No. 10-460

IN THE
Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION,

Petitioner,

v.

SIMONA M. LOPES, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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SUMMARY

The Fair Labor Standards Act ("FLSA") entitles employees to time-and-a-half overtime wages for all hours they work above forty per week. Certain categories of employees, however, need not be paid overtime premiums. Under Section 13(a)(1) of the Act, "any employee employed in a bona fide **administrative** capacity…or in the capacity of **outside salesman**" is exempt from overtime compensation. 29 U.S.C. § 213(a)(1).

Respondents are Sales Representatives ("Reps") employed by Petitioner Novartis Pharmaceuticals Corporation ("Novartis"). A Rep's primary duty is to visit (or "detail") physicians – typically for five minutes or less – and announce a pre-scripted message drafted by Novartis describing the Company's drugs in the hope that the doctors will later write prescriptions for those drugs. Novartis tightly micromanages the Reps' detailing activities. The Court of Appeals for the Second Circuit held that neither the "administrative" nor the "outside sales" exemptions cover the Novartis Reps. In so ruling, the Second Circuit gave controlling deference under *Auer v. Robbins*, 519 U.S. 452 (1997), to a Department of Labor ("DOL") *amicus* brief supporting the Reps' position that they are not exempt from overtime pay under the DOL's regulations.

Novartis's petition for *certiorari* should be denied. The decision of the Court of Appeals and the DOL brief on which the Court relied applied settled and straightforward regulatory standards to the specific facts of this case. Further, the decision addresses only

one of the two prongs of the administrative exemption, does not create a circuit split as to any legal rule, and upsets no legitimate, settled expectations of Novartis or any other employer. Because the decision below is fact-specific, narrow, and will produce no wide-ranging consequences, *certiorari* is unjustified.

The administrative exemption governs an employee who satisfies two prerequisites: his "primary duty" must (1) be "directly related to [his employer's] management or general business operations . . . and [(2)] include[] the exercise of discretion and independent judgment on matters of significance." 29 C.F.R. § 541.200(a). Bypassing the first element, the Circuit Court decided that the Reps were non-exempt under the second prong — they do not exercise sufficient "discretion and independent judgment." Novartis disagrees. But the extent to which Respondents exercise discretion and judgment is a fact-bound question that the Second Circuit answered based on a 2,900-page summary judgment record. This Court is not the forum for *de novo* review of the Second Circuit's application of settled law to those facts.

Nor is there a circuit split regarding the administrative exemption which might merit *certiorari*. All circuits concur that an employee must exercise a **high level** of discretion and independent judgment to qualify as an exempt administrator. Contrary to Novartis's Petition and its *amici*'s arguments, "minimal" or "some" discretion does not and has never sufficed. The *two* instances in which a court of appeals and the DOL — in a 1945 Opinion Letter — ruled that Pharmaceutical Reps fell under the administrative

exemption involved facts unlike those presented here. The Reps in those cases did not work for Novartis and enjoyed far more job freedom than do the Respondents.

The Second Circuit's application of the administrative exemption to the facts below is further unfit for review because the Court adjudicated only the exemption's "discretion and independent judgment" prong and did not consider whether the Reps' primary duty was "directly related" to Novartis's "management and general business operations." Even were this Court to grant *certiorari* and reverse on discretion and independent judgment, it would not thereby dispose of the entire appeal. This Court would still need to remand for the Second Circuit to review the trial court's ruling as to the "directly related" prong. This procedural muddle argues against granting *certiorari* on the administrative exemption.

The Court should also reject *certiorari* as to the Second Circuit's ruling that Novartis's Reps are not exempt from overtime as "outside salespersons." There is nothing new or surprising about the conclusion that Reps who promote but don't sell drugs are not "outside salespersons." No circuit court has ruled otherwise. The Second Circuit's understanding of the outside sales exemption is consistent with seventy years of FLSA regulations and precedent. And the DOL has never taken the position that pharmaceutical reps are excluded from overtime pay under the outside sales exemption. Moreover, in different contexts such as product liability suits, Novartis (along with other Pharma giants) has contended that its Reps **do not sell drugs**.

Applying *Auer v. Robbins*, the Second Circuit gave "controlling deference" to the DOL's *amicus* brief which argued that, given their job duties, the Respondent-Reps are not exempt administrators or outside salespersons. Under *Auer*, the Second Circuit concluded that the DOL's interpretation of its own regulations regarding the administrative and outside sales exemptions was not plainly erroneous. Novartis asks this Court to grant *certiorari* to "clarify" *Auer*'s holding.

Auer needs no clarification. The case is routinely applied in virtually every federal jurisdiction. The circuit courts are neither split nor confused about *Auer*. Novartis claims that *Auer* deference is out of place here because the DOL's *amicus* brief reflected a change in the agency's prior position. This is untrue. The DOL never has and never could issue a blanket overtime wage exemption for employees with the title of "Pharmaceutical Sales Representative." Job *duties*, not titles, control every exemption determination.[1] A solitary 1945 DOL Opinion Letter dealing with "medical detailists" — whose duties differed radically from those of Novartis's 21st century Reps — did not establish a DOL policy perpetually exempting Reps from overtime pay. The Court should decline the invitation by Novartis and its *amici* to muddy *Auer*'s clear rule of deference.

Novartis's appeals to policy are similarly baseless. Petitioner vastly exaggerates the impact of this decision on the pharmaceutical industry. This case involves *one* company — Novartis — that micromanages its Reps and gives them far less discretion than is typical in the industry. Reps at other drug companies who enjoy more

1. 29 C.F.R. § 541.2.

job freedom might well qualify for the administrative exemption. Novartis Reps perform standardized duties and are thus precisely the kind of employees that the overtime pay provisions of the FLSA are designed to protect. This case does not deserve *certiorari*.

