NO. 11-204

In the
Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER
AND FRANK BUCHANAN,

Petitioners,

v.

SMITHKLINE BEECHAM, CORP.,
D/B/A, GLAXOSMITHKLINE,

Respondent.

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

BRIEF 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 two questions presented in the Petition 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 PROCEEDINGS

Petitioners, Michael Shane Christopher and Frank Buchanan, were the appellants in the court 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. GlaxoSmithKline plc is the ultimate parent of both Respondent and GlaxoSmithKline Holdings (Americas), Inc., the shares of which are publicly traded on the London Stock Exchange and the New York Stock Exchange. No person beneficially owns 10% or more of the outstanding shares of GlaxoSmithKline plc.

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Respondent SmithKline Beecham Corporation d/b/a GlaxoSmithKline, now known as GlaxoSmithKline LLC ("GSK"), respectfully acquiesces in the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 635 F.3d 383 and is reproduced at Pet.App.1a–36a.[1] The opinion of the District Court granting respondent's motion for summary judgment is unreported but is available at 2009 WL 4051075 and is reproduced at Pet.App.37a–47a. The opinion of the District Court denying Petitioners' motion to amend or alter judgment also is unreported but is available at 2010 WL 396300 and is reproduced at Pet.App.48a–52a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its decision on February 14, 2011. A petition for panel rehearing and rehearing en banc was denied on May 17, 2011. Pet.App.53a. A timely petition for certiorari was filed on August 12, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] "Pet.App." refers to the Petition Appendix.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Most of the pertinent statutory and regulatory provisions are set forth in the Petition and Petition Appendix. Pet.1–3; Pet.App.54a–63a. In addition to those provisions, the Department of Labor's ("DOL's") interpretation at 29 C.F.R. § 779.241 (1970) is pertinent and provides:

> The statutory definition of the term "sale" or "sell" is quoted in § 779.15. As long as the employee in any way participates in the sale of the goods he will be considered to be "selling" the goods, whether he physically handles them or not. Thus, if the employee performs any work that, in a practical sense is an essential part of consummating the "sale" of the particular goods, he will be considered to be "selling" the goods. "Selling" goods, under section 3(s) has reference only to goods which "have been moved in or produced for commerce by any person," as discussed in §§ 779.242 and 779.243.

INTRODUCTION

The Petition in this case explains that the Circuits are split over both the specific treatment of pharmaceutical sales representatives ("PSRs") under the Fair Labor Standards Act ("FLSA") and the meaning of the term "sales" in Section 3(k) of the FLSA and the broader question of the proper deference to an agency's views when it uses an *amicus* brief to alter a longstanding position and fails even to acknowledge the change. The Petition further explains that the issues here—the proper classification of tens of thousands of PSRs across the

country and the proper judicial reaction to an agency's effort to reverse a longstanding administrative construction of a statute in an *amicus* brief—are of surpassing importance. The Petition also contends that the decision below is incorrect. Petitioners are correct about the first two points—the courts are divided and the issues are critically important—but wrong about the third.

The decision below correctly rejected an effort to overturn the longstanding consensus that the outside sales force of the pharmaceutical industry qualified for the FLSA's "outside sales" exemption, notwithstanding the novel position to the contrary taken by the Secretary in an *amicus* brief. The decision below also correctly refused to afford any deference, much less "controlling deference" under *Auer*, to the Secretary's abrupt departure from DOL's long-standing position and flexible interpretation of the term "sales," a departure that was neither acknowledged nor explained. Indeed, the Ninth Circuit appropriately recognized that the Second Circuit's extreme deference to DOL in its *Novartis* case[2] would allow agencies to circumvent the rulemaking process and to regulate by *amicus* brief.

Nonetheless, even though the decision below is correct, the issues are important, the Circuits are badly divided, and Respondent and the pharmaceutical industry more broadly need a clear

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[2] *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011).

and uniform answer to the questions presented. Accordingly, Respondent acquiesces in the petition for certiorari.

STATEMENT OF THE CASE

1. DOL's earliest regulations concerning the outside sales exemption provided that an "outside salesman" is one in pertinent part "[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 (1) Making sales within the meaning of section 3(k) of the Act." 29 C.F.R. § 541.5(a) (1940).[3] Section 3(k) defined "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) (emphasis added). And DOL emphasized the flexible, nonrestrictive manner in which Congress had defined "sales" in Section 3(k) by explaining that an employee engages in such "sales" whenever the employee has "in some sense ma[d]e a sale." Dep't of Labor, Wage & Hour Div., "*Executive, Administrative, Professional . . . Outside Salesman" Redefined: Report and Recommendation of the Presiding Officer at Hearings Preliminary to Redefinition* 46 (Oct. 10, 1940) ("Stein Report").

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[3] The current regulations are little changed, defining an "outside salesman" as one in pertinent part 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).

Thirty years later, DOL continued its flexible approach to "sales" under the Act with 29 C.F.R. § 779.241, entitled "Selling."[4] In interpreting the Section 3(k) definition of "sales," DOL again adopted an expansive, nonrestrictive, and practical position:

> As long as the employee *in any way participates* in the sale of the goods he will be considered to be "selling" the goods, whether he physically handles them or not. Thus, if the employee performs any work that, *in a practical sense* is an essential *part* of consummating the "sale" of the particular goods, he will be considered to be "selling" the goods.

29 C.F.R. § 779.241 (1970) (emphasis added).

More recently, in its 2004 rulemaking, DOL emphasized that it "did not intend any substantive changes" and it in fact did not change its interpretation of the term "sales." *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 69 Fed. Reg. 22122, 22161–22162 (Apr. 23, 2004). To the contrary, DOL explained that the "framework of the existing Part 541 regulation is based upon the 1940 Stein Report" and other early DOL reports and noted that "much of the reasoning" of those reports "remains as

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[4] Although § 779.241 addresses retailers, it interprets "[t]he statutory definition of the term 'sale' or 'sell' . . . quoted in § 779.15"—namely, 29 U.S.C § 203(k), the precise statutory definition at issue here. Congress provided that definitions in § 203 would apply uniformly throughout the FLSA. *See* 29 U.S.C. § 203 ("Definitions . . . [a]s used in this chapter").

relevant as ever." *Id.* at 22124. And DOL specifically reiterated its statement from the Stein Report that all that is required for the exemption to apply is that the employee "'*in some sense* make a sale.'" *Id.* at 22162.

