No. 11-204

In the Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER, ET AL., PETITIONERS

v.

SMITHKLINE BEECHAM CORPORATION,
DBA GLAXOSMITHKLINE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, imposes minimum-wage and overtime-pay requirements on covered employers. The FLSA exempts from those requirements "any employee employed * * * in the capacity of outside salesman." 29 U.S.C. 213(a)(1). The question presented is as follows:

Whether the FLSA's "outside salesman" exemption applies to pharmaceutical sales representatives who promote but do not sell their company's drugs to physicians.

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INTEREST OF THE UNITED STATES

This case presents the question whether the "outside salesman" exemption of the Fair Labor Standards Act of 1938 (FLSA or Act), 29 U.S.C. 213(a)(1), applies to pharmaceutical sales representatives who promote but do not sell drugs to physicians. The Secretary of Labor is responsible for administering and enforcing the FLSA, and is authorized to promulgate regulations "defin[ing] and delimit[ing]" the terms used in the exemption. 29 U.S.C. 213(a)(1). Pursuant to that authority, the Secretary has determined through notice-and-comment rulemaking that the "outside salesman" exemption does not encompass workers who promote their

employers' products in order to facilitate sales by other company employees. The United States therefore has a significant interest in the resolution of the question presented here.

STATEMENT

1. In 1938, Congress enacted the FLSA to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. 202(a). To address substandard working conditions, Congress required employers covered by the Act to pay their employees a minimum wage for all hours worked. 29 U.S.C. 206 (2006 & Supp. IV 2010). The FLSA also requires covered employers to pay their employees at a rate of one and one-half times their regular rate of pay for time worked in excess of 40 hours in a workweek. 29 U.S.C. 207 (2006 & Supp. IV 2010).

Those minimum-wage and overtime-pay requirements, however, do not apply to

> *any employee employed* in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or *in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary*, subject to the provisions of subchapter II of chapter 5 of title 5 * * *).

29 U.S.C. 213(a)(1) (emphasis added). This case presents the question whether a pharmaceutical sales representative who promotes but does not sell drugs to physicians is employed "in the capacity of outside salesman."

2. In 1938, 1940, and 1949, the Secretary promulgated regulations interpreting the "outside salesman" exemption. At least by 1949, those regulations distinguished between exempt outside salesmen (who consummated their own sales) and nonexempt promoters (who stimulated the overall sales of their companies but did not consummate their own sales). See 14 Fed. Reg. 7730 (Dec. 28, 1949) (codified at 29 C.F.R. 541.500-504 (Cum. Supp. 1962)). In both 1940 and 1949, after holding hearings, the Department of Labor (Department) issued reports on proposed changes to the regulations. See U.S. Dep't of Labor, Wage & Hour Div., *"Executive, Administrative, Professional . . . Outside Salesman" Redefined: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition* (Oct. 10, 1940) (*Stein Report*); U.S. Dep't of Labor, Wage & Hour & Public Contracts Div., *"Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman": Report and Recommendations on Proposed Revisions of Regulations, Part 541* (June 30, 1949) (*Weiss Report*).

On both occasions, regulated parties asked that "promotion men and others engaged in 'indirect sales' be included within the definition of 'outside salesman.'" *Weiss Report* 82; see *Stein Report* 46. Both times, the Department declined to define the exemption in a manner that would encompass promotional activities. See *id.* at 46-47; *Weiss Report* 82-84. The Department concluded in 1940 that "it would be an unwarrantable extension of the Administrator's authority to describe as a salesman anyone who does not in some sense make a sale." *Stein Report* 46. The agency reaffirmed in 1949 that "the test is whether the person is actually engaged

in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling." *Weiss Report* 83.

The Department's FLSA regulations remained virtually unchanged for 55 years. In 2004, following notice-and-comment procedures, the Department revised its "outside salesman" regulations. See 69 Fed. Reg. 22,122 (Apr. 23, 2004) (revising 29 C.F.R. 541.500-504). Those revisions, however, did not make any relevant substantive changes. The regulations continue to provide that an outside salesman must be primarily engaged in making sales or obtaining service orders, 29 C.F.R. 541.500(a)(1)(i)-(ii); that making sales of goods requires the transfer of title to those goods, 29 C.F.R. 541.501(b); and that promotional work is not exempt unless it is directed toward consummation of the employee's own sales, 29 C.F.R. 541.503.

The current regulations thus maintain the distinction between sales work and promotional work that the Department first articulated in the 1940s, even though several commenters requested during the 2004 rulemaking that the distinction be eliminated. See 69 Fed. Reg. at 22,162. The United States Chamber of Commerce, for instance, argued that "promotional activities, even when they do not culminate in an individual sale, are nonetheless an integral part of the sales process." *Ibid.* The Department responded in the regulatory preamble that it did not "intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders for contracts for services." *Ibid.* The Department explained

that "[a]n employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales." *Ibid.* The Department concluded that "[e]xtending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test." *Ibid.*

3. Petitioners Michael Shane Christopher and Frank Buchanan were formerly employed as pharmaceutical sales representatives (PSRs) by respondent SmithKline Beecham Corporation dba GlaxoSmithKline (GSK). Petitioners visited physicians within their assigned territories, presented them with information concerning GSK medications, and attempted to persuade the physicians to prescribe those GSK medications to their patients. Pet. App. 4a. In preparation for those visits, GSK trained petitioners on how to promote its products to doctors. *Id.* at 5a-6a. GSK then provided petitioners with information on the doctors' prescribing habits, "[c]ore [m]essages" that should be included in petitioners' presentations, a budget for social events with the physicians, and sample products for distribution to the physicians. *Id.* at 4a-5a.[1]