STATUTORY AND REGULATORY BACKGROUND

A. The FLSA's Overtime Requirements

Section 7 of the FLSA, enacted in 1938, dictates that "no employer shall employ any of his employees…for a workweek longer than forty hours…unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one-and-one-half times the regular rate at which he is employed." (29 U.S.C. § 207).

The FLSA is designed to ensure that each employee covered by the Act receives not only a "fair day's pay for a fair day's work", but – as importantly – is protected from **"the evil of overwork as well as underpay."** *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 578 (1942), *quoting* 81 Cong.Rec. 4983 (1937) (message of President Roosevelt).[2] Because the FLSA aims to combat overwork as well as underpay, even well-compensated employees are entitled to overtime wages if their job duties do not satisfy an overtime exemption. "Employees are not to be deprived of the benefits of the Act simply because they are well paid…." *Jewell Ridge Coal Corp. v. United Mineworkers of America*,

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2. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (the FLSA's legislative purpose was "to protect workers…from the evil of 'overwork' as well as 'underpay'").

325 U.S. 161, 167 (1945). *Jewell Ridge's* pronouncement is more than a platitude. In certain circumstances, workers earning more than $100,000 annually must be paid overtime wages.[3]

B. The FLSA's Exemptions from Overtime Pay

Section 213(a)(1) of the Act exempts from the overtime wage requirement "any employee employed in a bona fide…administrative…capacity [the administrative exemption] or in the capacity of outside salesman [the outside sales exemption] (as such terms are defined and delimited from time to time by the regulations of the Secretary [of Labor])." *Id.* § 213(a)(1).

The overtime exemptions are affirmative defenses as to which the employer bears the burden of proof. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). And because the FLSA is a remedial statute, exemptions from overtime pay must be narrowly construed against the employer, *A.H. Phillips v. Walling,* 324 U.S. 490, 493 (1945). Congress delegated to the Department of Labor the authority to "define" and "delimit" the scope of the exemptions. Given this delegation, the exemption regulations and the DOL's reasonable constructions thereof "are legally binding." *Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 164 (2007); *see Auer*, 519 U.S. at 461.

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3. 29 C.F.R. § 541.601(b)(3) ("Highly Compensated Employee" exemption). See *Mohorn v. T.V.A.*, 2007 WL 2077549 (E.D. Tenn. July 17, 2007) (supervisors who earned more than $100,000 per year were not exempt because employer failed to meet its "heavy burden" of showing that an overtime exemption applied.).

C. The Administrative Exemption Regulations

The DOL's regulations define the statutory term "employee employed in a bona fide administrative capacity" to mean, in relevant part, an employee "whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer" (prong one), and "whose primary duty includes the exercise of *discretion and judgment* with respect to matters of *significance*" (prong two). 29 C.F.R. § 541.200(a) (emphasis added). The first prong was not addressed by the Second Circuit below.

As to the second prong, the regulations caution that "the phrase 'discretion and independent judgment' must be applied in light of all the facts involved in the particular employment situation in which the question arises." *Id*. § 541.202(b). Ten factual considerations are listed to aid in this determination.[4]

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4. These are:

> whether the employee has the authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree…; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies … without prior approval; whether the employee has authority to negotiate and bind the

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The DOL's longstanding and consistent position has been that "**[a] high level** of discretion and independent judgment are necessary to qualify for [the administrative] exemption." Wage and Hour Opinion Letter, 1997 DOLWH LEXIS 30, at *6 (DOL July 23, 1997) ("[T]he exercise of discretion and independent judgment must be more than the use of skill in applying well established techniques, procedures or specific standards described in manuals or other sources."). *Id.* § 541.202(e). S*ee also* Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor, *Report and Recommendations on Proposed Revisions of Regulations,* pt. 541, at 63 (June 30, 1949) ("1949 Weiss Report"),[5] ("An employee performing routine clerical duties" is not administratively exempt, "even though he may exercise *some* measure of discretion and judgment as to the manner in which he performs his clerical tasks.") (emphasis added). This position is supported by

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> company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. § 541.202(b).

5. The Department of Labor held hearings on overtime exemptions and produced the 1940 Stein Report and the 1949 Weiss Report, both of which explain several overtime exemptions. *See* 69 Fed. Reg. at 22,124.

inescapable common sense. Every job involves at least "some" or "minimal" discretion. It would have been pointless to insert into the administrative exemption a discretion and independent judgment requirement if the exemption did not mandate more than "some" or "minimal" job discretion.

In the 2004 preamble to the current version of the administrative exemption, the DOL explained that the "discretion and independent judgment" aspect of the rule "is not a change in the current law" and was intended to reaffirm the settled requirements that "the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence." 69 Fed. Reg. 22,142, 22,143 (2004).