Over the years, DOL has also provided other guidance and has approvingly quoted judicial decisions for the proposition that "the term 'sale' does *not* always have a fixed or invariable meaning," and must be defined contextually and in the totality of the circumstances presented. *See* Wage and Hour Opinion Letter FLSA 2005-6, 2005 WL 330605 (Dep't of Labor Jan. 7, 2005) (internal quotation marks omitted; emphasis added). Thus, DOL repeatedly and consistently directed employers and the courts to construe the term "sale" in a "practical," rather than a technical or restrictive manner.

That changed abruptly in 2009 when the Secretary of Labor filed an *amicus* brief in the Second Circuit's *Novartis* case. In that brief, without even acknowledging all it previously had said on the subject, DOL changed its interpretation of Section 3(k) and demanded deference for precisely the sort of "fixed [and] invariable" definition of sales that it had previously, explicitly rejected. Under DOL's entirely new and markedly more restrictive definition, a "sale" always, invariably, requires a fully

"consummated transaction directly involving the employee for whom the exemption is sought."[5]

This radical change in position had a convulsive effect on the pharmaceutical industry in which a large outside sales force does not consummate physical transfers of product because of prescription requirements and other details of the regulatory environment. Indeed, according to DOL, the Novartis pharmaceutical sales representatives did not qualify for the exemption because they did not themselves personally, "actually," irrevocably, and fully consummate any transactions. The Second Circuit in *Novartis* gave this new interpretation controlling deference under this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997). DOL filed a similar brief in this case, but the Court of Appeals disagreed both with DOL's novel construction of the statute and regulations and with the Second Circuit's conclusion that DOL's new position was entitled to deference.

2. Petitioners Christopher and Buchanan were employed by GlaxoSmithKline as PSRs. When they applied for this position, each understood that GSK preferred candidates who had previous sales experience.[6] The reason for this preference is plain:

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[5] Br. for Sec'y of Labor as *Amicus Curiae* in Supp. of Pls.-Appellants, at 11, *In re Novartis Wage and Hour Litig.*, 611 F.3d 141 (2d Cir. Oct. 13, 2009) (No. 09-0437), *available at* http://www.dol.gov/sol/media/briefs/novartis(A)-10-13-09.pdf.

[6] Ninth Circuit Supplemental Excerpts of Record ("SER") 0028–0029 (Deposition of Michael Shane Christopher ("Christopher

the job description for the PSR position identifies as the incumbent's *first* "key responsibility" "[s]ell[ing] products to [a] specific customer market according to the business plan." SER 0108 (Christopher Dep. Ex. 1); SER 0302 (Buchanan Dep. Ex. 5). The "customers" who were the focus of the vast majority of PSRs' sales efforts were physicians—the only people authorized under federal law to write prescriptions for GSK products and therefore the only people who could get GSK products into the hands of patients with a medical need for them. Pet.App.2a–4a.

As PSRs, Petitioners were expected to use "customer-focused selling techniques" to meet or exceed the sales goals and objectives they received from the Company. SER 0034, 0036–0037 (Christopher Dep.). 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, perhaps most importantly, to "[p]ositively impact sales in [their] territory." SER 0248–0249, 0302 (Buchanan Dep. & Dep. Ex. 5).

Even after starting their jobs at GSK, Petitioners received specialized training in sales skills.[7] Petitioners were trained to identify key customers;

Dep.")); SER 0246 (Deposition of Frank Buchanan ("Buchanan Dep.")).

[7] SER 0379–0382 (Declaration of William D. Curtin ("Curtin Decl.")); SER 0076–0077 (Christopher Dep.); 0265–0266 (Buchanan Dep.).

ask questions to engage customers in meaningful and appropriate discussions about GSK products; and unearth and resolve objections their customers might have to prescribing GSK products. And they were trained how to "close the sale,"—to ask for a commitment from their customer-physicians to prescribe GSK products for patients the doctors believed could benefit from them. SER 0380 (Curtin Decl.).

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 and visiting with their customers.[8] 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.[9] They targeted physicians they believed could appropriately prescribe more GSK products and thus increase GSK's market share, and then tailored their sales approach for those physicians.[10] Each Petitioner had a different approach to engaging with physicians.[11] Each implemented GSK's "core messages" to suit his

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[8] SER 0080–0081 (Christopher Dep.); SER 0290–0291 (Buchanan Dep.)

[9] SER 0128 (Christopher Dep. Ex. 18); SER 0229–0230, 0275–0277, 0296 (Buchanan Dep.); SER 0339 (Buchanan Dep. Ex. 15); SER 0343–0344 (Buchanan Dep. Ex. 16).

[10] SER 0181-0183 (Christopher Dep. Ex. 25); SER 0261–0265, 0288–0289 (Buchanan Dep.).

[11] SER 0068–0073, 0092–0093 (Christopher Dep.); SER 0355 (Buchanan Dep.).

approach and selected the messages he thought would be most appropriate to use on each call.[12] GSK provided them with clinical aids to use on their sales calls, but Petitioners decided which of these aids to use and when, as well as which sales messages they would emphasize in each call.[13]

Petitioners were evaluated 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 GSK products for appropriate patients. On supervisor "ride-alongs" (which occurred every month or two), a manager would accompany each PSR in the field. The manager would then complete a Field Coaching Report that assessed the sales representative's competence with respect to GSK's "Winning Practices."[14] Other than these ride-alongs, however, each carried out daily work tasks independently, without in-person supervision, speaking with his manager about once a day.[15]

After being hired as salespeople for a job denominated as a sales job, being trained in sales

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[12] SER 0071–0073 (Christopher Dep.); SER 0279–0280, 0286–0287 (Buchanan Dep.).

