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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. The Decision Below Presents Important Legal Issues With Far-Reaching Ramifications

The Second Circuit's alteration of the legal standards governing the administrative and outside sales exemptions under the Fair Labor Standards Act ("FLSA") has far-reaching significance. These new standards determine whether American businesses must restructure their workforces to comply with the FLSA and are liable for massive retroactive overtime pay. Unquestionably, that is why the Chamber of Commerce has appeared as an amicus curiae in support of the Petition.

Respondents nevertheless portray the Second Circuit's decision as "fact-specific", "narrow" and without "wide-ranging consequences". Opp. 2. But Respondents' contention that the decision is limited to "a single company" with "suffocating controls", Opp. 22, fails to explain why every major pharmaceutical company has been confronted with the same allegations concerning their sales reps—including by Respondents' counsel;[1] and why the Department of Labor ("DOL") filed an unsolicited amicus brief below and then argued that the Ninth Circuit should follow *Novartis* because SmithKline's

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[1] *E.g.,* Reply Mem. of Law in Further Support of Mot. for 216(B) Notice at 14 n.16, *Amendola v. Bristol-Myers Squibb Co.*, No. 07-Civ.-6088, (S.D.N.Y. Feb. 29, 2008), ECF No. 40 (arguing that "[sales reps] today are constrained by FDA oversight and regulation . . . . [They] must follow strict guidelines when promoting products and . . . do not have a wide degree of discretion").

sales reps are "nearly identical" to Novartis's. *See* Br. for DOL as Amicus Curiae Supporting Pls.-Appellants at 13-14, 22, *Christopher v. SmithKline Beecham Corp.*, No. 10-15257 (9th Cir. Aug. 10, 2010), ECF No. 34.

Indeed, the decision below already has impacted not only other pharmaceutical companies, *see Harris v. Auxilium Pharms., Inc.*, No. 4:07-cv-3938, 2010 WL 3817150, at *3-4 (S.D. Tex. Sept. 28, 2010) (granting plaintiffs' motion for reconsideration and "adopt[ing] the reasoning of the Second Circuit" on both exemptions), but also other industries, *e.g., Harper v. Gov't Emps. Ins. Co.*, — F. Supp. 2d —, No. CV09-2254, 2010 WL 4791635, at *4-5 (E.D.N.Y. Nov. 16, 2010) (*Novartis* is "binding" law on the administrative exemption).

II. The Second Circuit's Rejection of the Administrative Exemption Is in Square Conflict with Decisions of the Third and D.C. Circuits

The decision below creates a split among the courts of appeals in two critical (and independent) respects: first, regarding the application of the administrative exemption to pharmaceutical sales reps specifically, *see Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010); and second, regarding the application of the administrative exemption to employees generally, *see Robinson-Smith v. Gov't Emps. Ins. Co.*, 590 F.3d 886 (D.C. Cir. 2010). Respondents' contention that "there is no circuit split" because "[e]ach case turn[s] on its own facts", Opp. 18, is demonstrably wrong.

As to the circuit conflict directly involving pharmaceutical sales reps, Third Circuit cases subsequent to *Smith* make clear that the decision sustaining the administrative exemption is not a one-off ruling confined to the facts of the case. On the contrary, in *Baum v. AstraZeneca LP,* the Third Circuit applied *Smith* to uphold the administrative exemption for an AstraZeneca sales rep because her "duties were very similar to the plaintiff's duties in *Smith*". 372 Fed. App'x 246, 249 (3d Cir.), *cert. denied*, 131 S. Ct. 332 (2010). Similarly, in *Jackson v. Alpharma, Inc.*, the district court rejected plaintiffs' attempt to distinguish *Smith* on factual grounds. No. 07-3250, 2010 WL 2869530, at *4 (D.N.J. July 19, 2010). Although acknowledging that, in contrast to *Smith*, there was no "direct testimony of the plaintiffs regarding their autonomy and independent nature," the court nonetheless found that "the underlying facts differ little from the facts in *Smith*". *Id.* Finding the sales reps' exempt status "clear" under *Smith* and *Baum*, the court declined even to consider the Second Circuit's decision. *Id.* at *4-5.