Courts have agreed with the DOL that – contrary to Novartis and its supporting *amici* – an employee who exercises only "some" or "minimal" discretion is not an overtime-exempt administrator. *See, e.g.*, *Heidtman v. County of El Paso*, 171 F.3d 1038, 1042 (5th Cir. 1995) (affirming jury verdict that local tourism promoters were not covered by administrative exemption where they followed scripts and their duties were mechanical and repetitive); *Clark v. J.M. Benson Co., Inc.*, 789 F.2d 282, 287-88 (4th Cir. 1986) (noting that employee does not use the requisite discretion or independent judgment if he merely decides when, where or how to do assigned tasks); *Grandits v. United States*, 66 Fed. Cl. 519, 543 (2005) (finding that duties of GS-13 Import Specialist for U.S. Customs Service "requir[ed] knowledge and skill in the application of Customs statutes, regulations and schedules, but le[ft] little room for the level of

discretion and independent judgment necessary for exemption"); *Brock v. Nat'l Health Corp.*, 667 F. Supp. 557, 566 (M.D. Tenn. 1987) (staff accountants non-exempt). Even information technology ("IT") specialists, copy editors and legal assistants — all of whom use "some" or "minimal" job discretion — lack sufficient discretion and independent decisional authority to qualify as exempt.[6]

D. The DOL's 1945 Opinion Letter Concluding That "Medical Detailists" Were Covered by the Administrative Exemption

In 1945 the DOL issued an opinion letter finding that certain "medical detailists" working for an unnamed pharmaceutical company were exempt administrative

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6. *See also Ahle v. Veracity Research Co.*, 2010 U.S. Dist. LEXIS 88250, at *18 (D. Minn. Aug. 25, 2010) (claims investigators were not exempt administrators because their job duties "do not involve **a sufficient degree of discretion and independent judgment** with respect to matters of significance") (emphasis added). IT specialists, copyeditors, claims investigators and legal assistants certainly exercise "some" or "minimal" discretion, but all are non-exempt because they lack *significant* job discretion and independent judgment. 2006 DOLWH LEXIS 60 (opining that senior copy editors are non-exempt); 2006 DOLWH LEXIS 37, at *7 (observing that while legal analysts work independently and use their own judgment to prioritize assignments, including how much time to spend on each assignment, "it is **not sufficient** that an employee makes…limited decisions regarding relatively insignificant matters") (emphasis added); 2006 DOLWH LEXIS 56 (Oct. 26, 2006) (IT support specialists are non-exempt); *Martin v. Indiana Mich. Power Co.*, 381 F.3d 574, 584 (6th Cir. 2004) (reversing grant of summary judgment and holding that computer security specialists are non-exempt).

employees.[7] Upon this solitary letter, Novartis (and its amici) build the claim that for 65 years, until the DOL's 2009 amicus brief below, the agency considered Pharmaceutical Reps exempt from overtime wages. But the 1945 "medical detailist" was consulted for advice in matters of life and death and was a different species from the modern micromanaged Novartis Rep described in the record below. (Pgs. 16-17 *infra*).

The DOL's 1945 letter stated that the detailists' work "appears to require a high degree of technical knowledge...[and] these men are said to be experts...[who] are consulted with respect to...problems encountered by hospitals and physicians including questions concerning epidemics." *Id.*

An authoritative source, moreover, confirms that the Pharmaceutical Rep of that era was "a scientifically trained graduate in pharmacy, pharmaceutical chemistry, pharmacology, or biology. He usually has a bachelor of science or higher degree. He is well versed in chemistry, bacteriology, physiology, and pharmacology and obviously thinks as a scientist." Arthur F. Peterson, *Pharmaceutical Selling, "Detailing" and Sales Training* 26 (2d ed. 1959). Furthermore, the Rep or detailist of the 1940's, '50's and early '60's worked on commission, arranging sales of specific quantities of drugs to pharmacies and "physicians' supply houses," and on occasion to physicians themselves. *Id.* at 119, 166-67, 189, 198. The old-style Rep also conducted market research on his territory and had the authority to remove physicians from his "detail" list. *Id.* at 73. As discussed *infra*, the duties of the modern Novartis Rep

7. 2 Lab.L.Rep. (CCH) ¶ 33,093 (3d Ed. 1946).

are far more circumscribed and are stripped of meaningful job discretion. (Pgs. 16-17).

E. The Outside Sales Exemption Regulations

Section (3)(k) of the FLSA defines "sale" or "sell" as "any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition." 29 U.S.C. § 203(k). The DOL's regulations, promulgated under its authority to define and delimit the outside sales exemption, explain that an "outside salesman" is an employee whose primary duty is "making sales within the meaning of section 3(k)…or…obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by the client or customer; and…[w]ho is customarily and regularly engaged away from the employer's place or places of business…" 29 C.F.R. § 541.500(a).

A task qualifies as "making sales" only if it involves the "transfer of title to tangible property," *id.* § 541.501(b), and a customer's "commitment to buy." 69 Fed. Reg. at 22,162-63 ("Employees have a primary duty of making sales if they 'obtain a commitment to buy' from the customer and are credited with the sale.") (quoting 1949 Weiss Report at 83). An employee who *promotes a product that someone else will later sell* does not "make a sale" as contemplated by the outside sales exemption. 29 C.F.R. § 541.503(a) ("[P]romotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work….").

Virtually from the birth of the FLSA, business interests have pressed the DOL to extend the outside sales exemption to employees who, like Novartis's Reps,

are "missionary men" *i.e.*, promoters who don't make their own sales.[8] For more than seven decades, the DOL has steadfastly refused these petitions. *See* Wage and Hour Division, U.S. Department of Labor, *Executive, Administrative, Professional * * * Outside Salesman Redefined*, *Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition* 46-47 (Oct. 10, 1940) ("Stein Report") (stating that "exemptions have been asked" for "sales promotion and missionary men," but that "it would be an unwarrantable extension" of the outside sales exemption **"to describe as a salesman anyone who does not in some sense make a sale" and "sales promotion and missionary men are persons who normally make no sales at all."**) (emphasis added); 2004 preamble, 69 Fed. Reg. at 22,162 ("The Department does not intend to change any of the essential elements required for the outside sales exemption.") (citing Stein Report).[9]

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8. *See* 69 Fed. Reg. 22,162 (preamble to current rule).