[13] SER 0279–0280, 0286–0287 (Buchanan Dep.).

[14] SER 0056 (Christopher Dep.); SER 0129–0143, 0175–0187 (Christopher Dep. Exs. 19–21, 23–26); SER 0296 (Buchanan Dep.); SER 0349–0377 (Buchanan Dep. Exs. 19–26).

[15] SER 0064 (Christopher Dep.); SER 0294–0296 (Buchanan Dep.).

techniques, and performing the duties of a salesperson, Petitioners were, not surprisingly, *paid* as salespeople. In addition to a fixed base salary, a significant portion of their total pay was contingent upon convincing the physicians on whom they called to write more prescriptions for GSK drugs for appropriate patients and thereby directly increasing sales within the territory.[16] Petitioners each received incentive compensation based on his success in increasing the market share and/or sales volume in his territory for the specific GSK products for which he was responsible.[17] Between 26% and 41% of Petitioners' total annual compensation during the relevant period was from incentive compensation.[18] GSK and Petitioners both understood that Petitioners' individual sales efforts directly led to sales success in their respective territories, and in turn, formed the basis for their incentive compensation.[19]

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[16] SER 0621–0623 (Declaration of Robert Pellegrino ("Pellegrino Decl.")); SER 0035, 0087–0089 (Christopher Dep.); SER 0228–0229 (Buchanan Dep.).

[17] SER 0623 (Pellegrino Decl.); SER 0228–0229 (Buchanan Dep.).

[18] SER 0623 (Pellegrino Decl.).

[19] *See*, *e.g.*, SER 0351 (Buchanan Dep. Ex. 19) (Buchanan told GSK that his sales efforts "will impact the volume change . . . and pull up the quarter[ly]" sales numbers); SER 0354 (Buchanan Dep. Ex. 20) (Buchanan told GSK that "[s]ales data will continue to improve as a result of" his work to improve consistency on "sales calls"); SER 0368 (Buchanan Dep. Ex. 24) (as a result of his efforts to "tweak [his] sales presentations," Buchanan felt that "Advair [sales performance] will improve

3. After leaving their employment at GSK,[20] Petitioners filed a putative class action in the United States District Court for the District of Arizona claiming that GSK had improperly classified them (and others similarly situated to them) as exempt from the FLSA's overtime compensation provisions. Specifically, Petitioners argued that because federal law prohibited them from selling directly to the end-user of the Company's products—patients—and because the physicians on whom they called do not pay for or inventory GSK's products,[21] PSRs like them do not "sell" as that term might be defined in the dictionary or understood in common parlance. Pet.App.41a–42a. Petitioners insisted that the only "sales" that occur in GSK's entire business model occur between GSK and wholesalers who in turn sell to pharmacies. *Id.*

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significantly"); SER 0121 (Christopher Dep. Ex. 10) (Christopher's sales efforts will "make a positive impact on our goal [and] our market share"); SER 0123–0127 (Christopher Dep. Ex. 12) (Christopher listing his "sales goal achievement" and expressing pride in his ability to exceed his sales goals).

[20] Petitioner Christopher's employment with GSK was terminated in May 2007 and petitioner Buchanan left GSK for a position as a PSR at another pharmaceutical company. Pet.App.2a.

[21] Petitioner's assertion that all PSRs throughout the industry are identically situated with respect to their job duties is factually inaccurate and unsupported by the record. For example, some customers of pharmaceutical companies do, in fact, in relatively unusual circumstances pay for and inventory drugs, and the discussion in the text would not apply to them. Nonetheless, the reasoning of DOL in its *amicus* briefs would reach the vast majority of PSRs.

The district court rejected that argument.[22] Looking to the definition of "sale" in Section 3(k) of the Act (and not, as Petitioners had urged, a dictionary definition) for purposes of determining what the term means in the context of the outside sales exemption, the court explained that the FLSA and DOL define the term "somewhat loosely." Pet.App.43a. Under the Act, a sale is "any sale, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition*." Pet.App.43a–44a (internal quotation marks omitted); *see* 29 U.S.C. § 203(k). The District Court noted that in its most recent formal rulemaking, DOL explained that the exemption requires a sale only "in some sense." Pet.App.43a–44a; *see* 69 Fed. Reg. at 22162. Both the statute and final rule, the district court explained, provide for an interpretation of the term "sale" "beyond a constricted, traditional sense of the word." Pet.App.44a.

The district court concluded that Petitioners' physician-focused sales activity qualified as "sales" under Section 3(k) and therefore, consistent with DOL's final rule, Petitioners "plainly and unmistakably fit within the terms and spirit of the exemption" and are "exempt employees under the outside sales exemption." *Id.* at 46a. On this basis, the district court granted GSK's motion for summary judgment.

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[22] GSK argued in the alternative that Petitioners also were exempt under the "administrative employee" exemption, but the district court found it unnecessary to reach that question and it is not implicated by the Petition here.

4. Following entry of summary judgment, Petitioners moved the district court to alter or amend judgment on the ground that the district court had failed to consider DOL's *amicus* brief from the *Novartis* case. Pet.App.49a. Petitioners argued that the brief was entitled to "controlling deference" under *Auer*. The district 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 its prior pronouncements, but it also defies common sense" in light of the fact that PSRs "make sales the way that sales are made in the pharmaceutical industry." Pet.App.51a–52a.

5. The Court of Appeals affirmed. On appeal, DOL filed an *amicus* brief that largely recapitulated the brief in *Novartis*. The Court of Appeals began its analysis by addressing what, if any, deference it owed the positions set forth in that brief, and it concluded that, as in *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006), *Auer* deference was not appropriate when an agency "has elected merely to paraphrase the statutory language." And that, the panel concluded, is exactly what DOL has done here.

