.49a. The court denied the motion, rejecting DOL's position as an "absurdity" and concluding that "[n]ot only is the DOL's current interpretation inconsistent with the statutory language and [the Agency's] prior pronouncements, but it also defies common sense," given that PSRs "make sales the way that sales are made in the pharmaceutical industry." Pet.App.51a-52a.

Petitioners appealed to the Ninth Circuit, and DOL filed an uninvited *amicus* brief that largely tracked its *Novartis* brief. The court of appeals agreed with the district court that DOL's novel

interpretation of "sales" was not entitled to *Auer* deference.

The court noted that, rather than attempting to clarify the definition of "sales," DOL's regulations simply define a salesman as someone who "mak[es] sales within the meaning of section 3(k) of the Act," 29 C.F.R. § 541.500(a)(1). Because DOL's *amicus* brief purported to interpret a regulation that did "'little more than restate the terms of the statute itself,'" the court held that DOL's novel interpretation of "sales" was not entitled to controlling deference. Pet.App.23a (quoting *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006)). Deferring to DOL's brief in such circumstances, the court concluded, would "sanction bypassing of the Administrative Procedures Act and notice-and-comment rulemaking." Pet.App.24a.

The court further held that DOL's "about-face regulation, expressed only in ad hoc *amicus* filings," Pet.App.35a, was not persuasive under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Based on the text of the FLSA and DOL's regulations, the court concluded that PSRs do in fact make sales "in some sense" and that the "sale" in the pharmaceutical industry is the "exchange of nonbinding commitments between the PSR and physician at the end of a successful call." Pet.App.26a. This "common sense understanding" of sales reflects the practical reality of the pharmaceutical industry, and is consistent with the text of section 3(k), which makes "open-ended use of the word 'sale', [and] *includes* 'other disposition[s].'" Pet.App.28a. It is also consistent with DOL's own usage and regulations, which as recently as 2004 reaffirmed

the "open-ended concept that a salesman is someone who 'in some sense' sells." *Id.* The court thus concluded that PSRs were covered by the outside sales exemption. Pet.App.34a.

The court of appeals denied rehearing en banc, Pet.App.53a, and this Petition followed.

SUMMARY OF ARGUMENT

I. Under the plain text of the FLSA, DOL's regulations, and DOL's longstanding interpretation of those regulations, PSRs fall comfortably within the outside salesman exemption.

A. The FLSA adopts a broad, functional approach to exempt those employees who function in the "capacity" of outside salesmen. DOL has reinforced that breadth and flexibility by adopting the FLSA's own expansive definition of sales. That definition provides that "'[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). By stating what a sale "includes," rather than what it "means," Congress made clear that the list of transactions deemed to constitute "sales" is illustrative, not exhaustive. The fact that this list is prefaced by the word "any," and includes "sale" among the multiple transactions covered, further confirm that the definition is not limited to a formalistic or technical conception of sales, but instead includes a broad swath of transactions, without regard to the specific manner in which sales occur in a particular industry.

DOL's regulations regarding the outside salesman exemption incorporate the broad, flexible

statutory definition of sales, but do not further define the term, providing that an employee is exempt if his "primary duty" is "making sales within the meaning of section 3(k)." 29 C.F.R. § 541.500(a); *see id.* § 541.501(b). Since it first promulgated those regulations in 1940, DOL has repeatedly confirmed that the definition of "sales" must be applied in a pragmatic, functional manner, in which an employee engages in "sales" as long he makes a sale "in some sense" or "in a practical sense." As recently as 2005, DOL again reaffirmed its understanding that the term sale does *not* have a "fixed or invariable meaning," but must instead be applied contextually, based on the totality of the circumstances.

B. PSRs plainly engage in "sales" under this flexible, common-sense definition. Indeed, as both courts below concluded, PSRs are the pharmaceutical industry's outside sales force and conduct the relevant sales activity permitted in this highly regulated industry. The PSR positions for which Petitioners were hired were advertised as sales jobs and GSK made clear that it was looking for applicants with prior sales experience. After they were hired, Petitioners received extensive training about how to hone their sales techniques while complying with the unique regulatory environment. While on the job, Petitioners did what outside salesmen do—they spent their days outside the office meeting with physicians in designated territories, attempting to obtain commitments to write prescriptions for specific GSK products, where medically appropriate.

C. Treating PSRs as exempt is consistent with both the broader purposes of the FLSA and the

specific purposes of the outside sales exemption. The exemptions are defined functionally and operate across all industries. The peculiarities of how sales take place in the pharmaceutical industry have everything to do with regulatory concerns unique to that industry and nothing to do with the policies of the FLSA or the wisdom of exempting individuals who function "in the capacity of outside salesman."

The FLSA was enacted to ensure a minimum standard of living for the nation's lowest-paid workers and those who worked under dangerous or difficult conditions. The PSR position, however, is one of the most desirable positions in the United States, with *median* pay exceeding $90,000 per year. PSRs also work by themselves, away from the home office, and it is both infeasible and undesirable for GSK to supervise their work closely. Flexibility and independence are critical and central to what makes this a desirable position. These longstanding aspects of the PSR position are simply incompatible with a rigid overtime regime.

D. Petitioners and DOL rely on a purported canon of construction under which the FLSA's exemptions must be interpreted narrowly. But even assuming such a canon exists, it would have no application here. DOL adopted the FLSA's own broad, flexible definition of "sales," and that term—which applies equally to the exemptions *and coverage provisions* which incorporate the term—is not subject to any narrow construction canon. Moreover, having adopted a definition of sales notable for its flexibility and breadth, DOL is now ill-positioned to insist on a narrow or formalistic definition of the term.

DOL's novel theory that "sales" must include a formal transfer of title has no basis in the language of the statute or regulations. At least one of the illustrative examples of a "sale" "include[d]" in section 3(k)—consignment—does *not* involve a transfer of title, and thus DOL's view cannot be reconciled with the statute itself. Reliance on dictionary definitions of "sale" is also misplaced. Congress defined sales in a manner that goes far beyond a narrow, technical interpretation of that term (and indeed, includes an unmodified "sale" among the transactions included in the broader statutory term), and it is this statutory definition—rather than a narrower dictionary definition—that must be given controlling effect.

The argument that PSRs are merely non-exempt "promoters" also finds no support in the regulations, the record, or the cases and opinion letters upon which Petitioners and DOL rely. Classification of an employee's work necessarily depends upon the circumstances under which the work is performed, and the exemption applies if promotional work is incidental to and in conjunction with an employee's own sales. The argument therefore begs the question whether PSRs engage in sales. While Petitioners rely on decades-old books and other extra-record material to argue that PSRs are promoters rather than salesmen, the record overwhelmingly demonstrates that PSRs do, in fact, make "sales."

Moreover, the regulation clearly envisions that non-exempt promoters would pave the way for someone else's sales. But here Petitioners seize on regulatory peculiarities of the pharmaceutical

industry to portray the industry's entire sales force as promoters, and essentially deprive the industry of any outside sales force.

II. For more than 70 years, DOL consistently took a flexible, pragmatic approach to the meaning of sales. But it made an abrupt about-face in 2009, arguing for the first time in an uninvited *amicus* brief that "sales" require a formal transfer of title to the goods in question. That new position is entitled to no deference at all, much less the "controlling" *Auer* deference that DOL seeks.

A. DOL's new interpretation of sales cannot be squared with the plain text of the FLSA and DOL's prior regulations, neither of which can be read as requiring a mandatory transfer-of-title test. This Court has repeatedly held that agency interpretations that conflict with prior interpretations are not entitled to deference—particularly where, as here, the agency has not even acknowledged, let alone explained, its departure from precedent.

DOL's new interpretation of sales is also entitled to no deference for the separate and independent reason that the regulations purportedly being interpreted do little more than incorporate and paraphrase the statutory definition of "sales." DOL's new, formalistic interpretation of sales is inconsistent with the flexible, functional definition it has incorporated into its regulations. And it is well established that when a regulation merely parrots the underlying statute, the agency cannot claim binding deference to subsequent interpretations of those regulations. That is exactly the case here.

DOL's regulations clarify nothing about the scope of the term "sales," but instead merely quote and cross-reference the statutory definition.