9. See also *Clements v. Serco, Inc.*, 530 F.3d 1224 (10th Cir. 2008) (private recruiters who "sold" idea of joining the army to potential enlistees, but didn't obtain binding commitments, were not outside salesmen; the enlistees signed up at U.S. Army stations and the recruiters merely promoted sales made by someone else); *Wirtz v. Keystone Readers Services, Inc.*, 418 F.2d 249, 260 (5th Cir. 1969) ("To the extent that [Plaintiffs] are engaged in promotional activities designed to stimulate sales which will be made by someone else, the work [is] non-exempt.").

In *accord*: 2006 DOLWH LEXIS 65, at *5 ("Soliciting promises of future charitable donations or 'selling the concept' of donating to a charity does not constitute 'sales' for purposes of the outside sales exemption."); 1998 DOLWH LEXIS 17, at *7 (a college recruiter was not an outside salesperson where he "is

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PROCEEDINGS BELOW

Plaintiffs, representing the Respondent-Reps, filed class and collective actions against Novartis in the Southern District of New York and the Central District of California and alleged that Novartis's Reps are entitled to overtime under the FLSA and state law. The cases were consolidated in the Southern District of New York. After the District Court certified a class, Novartis and the class cross-moved for summary judgment on liability. The trial court granted summary judgment for Novartis, finding that Respondents were exempt from overtime under both the outside sales exemption and the administrative exemption. (69a).

A unanimous panel of the Second Circuit vacated the judgment and remanded. As to the outside sales exemption, the Second Circuit noted that the Secretary of Labor, participating in the appeal as *amicus curiae*, stated in her brief that the DOL regulations "make it clear that a person who merely promotes a product that will be sold by another person does not, in any sense intended by the regulations, make a sale." (26a). Here, while "the Reps may give physicians free samples," they "cannot transfer ownership of any quantity of [a] drug in exchange for anything of value." (27a). Nor do the

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engaged in identifying qualified customers, i.e., students, and inducing their application to the college, which in turn decides whether to make a contractual offer of its educational services to the applicant."); 1994 DOLWH LEXIS 65 ("Selling [the] concept [of donating human tissues] does not constitute 'sales' within the meaning of the regulations" and neither is "buying into the merits" of a product purchase).

Reps obtain doctors' "commitment[s] to buy." (30a). "There is no genuine dispute," the court noted, "over the sales path generally traversed by Novartis pharmaceuticals.... Novartis sells its drugs to wholesalers; the wholesalers then sell them to pharmacies; and the pharmacies ultimately sell the drugs to patients who have prescriptions for them. The Reps promote the drugs to the physicians; the Reps do not speak to the wholesalers or to the pharmacies or to the patients." (*Id.*) Consequently, held the court, "it is reasonable [for the DOL] to view what occurs between the physicians and the Reps as less than a 'sale,'" and the Secretary's position that the Reps are not outside salespersons deserved *Auer* deference. (28a).

With respect to the administrative exemption, although the District Court addressed both prongs of the "primary duty" test in the DOL regulations (*see supra*), the Second Circuit framed the controlling issue as "whether Novartis has adduced sufficient evidence to allow a rational juror to conclude" that the Reps' primary duty satisfies the *second* prong, *i.e.*, whether such duty "includes the exercise of discretion and independent judgment with respect to matters of significance." (30a).[10] The DOL's *amicus* brief again supported the Reps. "The Secretary takes the position," the court noted, "that for the administrative exemption to apply to the Reps, the regulations require a showing of a greater degree of discretion, and more authority to

10. "For purposes of this appeal, the relevant issue is whether Novartis has adduced sufficient evidence to permit a rational juror to infer that the Reps meet the [discretion] criterion." (30a).

use independent judgment in matters of significance, than Novartis allows the Reps. Again we find it appropriate to defer to the Secretary's interpretation [under *Auer*]." (33a).

Comparing the record evidence of the Reps' job duties to the ten illustrative indicia of administrative job discretion listed in 29 C.F.R. § 541.202(b), the Second Circuit stressed that it was "undisputed" that the Reps:

- have no role in planning Novartis's marketing strategies;
- have no role in formulating the core messages they deliver to physicians;
- are required to visit a given physician a certain number of times per trimester as established by Novartis;
- are required to promote a given drug a certain number of times per trimester as established by Novartis;
- are required to hold at least the number of promotional events ordered by Novartis;
- are not allowed to deviate from the promotional 'core messages'; and
- and are forbidden to answer questions for which they have not been scripted. (34a-35a).

The Court also observed that the Reps cannot exceed promotional budgets or bind Novartis on any important matters. (34a). Novartis so tightly manages its Reps that it even directs them on how they must hold their pens when pointing to a visual aid during detail calls. (6a). Unsurprisingly, some Reps testified that they viewed themselves as "robots." (7a).

Given these numerous undisputed job restrictions, the Second Circuit agreed with the DOL that "the Reps are not bona fide administrative employees within the meaning of the FLSA and the regulations." (35a). The court therefore vacated the judgment for Novartis. *Id.*

NO WRIT SHOULD ISSUE AS TO EITHER OVERTIME EXEMPTION

A. The Court Should Deny *Certiorari* on the Administrative Exemption

1. The Court Should Not Grant *Certiorari* to Weigh Facts

Novartis contends that the Second Circuit erred in concluding that Novartis Reps exercise insufficient discretion and independent judgment to fall within the administrative exemption. (Pet. 10-11). Respondents disagree. Novartis's arguments that the Court of Appeals misconstrued the voluminous record should be disregarded, because the Supreme Court does not sit to correct this kind of purported error. *See Superintendent v. Hill*, 472 U.S. 445, 460-61 (1985) ("We do not grant *certiorari* to review evidence and discuss specific facts.").