DOL's regulations define a salesman somewhat circularly as someone who "mak[es] sales within the meaning of section 3(k) of the Act," 29 C.F.R. § 541.500(a)(1). The regulations in turn provide an "open-ended" definition of "sales within the meaning of section 3(k)." The definition begins by stating that such sales "*include* 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) (emphasis added). And in the next

sentence, the Court of Appeals observed, the regulations complete the definition by simply "cross-referenc[ing] back to the language of Section 3(k) of the Act—the very language purportedly being defined." Pet.App.21a–22a.

Because DOL's *amicus* brief purported to interpret a regulation that merely "parroted" the language of the statute—*i.e.*, "'*does little more than restate the terms of the statute itself*,'" (quoting *Gonzales*, 546 U.S. at 256–57)—DOL's new, sharply constrained interpretation of the term "sales" in the *amicus* brief amounted to a "*reinterpretation* of Section 3(k)" that was not entitled to controlling deference. Pet.App.23a. Granting deference to DOL's brief in such circumstances, the court concluded, would in essence "sanction bypassing of the Administrative Procedures Act and notice-and-comment rulemaking." Pet.App.24a.

The Court of Appeals further held that DOL's new interpretation of the term "sales" under Section 3(k) was not persuasive under *Skidmore*[23] in view of the "many similarities between PSRs and sales people in other fields, pharmaceutical industry norms, and the acquiescence of the Secretary over the last seventy-plus years" in the sales practices of the pharmaceutical industry. Pet.App.34a.

Having declined to defer to what it termed DOL's "about-face regulation, expressed only in ad hoc *amicus* filings," Pet.App.35a, the Court of Appeals looked to the statute and regulations and concluded

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[23] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

that PSRs do in fact make "sales" 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," which reflects the practical reality of the pharmaceutical industry, finds support in the text of Section 3(k), which makes "open-ended use of the word 'sale', which *includes* 'other dispositions,'" and by DOL's own usage and regulations, which as recently as 2004 reaffirmed the "openended concept that a salesman is someone who 'in some sense' sells." Pet.App.28a.

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

REASONS FOR GRANTING THE PETITION

Petitioners correctly identify a split of authority on both the specific question of whether PSRs qualify for the FLSA's outside sales exemption and the broader question concerning the appropriateness of *Auer* deference in this specific context and more generally. Those underlying issues are important, and the division of authority leaves GSK—and, indeed, all pharmaceutical companies that employ sales representatives in the United States—in an untenable situation. GSK and those other companies cannot feasibly treat their sales representatives differently with respect to compensation and FLSA-eligibility on a circuit-by-circuit basis. But, absent intervention by this Court, GSK faces liability—and even the possibility of nationwide liability—in the Second Circuit for structuring its sales force in a manner the Ninth

Circuit has expressly approved. That situation is untenable. A national rule is essential, and only this Court can provide it.

Needless to say, GSK and petitioners disagree sharply on the correctness of the decision below and the appropriateness of *Auer* deference both in this context and more broadly. But all of that can be fully explored in the merits briefing. For now, what the parties agree on is more important than what divides them: this Court should grant certiorari to resolve the split of authority on these important issues.

I. The Decision Below Creates A Split Among The Circuit Courts of Appeals.

The decision below opens up an acknowledged and unambiguous split of authority over whether (i) PSRs "sell" within the meaning of that section and therefore meet the requirements of the FLSA's outside sales exemption and (ii) the amount of deference, if any, owed to DOL's reversal-by-*amicus* brief view of Section 3(k).

A. The Decision Below Creates A Split Among The Circuits Over Whether Pharmaceutical Sales Representatives Meet the Requirements Of The Outside Sales Exemption.

The Ninth Circuit and Second Circuit have now adopted starkly different approaches to the question of whether PSRs qualify for the FLSA's outside sales exemption. The Second Circuit holds that, because of the structure of sales in the regulated pharmaceutical industry, PSRs do not make "sales"

within the meaning of Section 3(k). The Ninth Circuit disagrees and treats PSRs consistent with the practical industry understanding of their role—namely, as outside salespeople. In both cases, DOL filed an *amicus* brief articulating its novel position that the vast majority of the outside sales force in the pharmaceutical industry does not qualify for the FLSA's outside sales exemption. The Second Circuit deferred to DOL's newly-minted position, giving the brief *Auer* deference. The Ninth Circuit refused to apply *Auer* and found DOL's new position unpersuasive under *Skidmore*. The Ninth Circuit had the benefit of the Second Circuit's reasoning and expressly rejected it. Pet.App.17a. The conflict could not be starker.

Under DOL's current, restrictive definition, which it has advanced only in *amicus* briefs, a PSR must actually and personally transfer title to qualify for the outside sales exemption:

> "[S]ale" for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought.

Pet.App.79a (Dep't of Labor Ninth Circuit *Amicus* Br.).[24] In *Novartis*, the Second Circuit found that

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[24] *See also* Pet.App.77a ("Because the Reps do not sell any drugs or obtain any orders for drugs, and can at most obtain from the physician a non-binding commitment to prescribe GSK drugs to their patients when appropriate, they do not meet the regulations' requirement that their primary duty must be 'making sales' . . . . [T]he actual sale of GSK drugs

new position entitled to "controlling deference" under *Auer* "unless th[e] interpretations are plainly erroneous or inconsistent with the regulation." *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 153 (2d Cir. 2010) (internal quotation marks omitted). Having concluded that DOL's interpretation of "sale" did not fail that deferential and forgiving standard, the Second Circuit interpreted "sale" narrowly to reflect DOL's insistence on an actual, personal transfer of title and held Novartis' PSRs non-exempt. There was nothing idiosyncratic about Novartis' PSRs that produced this result. The obstacles that precluded Novartis' PSRs from consummating the sale to the Second Circuit's satisfaction are inherent aspects of the pharmaceutical industry and preclude the consummation of sales by the vast majority of all PSRs.