Although GSK recruits applicants with prior sales experience for its PSR positions, PSRs are prohibited by federal law from selling samples, taking orders for any medication, or negotiating drug prices or contracts with

[1] This brief uses the term "PSR" to refer to those representatives who, like petitioners, are responsible for promoting but not selling pharmaceutical products to physicians. To the extent that companies employ outside representatives who actually sell pharmaceutical products to retailers and wholesalers, those employees may fall within the "outside salesman" exemption.

either physicians or patients. Pet. App. 5a. A pharmaceutical company like GSK must sell its medications to distributors or retail pharmacies, which then dispense those medications to patients as authorized by licensed doctors' prescriptions. *Id.* at 4a. Although PSRs may seek nonbinding oral commitments from physicians to prescribe GSK medications, it is impossible to determine with certainty whether a PSR's promotional work induced any particular prescription. GSK therefore pays incentives based on the overall performance of a given product in a PSR's assigned territory. *Id.* at 6a-7a, 46a. GSK aims for a PSR's total compensation to be approximately 75% salary and 25% incentive-based. *Id.* at 7a.

4. Petitioners brought suit, alleging that respondent had violated the FLSA by failing to pay compensation for overtime work. Pet. App. 9a. The district court granted respondent's motion for summary judgment. *Id.* at 37a-47a. The court appeared to recognize that the Department interprets the "outside salesman" exemption to apply only when an employee "is actually engaged in activities directed toward the consummation of his own sales." *Id.* at 40a (quoting 69 Fed. Reg. at 22,163). The court determined, however, that "a PSR engages in what is the functional equivalent of an outside salesperson," and it declined "to adopt a hypertechnical construction of the regulations that runs counter to the purpose of the Act." *Id.* at 46a. Petitioners subsequently moved to alter or amend the judgment, relying on an amicus brief filed by the Department in *In re Novartis Wage & Hour Litigation*, 611 F.3d 141 (2d Cir. 2010), cert. denied, 131 S. Ct. 1568 (2011). The district court denied that motion, concluding that the

Department's interpretation was not entitled to any deference. Pet. App. 48a-52a.

5. The court of appeals affirmed. Pet. App. 1a-36a. As in *Novartis*, the Department filed an amicus brief arguing that PSRs are not covered by the FLSA's "outside salesman" exemption. *Id.* at 16a-17a; see *id.* at 64a-90a. The court of appeals recognized that "a proper interpretation of the FLSA is necessarily guided by the regulations issued by the Secretary of Labor." *Id.* at 12a. The court further recognized that, "[i]n the regulations, the Secretary draws a distinction between sales work and promoting." *Id.* at 14a. The court of appeals nevertheless ruled in respondent's favor, holding that the Secretary's position was not entitled to deference because (in the court's view) the pertinent regulations simply paraphrase the language of the FLSA. *Id.* at 21a-22a. In the alternative, the court held that deference was unwarranted because "the Secretary's position is both plainly erroneous and inconsistent with her own regulations and practices." *Id.* at 24a; see *id.* at 25a-36a.

SUMMARY OF ARGUMENT

A. The FLSA authorizes the Department to "define[] and delimit[]" the terms used in 29 U.S.C. 213(a)(1). The Department has long taken the position that the term "outside salesman" is limited to employees who make their own sales, and does not encompass workers who perform promotional functions that facilitate sales by others. Under that approach, petitioners were not covered by the exemption because they promoted GSK's products to physicians but were legally barred from selling those products to either doctors or patients. Indeed, the link between petitioners and any ultimate sales was

particularly attenuated because the physicians with whom petitioners interacted were not the intended purchasers of the products in question.

B. The Department's regulations "defin[ing] and delimit[ing]" the scope of the "outside salesman" exemption are entitled to judicial deference. Those regulations accord with the usual understanding of the term "salesman" as referring to persons who sell. The longstanding regulatory distinction between exempt outside sales work and nonexempt promotional work also provides a readily administrable standard. Regulated employers have repeatedly asked the Department to extend the "outside salesman" exemption to workers who promote products and thereby facilitate sales by others, and the Department has repeatedly declined to take that step.

C. To the extent that the Department's regulations are ambiguous, the agency has repeatedly interpreted those rules not to exempt promotional work of the type that petitioners perform. In a variety of documents, the Department has reaffirmed the basic distinction between employees who make their own sales and employees whose promotional activities facilitate sales by others. In amicus briefs filed in this and other recent cases, the agency has addressed the application of that principle to PSRs and has argued that PSRs are not exempt "outside salesm[e]n" because they do not make sales. The agency's interpretation of its own regulations is entitled to judicial deference.

ARGUMENT

THE FLSA'S "OUTSIDE SALESMAN" EXEMPTION APPLIES TO EMPLOYEES WHO SELL GOODS OR SERVICES, NOT TO EMPLOYEES WHO PROMOTE GOODS OR SERVICES IN ORDER TO FACILITATE SALES BY OTHERS

In exercising her statutory authority to "define[] and delimit[]" the term "outside salesman," 29 U.S.C. 213(a)(1), the Secretary has long distinguished between direct sales work (which is exempt) and promotional work that may eventually result in sales by others (which is not exempt). Federal law prohibits PSRs from directly selling pharmaceutical products to physicians or patients. Under the Labor Department's longstanding regulatory approach, employees like petitioners, who promote but do not directly sell their companies' products, are not employed "in the capacity of outside salesm[e]n." *Ibid.*

A. The Department's Regulations Distinguish Between Direct Sales Work And Promotional Work That May Result In Sales By Others