B. If the Court were to conclude that deference is nonetheless warranted under existing precedent, it should reconsider those decisions and hold that no deference is owed to an agency interpretation of its own regulations set forth for the first time in an *amicus* brief in a private damages action. Deferring to the positions set forth in *amicus* briefs gives agencies a powerful incentive to avoid the rulemaking process altogether, thus depriving interested parties of notice and the opportunity for comment. It also gives agencies a strong incentive to promulgate vague, open-ended rules, then make the hard choices out of the public eye, in *ad hoc* and *post hoc* court filings. As a result, regulated parties will be left in the dark about what conduct is permitted or prohibited under those rules until it is too late.

Deference to an agency's interpretation of its own regulations set forth in an *amicus* brief also lacks the structural safeguards that are present in other administrative law doctrines. Congress has every incentive to be specific and precise when it is delegating authority to executive agencies, to avoid granting agencies excessive discretion and to ensure that the agencies will implement the new statute consistent with Congress' intent. But when an agency promulgates a vague rule, it leaves to *itself* the interpretation of that rule. If regulatory vagueness expands the agency's own interpretive discretion, then there is no check on the agency's incentive to strengthen its own hand through vague regulations. Advancing interpretations of

regulations through *amicus* briefs also allows an agency to avoid the public and political scrutiny that would follow if it actually made the hard policy choices in its regulations. And permitting agency *amicus* filings in private damage actions to have dispositive effect *de facto* authorizes retroactive rulemaking and deprives the regulated community of fair notice.

III. A ruling in favor of Petitioners would have significant practical consequences for both employees and employers. A core attribute of the PSR position is its independence and flexibility, which allows those employees to schedule many work-related tasks around their personal obligations. Many of the most desirable aspects of the position would be lost if employers were forced to switch to a rigid, hours-based compensation regime and to closely monitor PSRs' activities. The Court should not allow DOL to upend the careers of the tens of thousands of PSRs who are not plaintiffs in this lawsuit, and who continue to thrive in their flexible and well-compensated careers.

ARGUMENT

I. PSRs FALL COMFORTABLY WITHIN THE OUTSIDE SALESMAN EXEMPTION

A. The FLSA and DOL's Regulations Require a Flexible, Pragmatic Approach to "Sales"

1. Under the FLSA, "[e]xcept as otherwise provided in this section," any employee working more than 40 hours in one week must receive compensation for those additional hours "at a rate

not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). Congress never intended the FLSA to reach well-compensated "white-collar" occupations, and so the Act exempts many different types of employees from that requirement, including "any employee employed in a bona fide executive, administrative, or professional capacity … or in the capacity of outside salesman." *Id.* § 213(a)(1). Application of the exemption does not turn on labels or formalism. Instead, it turns on a functional inquiry into the "capacity" in which the employee works. *See Black's Law Dictionary* (9th ed. 2009) (defining "capacity" as "[t]he role in which one performs an act"); *Random House Dictionary of the English Language, Unabridged* 219 (1967) (defining capacity as "position, function, relation"). Equally important, these exemptions apply across industries and are not designed to turn on the technical details of how employees discharge the executive, administrative, or outside sales function in any particular industry.

The FLSA does not specifically define "outside salesman," but it does define "sale" in broad, flexible, and inclusive terms: "'Sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." *Id.* § 203(k). This one-sentence definition contains at least three powerful indications that Congress intended it to have both a broad and flexible meaning.

First, Congress' use of the word "includes"—as opposed to "means"—makes clear that the list of transactions deemed to constitute "sales" is illustrative, not exhaustive. The word "includes" is "usually a term of enlargement, and not of

limitation," and "[a] term whose statutory definition declares what it 'includes' is more susceptible to extension of meaning … than where … the definition declares what a term 'means.'" *Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008); *see West v. Gibson*, 527 U.S. 212, 217-18 (1999) (the word "including" in the list of Title VII remedies "makes clear that 'appropriate remedies' are not limited to the examples that follow that word").

For a number of the FLSA's definitions, Congress used the narrower word "means," which indicates that the definition is exhaustive. *See* 29 U.S.C. § 203(a) ("'Person' *means* an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons") (emphasis added); *id.* § 203(t) ("'Tipped employee' means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips"). But Congress chose to use the broader term "includes" in the definition of "sale," and the Court must give effect to that choice.

Second, the definition of "sale" includes the unmodified word "sale" as one illustrative example of the type of transaction that falls within the defined term. That fact alone suggests that Congress' intent was broader than any narrow conception of a sale. But Congress did not stop there. It also included in the definition of "sales" several types of transactions that are *not* considered to be sales in a formal or technical sense of the word, such as "exchange[s]," "contract[s] to sell," "consignment[s]," and the catch-all term "other disposition[s]." 29 U.S.C. § 203(k). When "a statute includes an explicit definition,

[courts] must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000).

Third, Congress prefaced the list of illustrative examples of "sales" with the word "any." This Court has repeatedly held that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some *indiscriminately of whatever kind*.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New Int'l Dictionary* 97 (1976)) (emphasis added); *see Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 130-31 (2002). The definition is thus not limited to particular types of sales, exchanges, consignments, or other dispositions, but includes *any* such transactions "of whatever kind."

2. DOL has authority to adopt regulations that "define[] and delimit[]" the scope of the outside salesman exemption, 29 U.S.C. § 213(a)(1), and it has promulgated regulations in exercise of that authority, *see* 29 C.F.R. § 541.500 *et seq*.

Those regulations, as well as DOL's other regulatory guidance, embrace a broad conception of "outside salesman," most obviously by incorporating the broad, inclusive definition of "sales" in section 3(k), without further elaborating on it. The first step is the important one. DOL perhaps could have defined "outside salesman" in some alternative manner, but DOL consciously incorporated the broad and flexible statutory definition of sales. Having incorporated that definition, the regulations do not elaborate on the definition in any meaningful way. For example, the regulations provide that "[t]he term 'employee employed in the capacity of outside

salesman'" shall mean any employee whose "primary duty" is "making sales within the meaning of section 3(k) of the Act" and who "is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. § 541.500(a). Another part of this regulation simply quotes the definition of "sale" verbatim and notes that this definition "include[s] the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." 29 C.F.R. § 541.501(b).

Another DOL regulation—entitled "Selling"—further emphasizes the breadth and flexibility of the statutory approach to sales by providing that "[a]s long as the employee in any way participates in the sale of the goods, he will be considered to be 'selling'" those articles. 29 C.F.R. § 779.241. That is, "if the employee performs any work that, *in a practical sense* is an essential part of consummating that 'sale' of the particular goods, he will be considered to be 'selling' the goods." *Id.* (emphasis added).

While the outside salesman regulations merely adopt and parrot the statutory definition, to the extent DOL has provided any gloss on its regulations, it has emphasized the flexible, common-sense approach to the word "sale." When DOL originally promulgated its rules in 1940, it explained that an employee engages in "sales" if he has, "*in some sense*, ma[d]e a sale." Stein Report 46 (emphasis added). A question had arisen whether employees were covered by the exemption if they were, for example, "selling [ ] time on the radio," "solicit[ing] advertising for newspapers and other periodicals," or "solicit[ing] freight for railroads." *Id.*

at 45. DOL noted that all of these activities were "popularly described as sales" or "commonly known as sales." *Id.* DOL further explained that, "in a practical sense, these people are salesmen in that their activities are of the same nature as those of persons making sales within the meaning of section 3(k)." *Id.*

DOL has also provided guidance about how to determine in "border-line cases" if an employee is "'employed for the purpose of … making sales.'" *Id.* at 51. That inquiry must focus on the "actual nature of the employee's work," rather than a formalistic conception of "sales." *Id.* The relevant "factors to be considered" include, *inter alia*: "the employer's specifications as to qualifications for hiring," "sales training," "proportion of earnings directly attributable to sales effort," "attendance at sales conferences," and "comparison of duties of employees in question and of other employees engaged as … salesmen." *Id.* at 51-52.