2. There Is No Circuit Split on the Administrative Exemption

Novartis contends that the decision here conflicts with decisions of the Third Circuit in *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010), and the District of Columbia Circuit in *Robinson-Smith v. GEICO*, 590 F.3d 886 (D.C. Cir. 2010). But there is no circuit split. Each case turned on its own facts, and the *Smith* and *Robinson-Smith* courts applied the same legal test that the Second Circuit did.

In *Smith*, the following facts were sharply different from this case: (1) the plaintiff Rep testified that drug maker Johnson & Johnson gave her the freedom "to run [her] own business," 593 F.3d at 282; and (2) the DOL did not file an *amicus* brief supporting the Rep's claim that she was not exempt. The Third Circuit held that the *Smith* Rep was an exempt administrative employee but took pains to limit its ruling to the facts before it. Noting pointedly that the appeal in the *Novartis* case had not yet been argued, the *Smith* court cautioned that "based on different facts, courts, including this Court, considering similar issues involving sales representatives for other pharmaceutical companies, or perhaps even for J&J, might reach a different result than that we reach here." *Id*. at 283 n.1. Nothing in the decision below contradicts *Smith*.

In *Robinson-Smith* — another appeal in which the DOL did not appear as *amicus curiae* — the D.C. Circuit concluded that automobile insurance adjusters possessed a high "level of autonomy" plus "ample, unsupervised discretion" and therefore satisfied the

administrative exemption. 590 F.3d at 892. In *Robinson-Smith,* the average adjuster negotiated more than 1,000 claims totaling over $2.5 million annually. *Id*. Novartis reads *Robinson-Smith* as holding that any employee who exercises "only minimal" or "some" discretion satisfies the administrative exemption. (Pet. 7-8, 22). But *Robinson-Smith* did not so hold.

Rather, the undisputed record in *Robinson-Smith* showed that *when the adjusters exercised discretion* they did so in relation to matters of financial significance. The adjusters had "full authority" to *bind* the insurer by settling total loss claims for up to $10,000 or $15,000, 590 F.3d at 894-95. S*ee also* 29 C.F.R. § 541.207(d)(2) (employees exercise discretion as to matters of significance if they "exercise authority within a wide range to commit their employer in substantial respects financially or otherwise"). The adjusters argued, however, that they were non-exempt because they negotiated large claims only "occasional[ly]" or "some" of the time, and consequently, such negotiations were outside their "primary duty," which, they contended, was fact finding and appraisal. 590 F.3d at 895-96. But the D.C. Circuit disagreed.

The court noted that the applicable regulation, 29 C.F.R. § 541.2, "requires that the [employee's] primary duty 'include[]' the exercise of discretion and independent judgment; it does not specify how frequently discretion need be exercised." *Id.* at 894. The court went on, moreover, to examine the components of the adjusters' appraisal duties in some detail and to hold that even in appraisals the adjusters exercised sufficiently high-level discretion and independent

judgment to qualify as overtime-exempt. *Id.* at 896-97.[11] Thus, *Robinson-Smith* does not stand for the simplistic proposition that "some" or "minimal" discretion in any aspect of an employee's job renders the employee an exempt administrator. Unlike the *Robinson-Smith* adjusters, Novartis's Reps cannot bind Novartis "on any significant matter." (34a). There is no tension that this Court needs to resolve between *Robinson-Smith* and the Second Circuit's decision below.

3. The Second Circuit Did Not Address the Entire Administrative Exemption

The Second Circuit's ruling as to the administrative exemption is unsuited for *certiorari* for the additional reason that the exemption is not presented fully for review. To win on the administrative exemption, Novartis must show that the Reps "meet every requirement" of the exemption. *E.g.*, *Mitchell v. Williams*, 420 F.2d 67, 69 (8th Cir. 1969). The Second Circuit, however, ruled in favor of the Respondents on the second part of the exemption ("discretion and independent judgment") and did not reach the first requirement (that the Reps' primary duty be "directly related to [Novartis's] management or general business operations"). Consequently, even if this Court grants review as to the "discretion" prong and reverses, it will have adjudicated only half the administrative exemption

11. As the D.C. Circuit noted, a DOL regulation issued after the complaints in *Robinson-Smith* were filed states that the duties of claims adjusters, *e.g.*, "inspecting property damage" and preparing damage estimates, can bring them within the administrative exemption. 29 C.F.R. § 541.203(a) (promulgated in 2009).

because the "directly related" determination would still need to be decided on remand.[12]

4. The Second Circuit's Ruling Is Narrow and Unsurprising

Novartis argues that *certiorari* should be granted as to the administrative exemption because the decision below will have widespread consequences. But Novartis vastly exaggerates the decision's novelty and impact. Novartis presumes that Reps across the drug industry perform the same duties and therefore the Second Circuit's ruling will affect all drug manufacturers.. (Pet. 9 n.4). This premise is wrong. One size doesn't fit all in the pharmaceutical business. Novartis micromanages its Reps far more than do other pharmaceutical companies. It is therefore entirely possible that courts applying the same test that the Second Circuit used below will find that Reps for other drug manufacturers are exempt administrative employees. Indeed, some courts already have so ruled.[13] This appeal does not

12. Two recent Second Circuit precedents on the "directly related" prong, *Reiseck v. Universal Communications of Miami, Inc.*, 591 F.3d 101 (2d Cir. 2010), and *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529, 535 (2d Cir. 2009), *cert. denied*, 130 S.Ct. 2416 (2010), strongly intimate that, had the Second Circuit addressed the issue, the court would have ruled the Reps do not perform work directly related to Novartis's management and general business operations.