1. Congress expressly authorized the Department to define and delimit the scope of the "outside salesman" exemption

The "outside salesman" exemption appears within a broader exemption that also covers executive, administrative, and professional employees, and within a statute that contains other exemptions as well. The FLSA does not define the term "outside salesman," but provides instead for that term to be "defined and delimited from time to time by regulations of the Secretary." 29 U.S.C. 213(a)(1). The FLSA thus explicitly "leaves gaps" in the

statutory scheme and "provides the Department with the power to fill these gaps through rules and regulations." *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 165 (2007). Here, as in *Long Island Care at Home*, "[t]he subject matter of the regulation in question concerns a matter in respect to which the agency is expert, and it concerns an interstitial matter, *i.e.*, a portion of a broader definition, the details of which * * * Congress entrusted the agency to work out." *Ibid.*

2. The Department's regulations interpret the "outside salesman" exemption to apply only to employees who consummate sales of goods or services

In the 1930s and 1940s, after consulting with representatives of industry and labor, the Department issued regulations that interpreted the "outside salesman" exemption. In 2004, following notice-and-comment procedures, the Department revised and reissued those regulations. See 69 Fed. Reg. at 22,122. Three of those regulations—the general "outside salesman" regulation, 29 C.F.R. 541.500; the making-sales regulation, 29 C.F.R. 541.501; and the promotion-work regulation, 29 C.F.R. 541.503—are directly relevant here. The general regulation specifies that the main duty of an outside salesman must be to sell goods or services away from the employer's place of business; the making-sales regulation specifies that selling goods or services means transferring title to property (in the case of goods) or taking orders (in the case of services); and the promotion-work regulation specifies that promotional work is exempt only if it is incidental to an employee's own outside sales. Taken as a whole, the Department's

regulations draw a clear distinction between exempt sales work and nonexempt promotional work.

a. The Department has promulgated a "[g]eneral rule for outside sales employees," 29 C.F.R. 541.500, which recognizes that the words "outside" and "salesman" in 29 U.S.C. 213(a)(1) impose two distinct requirements for exempt status. An employee works "outside" if he "is customarily and regularly engaged away from the employer's place or places of business in performing [his] primary duty." 29 C.F.R. 541.500(a)(2); see 29 C.F.R. 541.502 (defining what it means to work away from an employer's place of business). PSRs typically satisfy that requirement because they "usually work outside of a [GSK] office and spend much of their time traveling to the offices of, and working with, physicians within their assigned geographic territories." Pet. App. 4a.

An employee is a "salesman" if his "primary duty" is "making sales within the meaning of [29 U.S.C. 203(k)]" or "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." 29 C.F.R. 541.500(a)(1)(i)-(ii); see 29 C.F.R. 541.700(a) (defining an employee's "primary duty" as "the principal, main, major or most important duty that the employee performs"); 29 C.F.R. 541.2 (providing that an employee's status as exempt or nonexempt is determined by his "salary and duties," not his "job title alone"). As explained below, the making-sales prong of that test refers to the sale of goods, and the obtaining-orders prong refers to the sale of services. The general regulation thus interprets the term "salesman" to encompass any employee whose primary job is selling goods or services. Because it is undisputed that

petitioners did not obtain orders for services, see Pet. App. 21a, the salient question is whether they sold goods, *i.e.*, whether they were "making sales within the meaning of [29 U.S.C. 203(k)]."

The FLSA provides that the term "'[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. 203(k). The general "outside salesman" regulation incorporates that definition by providing that an employee qualifies as a "salesman" under Section 213(a)(1) if he makes "[s]ale[s]" under Section 203(k). To be sure, the general regulation does not define what it means to "mak[e]" sales; that is the subject of a companion regulation discussed below. But the general regulation does specify that "[i]n determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's *own outside sales or solicitations* * * * shall be regarded as exempt outside sales work." 29 C.F.R. 541.500(b) (emphasis added). The general regulation thus presumes that the "primary duty of an outside sales employee" is making "the employee's own outside sales or solicitations."

b. The Department also has promulgated a regulation that defines "[m]aking sales" or "[o]btaining orders." 29 C.F.R. 541.501. It specifies that "[s]ales within the meaning of [Section 203(k)] 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). Under the regulation, an employee who transfers title to tangible goods (like automobiles or shoes) is a salesman, as is an employee who transfers title to tangible evidences of intangible property (like stocks, bonds, or insurance policies). An em-

ployee does not make a "sale" for purposes of the "outside salesman" exemption unless he actually transfers title to the property at issue.[2]

c. The Department has promulgated an additional regulation that specifically addresses "[p]romotion work." 29 C.F.R. 541.503. That rule explains that "[p]romotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed." 29 C.F.R. 541.503(a). Under the regulation, "[p]romotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work." *Ibid.* By contrast, "promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work." *Ibid.*

The regulation further clarifies the scope of the "outside salesman" exemption by giving examples of exempt and nonexempt promotional work. For instance, the regulation discusses "a company representative" who visits a store and performs various tasks that include "consult[ing] with the store manager when inventory runs low" but do not include "obtain[ing] a commitment for additional purchases." 29 C.F.R. 541.503(c). Under the regulation, such a representative "does not consum-

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[2] The regulation recognizes that outside sales work includes not only "the sales of commodities" but also "obtaining orders or contracts for services or for the use of facilities." 29 C.F.R. 541.501(c) (internal quotation marks omitted). Use of "[t]he word 'services' extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order." 29 C.F.R. 541.501(d). With services as with goods, however, an employee qualifies as a "salesman" under 29 U.S.C. 213(a)(1) only if he actually sells or takes an order.