In reaching this decision, the Second Circuit found DOL's position "on this appeal" to be dispositive. *In re Novartis*, 611 F.3d at 153. The court was unconcerned by DOL's abandonment of the decades-old flexible, functional understanding of "sale" reflected in earlier DOL regulations or by DOL's lack of acknowledgement of its earlier interpretation.

The conclusion and reasoning of the court below were to the contrary. The Ninth Circuit construed the term "sales" to give effect to the "open-ended" use of the word "sale" in Section 3(k), which includes "other dispositions," and DOL's own regulations,

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occurs between the company and distributors (and then to the pharmacy." (citations omitted)).

which for over seventy years have "emphasized a sensible application of the exemptions." Pet.App.28a. The Ninth Circuit declined to give automatic deference to DOL's *amicus* brief and indeed found it unpersuasive under *Skidmore*.

The Ninth Circuit, unlike the Second Circuit, considered not just DOL's position in this case but also DOL's actual regulations and guidance establishing a practical and flexible approach to "sales," *supra* at 4–6, and the long-standing actual practice in the pharmaceutical industry of classifying PSRs as exempt outside salespeople. The Ninth Circuit recognized, as Judge Posner explained for the Seventh Circuit, that while it is "possible for an entire industry to be in violation of the Fair Labor Standards Act for a long time without the Labor Department noticing," the "more plausible hypothesis is that the . . . industry has been left alone" because DOL considered the practices lawful. *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510–11 (7th Cir. 2007).

These Courts of Appeals further diverge with respect to DOL's *amicus* position (which Petitioners' embrace in the Petition) that PSRs are just "promoters who merely pave the way for others' sales" and who are therefore specifically excluded by the "make sales" requirement of the outside sales exemption. Pet.18–19. The Second Circuit found that view persuasive, while the Ninth Circuit recognizes that the analogy does not work given the "structure and realities of the heavily regulated pharmaceutical industry." Pet.App.25a. PSRs do not "pave the way" for some other sales force; PSRs *are* the outside sales force for this industry. As the

Ninth Circuit aptly explains, the distinction between "selling and promoting is only meaningful if the employee does not engage in *any* activities that constitute 'selling' under the Act." *Id.* at 31a. To the extent that GSK's sales representatives "promote," they do so "toward the end goal of causing a particular doctor to commit to prescribing *more* of the particular drugs in the PSR's drug bag." *Id.* The latter is the "sale" in this industry, and the PSRs do not merely "pave the way" for that "sale." They make it.

In sum, as the Petition recognizes, there is a stark, acknowledged and irreconcilable split between the Second and Ninth Circuits. The Second Circuit views unique aspects of the pharmaceutical industry—having nothing whatsoever to do with the purposes underlying the outside sales exemption—as creating a technical lack of sales. Indeed, in the Second Circuit's view, an entire industry—one of the Nation's most important with billions in annual sales—has no outside sales force simply because PSRs direct their efforts to the physicians who write prescriptions and not the wholesalers, pharmacies, or consumers who are permitted by law to purchase prescription drugs. *See In re Novartis*, 611 F.3d at 147, 154–55. The Ninth Circuit, by contrast, views those inherent aspects of the industry as posing no difficulty because of the flexibility built into the statutory definition and DOL's traditional regulatory approach to sales. The Ninth Circuit recognizes that PSRs make the relevant sales in this industry and certainly make sales "in some sense."

B. The Decision Below Creates A Split Among the Circuits Over Whether and How to Apply *Auer* Deference.

The split between the Second and Ninth Circuits runs deeper than the specific question of whether PSRs qualify for the FLSA's outside sales exemption. There is also a conflict on more fundamental questions concerning the deference owed to efforts to change longstanding administrative positions through nothing more formal than the filing of an *amicus* brief. In its decision below, the Ninth Circuit acknowledged that its split with the Second Circuit was based upon its reaching a "different conclusion" from the *Novartis* Court on the question of what deference is owed to the position articulated by DOL in its *amicus* briefs. Pet.App.17a. That difference is stark indeed: The Second Circuit concluded that DOL's position is owed "controlling deference" under *Auer*, *In re Novartis*, 611 F.3d at 149 (internal quotation marks omitted), and the Ninth Circuit concluded that the agency's position was unpersuasive and thus owed "*no* deference" even under *Skidmore*, Pet.App.17a (emphasis added).

1. As Petitioners themselves make plain, Pet.14–16, the decision below opens a clear split of authority over the reach of *Auer*, including applicability of this Court's decision in *Gonzales*, 546 U.S. 243. In *Gonzales*, this Court considered whether "controlling" deference under *Auer* was owed to an interpretive rule that the Attorney General argued was an elaboration of his own regulation. This Court, however, concluded that the interpretative rule at issue was not entitled to deference under *Auer* because the regulation it purportedly

elaborated upon "just repeat[ed] two statutory phrases and attempt[ed] to summarize others" giving "little or no instruction on" the issue that interpretative rule was attempting to address. *Id.* at 257. An agency interpretation of its own regulation that "does little more than restate the terms of the statute itself," this Court concluded, is not entitled to deference under *Auer* because the 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.*

In its decision below, the Ninth Circuit concluded that the level of deference owed to DOL "is best captured" by *Gonzales* because the same sort of "parroting" language at issue in *Gonzales* "is present in the Secretary's outside sales regulations," which do little more than "direct employers, employees, and this court back to the language of the FLSA" for its definition of sales. Pet.App.21a–23a. DOL's *amicus* brief, therefore, presents only a "*reinterpretation* of Section 3(k)" itself and there is no "meaningful regulatory language to interpret." *Id.* at 23a–24a.

The Second Circuit, on the other hand, expressly rejected the applicability of *Gonzales*, concluding that DOL's regulations do not merely parrot the statutory language but instead "define and delimit the terms used in the statute"—including the term "sales"—and therefore DOL's interpretation-by-*amicus* brief was entitled to "controlling deference" under *Auer*. *See In re Novartis*, 611 F.3d at 149.