13. In *Amendola v. Bristol-Meyers Squibb*, 558 F. Supp. 2d 459 (S.D.N.Y. 2008), the Court held that the Reps employed by Bristol-Meyers Squib ("BMS") were administratively exempt. A BMS Rep exercises far more job discretion than his or her Novartis counterpart. Unlike Novartis, BMS requires that its

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affect the drug business as a whole, let alone any other industry. It carries no implications beyond its peculiar facts involving a single company — Novartis — that smothers its Reps with suffocating controls.

Novartis implies (Pet. 9) that, because the DOL did not expressly opine until its 2009 *amicus* brief that a Pharmaceutical Rep was eligible for overtime, the drug industry could reasonably assume that for seventy years the agency viewed all Reps as exempt. This position is baseless. The DOL is not a commissariat of American industry; it has neither the obligation nor the resources to spoon-feed legal advice to the pharmaceutical industry or any of the thousands of businesses in the country.

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Reps have pharmaceutical experience and expertise. BMS also allows its Reps to determine which physicians they will visit on detail calls. *Id.* at 464. And BMS encourages its Reps to conduct independent medical research and to be self-directed in their calls.

The exempt Alpharma Rep in *Jackson v. Alpharma, Inc.*, 2010 U.S. Dist. LEXIS 72435 (D.N.J., July 19, 2010), also has significantly more discretion than a Novartis Rep. *Id.* at *4.

Amendola and *Jackson* teach that even though the current FDA regulatory system restricts what a Pharmaceutical Rep can say about a drug, there are still realms of substantial discretion that a Rep's employer can vest him with — discretion which Novartis removes from the Respondents. It is not the FDA's restrictions that prevent a Novartis Rep from exercising the discretion of an exempt administrator, but instead the Company's decision to straitjacket its Reps beyond the norm other drug manufacturers apply. Novartis's idiosyncratic control of its Reps narrows the effect of the Second Circuit's administrative exemption decision, and undermines *certiorari* on that exemption.

"Congress did not seek to secure [FLSA] compliance…through…detailed federal supervision…. Rather, it chose to rely on…complaints from employees." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). It was up to Novartis to monitor its compliance with the FLSA and the overtime regulations. Because Novartis failed in that task, the FLSA gave Novartis's Reps the right to sue.

Novartis also argues that the pharmaceutical industry's seventy-year practice of denying overtime pay to its Reps is sacrosanct and therefore this Court should order *certiorari* to endorse that custom. In *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 741 (1981), however, this Court cautioned that an industry cannot seek refuge in "customs" or "practices" to excuse violations of the FLSA. Novartis cannot credibly plead surprise or industry custom as considerations which favor granting certiorari.

B. The Court Should Deny *Certiorari* on the Outside Sales Exemption

1. There Is No Circuit Split on the Outside Sales Exemption

Certiorari should likewise be denied as to the Second Circuit's decision on the outside sales exemption. The ruling does not create a circuit split because the Second Circuit is the only court of appeals that has addressed the application of the outside sales exemption to Pharmaceutical Reps. On November 3, 2010, the Ninth Circuit heard oral argument on the issue of whether the FLSA's outside sales exemption applies to

Reps for other drug makers.[14] *If* the Ninth Circuit's decision creates an actual intercircuit conflict, the Court can then decide whether to review the status of Pharmaceutical Reps under the outside sales exemption.[15] There is no reason to grant *certiorari* as to that exemption now.

2. The Second Circuit Correctly Applied Settled Law

Novartis makes several merits arguments regarding the outside sales exemption, but none of them are *certiorari*-worthy and all are wrong. Novartis and *amici* repeatedly invoke the Department of Labor's statement in the preamble to the current outside sales rule that an outside salesperson must "in some sense" make a

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14. *Christopher v. SmithKline Beecham Corporation*, No. 10-15257.

15. Novartis inaccurately suggests that most district courts have held that pharmaceutical sales Reps qualify for the outside sales exemption. (Pet. Br. at 14, n.9). The majority of the cases cited by Novartis, however, involve **state law** versions of the outside sales exemption and **not the FLSA**. *E.g. Baum v. Astrazeneca LP*, 605 F. Supp. 2d 669 (W.D. Pa. 2009) (Pennsylvania law); *Brody v. Astrazeneca Pharms., LP*, 2008 U.S. Dist. LEXIS 107301 (C.D. Cal. June 11, 2008) (California law); *Menes v. Roche Labs., Inc.*, 2008 U.S. Dist. LEXIS 4230 (C.D. Cal. Jan. 7, 2008) (same). When it comes to the FLSA's exemption, however, most federal courts have held that pharma Reps are **not outside salespersons**. In addition, *Christopher*, – which ruled that the FLSA exemption applies – is pending in the Ninth Circuit, so it is not appropriate to rely on that case until the Ninth Circuit issues a decision.

sale. (Pet. 6, 8, 23). But Novartis ignores the immediately following statement in the regulations that a sale involves a transfer of title or a commitment to buy and that the exemption does not extend to those who promote so that others may sell. 29 C.F.R. §§ 541.501(b) to 503. As the Second Circuit properly held, promoters like Novartis's Reps "in no sense" make a sale. (29a).