mate the sale nor direct efforts toward the consummation of a sale," and his in-store promotional activities are "not exempt outside sales work." *Ibid.* The regulation further explains that a "manufacturer's representative" is exempt as an outside salesman only if his "primary duty is making sales or contracts." 29 C.F.R. 541.503(b). "Promotion activities directed toward consummation of the employee's own sales are exempt," the regulation reiterates, whereas "[p]romotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work." *Ibid.*

3. Under the Department's regulations, petitioners were not outside salesmen because they did not, and legally could not, sell respondent's products to physicians or patients

The pertinent Labor Department regulations unambiguously provide that an employee is an "outside salesman" only if his primary duty is selling goods or services away from his employer's place of business; see 29 C.F.R. 541.500(a)(1)(i); that an employee sells goods only if he transfers title to those goods to the buyer, 29 C.F.R. 541.501(b); and that an employee's promotional activities are exempt only if they are incidental to and in conjunction with that employee's own outside sales, 29 C.F.R. 541.503(a). The regulations thus make clear that an employee who extols a product's virtues in order to facilitate sales by others does not qualify for the "outside salesman" exemption. See *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 153 (2d Cir. 2010) (*Novartis*) ("[T]he 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 the sale."), cert. denied., 131 S. Ct. 1568 (2011).

Petitioners' primary duty was to persuade physicians of the merits of GSK products, thereby increasing the likelihood that the doctors would prescribe GSK products to their patients. Successful performance of petitioners' job would ultimately increase demand for (and thus sales of) GSK pharmaceuticals. Petitioners were prohibited by federal law, however, from selling samples of GSK products, taking orders for any GSK medication, or negotiating drug prices or contracts with either physicians or patients. Pet. App. 5a. At most, petitioners could persuade a physician to prescribe a particular GSK product to her patient, who could elect to fill that prescription at a pharmacy, which would have purchased the product from a wholesaler, which would have purchased the product from GSK. See *Novartis*, 611 F.3d at 153-154.

The courts below were therefore wrong in concluding that PSRs "make sales the way that sales are made in the pharmaceutical industry." Pet. App. 51a; see *id.* at 25a-27a. GSK has a sales force that takes and processes orders from retailers and wholesalers. To be sure, members of that sales force will not fall within the "outside salesman" exemption if they perform their duties at GSK facilities rather than "outside" GSK's places of business. Cf. 69 Fed. Reg. at 22,162 (treatment of inside sales employees as exempt would be "beyond the statutory authority of the Administrator"). Nothing in the FLSA suggests, however, that every covered employer (or every covered employer that manufactures products for retail sale) must be deemed to employ outside salespeople. When economic or legal imperatives lead an employer to hire inside salespeople and outside promot-

ers, neither class of employees is covered by the "outside salesman" exemption.[3]

The link between PSRs' promotional activities and any resulting sales is particularly attenuated because the physicians with whom PSRs interact are not the ultimate purchasers of GSK products. See *Novartis*, 611 F.3d at 154 ("The type of 'commitment' [PSRs] seek and sometimes receive from physicians is not a commitment 'to buy.'"). The court of appeals concluded that, because "the patient is not at liberty to choose personally which prescription pharmaceutical he desires[,] * * * he cannot be fairly characterized as the 'buyer.'" Pet. App. 26a. That is a non sequitur. Although the need for a doctor's approval is surely a distinctive feature of prescription-drug sales, it does not call into question the patient's status as the purchaser. Indeed, as the volume of print and television advertisements for prescription drugs attests, the pharmaceutical industry understands that patients, not physicians, are the true purchasers of its products. Because the prescribing physician neither pays for the relevant pharmaceutical product nor takes title to it, the court of appeals' description of the doctor as "the 'real' buyer" (*ibid.*) is at best a metaphor. The fact that petitioners had no contact with potential buyers of GSK products reinforces the conclusion that they did not make sales themselves but rather facilitated sales by others.

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[3] The fact that an employee does not qualify for the "outside salesman" exemption does not prevent the employee from qualifying as exempt under other provisions of the FLSA, provided that he meets the requirements of another exemption. See 69 Fed. Reg. at 22,163; see also 29 C.F.R. 541.503(a).

B. The Department's Regulations Are Entitled To Judicial Deference

"If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843-844 (1984). Such "legislative regulations" must be upheld "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. If the legislative delegation to the agency on a particular question is "implicit" rather than "explicit," the agency's interpretation must be upheld if it is "reasonable." *Ibid.* In either circumstance, a reviewing court cannot reject the agency's interpretation "simply because the agency's chosen resolution seems unwise." *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001).

The FLSA exempts particular categories of employees, including persons employed "in the capacity of outside salesman," "as such terms are defined and delimited from time to time by regulations of the Secretary." 29 U.S.C. 213(a)(1). In light of Congress's express directive that the term "outside salesman" will be given the meaning the Secretary assigns to it, the Department's interpretation is entitled to particular respect. Cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988) (explaining that the statute at issue, which authorized dismissal of CIA employees "whenever the Director 'shall *deem* such termination necessary or advisable in the interests of the United States[,]' * * * fairly exudes deference to the Director") (quoting 50 U.S.C. 403(c) (1988)). The Department's regulations, promulgated after notice-and-comment rulemaking, reflect a reasonable interpretation of the FLSA's language and provide a readily administrable test for classification. And, contrary to re-

spondent's contention, the Department's view that PSRs fall outside the "outside salesman" exemption is consistent with its longstanding regulatory practice.