2. Also fundamental to the split (but overlooked by Petitioners) is the applicability of *Auer* when an

agency interpretation effects an abrupt and unexpected change outside the more formal rulemaking process employed to reach earlier agency positions. The need for a resolution of this question is particularly acute because DOL's effort here to regulate by *amicus* brief is not an isolated incident. The Agency has indicated that it intends to make greater use of *amicus* briefs, and if the Agency's *amicus* briefs are really entitled to "controlling deference" even when they depart from longstanding positions adopted through more formal means, then the Agency would be irrational not to do so.[25]

Fortunately, however, the law does not make it that easy for an agency to change its regulatory views via *amicus* brief (or serial *amicus* briefs). To be sure, *Auer* indicates that an agency's interpretation of its own ambiguous regulations can be entitled to "controlling" deference unless that interpretation is "plainly erroneous or inconsistent with the regulation." 519 U.S. at 462 (internal quotation marks omitted). This is so even if, as in *Auer* itself, the interpretation is announced in a legal brief. *See, e.g.*, *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880–81 (2011). But *Auer* also indicates that there are limits to that deference, and that there must be "no reason to suspect that the interpretation d[id] not reflect the agency's *fair and*

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[25] The Solicitor of Labor is reported to have told an audience last year that she intends to "reinvigorate" DOL's *amicus* program. *See* Richard Renner, *Solicitor of Labor Patricia Smith speaks about policy*, Whistleblowers Protection Blog (June 25, 2010), http://www.whistleblowersblog.org/2010/06/.

considered judgment on the matter in question." *Auer*, 519 U.S. at 462 (emphasis added). And more recently, this Court has explained that where an agency's change in an interpretation of its own regulation creates "unfair surprise," the change can present a ground for disregarding the agency's new interpretation advanced in litigation. *See Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 170–71 (2007); *cf. Kennedy v. Plan Adm'r for DuPont Savings and Inv. Plan*, 129 S. Ct. 865, 872 n.7 (2009) (noting that change in the Labor Secretary's position on the applicability of an anti-alienation provision to conform to the Treasury Secretary's different position on the same interpretive issue did not vitiate deference to the position advanced by both agencies in an *amicus* brief). Lower courts are now grappling with how to assess whether an agency's proffered interpretation is the result of a "fair and considered judgment" and with when an agency's change in position about the meaning of its regulations constitutes "unfair surprise" sufficient to vitiate or lessen the deference owed under *Auer*.

The Second Circuit all but ignored the broader regulatory framework and the inconsistent positions adopted by DOL in the past, which were neither acknowledged nor explained. The Second Circuit focused exclusively on DOL's position "on this appeal." The Ninth Circuit, by contrast, emphasized the agency's seventy-plus year history of interpreting the term "sales" (and therefore the outside sales exemption itself) in a flexible manner. Indeed, the court below explained that "the Secretary's acquiescence in the sales practice of the drug industry for over seventy years further

butresse[d]" the court's decision and noted that until DOL filed its *amicus* brief in *Novartis*, DOL itself had never challenged the "conventional wisdom that detailing [*i.e.*, the activity of PSRs] is the functional equivalent of selling pharmaceutical products." Pet.App.34a.

The Ninth Circuit's focus upon DOL's inconsistency was in keeping with its own precedents as well as those of other courts of appeals. In *Boose v. Tri-County Metropolitan Transportation District of Oregon*, 587 F.3d 997 (9th Cir. 2009), the Ninth Circuit concluded that the fact that the Department of Transportation had changed its view was not a separate ground for disregarding the agency's new position, but only because the agency had already taken "recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation" and there was therefore "'no unfair surprise.'" *Id.* at 1005 n.13 (quoting *Long Island Care at Home,* 551 U.S. at 170–71).

Other courts have held expressly that a "fair and considered" agency position is one that is consistent with prior interpretations. *See, e.g.*, *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1016 n.15 (D.C. Cir. 2002) (noting that whether an interpretation is "fair and considered" turns on whether the agency has "ever adopted a different interpretation of the regulation or contradicted its position on appeal" and concluding that deference to an agency's position contained in a brief on appeal therefore was inappropriate where the agency had already adopted a contradictory interpretation during an earlier review (internal quotation marks omitted)). And other courts, even if they do not require such

consistency, at least consider the consistency of an agency's current position with prior interpretations before deferring to it. *See, e.g.*, *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 777–78 (5th Cir. 2010) (finding "little reason to believe" that the position was not the fair and considered judgment of the agency "[w]ithout stronger evidence that the agency has applied the regulation at issue inconsistently"); *Massachusetts v. United States*, 522 F.3d 115, 129 (1st Cir. 2008) (rejecting an argument that the agency had adopted a definition of the term "party" for the first time in litigation and deferring under *Auer* where the agency's proffered reading of the term was "consistent with the agency's practice generally, as well as its litigation position in this court").

The focus upon the consistency of agency interpretations by the courts of appeals is consistent with decisions of this Court as well. Even before *Long Island Care at Home*, this Court had long recognized that inconsistency in agency positions can lessen the deference owed to an agency's interpretation. *See, e.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (stating that an agency's interpretation of its regulations does not necessarily control where there are "other indications of the Secretary's intent at the time of the regulation's promulgation" and that an agency position that conflicts with an earlier position "is entitled to considerably less deference" (internal quotation marks omitted)); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (noting that "[a]n additional reason for rejecting the INS's request for heightened deference to its position is the

inconsistency of the positions the BIA has taken through the years"); *Watt v. Alaska*, 451 U.S. 259, 273 (1981) (concluding that the Department of the Interior's "current interpretation, being in conflict with its initial position, is entitled to considerably less deference"). And just last Term, when this Court deferred to agency interpretations advanced in *amicus* briefs, the Court explained that the interpretations were not inconsistent with past agency views.