When DOL revisited the definition of "outside salesman" in 1949, it again emphasized the functional nature of the inquiry. In addressing whether employees who perform "promotional activities" should be covered by the exemption, DOL reiterated that such employees "can be considered salesmen only if they are actually employed for the purpose of and are engaged in making sales or obtaining orders or contracts" and that "[w]ith such variations in the methods of selling and promoting sales each case *must be decided upon its facts*." Weiss Report 83 (emphasis added). DOL explained once again that "[i]n borderline cases the test is whether the person is actually engaged in activities

directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling." *Id.*

DOL reaffirmed its longstanding interpretation of "sales" in 2004, noting that an employer qualifies for the exemption if "it demonstrates objectively that the employee, in some sense, has made sales." 69 Fed. Reg. at 22,162. DOL reiterated the importance of flexibility, concluding that "technological changes in how orders are taken and processed should not preclude the exemption for employees who in some sense make the sales." *Id.* The exemption applies as long as the employee "'obtain[s] a commitment to buy' from the customer and [is] credited with the sale." *Id.* In 2005, DOL again confirmed that "the term 'sale' does not always have a fixed or invariable meaning." Opinion Letter, 2005 WL 330605, at *2.

B. PSRs Engage in "Sales" under Section 3(k)

PSRs are plainly outside salesmen under the FLSA and DOL's implementing regulations. It is undisputed that the "outside" prong of the definition is satisfied because PSRs are "customarily and regularly engaged away from the employer's place or places of business in performing [their] primary duty." 29 C.F.R. § 541.500(a)(2). That is no small concession because it underscores that PSRs operate in an environment where the kind of close supervision that typifies non-exempt positions is impractical. This concession is also significant because it highlights that DOL's position turns entirely on a narrow, technical conception of sales that is inconsistent with the statutory provisions

and the whole thrust of DOL's regulatory approach. There are certainly some aspects of the pharmaceutical industry and how it is regulated that make sales in this industry different. But it is equally certain that PSRs are the outside sales force for the pharmaceutical industry and that Petitioners were engaged in making sales "in a practical sense." Stein Report 45.

The PSR positions were advertised as sales jobs. In GSK's job description, number one on the list of "Key Responsibilities" was to "[s]ell products to specific customer market according to the business plan." JA 170. That list also includes delivering "sales presentations," developing "creative sales strategies," and creating "local business plan[s] to increase market share." *Id*. Petitioners understood that GSK was looking to hire candidates with sales experience. Indeed, Mr. Christopher was met with skepticism by GSK's recruiter because he lacked such experience. JA 7. And Mr. Buchanan thought that his substantial prior sales experience would help him "perform satisfactorily as a pharmaceutical sales representative." JA 53-54.

Once hired, Petitioners were given training, advice, and instructions about how to hone their sales techniques in the unique regulatory environment of the pharmaceutical industry. *See* JA 93-102. GSK's "Winning Practices" program taught PSRs to: know the intricacies of their territories; develop expertise about their products; gain "insight into [their] customers and how to influence them"; organize "the sales call to maximize … selling time and results"; "confidently deliver the right selling

message"; and "get the best possible commitment on every call." JA 217-18.

While on the job, Petitioners did what any other salesmen do. Their core responsibility was to meet with customer-physicians within their territories to obtain a commitment from those physicians to write more prescriptions for specific GSK products, where medically appropriate and consistent with the labeling. JA 50, 57, 85, 133, 170. In doing so, Petitioners targeted the physicians who presented the greatest opportunities for sales growth. JA 57-62, 72-73. Petitioners made sales pitches to those doctors about the benefits of their assigned products and the results of recent clinical trials, and educated them about product safety. JA 231-33. They provided free samples to help demonstrate the benefits of the products. JA 238. They answered questions and addressed any concerns about the products. JA 196. And they concluded each sales call by seeking a commitment from the physician to prescribe the GSK product in question when it was clinically appropriate to do so. JA 100, 134, 139, 235, 274. Although the regulatory environment in which they operated meant that their customers or sales targets were the prescribing physicians rather than the end-users, that regulatory detail did not alter their basic function as outside salespeople.

Nor did it affect their evaluations, which were based on Petitioners' sales efforts and performance. For example, one of Mr. Christopher's reviews praised him for focusing his "selling time" on the particular physicians with whom "there is the [greatest] potential for Boniva market share growth," and for "leverag[ing] his relationship with

Dr. Feldman to bring him from prescribing 'zero' Boniva to now prescribing 1 or 2 per month." JA 197. And, of course, it was the lack of supervision inherent in the "outside sales" function that ultimately led to Mr. Christopher's separation. SER 94-100, 200. Mr. Buchanan's review noted that he prepared for each "sales call" by developing a written plan that contained "historical prescribing data [with] competitive info, and an objective for each practitioner." JA 269. His "[s]ales materials were well organized and Frank was ready to sell." *Id.*

And Petitioners were paid as salesmen. Petitioners derived a substantial portion of their income from incentive-based compensation, which was calculated based on their sales efforts and performance. Petitioners earned between $67,243 and $84,932 each year they worked for GSK, with incentive pay comprising between 26% and 41% of their total compensation. Pet.App.7a n.8 (Christopher earned between $21,231 and $29,993 each year in incentive pay, and Buchanan earned between $19,232 and $32,519); JA 279. It was only because of the peculiarities of the regulatory controls on prescription pharmaceuticals that the incentive pay was not tied directly to the results of specific sales calls. But Petitioners were certainly "credited with" the sales in question. *See* Weiss Report 83; JA 277 (factors affecting incentive compensation).

In sum, Petitioners spent their workdays in the field, trying to obtain commitments from specific physicians in specific territories to write more prescriptions for specific GSK products. They were hired as salesmen, trained as salesmen, evaluated

based on their sales techniques, paid based on their sales efforts and performance and—when they were not plaintiffs in litigation—even described themselves as salesmen. Unique aspects of the regulatory environment meant that they paid sales calls on prescribing doctors, not the end-user patients, but this did not alter the PSRs' basic sales function. They "make sales" in every relevant sense—both in common parlance and under the flexible, common-sense definition of "sale" set forth in the FLSA and DOL's regulations.

C. Treating PSRs as Exempt is Consistent with the Purpose of the FLSA and the Outside Sales Exemption

As noted above, *see supra* pp. 1-3, the purpose of the FLSA was to "promote economic justice and security for the lowest paid of our wage earners." S. Rep. 81-640, at 1-3. Exempt employees, in contrast, "typically earned salaries well above the minimum wage," and enjoyed "above average fringe benefits and better opportunities for advancement." 69 Fed. Reg. at 22,123-24.

PSRs are not even remotely within the scope of the harm Congress sought to remedy when it enacted the FLSA. In 2007, CNN/Money.com ranked the PSR position among the "best jobs in America" and reported that the *median* pay for such jobs is $93,700.[5] Even entry level PSRs typically make more than $60,000 per year; experienced PSRs

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[5] *Young and Restless—Top 20 Jobs*, *at* http://money.cnn.com/galleries/2007/moneymag/0703/gallery.bestjobs_young.moneymag/16.html.

often earn well into six figures.[6] Petitioners, both entry-level PSRs, earned between $67,243 and $84,932 each year they worked for GSK. Pet.App.7a n.8.

More specifically, PSRs are exactly the types of employees to whom the outside salesman exemption was intended to apply. As the Tenth Circuit explained in a leading early case regarding the exemption, "[t]he reasons for excluding an outside salesman are fairly apparent." *Jewel Tea*, 118 F.2d at 207. Those salesmen, "to a great extent, work[] individually." *Id.* They work "away from [the] employer's place of business," are "not subject to the personal supervision of [the] employer," and the employer "has no way of knowing the number of hours he works per day." *Id.* at 208. An outside salesman also "ordinarily receives commissions as extra compensation" in lieu of overtime, and can "earn as much or as little, within the range of his ability, as his ambition dictates." *Id.* at 207-08. Thus, "[t]o 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." *Id.* at 208 (emphasis added).[7]

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[6] *Salesforce Survey 2008*, *at* http://www.pharmexec.com/pharmexec/article/articleDetail.jsp?id=483071.

[7] Contrary to Petitioners' and DOL's argument, Pet. Br. 45-46; U.S. Br. 21-22, *Jewel Tea* is not distinguishable in any material way. The plaintiffs in *Jewel Tea*—like Petitioners—were assigned specific territories, were provided sales training, were required to know extensive details about their products and customers, were subject to minimal oversight, and were paid based on their sales performance. 118 F.2d at 203-05. In

All of these statements could have been written about PSRs. PSRs do not punch a clock at the beginning and end of each day; they work independently, away from the main office, with little direct supervision other than a "ride along" with a supervisor once every month or two. JA 16, 76-78. Flexibility is critical—physicians have widely varying preferences about how much time they are willing to spend on a meeting and what topics they find most important, and PSRs must necessarily tailor their meetings and presentations to accommodate those preferences. *See* 69 Fed. Reg. at 22,123-24 (exempt work is often "difficult to standardize to any time frame"). The fact that PSRs interact with doctors—who are themselves highly educated professionals—underscores the specialized, white-collar nature of the PSR's function.