1. The Department's interpretation follows naturally from the FLSA's language and provides an easily administrable test

a. When the FLSA was enacted, the term "salesman" meant "[o]ne whose occupation is to sell goods or merchandise," and the term "sale" meant the "[a]ct of selling; a contract whereby the absolute, or general, ownership of property is transferred from one person to another for a price, or sum of money, or, loosely, for any consideration." *Webster's New International Dictionary* 1871 (1917); see 9 *Oxford English Dictionary* 50 (1933) (defining "[s]alesman" as "[a] man whose business it is to sell goods or conduct sales"); *id.* at 49 (defining "[s]ale" as "[t]he action or an act of selling or making over to another for a price; the exchange of a commodity for money or other valuable consideration"). Consistent with that understanding, the Department has long interpreted the FLSA's "outside salesman" exemption to apply only to employees who consummate their own sales, *i.e.*, employees who transfer title to goods or take orders for services. See, *e.g.*, *Stein Report* 46 (stating in 1940 that "it would be an unwarrantable extension of the Administrator's authority to describe as a salesman anyone who does not in some sense make a sale").

To be sure, the marketing of pharmaceutical products to physicians—a practice commonly known as "detailing," *Sorrell* v. *IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011)—was a less significant business practice at the time of the FLSA's enactment. See Pet. App. 7a-8a nn.9-10; see also Julie Donohue, *A History of Drug Ad-*

vertising: The Evolving Roles of Consumer and Consumer Protection, 84 Milbank Q. 659, 668 (2006). But the terms "salesman" and "detail man" are distinct in current usage. A "salesman" is "employed to sell goods or services either within a given territory or in a store—see SALESCLERK, TRAVELING SALESMAN; compare DETAIL MAN." *Webster's Third New International Dictionary of the English Language* 2003 (1993) (*Webster's Third*). By comparison, a "detail man" is "a representative of a drug manufacturer who introduces new drugs to professional users (as physicians or pharmacists)." *Id.* at 616; see *The American Heritage Dictionary of the English Language* 494 (4th ed. 2006) (defining a "detail man" as "[a] representative of a manufacturer of drugs or medical supplies who calls on doctors, pharmacists, and other professional distributors to promote new drugs and supplies").

In addition to its primary meaning, the term "salesman" has developed a more colloquial usage as "one who seeks to persuade others to accept or approve an idea, system of thought, or course of action." *Webster's Third* 2003 (giving as an example of that usage the statement that "[a]mbassadors in overalls can be the best salesmen of democracy") (emphasis omitted). PSRs might be regarded as salesmen in that colloquial sense because they seek to persuade physicians "to approve" a "course of action"—namely, the patient's purchase and use of particular prescription drugs. In promulgating rules used to determine whether particular workers are "employed * * * in the capacity of outside salesman" (29 U.S.C. 213(a)(1)), however, the Department acted reasonably in selecting the standard employment-based usage of the term "salesman."

If the agency had defined "salesman" in its broader sense, the exemption would have encompassed various classes of employees, including promoters, advertisers, and other types of marketers, who are not commonly characterized as salespeople. See, *e.g.*, *Clements* v. *Serco, Inc.*, 530 F.3d 1224, 1228 (10th Cir. 2008) (civilian military recruiters who had no authority to enlist recruits were not outside salesmen); *Gorey* v. *Manheim Servs. Corp.*, 788 F. Supp. 2d 200, 207 (S.D.N.Y. 2011) (auctionhouse's "outside sales representatives" were not outside salesmen because they obtained only nonbinding commitments from car dealers to participate in auctions). Acceptance of respondent's position would eviscerate the Department's longstanding regulatory distinction between sales work and promotional work that is intended to facilitate sales by others.

The court of appeals observed that the FLSA defines the term "sale" in an "open-ended" way, Pet. App. 28a, by providing that "'[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or *other disposition*." 29 U.S.C. 203(k) (emphasis added). In that context, the term "disposition" itself indicates a transfer of some interest in goods or services. See 3 *Oxford English Dictionary* 493 (1933) (defining "[d]isposition" in part as "[t]he action of disposing of, putting away, getting rid of, making over * * * ; bestowal"). In any event, consistent with the interpretive canon of *ejusdem generis*, the Department reasonably interprets the italicized catch-all language to share the common characteristic of the preceding enumerated terms, so that the "other disposition" must be in some sense a sale, see *Novartis*, 611 F.3d at 153, *i.e.*, a contract for the exchange of goods or services in return for value. Although the Department has interpreted that

basic requirement flexibly to encompass the various ways in which salespeople can obtain a commitment to buy, see pp. 32-33, *infra*, it has adhered to the view that an outside salesman's efforts must be directed toward the consummation of his own sales.

b. The Department's distinction between exempt outside sales work and nonexempt promotional work also provides an easily administrable standard. In "borderline cases" it may be difficult to discern whether an employee's efforts "are directed toward stimulating the sales of his company generally" or are instead directed toward "the consummation of his own specific sales." 69 Fed. Reg. at 22,162-22,163. That test is far easier to administer, however, than the one applied by the courts below, which looks to whether employees who do not contract for the exchange of goods or services can nevertheless be considered the functional equivalent of salespeople within a particular industry. See Pet. App. 25a-27a, 46a. The court of appeals did not suggest that *every* employee whose promotional activities facilitate sales by others is a "salesman" within the meaning of 29 U.S.C. 213(a)(1). Rather, the court appeared to conclude that PSRs are "outside salesm[e]n" because, given the legal constraints on sales activity in the pharmaceutical industry, PSRs are the closest analogue to traditional salespersons that the industry has to offer. See Pet. App. 26a-27a. That approach would substantially complicate the FLSA inquiry by introducing industry-by-industry variations into the criteria used to determine "outside salesman" status.