There is nothing surprising about this conclusion that could justify *certiorari.* The DOL has never opined that Pharmaceutical Reps are exempt outside salespersons, and for good reason. Reps make no sales. They visit physicians – usually for under five minutes – and the doctors do not purchase drugs themselves. The Reps recite a pre-scripted message about their employers' drugs in the hope that doctors will prescribe these drugs. If a doctor prescribes the drug, *another* party — a hospital or retail pharmacy -—— will buy those drugs from *yet another* party, a wholesaler. The Reps don't discuss the price or quantity of the Novartis drugs that they detail. They have no contact with the person or entity paying money to buy a Novartis pharmaceutical. And a doctor cannot realistically "commit" to prescribe a drug because such a promise is unenforceable. (8a). There is little wonder, then, that in different litigation contexts such as product liability suits **Novartis and other drug manufacturers have argued that their Reps don't sell drugs**.[16] And it is just as unsurprising that in its annual Form 20-F public filings, Novartis sharply distinguishes between the

16. In *DaCosta v. Novartis Pharmaceuticals Corp.*, 242 F. Supp. 2d 765 (D. Or. 2002), a product liability suit, Novartis (Cont'd)

Reps' marketing duties and the Company's sale of prescription drugs "primarily to wholesale and retail drug distributors, hospitals, clinics, government agencies and managed healthcare providers."[17]

Novartis argues that the words "other disposition" in the FLSA's definition of "sale," 29 U.S.C. § 203(k) ("any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition"), extend the meaning of "sale" beyond a true sale or transfer of title to encompass the Reps' low-level promotional work. (Pet. 6, 24). The Second Circuit correctly rebuffed this construction, applying the canon of *ejusdem generis* and concluding that each of the examples in the statutory definition involves a transfer of title and an enforceable commitment to buy. (26a-27a). Indeed, federal courts interpreting the term "other disposition" in other statutes where those two words appear after the word

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filed an affidavit in which one of its Reps, Leonard Weaver, swore that:

> **"As a sales representative, I do not sell drugs to doctors or to anyone else…."**

In another product liability case, *Gordon v. Pfizer, Inc.*, 2006 WL 237002, at *5 (N.D. Ala. May 22, 2006), Pfizer proffered sworn declarations from its Pharmaceutical Representatives stating:

> At no time did I ever sell, offer to sell, or take orders for the sale of Bextra to healthcare providers, physicians or patients.

17. *See* Novartis SEC Filing, "AG Form 20-F," at 43 (2009), *available* at http://access.edgar-online.com, search Novartis, last 12 months.

"sales" have uniformly construed "other disposition" to require a transfer of title to property.[18]

Novartis's *amici* attempt to show that the outside sales exemption applies here by injecting into that exemption the broad definition of the term "sales" from the FLSA's **coverage** provisions. (PhRMA Am. Br. 15). That effort, too, misses its target. The FLSA covers enterprises that generate $500,000 of "business" or "sales" per year. 29 U.S.C. § 203(s). The regulatory definition of "sales" for purposes of the coverage provision states that "an employee who in any way participates in the sale of goods[] will be considered selling the goods." 29 C.F.R. § 779.241. *Amici*'s argument that this general coverage language overrides

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18. *Udall v. Tallman*, 380 U.S. 1, 19 (1965), ("'[S]ale' and 'entry' are…terms contemplating transfer of title…. It [is]…reasonable…to construe 'other disposition' to encompass only dispositions which like [those previously] enumerated…convey[]…title."). See also *Weisbart & Co. v. First National Bank*, 568 F.2d 391, 395 (5th Cir. 1978) (doctrine of *ejusdem generis* meant that "other disposition" language in provisions containing terms "sale, exchange, or other disposition" required transaction involving transfer of property).

To the same tenor are *In re McDonnell*, 224 B.R. 862, 869 (Bankr. S.D. Ga. 1998) (Under Uniform Commercial Code § 9-306(2) "a secured party loses its security interest in collateral when it authorizes…the 'sale,' 'exchange,' or **other disposition of the collateral.**" The Court held that "other disposition" refers to a transaction of the same general type as a sale or exchange. Thus, "other disposition" must meet the threshold test by effecting a transfer of property.).

the specific limitations in the outside sales regulations was properly rejected more than four decades ago in *Wirtz v. Keystone Readers Services, Inc.*, 418 F.2d 249, 261 (5th Cir. 1969) (citing "the rule that the coverage provision should be liberally construed while the exemptions are to be narrowly construed"). *Wirtz*'s ruling was followed in *Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F. Supp. 2d 308, 318 (D.Conn. 2008). Like the other claims of error discussed above, this specious argument supplies no basis for *certiorari*.

C. The Court Should Not Grant *Certiorari* to "Clarify" or Disturb *Auer*

Auer v. Robbins held that when the DOL's overtime regulations are deemed ambiguous, courts must give controlling deference to the agency's interpretation of its regulations, including interpretations set forth in an amicus brief, unless the construction is plainly erroneous. 519 U.S. at 461; *see also Federal Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008). *Auer* deference applies to administrative statements generally and is not limited to the context of overtime litigation. *See Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2473-77 (2009) (granting *Auer* deference to internal Environmental Protection Agency memorandum).

Auer provides a readily understandable rule that guards against inconsistent agency positions by directing greater scrutiny to changed interpretations. *See id.* Novartis does not and cannot claim that the circuits are divided on how *Auer* should be utilized. There is no circuit split. Federal courts throughout the

country have followed *Auer* without difficulty.[19] The Second Circuit properly granted *Auer* deference here. The positions taken by the DOL as *amicus* are consistent with the regulations and do not contradict any prior agency statements applying the overtime exemption regulations to the same or substantially similar facts. To the contrary, the DOL's *amicus* position conforms with seventy years of administrative practice establishing that: A) an outside salesman must obtain a commitment to buy and, consequently, mere promotional work is in no sense a sale; and B) an employee is an exempt administrator only if he exercises a "high" level of job discretion.