Moreover, as in *Jewel Tea*, the *quality* of a PSR's work is far more important than the sheer number of hours worked. The ultimate goal is to increase the number of prescriptions being written for the appropriate medical use of the PSR's assigned products—a PSR who can achieve that goal through short, persuasive meetings is far more valuable to GSK than a PSR who spends 12 hours per day meeting with doctors but has little success in increasing sales. Hourly compensation is incompatible with the very nature of the PSR position.

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any event, the Ninth Circuit relied on *Jewel Tea* not as directly controlling but because its description of the difficulties of treating outside salespeople as non-exempt is fully applicable to PSRs. Pet.App.28a-31a.

D. Petitioners' and DOL's Arguments to the Contrary Lack Merit

1. The Definition of "Sale" Should Not be Interpreted Narrowly

Petitioners contend that the FLSA's exemptions must be construed "narrowly." Pet. Br. 22-23. DOL less plausibly advances a "government-always-wins" canon of construction, under which the definition of "sale" is interpreted *broadly* when dealing with coverage and *narrowly* when dealing with exemptions. U.S. Br. 26-27.

But the term on which DOL's position turns is not just an exemption—it is the definition of "sale" in section 3(k), which applies throughout the FLSA, including to provisions specifying which employers are covered by the statute. DOL decided to incorporate that definition into the outside sales exemption. In doing so, DOL did not change the meaning of a term specifically defined (inclusively and flexibly) by Congress. The "'normal rule of statutory construction'" is that "'identical words used in different parts of the same act are intended to have the same meaning.'" *Gustafson v. Alloyd*, 513 U.S. 561, 570 (1995); *see Brown v. Gardner*, 513 U.S. 115, 118 (1994). *A fortiori*, a single definition must have the same meaning when the agency incorporates it into the definition of a related statutory term.

Those general principles are reinforced by the FLSA's direction that defined terms be given their uniform, specified meaning whenever they are "used in this chapter." 29 U.S.C. § 203. "Sale" is a defined term that is used at least 37 times in the FLSA, in a

wide variety of contexts. Nothing in the statute remotely suggests that this definition will vary depending on whether it is used for coverage, an exemption, or another purpose altogether. There is thus no basis for an artificial presumption or thumb on the scale in either direction. And certainly where, as here, the agency expressly incorporates a statutory definition, the purpose for which it incorporates the term cannot trump Congress' definition. The Court should simply interpret and apply the definition of "sale" as written. *See Anderson v. Cagle's*, 488 F.3d 945, 957-58 (10th Cir. 2007) (definition of "hours worked" in 29 U.S.C. § 203(o) is "not an exemption under the FLSA," and thus not subject to any narrow-construction rule).

Finally, the canons Petitioners and DOL invoke cannot trump Congress' deliberate adoption of an inclusive and flexible definition of sales. The canon Petitioners invoke is hardly some deeply rooted and hoary canon of construction. Indeed, it is not clear that it has any more contemporaneous relevance than vague admonitions to interpret remedial statutes broadly. *See OWCP v. Newport News Shipbuilding*, 514 U.S. 122, 135-36 (1995) (describing broad-construction canon as "that last redoubt of losing causes"). But whatever its remaining relevance, it cannot trump Congress' deliberate decision to define sales broadly in Section 3(k). DOL simply cannot adopt that broad, flexible, and functional definition in its regulation and then urge this Court to interpret the term in a narrow, rigid, and formalistic way so that an exemption will be narrowly construed.

2. A "Sale" Does Not Require Transfer of Title

Petitioners and DOL further contend that making a sale requires "transfer of title" to the articles in question. Pet. Br. 25-27; U.S. Br. 4, 10-13, 24-25, 31. But the plain text of the FLSA requires no such thing. Indeed, at least one of the illustrative examples of a sale in section 3(k)—consignment—is notable precisely because it *does not* involve a transfer of title to the goods being consigned. *See Rahanian v. Ahdout*, 258 A.D.2d 156, 158-59 (N.Y. 1999) (distinguishing consignment from a "true sale" because "[t]itle and right to immediate possession remain with the [seller]"); *Ellet-Kendall Shoe Co. v. Martin*, 222 F. 851, 857 (8th Cir. 1915) ("a consignee of property for sale on commission acquires no title to the unsold property received under such contract"). Petitioners are thus flatly wrong to suggest that "each of the other items" in the statutory definition "involves an agreement to transfer the good's title." Pet. Br. 26.

Reliance on the *ejusdem generis* canon, *see* Pet. Br. 26; U.S. Br. 20-21, is misplaced for the same reason. Given that at least one of the illustrative examples of "sales" does not involve a transfer of title, there is no basis whatsoever for requiring *every* item in the list to include that limitation. This Court has refused to apply the *ejusdem generis* canon where "at least one of the specifically enumerated provisions" did not include the purported limitation. *Harrison v. PPG Indus.*, 446 U.S. 578, 588 (1980). Moreover, the definition of "sale" includes "*any*" sale, exchange, transfer, or other disposition. When Congress uses the word "any" before the phrase in

question, there is no reason to adopt a "limiting construction" of the statute, and it is "inappropriate to apply the rule of *ejusdem generis*." *Id.* at 588-89.

DOL relies heavily on a regulation providing that the definition of "sale" in section 3(k) "include[s] the transfer of title to tangible property." U.S. Br. 31 (quoting 29 C.F.R. § 541.501(b)). But a regulation noting what is *included* in a statutory definition that is itself worded in terms of what sales *include* is not a promising basis for *excluding* anything. GSK has never disputed that transfers of title are *included* in the definition of sales. A transfer of title may be sufficient to give rise to a sale, but it is clearly not necessary; the text of section 3(k) confirms that. Indeed, so does DOL's regulation, which, one sentence later, simply repeats the statutory definition that "'sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." *Id.*

Like the statute itself, DOL's regulation unquestionably encompasses transactions—such as consignments—that do *not* require a formal transfer of title. And, of course, a single, rigid transfer-of-title test would be inconsistent not only with the statutory and regulatory definitions but with DOL's reliance on numerous other considerations in conducting this analysis. *See* Stein Report 51-52. A rigid transfer-of-title requirement is also inconsistent with multiple court of appeals decisions holding that section 3(k) encompasses rentals or leases, even though these transactions are not

"sales" in a formal sense of the word and do not involve transfers of title.[8]

DOL relies on various dictionary definitions of the word "sale" in support of its transfer-of-title theory. *See* U.S. Br. 18-19. But those definitions are irrelevant given that the FLSA contains its own definition of "sale." When "a statute includes an explicit definition, [courts] must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg*, 530 U.S. at 942. Congress often defines terms in a manner that differs from those words' ordinary meaning. *Cf.* 16 U.S.C. § 1532(19) (defining "take" under the Endangered Species Act as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct"). Indeed, reliance on dictionary definitions of the word sale is particularly inappropriate here, given that an otherwise undefined and unmodified "sale" is only one illustrative example of a transaction that falls within the necessarily broader statutory definition.

Nor would such a rigid approach make sense in light of the FLSA's effort to adopt exemptions at a broad, functional level to apply across industries. In some industries, the relevant sale does not involve transfer of title based on customs or regulatory factors having nothing to do with the basic function

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[8] *See Gieg v. DDR*, 407 F.3d 1038, 1048 & n.11 (9th Cir. 2005) (automobile leases are "sales" under section 3(k)); *Wirtz v. First Nat'l Bank*, 365 F.2d 641, 645 (10th Cir. 1966) (rejecting argument that "rentals are not sales"); *Wirtz v. Savannah Bank*, 362 F.2d 857, 863 (5th Cir. 1966) ("rental[s] from office space" constitute sales).

of the outside salesman or with the policies of the FLSA. In some industries, the relevant sale is an agreement to lease, not an agreement to purchase. In another, the general contractor may be the relevant sales target, even though the technical purchaser may be the subcontractor or homeowner. And in the pharmaceutical industry, the doctor is the relevant "customer" or "sales target" because he writes the prescription, even though the end-user will ultimately take title at the pharmacy. Those details have everything to do with the customs or regulatory environments of the various industries and nothing whatsoever to do with the function of the outside salesperson or the policies of the FLSA.