As support for its functional-equivalency approach, the court of appeals relied in part (see Pet. App. 28a-31a) on *Jewel Tea Co.* v. *Williams*, 118 F.2d 202 (10th Cir. 1941). The Tenth Circuit in *Jewel Tea* discussed the

policy reasons for excluding outside salespeople from the scope of the FLSA, among them that (i) outside salespeople ordinarily receive commissions "[i]n lieu of overtime * * * as extra compensation" and (ii) enforcement of the FLSA's overtime-pay requirements would be difficult for outside salespeople, who are not subject to close daily supervision by their employers. See *id.* at 207-208. The court of appeals in this case concluded that, because the duties and work conditions of PSRs overlap substantially with those of the salesmen in *Jewel Tea*, PSRs should likewise be covered by the "outside salesman" exemption. See Pet. App. 30a-31a.

The employees involved in *Jewel Tea*, however, were salesmen in the classic sense, because they visited customers' homes and solicited and took orders for tangible goods. See 118 F.2d at 203-204, 208. The court in *Jewel Tea* may have accurately identified certain characteristics of outside salespersons (compensation through commissions and insulation from close supervision) that led Congress to exempt such workers from the FLSA. Congress did not make the exemption applicable to all workers who share those attributes, however, but instead referred specifically to persons "employed * * * in the capacity of outside salesman." 29 U.S.C. 213(a)(1). Consistent with that congressional choice, the Department has long required, as a prerequisite to coverage by the exemption, that a particular employee must in some sense make sales.

2. The "outside salesman" regulations represent the consistent and considered judgment of the Department for more than 70 years

Respondent contended at the certiorari stage that the amicus briefs filed by the Department in the courts

below reflected an "abrupt departure from [the agency's] long-standing position." Br. 3. That is incorrect. The Department first recognized the distinction between exempt sales work and nonexempt promotional work in the 1940s, and it has adhered to that distinction ever since, including when it revised the current regulations in 2004. See *Novartis*, 611 F.3d at 151-152. In concluding that PSRs are not covered by the "outside salesman" exemption, the Department did not reverse or alter its prior views. It simply applied longstanding principles to a particular category of employees. Respondent, by contrast, seeks to rewage a battle that regulated employers lost initially in 1940, again in 1949, and most recently in 2004.

a. The FLSA was enacted in 1938. That year, after consulting with representatives of industry and labor, the Administrator of the Wage and Hour Division of the Department of Labor issued a regulation that interpreted the "outside salesman" exemption to encompass "any employee who customarily and regularly performs his work away from his employer's place or places of business [and] who is customarily and regularly engaged in making sales as defined in [29 U.S.C. 203(k)]." 29 C.F.R. 541.4 (Supp. 1938). Although the regulation did not define what it meant to be "engaged in making sales," the contemporaneous definition of "sale" referred to an exchange of a commodity in return for value. See p. 18, *supra*. The regulation thus implicitly indicated that an employee qualified as an outside salesman only if he consummated his own sales.

Shortly thereafter, the Department made that requirement explicit. In both 1940 and 1947, the Department held hearings on proposed changes to the "outside salesman" regulation. On both occasions, regulated par-

ties asked that "promotion men and others engaged in 'indirect sales' be included within the definition of 'outside salesman.'" *Weiss Report* 82; see *Stein Report* 46. Both times, the Department declined to expand the exemption to include promotional activities. See *id.* at 46-47; *Weiss Report* 82-84. The Department explained that "the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling." *Id.* at 83; see *Stein Report* 46 ("A further group of persons for whom exemptions has been asked and who are admittedly not outside salesmen, in that they do not make actual sales, are sales promotion men * * * [who are] engaged in paving the way for salesmen.").

Following the 1947 hearings, the Department issued the making-sales and promotion-work regulations in 1949. Those regulations directly addressed the distinction between selling goods or services and promoting them. As relevant here, the making-sales regulation provided that an employee does not make a "sale" within the meaning of the "outside salesman" exemption unless he transfers title to the property at issue. See 14 Fed. Reg. at 7743 (codified at 29 C.F.R. 541.501(b) (Cum. Supp. 1962)). The promotion-work regulation stated that "promotional work" was exempt only if it was "actually performed incidental to and in conjunction with an employee's own outside sales or solicitations." 29 C.F.R. 541.504(a) (Cum. Supp. 1962); see 29 C.F.R. 541.504(b)(2) (Cum. Supp. 1962) ("[P]romotional activities designed to stimulate sales which will be made by someone else * * * must be considered nonexempt."). The promotion-work regulation gave examples of nonexempt employees, including a manufacturer's representa-

tive who solicited orders that were placed with the manufacturer rather than directly with the representative. See 29 C.F.R. 541.504(c)(4).

Those regulations remained virtually unchanged for 55 years.[4] In 2004, following notice-and-comment procedures, the Department revised the regulations that govern application of the "outside salesman" exemption. See 69 Fed. Reg. at 22,122 (revising 29 C.F.R. 541.500-504). Those revisions, however, did not make any relevant substantive changes.[5] The regulations continue to provide that an employee will be treated as an "outside salesman" only if his main duty is to sell goods or services away from the employer's place of business, 29 C.F.R. 541.500(a)(1)(i)-(ii); that selling goods or services means transferring title to property (in the case of goods) or taking orders (in the case of services), 29 C.F.R. 541.501(b) and (d); and that promotional work is exempt only if it is incidental to an employee's own outside sales, 29 C.F.R. 541.503. Viewed as a whole, the current regulations preserve the distinction between sales work and promotional work that the Department first articulated in the 1940s.