Contrary to Respondents' contentions, Opp. 21 & n.13, had these cases been governed by *Novartis*, rather than *Smith*, the outcomes would have been different because the Second Circuit created a materially different legal standard in mistaken deference to DOL. Under the Second Circuit's new heightened standard for "discretion and independent judgment", the application of the same statute to the same facts—an environment strictly controlled by FDA regulations—produces different results depending on whether the parties litigate in the

Second or Third Circuit. Despite Respondents' denials, both sales reps and pharmaceutical companies appear to understand that there are two different legal regimes, as evidenced by recent motions to transfer venue to the Second Circuit by plaintiff-sales reps and motions to transfer venue to the Third Circuit by drug company-defendants.[2] Averting forum shopping fomented by a circuit split is another reason for the Court to act now. *See Yee v. City of Escondido*, 503 U.S. 519, 538 (1992).

There is also an irreconcilable split between the decision below and the D.C. Circuit's decision in *Robinson-Smith*. Again, Respondents argue that the facts in the two cases are distinct. Opp. 19-20. But, again, the difference lies in the governing legal standard. In the D.C. Circuit, the exercise of "some discretion" in matters of significance would have clearly qualified Novartis's sales reps for the administrative exemption.[3] *Robinson-Smith*, 590

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[2] *See* Pl.'s Mot. for Transfer, *In re Boehringer Ingelheim Pharms., Inc. Overtime Pay Litig.*, No. 10-cv-22398-UU (J.P.M.L. Dec. 6, 2010), ECF No. 54; Mem. in Supp. of Def.'s Mot. to Transfer, *Heldman v. King Pharms., Inc.*, No. 3:10-cv-01001 (M.D. Tenn. Nov. 19, 2010), ECF No. 12; Mem. in Supp. of Mot. to Transfer Venue, *Quinn v. Endo Pharms, Inc.*, No. 10-11230 (D. Mass. Oct. 21, 2010), ECF No. 13.

[3] As the district court noted, it is "self-evident" that sales reps' discretionary activities relate to matters of significance because reps seek "to influence prescription writing practices—a matter of great consequence" to pharmaceutical companies' business. App. 77a (internal quotation omitted).

F.3d at 893-94 ("Although the parties disagree on how much discretion the adjuster exercises, no one disputes that he exercises 'some'."). In the Second Circuit, however, "some discretion" is legally insufficient.[4]

This conflict in legal standards is underscored by a recent decision in the Eastern District of New York involving the application of the administrative exemption to a class of GEICO telephone adjusters. *See Harper*, 2010 WL 4791635, at *1. In *Robinson-Smith*, the D.C. Circuit characterized telephone adjusters as being at "the higher end of the responsibility scale", exercising more discretion and independent judgment than the auto damage adjusters at issue in that case, whom the court found were exempt. 590 F.3d at 888, 897. Nonetheless, although acknowledging that *Robinson-Smith* was "particularly on point", "well-reasoned" and "persuasive", the court held that the administrative exemption did not apply to telephone adjusters

[4] According to Respondents, DOL has stated that the administrative exemption requires a "high level of discretion and independent judgment". Opp. 8-9 (citing authorities). This contention, however, is not supported by the authorities Respondent cites. The 1997 DOL opinion letter involves wholesalers and merely restates the governing regulations regarding use of skill in applying well-established techniques. The Weiss Report concerns the first prong of the exemption and is inapplicable here. Respondents' argument is further belied by the 2004 Final Rule, which clarified that the exemption requires only that the employee's primary duty "include" the exercise of discretion and independent judgment. App. 142a.

because *Novartis*, which controls in the Second Circuit, represents "a very narrow interpretation of the FLSA administrative exemption". *Harper*, 2010 WL 4791635, at *4-5.[5]

III. The Decision Below Is a Sharp Break from Settled Regulatory Standards That Upsets Justified Expectations.

Respondents' characterization of the Second Circuit decision as "nothing new or surprising"—a "straightforward" application of "settled" regulatory standards, Opp. 1, 3—is an exercise in revisionism that ignores both the roots and evolution of the exemptions, culminating in the 2004 notice-and-comment rulemaking, as well as the historic treatment of pharmaceutical sales reps for the last seven decades. *See* Pet. 3-8, 12-14.