The anomaly of relying on a rigid transfer-of-title test is well-illustrated by considering two outside salespeople who might visit the same doctor on the same day. One sells non-prescription medical supplies—tongue depressors, bandages, blood pressure monitors, and the like—that a doctor either uses in the office or distributes directly to patients without a prescription. The other sells a product that, for regulatory reasons, can only be distributed to a patient with a prescription by a pharmacist. The two individuals' jobs are identical in all relevant respects: Both were hired because of their sales skills, both spend their days meeting with doctors in a designated territory to convince them to use specific medical products, and both are paid in large part based on their efforts and performance in selling those products. There is no reasonable basis for treating one as exempt and the other as non-exempt based on differences in regulatory treatment having nothing to do with the FLSA's policies and

contrary to the statute's purposefully broad and flexible definition of sales.

3. PSRs Are Not Merely "Promoters"

Petitioners and DOL assert that there is a "bright line" in the regulations distinguishing "sales" from "promotional work that furthers sales by others" or "stimulat[es] the sales of [the] company generally," and that PSRs are properly classified as non-exempt "promoters." Pet. Br. 18-25; U.S. Br. 13-16, 21-25. That distinction is not nearly as "bright" as Petitioners suggest, but in all events has no application here because PSRs are selling specific products to specific doctors, not promoting sales by pharmacists to patients or stimulating GSK's sales "generally."

DOL's own "Promotion Work" regulation belies any notion of a clear divide between promotion and sales by providing that "[p]romotion work is one type of activity often performed by persons who make sales, which may or may not be exempt *depending upon the circumstances* under which it is performed." 29 C.F.R. § 541.503(a) (emphasis added). The plain text of that rule makes clear that there is no bright line between salesmen and promoters. Promotional work that is "actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt." *Id.* In contrast, promotional work that "is incidental to sales made, or to be made, by someone else" is non-exempt. *Id.*; *see id.* § 541.503(b) ("Promotion activities designed to stimulate sales that will be made by someone else are not exempt outside sales work."); Stein Report 46

("promotion men" are "engaged in paving the way for salesmen").

As already explained, PSRs "make sales" to doctors under section 3(k) and the regulations, but it is even clearer that they are not paving the way for someone else to make a sale to that doctor. And that is the situation the promotion language is designed to address—one person laying the groundwork with a sale target so that another person can close the sale with that same person. Here, Petitioners and DOL seize on the regulatory peculiarity that the doctor places the order, but that the transfer of title is between patient and pharmacist, to claim that PSRs are mere promoters of sales by others. That is doubly wrong. The PSRs are not paving the way for someone else to clinch the sale with the doctors, nor are they promoting sales between pharmacists and patients. Rather, PSRs make sales to doctors in a practical sense and the only sense that matters in this particular industry.

The record bears this out. To the extent PSRs engage in promotional work at all, that work is incidental to their *own* sales. There are no "other" salesmen whose way is paved by the PSRs' efforts, nor are the PSRs simply promoting the sales of GSK products more generally. Indeed, Petitioners' own job evaluations focused on their specific sales performance, including their ability to obtain commitments from specific doctors to prescribe more of the GSK products for which Petitioners were responsible. JA 197, 274.

The fact that other GSK employees might also sell products to pharmacies, health insurers, or other

entities permitted by law to buy them does not alter the nature of PSRs' jobs. To the contrary, it only underscores that differences in regulatory schemes may affect when and where title transfers, but it does not affect the basic function of the outside salesperson. Under federal law, prescriptions are the *sine qua non* of sales of prescriptions drugs. *See* 21 U.S.C. § 353(b)(1) (certain drugs may be "dispensed only upon a written prescription"). Even the best sales force in the world could not convince pharmacies to stock GSK products unless physicians were writing prescriptions for those medications. Those prescriptions or authorizations to purchase are what make a sale. It is PSRs in the field who visit doctors' offices, build relationships, and have the primary duty to seek the commitments necessary to ensure that physicians are writing as many prescriptions as possible for those products for appropriate patients, as opposed to prescribing a competitor's products. To the extent other employees are involved in ensuring that pharmacies have the stock needed to fill those prescriptions, those efforts in no way undermine the reality that it is PSRs' work with doctors that produces the prescription, which is the relevant sale in this industry.[9]

Indeed, some state laws define "prescription" as "an oral, written, or electronic transmission *order* … [i]ssued by a physician." Cal. Bus. & Prof. Code § 4040(a)(1)-(2) (emphasis added); *see also* 29 Pa.

[9] As explained above, it would also be quite anomalous if an employee's exempt status turned on whether he was selling prescription drugs or non-prescription medical devices.

Code § 27.1 (defining "prescription" as "[a] written, electronic or oral *order* issued by a licensed medical practitioner" (emphasis added)). The fact that doctors must exercise independent judgment in deciding which, if any, GSK products to prescribe is irrelevant. If anything, this just underscores the professionalism and knowledge needed to be a PSR. Doctors are hardly the only sales targets who exercise independent professional judgment. A salesperson who persuades a doctor to prescribe a certain medicine when medically necessary—or a lawyer to use a forensic accounting service when legally appropriate for the client—is no less an outside salesperson for the sophistication of their sales target. Indeed, this only underscores the absurdity of treating PSRs as non-exempt. In the universe of outside salespeople, few sales forces are as well-educated and well-trained, or deal with as sophisticated a group of sales targets as PSRs. They are the last outside sales force that should fall outside the exemption, but they would be the first (though perhaps not last) under DOL's strained and formalistic approach that allows technical details of a non-FLSA regulatory regime to drive coverage, rather than the policies underlying the FLSA.

This case is fundamentally different from the cases and opinion letters upon which Petitioners and DOL rely in asserting that PSRs are promoters. Pet. Br. 45-48; U.S. Br. 33-34. In several of those cases and letters, the supposed outside salesman was actually more of a buyer than a seller. But DOL has long recognized that "it would clearly be a violation of the Administrator's power of definition and delimitation to include within an outside salesman

exemption the exemption of the salesman's opposite and counterpart, the outside buyer." Stein Report 45-46. Thus, for example, in *Clements v. Serco*, 530 F.3d 1224 (10th Cir. 2008), the court noted that Army recruiters were more akin to buyers than salesman because they were attempting to entice recruits to *sell* their labor. *Id.* at 1229 n.4; *see id.* at 1231 (McConnell, J. concurring).[10] DOL has similarly concluded that "tissue recovery coordinators" who seek to encourage organ donations are not outside salesmen because their "selling of a concept" is "similar to that of outside buyers who in a very loose sense are sometimes described as selling their employer's 'service' to the person for whom they obtain their goods." Opinion Letter, 1994 WL 1004855 (Aug. 19, 1994). That relationship "is the reverse of that of salesman-customer." *Id.*

In other cases and opinion letters finding the exemption inapplicable, the employees in question had only a limited sales role and paved the way for someone else to close the deal with the same sales

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[10] Petitioners' reliance on *Ackerman v. Coca-Cola*, 179 F.3d 1260 (10th Cir. 1999), is equally misplaced. *Ackerman* concludes that, when employees actually consummate sales at the stores they visit, any related promotional work is exempt as "'incidental to and in conjunction with'" those sales. *Id.* at 1266. The court rejected the plaintiffs' attempt to draw a bright line between their sales activities and promotional activities. To be sure, the court noted that "a key inquiry" in deciding whether promotion work is "incidental to and conjunction with" sales is "whether the employee in question actually consummates the sale of his or her employer's products." *Id.* at 1265. But the court did not suggest that consummated sales are *always* required in order for promotion work to be exempt.

target. *See Wirtz v. Keystone Readers Serv.*, 418 F.2d 249, 260-61 (5th Cir. 1969) (the role of student salesmen was "limited" because the orders they obtained were "turned over" to managers, who contacted the prospect, confirmed the order, and arranged a payment plan). Just the opposite is true here—PSRs are the *only* employees who engage in sales activities with respect to physicians.