In *Chase Bank USA*, this Court afforded deference under *Auer* to an interpretation of a regulation advanced in an *amicus* brief by the Board of Governors of the Federal Reserve. In addressing whether the interpretation was the result of the Board's "fair and considered judgment," this Court noted that the Board's interpretation was "entirely consistent with its past views" and concluded that

> there is no reason to suspect that the position the Board takes in its *amicus* brief reflects anything other than the agency's fair and considered judgment as to *what the regulation required at the time the dispute arose.*

Chase Bank USA, 131 S. Ct. at 881 (emphasis added). And in *Talk America v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254 (2011), this Court concluded that there was no reason to suspect that the Federal Communications Commission's "novel interpretation" advanced for the first time in an *amicus* brief was anything other than reflective of the Commission's "fair and considered judgment." *Id.* at 2263. The Court noted that the Commission had argued that "the issue in these cases did not

arise until recently" and that the Commission's interpretation in its brief was consistent with the "regulatory history" and did not conflict with its earlier orders. *Id.* at 2263–65.

The Second Circuit's uncritical and exclusive focus in *Novartis* upon the "position taken by the Secretary *on this appeal*," *see In re Novartis*, 611 F.3d at 153 (emphasis added), cannot be reconciled with this Circuit and Supreme Court precedent. The Second Circuit did not ask whether DOL's interpretation in its *amicus* brief was consistent with that agency's past views or the regulatory history concerning "sales" and the court therefore did not assess whether the interpretation advanced for the first time in the *amicus* brief reflected DOL's fair and considered judgment as to what the regulations required at the time the disputes arose (or, indeed, at any time during the previous seventy years). This case will provide the Court an opportunity to explore the limits of *Auer* deference and whether an abrupt change of position advanced in an *amicus* brief is entitled to the same deference as an agency position on a novel question raised for the first time by the litigation in which the brief is filed.

3. Finally, this case will provide the Court with an opportunity to address whether agencies will be allowed to use *Auer* to circumvent the rulemaking process.

The Ninth Circuit explained that it could not afford DOL's new interpretation "controlling deference" under *Auer* because to do so would "in essence" "sanction bypassing of the Administrative Procedures Act and notice and comment

rulemaking." Pet.App.24a (citing *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000)). That caution is consistent with—indeed, required by—this Court's precedents. For example, in *Long Island Care at Home*, this Court held that deference to DOL's views concerning a different exemption to the FLSA minimum wage requirements (one applicable to "domestic service" employees) was not vitiated by the agency's change in position over time where the agency had taken "recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation" thereby making the prospect of "unfair surprise" unlikely. 551 U.S. at 170–71. And in *Christensen*, this Court cautioned against deferring under *Auer* to an interpretation in an interpretative letter of an unambiguous regulation because that would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." 529 U.S. at 588.

Indeed, as Justice Scalia cautioned last Term in his concurring opinion in *Talk America*, "[i]t seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well" and "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" and thereby "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk Am.*, 131 S. Ct. at 2266.

The Second Circuit, however, exercised none of this caution or skepticism in evaluating an *amicus* brief that deviated from past agency views undertaken through substantially more formal

processes. That court's extreme deference to DOL's *amicus* positions ignored this Court's clear precedents and put it out of step with the approach of other Circuits. Worse still, the Second Circuit has allowed DOL to circumvent the rulemaking process, and thus to regulate by *amicus* brief. The Court's review in this case would not only allow it to bring the Second Circuit into line, but it would also provide an opportunity for this Court to give substantial guidance to the lower courts concerning the appropriate bounds of *Auer* deference.

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For all the foregoing reasons, therefore, Respondent agrees with Petitioners that there is an intractable split of authority. Indeed, that split is even deeper than Petitioners suggest and would allow this Court to provide substantial direction on recurring and important questions concerning the proper scope of *Auer* deference.

II. A National Rule Establishing The Proper Application of the Outside Sales Exemption Is Critically Important.

Because the decision below was correctly decided, GSK and other pharmaceutical companies can continue for now to adhere to the longstanding and universal practice of classifying PSRs as exempt in the nine western states covered by the Ninth Circuit. But they do not have that luxury in New York, Connecticut, or Vermont, where the Second Circuit's decision in *Novartis* now controls. In those States, pharmaceutical companies can no longer prevail on an argument that their PSRs are subject to the outside sales exemption, at least insofar as claims

brought directly under the FLSA are concerned. Indeed, to the extent that, as in *Novartis*, particular plaintiffs pursue collective actions under the FLSA in those states challenging the classification of PSRs on behalf of a putative nationwide class, even an employee working within the Ninth Circuit might be allowed to opt-in to such a suit under the special collective action procedures that govern FLSA actions.[26]

The prospect that a court within the Second Circuit in such an action could potentially award damages in favor an employee within the Ninth Circuit because the employer had structured and paid its sales force in a manner expressly approved by the Ninth Circuit is a wholly untenable situation. The need for a uniform, national rule is critical, and only this Court can provide it.

Nor is the confusion and uncertainty confined to the Second and Ninth Circuits. Other courts have noted the split of authority and some have sided with the Second Circuit. *See, e.g.*, *Palacios v.*

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[26] For example, earlier this month, a sales person for Allergan, Inc., which is headquartered in California, filed a putative FLSA collective action against the company in western New York state, alleging that Allergan "has engaged in a uniform practice of violating FLSA, as detailed in this Complaint by failing to provide overtime compensation to Sales Specialists for work performed in excess of a forty hour work week" and seeking issuance of a court-supervised notice pursuant to Section 16(b) of the FLSA, 28 U.S.C. § 216(b), to members of a putative class that is potentially nationwide in scope. (Compl., *Brace v. Allergan, Inc.*, No. 11-cv-847, ¶¶ 15-16, 43 (W.D.N.Y. Oct. 7, 2011).)

Boehringer Ingelheim Pharm., Inc., -- F. Supp. 2d --, 2011 WL 2837464 (S.D. Fla. July 12, 2011) (acknowledging the split in circuit authority and following the Second Circuit in holding that sales representatives do not meet the requirements of the outside sales exemption).