The Second Circuit's abrupt alteration of the legal standards that determine whether millions of workers are entitled to overtime pay conflicts with the DOL regulations from 1940 to 2004. Contrary to Respondents' contention, Petitioner does not rely on

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[5] Respondents make much of the Second Circuit's failure to address the first prong of the exemption, arguing that this somehow makes the Second Circuit's rejection of the exemption's "discretion and independent judgment" prong "unsuitable for *certiorari*". Opp. 20. Unsurprisingly, Respondents cite no authority for this proposition because there is none. On the contrary, the Court routinely grants *certiorari* to review important questions of law even where another issue may be left to resolve on remand. *See, e.g.*, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

a "solitary" DOL opinion, Opp. 4. The pharmaceutical industry's long-standing and universal treatment of sales reps as exempt employees rests on this long regulatory history and most importantly on DOL's 2004 regulations, which codified the applicable standards for the administrative and outside sales exemptions.

The Second Circuit decision merits review because it permits DOL to rewrite the FLSA's white-collar exemptions by means of an amicus brief. To dismiss such a reversal blithely, as Respondents do, *see* Opp. 22-23, is to ignore entirely industry's decades of reliance on the text and history of the statute, Pet. 3-5, its implementing regulations, Pet. 5-8, and judicial precedent, Pet. 13; App. 58a-61a. It was upon this authority that the district court grounded its holding that both exemptions applied to Novartis's sales reps. Pet. 15; App. 40a, 62a, 68a-69a, 78a-79a. Instead, the Second Circuit relied myopically upon DOL's unsolicited amicus brief espousing a narrow view of both exemptions, eschewing their purposeful and historic breadth.

Petitioner's treatment of its sales force as exempt, like the rest of the pharmaceutical industry, is consistent with the governing law. It is a reasonable expectation that the statute and governing regulations will control a court's analysis, and not an amicus brief misinterpreting statutory language and changing DOL's prior considered positions. That employers bear the burden of FLSA compliance, *see* Opp. 23, only heightens the necessity of deliberative and considered rule-making rather than *ad hoc* regulation by amicus brief. Employers should not be required to guess at their peril when

and how DOL might change its mind. This is particularly true when a consequence of guessing wrong is the imposition of massive retroactive liability.

The administrative exemption is premised on the breadth and flexibility of its two prongs, the demonstrated intent of Congress and DOL to make it the most open-ended and flexible of exemptions, and the codification by DOL of decisional law affirming the standard that only "some" discretion in matters of significance is required. The 1945 DOL opinion letter upholding the administrative exemption for medical detailers and the decision in *Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883 (E.D. Pa. 1982), reaching the same conclusion with respect to sales reps thirty-seven years later, provide added justification for the industry's decades-old practice treating its sales reps as exempt administrative employees. Pet. 12-13.

As for the outside sales exemption, the Second Circuit's disregard for the FLSA's expansive definition of sales—which controls the application of the outside sales exemption for all industries—conflicts with the statutory text, DOL regulations and judicial precedent. The 2004 regulations reiterate DOL's long-standing principle, first invoked in the wake of the FLSA's enactment, that the exemption only requires a sale "in some sense". Pet. 6. The decision below instead requires that sales reps make sales *in every sense*, including a formal transfer of title, contrary to the regulations. Pet. 16,

26; App. 27a-29a. Such a rigid interpretation dramatically changes prior law.[6]

Indeed, the Second Circuit decision is at odds with numerous decisions of other courts of appeals on the outside sales exemption. The conflict created by the decision pertains to the statutory definition of "sale", which applies throughout the FLSA, 29 U.S.C. § 203. Tellingly, Respondents do not even attempt to distinguish the cases cited in the Petition that have rejected a "transfer of title" standard under the FLSA. Pet. 25-26.

No interpretative canon can avoid the purposefully broad and flexible definition that Congress gave the term "sale" under the FLSA. The Second Circuit and DOL's attempt to rewrite the regulations fails utterly in light of Congress's broad definition of sales and its application throughout the

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[6] Respondents have parroted the Second Circuit's erroneous misstatement of the statutory and regulatory text by insisting that a sale "*involves*" a transfer of title or commitment to buy. Opp. 12, 25 (emphasis added). The view that a sale must "involve" a transfer of title is nowhere to be found in the statute or its regulations. The FLSA states that "'sale' or 'sell' *includes any sale*, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition*". App. 93a (emphases added). DOL expressly incorporated this definition into its regulations for the outside sales exemption, which state that sales "*include* the transfer of title", App. 107a (29 C.F.R. § 541.501(b)) (emphasis added); *see also* Stein Report at 46 (requiring only a "sale in some sense"). The language of the statute and regulations is expansive and illustrative, not limiting. Pet. 24-25.