Petitioners' reliance on *Sorrell v. IMS Health*, 131 S. Ct. 2653 (2011)—a case that had nothing to do with the FLSA or the meaning of "sales"—is equally misplaced. In *Sorrell*, this Court recognized that the interaction between PSRs and physicians is not only unique and highly regulated but also commercially important and effective. That is precisely why Vermont sought to restrict PSRs' speech. *See id.* at 2659-63 (statutory goal was to restrict PSRs' ability "to ascertain which doctors are likely to be interested in a particular drug and how best to present a particular sales message" to those doctors).

Petitioners suggest that *Sorrell* turned on the fact that PSRs' interactions with physicians was not "commercial" speech. But this Court did not need to address that issue because the outcome of the case would have been "the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Id.* at 2664, 2667; *see id.* at 2673 (Breyer, J. dissenting) (concluding that the Vermont statute limited access to data "that could help pharmaceutical companies create better sales messages" and that "this effect on expression is inextricably related to a lawful government effort to regulate a commercial enterprise").

Finally, Petitioners and the United States mischaracterize what DOL actually held in its 2004 rulemaking. Pet. Br. 18-19; U.S. Br. 31-34. In that rulemaking proceeding, DOL rejected a broad proposal that would have made *all* promotional work subject to the outside sales exemption. *See* 69 Fed Reg. at 22,162. But, in doing so, DOL did not impose a rigid, bright-line rule for distinguishing outside salesmen from outside promoters. Indeed, the overall purpose of the 2004 rulemaking was to make the outside sales exemption *more* flexible, not less.

Specifically, the 2004 amendments "address[ed] commenter concerns that technological changes in how orders are taken and processed should not preclude the exemption for employees whose primary duty is making sales." 69 Fed. Reg. at 22,162-63. As DOL explained, "[e]xempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system." *Id.*. In reaching that holding, DOL repeated its longstanding position that the exemption is available to all employees who "'*in some sense* make a sale.'" *Id.* at 22,162. Just as exempt status should not turn on the technological detail of "who types the order into a computer system," *id.* at 22,163, it should not turn on the technical, regulatory detail that transfer of title must await the presentation of the prescription to the pharmacist.

II. DOL'S LITIGATION POSITION IS NOT ENTITLED TO DEFERENCE

A. DOL's New Interpretation of "Sale" Is Entitled to No Deference

Petitioners and DOL spill much ink defending a proposition that GSK has never disputed—namely, that DOL's *regulations* were valid and are entitled to deference. *See* Pet. Br. 15-18, 36-42; U.S. Br. 17-19. The issue here is not the validity of those regulations in the abstract, but whether DOL's newly restrictive *interpretation* of its regulations—advanced for the first time in uninvited *amicus* briefs—is entitled to deference. On that issue, the parties disagree sharply.

1. DOL's newly formalistic interpretation of what it means to make a "sale" is entitled to no deference because it is "'plainly erroneous or inconsistent with the regulation.'" *Auer*, 519 U.S. at 461.

For the last 70 years, DOL has consistently interpreted its regulations, which expressly incorporate a statutory definition that is inclusive and functional, as reflecting a flexible, common-sense approach to "sales." DOL explained in 1940 that an employee falls within the definition as long as he has "in some sense, ma[d]e a sale." Stein Report 46. To determine whether certain categories of employees were covered, DOL would assess whether "in a practical sense, these people are salesmen in that their activities are of the same nature as those of persons making sales within the meaning of section 3(k)." *Id.* at 45. DOL reaffirmed its longstanding interpretation of "sales" as recently

as 2004, in light of new technologies, noting that an employer qualifies for the exemption if "it demonstrates objectively that the employee, in some sense, has made sales." 69 Fed. Reg. at 22,162.

Despite all this, in October 2009, DOL filed an uninvited *amicus* brief in the Second Circuit, in which it made a complete about-face and asserted that there can be no "sales" without a formal transfer of title to the goods in question. *See* Novartis Br. 5. The agency continues to press that argument before this Court, asserting that an employee sells goods only if he "transfers title" to those goods to the buyer. U.S. Br. 14, 24, 31. As explained at length above, a rigid transfer-of-title test cannot be squared with the plain text of the FLSA or DOL's regulations. *See supra* pp. 33-37.

Even if DOL's transfer-of-title theory were somehow consistent with the regulations—and it is not—this position would still constitute a *new* and quite different interpretation of "sales." An agency's interpretation of a statute or regulation that "conflicts with a prior interpretation" is "'entitled to considerably less deference' than a consistently held agency view." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994).[11] Similarly, while an agency is generally free to revisit its prior policies, it must at least "display awareness that it *is* changing position." *FCC v. Fox Television Stations*, 129 S. Ct.

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[11] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (refusing to defer to agency interpretation that was "contrary to [its] narrow view … advocated in past cases"); *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997).

1800, 1811 (2009). Here, DOL refuses to acknowledge its change of position, let alone proffer a persuasive justification for the change.[12]

This is also a quintessential case in which the agency's reinterpretation of its regulation results in "unfair surprise" for the regulated parties. *Long Island Care at Home v. Coke*, 551 U.S. 158, 170-71 (2007); *see Arkema v. EPA*, 618 F.3d 1, 7 (D.C. Cir. 2010) (finding agency action to be impermissibly retroactive where it was "'substantively inconsistent' with [the] prior agency practice and attache[d] new legal consequences to events completed before its enactment"). DOL applied a flexible standard of "sales" for more than 70 years, and the pharmaceutical industry employs more than 90,000 PSRs annually in reliance on those employees' exempt status. Not until 2009 did the agency give the slightest indication that a transfer of title was an absolute prerequisite to a "sale," or that regulatory peculiarities having nothing to do with the FLSA would render the pharmaceutical industry without an outside sales force in DOL's view.

DOL's longstanding acquiescence in how PSRs are compensated casts doubt on the legal validity of its newfound formalism. It may be "possible for an entire industry to be in violation of the [FLSA] for a

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[12] This is not to suggest that DOL could adopt a rigid transfer-of-title test even if it were to acknowledge the change and proffer an explanation. Given the regulation's incorporation of the flexible and inclusive statutory definition of "sale"—which includes transactions that do not involve a transfer of title, *see supra* pp. 33-37—it could not be subjected to such a narrow and formalistic gloss.

long time without the Labor Department noticing," but the "more plausible hypothesis" is that the industry "has been left alone because the character of its compensation system" is not unlawful. *Yi v. Sterling Collision*, 480 F.3d 505, 510 (7th Cir. 2007) (Posner, J.); *see PPL Montana v. Montana*, 132 S.Ct. 1215, 1235 (2012) (a State's "long failure to assert title is *some evidence* to support the conclusion" that it did not, in fact, possess title to the lands in question) (emphasis added); *New Process Steel v. NLRB*, 130 S. Ct. 2635, 2641-42 (2010) ("That our interpretation of the delegation provision is consistent with the Board's longstanding practice is persuasive evidence that it is the correct one, notwithstanding the Board's more recent view.").[13]

2. There are also more than a few reasons "to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462. In both *Auer* and *Talk America*, a court invited the agency to file an *amicus* brief expressing its views about the question presented. *See Talk America v. Mich. Bell Tel.*, 131 S. Ct. 2254, 2259-60 (2011); *Auer*, 519 U.S. at 461. Here, in contrast, DOL has touted the fact

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[13] DOL cites a regulation providing that courts should not presume it has a "practice or policy to refrain from acting" unless there has been "some affirmative action" reflecting that policy. *See* U.S. Br. 28-29 (citing 29 C.F.R. § 790.18(h)). But the cited regulation implements 29 U.S.C. § 259(a), which provides a *complete defense* to liability if the defendant has acted "in conformity with" an administrative ruling from the agency. GSK has not invoked that categorical bar to liability. In all events, an agency cannot render decades of acquiescence legally irrelevant just by its say so.

that it is attempting to advance its policy agenda through uninvited *amicus* briefs. DOL has announced a formal "Overtime Security *Amicus* Program," in which the Office of the Solicitor will strategically file *amicus* briefs in "private cases" in order to "provide[] clearer, stronger overtime protection for America's workers."[14]

Thus, DOL has announced an intention to change existing law to provide "stronger overtime protection," and to do so in a manner that gives no regard to settled expectations and circumvents the procedural safeguards that promote reasoned agency decision-making. DOL's novel interpretation of its regulations will have far-reaching consequences for both employers and employees in the pharmaceutical industry. *See infra* Part III. Rather than face the public and political scrutiny that would inevitably follow had the agency addressed this issue through a rulemaking proceeding (or even an interpretive rule), DOL announced its new policy for the first time in uninvited lower-court *amicus* briefs in private damage actions. This Court should not reward DOL's end-run around the rulemaking process by affording controlling deference to the agency's new position—endorsing DOL's conduct here would surely encourage other administrative agencies to begin "*amicus* programs" of their own.