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[4] In 1963 and 1973, the Department made minor technical amendments to the pertinent regulations. See 28 Fed. Reg. 14,424 (Dec. 28, 1963); 38 Fed. Reg. 11,407 (May 7, 1973). Those amendments are not at issue here.

[5] Whereas the general regulation formerly required that an employee be "employed for the purpose of" making sales, 29 C.F.R. 541.500(a) (1979), it now requires that an employee's "primary duty" be making sales, 29 C.F.R. 541.500(a)(1). The changes to the making-sales and promotion-work regulations were even more minor: the Department reworded them slightly for clarity and removed some outdated examples. Compare 29 C.F.R. 541.501(d)-(e) (1979), with 29 C.F.R. 541.501(d); and compare 29 C.F.R. 541.504(b)-(c) (1979), with 29 C.F.R. 541.503(b)-(c).

In adhering to its traditional approach, the Department discussed, but declined to adopt, the suggestion of several commenters that the distinction between sales and promotional activities be abandoned. See 69 Fed. Reg. at 22,162. The United States Chamber of Commerce, for instance, urged that "promotional activities, even when they do not culminate in an individual sale, are nonetheless an integral part of the sales process." *Ibid.* The Department responded in the regulatory preamble that it did not "intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services." *Ibid.* The Department concluded that "[e]xtending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test." *Ibid.*

b. The FLSA covers, *inter alia*, "an enterprise engaged in commerce or in the production of goods for commerce," 29 U.S.C. 207(a)(1), which is defined in part as an enterprise that has "employees handling, selling, or otherwise working on [interstate] goods or materials," 29 U.S.C. 203(s)(1)(A)(i). As respondent pointed out at the certiorari stage (Br. 5), the Department has defined the term "selling" in Section 203(s) to include "any work that, in a practical sense[,] is an essential part of consummating the 'sale' of the particular goods." 29 C.F.R. 779.241. It is "not surprising," however, that the Department has broadly interpreted the term "selling" in the enterprise-coverage provision, in light of "the well settled principle that the coverage provisions of the Act are to be liberally construed." *Wirtz* v. *Keystone Readers Serv., Inc.*, 418 F.2d 249, 261 n.8 (5th Cir. 1969);

see *Ruggeri* v. *Boehringer Ingelheim Pharms., Inc.*, 585 F. Supp. 2d 308, 318 (D. Conn. 2008). The Department has taken a narrower but equally reasonable approach in interpreting the "outside salesman" exemption. See *Keystone Readers Serv., Inc.*, 418 F.2d at 261 ("Given the rule that coverage provisions are to be liberally construed while exemptions are to be narrowly construed, definitions for one purpose would seem ill suited to the other.").

c. The court of appeals relied on a former Department of Labor publication that compiled basic descriptions of various jobs. See Pet. App. 34a (quoting U.S. Employment Service, *Dictionary of Occupational Titles* (4th ed. 1991) (*Dictionary*)). The court's reliance on that publication was misplaced. The *Dictionary* is no longer in effect, having been superseded by an online database called the Occupational Information Network (or O*NET). In addition, the *Dictionary* was published by the U.S. Employment Service, not the Wage and Hour Division. Accordingly, it contains an express disclaimer stating that the *Dictionary*'s "occupational information * * * cannot be regarded as determining standards for any aspect of the employer-employee relationship" and "should not be considered a judicial or legislative standard for wages, hours, or other contractual or bargaining elements." *Dictionary* xiii.

Moreover, the *Dictionary*'s definition of "pharmaceutical detailer" is extremely broad. It encompasses any employee who "[p]romotes use of and sells ethical drugs and other pharmaceutical products to physicians, [dentists], hospitals, and retail and wholesale drug establishments." *Dictionary* § 262.157-010. That definition likely reflects the fact that some detailers formerly performed both promotional and sales work, promoting

drugs to physicians and selling them to hospitals and retailers. See Pet. Br. 49. Even now, pharmaceutical companies may employ certain detailers who actually make sales to retail or wholesale drug establishments. Cf. note 1, *supra*. But the *Dictionary*'s oblique suggestion that such detailers may exist provides no support for respondent's reading of the FLSA, under which detailers who do *not* make sales would nevertheless be treated as "outside salesm[e]n."

3. The Department has never acquiesced in the view that PSRs are outside salesmen

According to the court of appeals, until the Department filed its amicus brief in *Novartis* in October 2009, it had acquiesced for approximately 70 years in employers' treatment of PSRs as outside salesmen. See Pet. App. 33a. That is incorrect. In suits brought under the FLSA, Congress has provided an affirmative defense for any employer who "pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on * * * any administrative practice or enforcement policy" of "the Administrator of the Wage and Hour Division of the Department of Labor." 29 U.S.C. 259(a)-(b) (2006 & Supp. IV 2010). A regulation implementing that provision states that "before it can be determined that an agency actually has a practice or policy to refrain from acting, there must be evidence of its adoption by the agency through some affirmative action establishing it as the practice or policy of the agency." 29 C.F.R. 790.18(h). Here, neither the court of appeals nor respondent has identified any "affirmative action" taken by the Administrator establishing an agency "practice or policy" of treating PSRs as outside salespeople. See 29 C.F.R. 790.18(g) (requiring that the

practice be with respect to the class of employees at issue).