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19. *See, e.g., Sec'y of Labor v. Beverly Healthcare-Hillview*, 541 F.3d 193, 200 (3d Cir. 2008) (holding that the Secretary of Labor's interpretation of an OSHA regulation was reasonable and therefore entitled to *Auer* deference because it did not impermissibly strain the plain language of the regulation and the interpretation was consistent with the purpose of the regulation); *IntraComm, Inc. v. Bajaj*, 492 F.3d 285, 295-96 (4th Cir. 2007) (deferring to the DOL's interpretation of its regulation in an amicus brief where the regulation was ambiguous and the DOL's interpretation was consistent with the plain meaning of the regulation); *Rucker v. Lee Holding Co.*, 471 F.3d 6, 12 (1st Cir. 2006) (granting controlling weight to the DOL's interpretation of its regulation where the DOL's position was consistently held and consonant with the language of the regulation); *Archuleta v. Wal-Mart Stores, Inc. (In re Wal-Mart, Inc.)*, 395 F.3d 1177, 1185 (10th Cir. 2005) ("We see no reason to accord less deference to [DOL] Wage & Hour opinion letters than the Supreme Court gave to the position of the DOL set forth in an amicus brief to the Court,...particularly when, as shown below, the letters reflect a consistent view over an extended period of time....").

Novartis and *amici* argue (Pet. 28; Chamber of Commerce Am. Br. 3) that the Court should grant *certiorari* here in order to "clarify" *Auer*. The proffered "clarification," however, is unnecessary and unworkable and would throw administrative law into disarray. In *Auer's* place, Novartis and *amici* seem to propose a multi-tiered edifice with different degrees of deference to *amicus* briefs depending on whether a brief represents an agency's "considered" views. But agencies are by now well aware that their briefs may receive *Auer* deference and can monitor those filings accordingly. Further, in light of the DOL's seventy-year positions that (I) promoting is not selling and (II) "high-level" discretion alone satisfies the administrative exemption, there is certainly no reason to suspect that the DOL's *amicus* brief in this case did not reflect the Department's considered views or was a *post-hoc* rationalization.

The attack by Novartis and *amici* on the Second Circuit's use of *Auer* is a poorly disguised, result-oriented request for this Court to overturn *Auer* and prevent the DOL from submitting effective *amicus* briefs in pending overtime litigation. Tinkering with settled administrative law for that narrow purpose would only generate uncertainty without redeeming benefits. The appropriateness of *Auer* deference in this matter is not a close call for ordering certiorari.

D. *Certiorari* Should Be Denied Because Novartis's and Its Amici's Assertions of Surprise and Damage to Pharmaceutical Manufacturers Are Belied by the Drug Industry's Own Actions

Just six months ago, Pfizer entered into a multi-billion dollar "Corporate Integrity Agreement" with the federal government after the Company illegally promoted "off-label" uses for its drug Bextra.[20] As part of the settlement, Pfizer's sales representatives **must** carry a "Tablet PC system" laptop computer whenever they visit doctors' offices on detail calls. The "Tablet" instantly records interactions between a Pfizer Rep and a physician and stores this information on a centralized computer.[21]

Even though the Tablet markedly reduces a Rep's job flexibility, Pfizer has expressed enthusiasm for this innovation and stated that **"all Reps are incredibly supportive of this."**[22]

Undoubtedly, Pfizer is one member of the pharma amici chorus here lending its voice to the Petition's plaint that paying a Rep overtime wages will rob the Reps of their job freedom and cripple Novartis. But when Pfizer signed the Corporate Integrity Agreement

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20. Corporate Integrity Agreement, available at http://oig.hhs.gov/fraud/cia/agreements/pfizer_inc_08312009.pdf.

21. *See* Peter Loftus, *Pfizer Adds New Type of Tablet to Sales Call, Giant Rolling Out Portable PC System Designed to Ensure Salespeople Comply with Regulations on Drug Marketing*, WALL STREET JOURNAL, Dec. 15, 2009, at B4.

22. Statement of David Kreutter, Pfizer's VP of commercial Operations, *Id.*

with the government, it praised the Tablet system even though a Tablet diminishes a Pfizer Rep's customary job discretion. This inconsistency parallels the pharma companies' posturing in product-liability suits. In those cases they insist that their Reps don't sell drugs, but here they shift gears and peddle a counter-narrative, expressing "shock" over the Second Circuit's ruling and the DOL's position that Reps are not outside salespeople. Such flip-flopping on both exemptions undermines the plea of "surprise" which is the main theme of Novartis's Petition for *certiorari*.

CONCLUSION

The Second Circuit's ruling that the Respondent-Reps fall outside the FLSA's administrative exemption is a fact-specific, narrow decision predicated largely on the rigorous control which Novartis exercises over its Reps. There is no circuit conflict regarding the legal standard under the exemption. All courts agree with the DOL's seventy-year-old position that an employee must exercise a "high" level of discretion and independent judgment to become an exempt administrator. Moreover, the Second Circuit addressed only part of the administrative exemption's prerequisites and therefore this exemption is poorly postured to be decided here.

Just as unsuitable for review is the Second Circuit's finding that the Reps are not exempt outside salespersons. For over seventy years, the DOL and courts have agreed that promoters – like the Respondent Reps – are not sellers. Thus far, there is no circuit split on whether the outside sales exemption covers pharmaceutical Reps.

Finally, Novartis's and amici's request for "*Auer* clarification" and their policy arguments for granting *certiorari* are baseless.

The Petition for *certiorari* should be denied in its entirety.

Respectfully Submitted,

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