3. Finally, *Auer* deference is inapplicable here for the separate and independent reason that DOL's regulations simply incorporate and then parrot the

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[14] Overtime Security *Amicus* Program, http://www.dol.gov/sol/541amicus.htm.

statutory definition of "sale." In *Gonzales v. Oregon*, the Attorney General issued an interpretive rule holding that using controlled substances to assist suicide was not a "legitimate medical purpose" under 21 C.F.R. § 1306.04. *See* 546 U.S. 243, 254 (2006). The government asserted that this interpretation was entitled to *Auer* deference because it was a reasonable interpretation of the Attorney General's regulations regarding controlled substances.

This Court disagreed, holding that *Auer* deference applies only where "the underlying regulations gave specificity to a statutory scheme" and "reflected the [agency's] considerable experience and expertise … with respect to the complexities of the [statute]." *Id.* at 256-57. But such deference is not warranted when a regulation "does little more than restate the terms of the statute itself." *Id.* at 257. When the agency has promulgated a "parroting regulation," the question "is not the meaning of the regulation but the meaning of the statute." *Id.* Put differently, 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.* It is "'certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.'" *Paralyzed Veterans*, 117 F.3d at 584.

The rationale for the anti-parroting rule is straightforward. Agency interpretations of a *statute* do not receive *Chevron* deference unless they are advanced through relatively formal means, such as notice-and-comment rulemaking or adjudication.

See Christensen v. Harris County, 529 U.S. 576, 587 (2000). The anti-parroting rule prevents an agency from bootstrapping itself into a higher degree of deference by casting its action as an interpretation of a *regulation* rather than of the underlying statute. Without this rule, an agency could easily evade the limits on *Chevron* deference that this Court established in *Christensen* and *United States v. Mead Corp.*, 533 U.S. 218 (2001).

This case is squarely controlled by *Gonzales*. DOL's regulations provide that a salesman is someone whose primary duty is "making sales within the meaning of section 3(k) of the Act." 29 C.F.R. § 541.500(a)(1). Another part of the regulation quotes the definition of "sale" word-for-word and notes that this definition "include[s] the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." 29 C.F.R. § 541.501(b). The court of appeals correctly held that these regulations "clarif[y] nothing about the meaning of Section 3(k)," and "merely incorporate[] the very undefined, undelimited term the Secretary seeks to clarify." Pet.App.22a. DOL's subsequent interpretation of its "parroting regulation" is thus entitled to no deference under *Auer*. *See Gonzales*, 546 U.S. at 257.

Petitioners and DOL assert that the regulations provide additional clarification beyond the statutory language because they state that only an employee's "own" outside sales qualify for the exemption. *See* U.S. Br. 30-31 (quoting 29 C.F.R. §§ 541.500(b), 541.503(a)); Pet. Br. 42-43. But that language clarifies nothing at all. The dispositive question in

this case is whether PSRs engage in "sales" under section 3(k). *See* U.S. Br. 11-12 (the "salient question" is whether the PSRs "sold goods" under section 3(k)). Inserting the word "own" in front of "sales" does nothing to alter this analysis or provide additional clarification beyond the plain language of section 3(k).[15] In any event, the parroting regulation need not be *identical* to the statute as long as it "paraphrase[s]" or is "near[ly] equivalen[t]" to the statutory text. *Gonzales*, 546 U.S. at 257. DOL's regulations—which expressly incorporate the statutory definition of sale in section 3(k)—plainly meet that standard.

B. This Case Underscores That Deference to Agency *Amicus* Briefs Is Misguided

If the Court concludes that *Auer* deference applies in this case under existing precedent, it should reconsider those decisions and hold that no deference is owed to an agency interpretation of its own regulations that is advanced for the first time in an *amicus* brief. That *ad hoc* approach to regulation significantly undermines the core principles embodied in the Administrative Procedure Act and this Court's administrative law jurisprudence—namely, notice and opportunity for comment, public

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[15] The regulation regarding "promotional work" is irrelevant for the same reason. That regulation merely distinguishes between promotional work directed towards the employee's "own" sales, which is exempt, and promotional work incidental to sales made by someone else, which is not exempt. *See* 29 C.F.R. § 541.503(a).

and political accountability, and respect for the separation of powers.[16]

The Administrative Procedure Act provides that a "[g]eneral notice of proposed rule making shall be published in the Federal Register," and that "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b)-(c). These are not "arbitrary hoops through which federal agencies must jump without reason." *Sprint v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003). Rather, the APA's notice and comment requirements "improve[] the quality of agency rulemaking" by exposing regulations to "'diverse public comment.'" *Small Refiner Lead Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). They also ensure "'fairness to affected parties'" and provide a well-developed record that "enhances the quality of judicial review." *Id.*

Granting *Auer* deference to *amicus* briefs gives agencies a powerful incentive to promulgate vague, open-ended rules, then seek controlling deference to legal briefs that are crafted out of public view, with no notice to regulated entities that a new policy is being considered, and no opportunity for comment before that policy becomes effective. An agency

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[16] Professor John Manning has provided the most comprehensive critique of *Auer* deference. *See Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) ("Manning"). For a more recent critique that focuses specifically on the "powerful arguments" for withholding *Auer* deference from agency *amicus* briefs, *see* Matthew Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 Geo. Wash. L. Rev. 1449, 1492-94 (2011).

cannot purport to engage in reasoned decision-making when it makes the decision in question without having considered the views of interested parties on all sides of the issue. *See FLRA v. Dep't of Treasury*, 884 F.2d 1446, 1455 (D.C. Cir. 1989) (en banc) ("a position established only in litigation may have been developed hastily, or under special pressure, or without an adequate opportunity for presentation of conflicting views").[17]

Deference to agency *amicus* briefs undermines another type of notice as well—namely, notice to regulated parties and the public about the conduct that is covered by the regulations. Agency rules "should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law." *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., concurring). But "deferring to an agency's interpretation of its own rule encourages the agency to enact *vague* rules which give it the power, in future adjudications, to do what it pleases." *Talk America*, 131 S. Ct. at 2266 (Scalia, J. concurring) (emphasis added).[18]

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[17] *See* Pierce, *Seven Ways To Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 86 (1995) ("Agencies are more likely to make wise and well-informed policy decisions if they solicit, receive, and consider data and views from all citizens who are likely to be affected by a policy decision.").

[18] *See Appalachian Power v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (describing the "familiar" phenomenon in which agencies give substantive content to "broad," "open-ended" regulations "without notice and comment, without public participation, and without publication in the Federal Register"); Pierce, *supra*, at 85 (the vague regulations promulgated by agencies are often "utterly worthless for all

Similarly, when an agency adopts new policy positions for the first time in *amicus* briefs, regulated entities will often be left in the dark about what conduct is covered by the relevant regulations. *See* Manning at 670 (as a result of *Auer* deference, "regulated parties may find it more difficult to have a clear picture of relevant legal requirements until such parties have offended them"). It is hardly reasonable to expect regulated parties—particularly small or newly formed businesses—to monitor lower court dockets around the country in order to determine whether their conduct is lawful.

Deference to *amicus* briefs in private civil actions for money damages also raises serious retroactivity concerns. Retroactive rulemaking is generally disfavored. If an agency seeks to give a new regulation retroactive effect, it must do so clearly and must identify express statutory language authorizing that draconian remedy. *See Bowen*, 488 U.S. at 208-09. Any private action for money damages necessarily seeks to hold the defendant liable for *past* conduct. If an agency's uninvited *amicus* briefs in private litigation receive controlling deference, then the agency effectively gains the power to engage in retroactive rulemaking without satisfying the carefully crafted safeguards set forth in *Bowen*.[19] That is particularly true of an *amicus*

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purposes except one"—namely, allowing the agency to claim deference to subsequent interpretations of those rules).