FLSA. Pet. 24-25. Because the construction at issue is a statutory definition, not an exemption, and because the statutory language and intent of Congress are clear, the "narrowly construe" canon of construction does not apply. Pet. 23. *See Yi v. Sterling Collison Ctrs., Inc.*, 480 F.3d 505, 508 (7th Cir. 2007).

In substituting its judgment for Congress's language, the Second Circuit ignores fundamental principles of statutory construction: that the statutory definition controls (over a conventional definition) and that defined terms are interpreted consistently throughout a statute. The decision assigns different meanings to the definition of "sale" depending on individual circumstances. DOL interprets the statutory definition of sale in its regulations entitled "Selling" as "in any way participat[ing] in the sale", noting that if an 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. Respondents criticize amicus PhRMA's invocation of this "general coverage language" over "the specific limitations in the outside sales regulations", Opp. 27-28, but this criticism overlooks the basic premise that identical words must have the same meaning throughout a statute, *see Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860-61 (1986).

Respondents mischaracterize sales reps as promotion or missionary men who do work that is merely incidental to sales made by another. Opp. 12-13; *see* App. 108a-109a (29 C.F.R. § 541.503(a)). There is no one else in the pharmaceutical industry

who bears the indicia of an outside salesman and for whom sales reps pave the way to make the ultimate sale. The sales reps are often the only point of personal contact between pharmaceutical companies and physicians, who dictate what drugs are purchased though their prescriptions. Pet. 9. Under the Second Circuit's and Respondents' interpretation, pharmaceutical companies generate billions of dollars in sales revenue without any salesmen. This defies common sense and the treatment of the same sales reps by other federal agencies, *see* Pet. 27 n.13.

IV. Review Is Warranted To Address the Application of *Auer v. Robbins* When an Agency's Abrupt Change in Position Upsets Long-Settled Expectations

Respondents assert that *Auer v. Robbins*, 519 U.S. 452 (1997), "provides a readily understandable rule" and clarification is "unnecessary". Opp. 28-30. But confusion abounds over *Auer*'s parameters, warranting the Court's review. Pet. 30-31; PhRMA Amicus Br. 5-13.

First, the Second Circuit applied *Auer* without finding that the regulations were ambiguous, a prerequisite to *Auer* deference. *See Auer*, 519 U.S. at 462-63. The failure of the decision below to engage in any analysis of even this basic premise before applying *Auer* demonstrates the need for this Court

to clarify what *Auer* deference is and when it should be applied.[7]

Second, Respondents belittle NPC's concern about whether DOL's amicus brief represented the agency's "considered" views. Opp. 30. But the *Auer* Court found "no reason to suspect that [DOL's] interpretation does not reflect the agency's fair and considered judgment" in part *because* DOL's approach did not impose "massive and unanticipated [] liability". 519 U.S. at 461-62. Here, in contrast, DOL's amicus position does impose massive and unanticipated liability by rewriting its 2004 Final Rule after it had undergone two decades of public scrutiny and congressional hearings. Thus here, unlike in *Auer*, there is good reason to believe the agency's amicus position does not reflect its "fair and considered judgment".

Finally, and perhaps most incredibly, is Respondents' assertion that *Auer* "guards against inconsistent agency positions by *directing greater scrutiny* to changed interpretations". Opp. 28 (emphasis added). If that were *Auer*'s clear and "readily understandable rule", it somehow eluded the Second Circuit. DOL's amicus position is an abrupt departure from its formal rulemaking, yet the Second Circuit uncritically deferred to DOL's amicus position without even acknowledging its drastic change from DOL's historic treatment of

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[7] Respondents' contention that the Court cannot grant a petition for certiorari to clarify its jurisprudence is unfounded. *E.g.*, *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 433 (2002).

pharmaceutical sales reps or the 2004 Final Rule's endeavor to streamline and clarify the white-collar exemptions. Moreover, lower courts have wrestled over the effect of an agency's change in position on the application of *Auer* deference, without any clear consensus. *See* PhRMA Amicus Br. 5-9 (citing authorities). That uncertainty over Respondents' very proposition only highlights the need for the Court's clarification of *Auer*.

Respondents wrongly characterize Novartis's position as a "request . . . to overturn *Auer*". Opp. 30. As the Petition states, *Auer* deference has an appropriate place in the Court's administrative law jurisprudence. What all litigants and the lower courts need is the Court's guidance as to what precisely that place is.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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