The concern that litigation will flourish is not worried conjecture on the part of the industry. More than a dozen other individual and class actions challenging the industry's classification of sales representatives as exempt employees are pending in federal courts around the country. Pet.4. The split in authority over the proper application of the outside sales exemption threatens utter unpredictability in structuring the sales force and managing sales costs in an important industry. *Cf. Schaefer-LaRose v. Eli Lilly & Co.*, No. 07-cv-1133-SEB-TAB, 2010 WL 3892464, at *1–2 (S.D. Ind. Sept. 29, 2010) (noting *Novartis* decision and the then-pending appeal in this case before the Ninth Circuit but declining to reconsider a decision holding PSRs exempt: "Our decision cannot be a swinging pendulum, vacillating back and forth as each new ruling addressing this question is handed down by some court or another across the nation.").[27]

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[27] An appeal from the district court's decision holding PSRs exempt in *Schaefer-LaRose* is pending before the Seventh Circuit, *see Schaefer-LaRose v. Eli Lilly & Co.*, No. 10-3855 (7th Cir.), and an appeal from the decision of another district court holding PSRs are not exempt is pending in the Fifth Circuit, *see Harris v. Auxilium Pharm.*, Inc., No. 11-20151 (5th Cir.). Given the unambiguous split between the Second Circuit and Ninth Circuit and the abundance of district court decisions

The split also threatens unpredictability in litigation costs and liability under the FLSA if lower courts follow the Second Circuit's lead. There are upwards of 90,000 people employed as PSRs in the United States. Pet.App.28a. The damages exposure in the *Novartis* case alone (involving only 2,500 of those sales representatives) could reach $100 million. *See* Mark Hamblett, *Circuit Finds Novartis Drug Reps Not Exempt From Overtime Law,* N.Y.L.J. (July 7, 2010), *available at* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202463306500&slreturn=1. Moreover, the financial impact to the industry from that approach could be magnified if, as is permitted in some states, state wage and hour laws are interpreted to track the FLSA and the Second Circuit's approach is followed (although it should not be). *See, e.g.*, *Pa. Dep't of Labor & Indus., Bureau of Labor Law Compliance v. Stuber,* 822 A.2d 870, 873 (Pa. Commw. Ct. 2003) (noting that when interpreting state laws courts may look to federal case law interpreting parallel federal statutes, including the FLSA).

There is certainly nothing in the FLSA or the industry practice that suggests that this split in authority is tolerable. The FLSA was designed as a way to bring nationwide uniformity to working conditions and address the plight of the workers

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addressing the issue, there is no reason for this Court to await the decisions of still more courts of appeals before establishing a national rule and eliminating the uncertainty now hanging over the pharmaceutical industry.

forced to endure long work weeks due to uneven bargaining power. The latter concerns have no application to the highly mobile and well-compensated PSRs, who if they work long hours do so to increase their already substantial compensation through incentive compensation. Nonetheless, the concern for uniformity applies with full force. The pharmaceutical industry is a national industry where consistent practices are at a premium. If the industry really must restructure the PSR position to comply with the Second Circuit decision, it would make sense to do so on a nationwide basis. Continuing the traditional practice only in the Ninth Circuit is not a practical alternative.

And it is not just the pharmaceutical industry that is threatened with unpredictability; the split in authority over the definition of "sale" triggered by DOL's newly restrictive interpretation of the term also has implications for FLSA enforcement more generally. The definition of "sale" in Section 3(k) applies "in this chapter" and the term (or a variant of it) appears more than a dozen times in the Act. The split therefore affects other FLSA provisions, and the employers covered by them. For example, Section 7 establishes maximum hour requirements for some employers in part by looking to the volume of "sales," 29 U.S.C. § 207(b)(3), and Section 15 makes it unlawful to "sell" goods "in the production of which any employee was employed in violation of" the Act's minimum wage or overtime provisions, 29 U.S.C. § 215(a)(1). DOL's new, constricted definition of "sales" therefore risks altering the scope of the protections of the FLSA in ways that extend

beyond the outside sales exemption upon which DOL has focused in its *amicus* briefs.

Finally, restructuring the PSR position to comply with the Second Circuit decision would work a fundamental change in the structure of the sales force in the pharmaceutical industry. It is almost certain that a shift by GSK and other pharmaceutical companies in their classification of PSRs from exempt to non-exempt employees would require a change in the very nature of the position. For example, if non-exempt, PSRs would likely be subject to more regimented and structured work activities, require closer supervision and monitoring, and otherwise lose the flexibility they currently enjoy, such as the ability to complete key job requirements at the times most convenient for the employee. *Cf. Jewel Tea Co. v. Williams,* 118 F.2d 202, 207–08 (10th Cir. 1941) (discussing the reasons for exempting outside salesmen from overtime requirements). PSRs also could lose the benefit of an incentive-based compensation model that traditionally has rewarded the individual efforts of motivated and skilled PSRs but would be ill-suited for a non-exempt sales force.

The problem for the pharmaceutical industry would be particularly acute because of the transferability of the basic sales training and skills that PSRs use every day to sales jobs in other industries. Just as PSRs are often recruited from sales jobs in other industries, PSRs who value the professional benefits of working in an exempt position could just as surely leave the industry and apply their sales skills in other industries in which the regulatory model does not create limits on the

extent to which sales representatives can fully consummate the final transfer of title. Indeed, precisely because DOL's new position has nothing to do with the basic nature of the sales function that PSRs undoubtedly perform and everything to do with regulatory details of the pharmaceutical industry having nothing to do with the policies underlying the outside sales exemption, the pharmaceutical industry faces a unique threat of the PSRs migrating to similar sales jobs in other industries.

The Court should grant the petition to review these important questions on which the Circuits are now clearly divided.

CONCLUSION

The respondent does not oppose the petition for a writ of certiorari.

Respectfully submitted,

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