[19] The test for whether an agency action has retroactive effect is not particularly demanding. *See Arkema*, 618 F.3d at 7 ("[e]ven where a rule merely narrows a 'range of possible interpretations' to a single 'precise interpretation,' it may

campaign designed to change the law to provide "stronger overtime protection." Indeed, DOL's *amicus* program is likely to have far-reaching retroactive effects given that wage-and-hour claims have been "skyrocketing" in recent years.[20]

Auer deference also lacks the structural safeguards that are present in other administrative law doctrines. For example, *Chevron* deference makes sense because there are built-in structural limits on Congress' willingness to delegate to administrative agencies. When Congress "enacts an imprecise statute that it commits to the implementation of an executive agency, [Congress] has no control over that implementation." *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring). Thus, "[d]eferring to an agency's interpretation of a statute does not encourage Congress, out of a desire to expand its power, to enact vague statutes." *Id.* Especially in times of divided government, Congress has every incentive to use precise statutory language, to ensure that the executive branch will implement the statute as Congress intended.

In contrast, "when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule's meaning." *Id.* Deference to an agency's interpretation of its own regulations "leaves in place

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change the legal landscape in a way that is impermissibly retroactive").

[20] *Wage and Hour Litigation Is Big—and Getting Bigger*, Corporate Counsel (Mar. 19, 2012), *at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202546026856&Wage_and_Hour_Litigation_is_Bigmdashand_Getting_Bigger.

no independent interpretive check on lawmaking by an independent agency." Manning at 639.

Applying *Auer* deference to agency *amicus* briefs would also lead to significant inconsistencies in this Court's administrative law jurisprudence. An agency's interpretation of a *statute* is not entitled to *Chevron* deference if it is set forth for the first time in a legal brief. *See Mead*, 533 U.S. at 238 n.19; *Bowen*, 488 U.S. at 212-13. There is no reason to treat an agency's interpretation of its own regulations any differently. "If one believes, plausibly, that Congress would not and should not allow an agency to authoritatively construe a statute in a *post hoc* litigation brief (written by agency lawyers in an adversarial context), then it is hard to articulate a good reason for assuming that Congress would nonetheless delegate to agencies the power to authoritatively construe regulations in this way." Stephenson & Pogoriler, *supra* n.16, at 1493.

Finally, regulation-by-*amicus*-brief allows the agency to avoid the public and political scrutiny that would follow if it actually made hard policy choices in its regulations. Here, for example, DOL's new interpretation of the outside salesman exemption will impose massive costs on the pharmaceutical industry (and likely other industries as well). Had the agency attempted to adopt this policy through an adjudication or notice-and-comment rulemaking, it would have been subject to public scrutiny, extensive comments from supporters and opponents of the new policy, and congressional oversight. There would have been substantial pressure, at a minimum, to make any change prospective only. By proceeding through *amicus* briefs, however, DOL was able to

avoid much of this scrutiny and yet could still achieve the same policy outcome as if it had adopted its rules through a notice-and-comment proceeding. *See* Pierce, *supra* n.17, at 86 (noting that "agencies are more likely to make policy decisions that are consistent with the views of the people and their elected representatives if they provide public notice of their intention to make a particular policy decision").[21]

* * *

None of this is to suggest that the agency's views would be *irrelevant*. An agency would remain free to file *amicus* briefs explaining why its preferred interpretation is the right one. But such arguments should be considered based solely on the "the validity of [their] reasoning, [their] consistency with earlier and later pronouncements," and any other factors that have the "power to persuade." *Skidmore*, 323 U.S. at 140. Any additional thumb on the scale in favor of the agency comes at too great of a cost to the longstanding principles underlying the APA and this Court's administrative law jurisprudence. Here, in the guise of interpreting a regulation that incorporates an inclusive and flexible definition of sales, DOL has sought to impose a narrow and rigid gloss, with no prior notice to interested parties, no

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[21] *Auer* deference also raises significant questions regarding the scope of delegated authority to an agency, especially where—as here—an agency's Solicitor's office has independent litigating authority. *See Nat'l Wildlife Federation v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) ("appellate counsel's interpretation may not reflect the views of the agency itself"); *Keys v. Barnhart*, 347 F.3d 990, 993-94 (7th Cir. 2003).

opportunity for comment, and little if any accountability to Congress and the public. If this is what *Auer* deference has come to, then the Court should abandon that doctrine, at least in the context of agency interpretations set forth for the first time in *amicus* briefs.

III. A RULING IN FAVOR OF PETITIONERS WOULD HAVE FAR-REACHING NEGATIVE CONSEQUENCES FOR EMPLOYEES AND EMPLOYERS

A ruling for Petitioners would severely and negatively affect the nearly 90,000 workers currently employed as PSRs. PSRs currently enjoy a great deal of independence and flexibility in managing their schedules. *See* JA 77 (Mr. Buchanan agreeing that he could "organize[] [his] own schedule" around his "personal life"); JA 75-77, 123, 155 (PSRs work at home reading e-mail, updating records, checking voicemail, and studying product literature). That flexibility and independence is particularly important for employees with young children or other personal obligations.[22]

Notwithstanding Petitioners' derisive suggestion that the PSR job attracts applicants who want to put their college cheerleading experience to good use, Pet. Br. 49, the position attracts many applicants who seek to work in an industry where outstanding performance is fairly rewarded. *See* JA 183-85, 246, 265, 274 (Petitioners touting their sales performance

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[22] *Happiest Jobs for Working Moms*, http://www.careerbliss.com/press-releases/careerbliss-releases-happiest-jobs-for-working-moms/.

in seeking promotions and incentive compensation). The ability to earn substantial incentive compensation—combined with a flexible work environment and numerous other perks—makes PSR positions one of the most sought-after jobs in the country. But many of the most desirable aspects of the PSR position are not sustainable under a rigid overtime regime that would require the close supervision, highly structured work environment, and uniform hourly compensation that typically characterize non-exempt work. *Cf. Jewel Tea*, 118 F.2d at 207-08. And those negative effects will likely extend far beyond the pharmaceutical industry, as other positions that have long been considered exempt become the next targets of FLSA claims.

Petitioners downplay the financial impact of this flexibility by pointing out that GSK has recently "altered its compensation policy." Pet. Br. 30. That new policy, of course, is not at issue in this case. In any event, incentive compensation remains an important component of PSRs' overall compensation and is tied to their sales behaviors and competence. The key metric in determining that compensation is no longer the volume of prescriptions that PSRs obtain, but one of the factors that will be considered in determining their incentive compensation is their effectiveness in seeking commitments to prescribe for appropriate patients. And incentive compensation is also based on PSRs' "scientific and business knowledge," "feedback from customers in their region," and "overall performance of the

business unit they support."[23] Those metrics still very much reward the PSRs who are most successful at developing the sales competencies that are essential to obtaining commitments from physicians for appropriate patients.

Fundamentally, the PSR position is no more of a 9-to-5 job than are outside sales positions in any other industry. It is that very nature of the job that makes it a rewarding and highly remunerative one for so many employees. Petitioners' and DOL's interpretation of the outside sales exemption would undermine the fundamental nature of the PSR position by retrofitting this long-exempt and highly competitive position with the rigid overtime requirements of the FLSA, thus providing an unwanted remedy for a non-existent problem. And it would do so based on regulatory peculiarities having nothing to do with the FLSA. This Court should not allow DOL to upend the careers of the tens of thousands of PSRs who continue to thrive in their flexible and well-compensated careers.[24]

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[23] GSK, *Delivering Value in a Values-Based Way* 5 (2010), *at* http://www.gsk.com/investors/presentations/ 2011/8th-CBI-Compliance-Jan11.pdf.

[24] DOL now suggests that PSRs might be covered by other exemptions, U.S. Br. 16 n.3, but it has previously argued, in both this case and *Novartis*, that the "administrative" exemption does *not* apply to PSRs. Pet.App.89a; Novartis Br. 17. While DOL has vacillated, GSK continues to believe, as it argued below, that the administrative exemption would apply, but the district court found it unnecessary to address this issue. Pet.App.46a-47a n.14.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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