The court of appeals may have inferred acquiescence from the apparent absence of any prior Department enforcement action alleging a violation of the FLSA's overtime requirement with respect to PSRs. Section 259 and its implementing regulations make clear, however, that no inference of legality may be drawn from the Department's mere failure to initiate enforcement proceedings. See, *e.g.*, 29 C.F.R. 790.18(h) ("A failure to inspect might be due to any one of a number of different reasons."); see also *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985) ("[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise."). The court of appeals' inference was particularly unwarranted because the Department had repeatedly affirmed the general rule that promotional workers who facilitate sales by others are not exempt "outside salesm[e]n." The Department's recent amicus briefs do not reflect any change in agency position. Rather, when private lawsuits required lower courts to address the FLSA's application to PSRs, the agency reasonably sought to ensure that its own views on the disputed interpretive questions were accurately understood.[6]

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[6] The court of appeals also pointed to "industry practice and prevailing customs" that treat PSRs like salesmen. Pet. App. 27a. This Court has held that industry practice and custom do not define or circumscribe employees' rights under the FLSA. See *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 741 (1981). The pharmaceutical industry cannot convert PSRs into outside salesmen simply by paying them incentives or allowing them to keep their own schedules. See *Novartis*, 611 F.3d at 155 ("To the extent that the pharmaceutical industry wishes to have the concept of 'sales' expanded to include the

C. The Department's Interpretation Of Its Own Regulations Is Entitled To Judicial Deference

The Department's regulations make clear that the FLSA's "outside salesman" exemption is limited to employees who consummate their own sales. To the extent the Court finds the regulations ambiguous, however, the Department has repeatedly interpreted those rules not to exempt promotional work of the type performed by petitioners. Because the Department's interpretation is not plainly inconsistent with the regulations and represents the Department's considered judgment on the proper scope of the exemption, it is entitled to controlling weight under *Auer* v. *Robbins*, 519 U.S. 452 (1997).

1. Relying on *Gonzales* v. *Oregon*, 546 U.S. 243 (2006), the court of appeals held that the Department's interpretation of its own regulations is not entitled to *Auer* deference because the regulations simply paraphrase the language of the FLSA. See Pet. App. 21a-24a. In reaching that conclusion, the court addressed only the general "outside salesman" regulation. Although that regulation defines a salesman by reference to "making sales" under 29 U.S.C. 203(k), it does more than merely incorporate the statutory text. It also specifies that "[i]n determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's *own outside sales or solicitations* * * * shall be regarded as exempt outside sales work." 29 C.F.R. 541.500(b) (emphasis added). The regulation thus presumes that the "primary duty of an outside sales employee" is making "the

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promotional activities at issue here, it should direct its efforts to Congress, not the courts.").

employee's own outside sales or solicitations," which is an elaboration on the statutory language.

More importantly, the court of appeals ignored two other regulatory provisions—the making-sales and promotion-work regulations—that elaborate on the language of the FLSA and that bear directly on the question presented here. The making-sales regulation provides that an employee does not make a "sale" within the meaning of the "outside salesman" exemption unless he transfers title to the property at issue. See 29 C.F.R. 541.501(b). The promotion-work regulation states that "promotional work" is exempt only if it is "actually performed incidental to and in conjunction with an employee's own outside sales or solicitations," 29 C.F.R. 541.503(a), and that "[p]romotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work," 29 C.F.R. 541.503(b). As the Second Circuit observed, the regulations "defining the term 'sale' as involving a transfer of title, and defining and delimiting the term 'outside salesman' in connection with an employee's efforts to promote the employer's products, do far more than merely parrot the language of the FLSA." *Novartis*, 611 F.3d at 153; cf. *Harrell* v. *USPS*, 445 F.3d 913, 925 (7th Cir.) ("It is true that part of the implementing regulation * * * follows closely the language of the statute; however, the regulation goes beyond the mere recitation of the statutory language and speaks to the issue presented in this case."), cert. denied, 549 U.S. 1095 (2006).

2. The Department contemporaneously interpreted the regulations not to exempt promotional work of the type performed by petitioners. In the 2004 preamble to the current regulations, the Department emphasized that the 2004 revisions did not "change any of the essen-

tial elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services." 69 Fed. Reg. at 22,162. "Employees have a primary duty of making sales," the preamble explained, "if they 'obtain a commitment to buy' from the customer and are credited with the sale." *Ibid.* (quoting *Weiss Report* 83). Relying on the 1940 *Stein Report*, the preamble further observed that "[e]xtending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test." *Ibid.* The preamble also reiterated the Department's statement in 1949 that "[i]n borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling." *Id.* at 22,162-22,163 (quoting *Weiss Report* 83).

In relying on preamble language (also drawn from the 1940 *Stein Report*) that an outside salesman must "in some sense" make sales, Pet. App. 28a (quoting 69 Fed. Reg. at 22,162), the court of appeals misunderstood the context in which that language appeared. During the 2004 rulemaking, various commenters, including the United States Chamber of Commerce and the National Association of Manufacturers, expressed concern that "outside sales employees may no longer be exempt under the proposed regulations because they no longer execute contracts or write orders due to technological advances in the retail business." 69 Fed. Reg. at 22,162; see *ibid.* ("[D]ue to advances in computerized tracking of inventory and product shipment, the sales of manufactured goods are increasingly driven by computerized

recognition of decreases in customer's inventory, rather than specific face-to-face solicitations by outside sales employees."). The Department agreed that "technological changes in how orders are taken and processed should not preclude the exemption for employees who in some sense make the sales." *Ibid.*

When the Department stated that an outside employee must "in some sense" make sales, it did not suggest that every employee whose actions *facilitate* sales is a "salesman." Because every employee of a manufacturing company presumably contributes in some fashion to sales of the company's products, treating facilitation as indicative of "salesman" status would subvert Congress's evident intent to single out a discrete class of workers. Rather, the agency simply recognized that an employee may properly be regarded as an "outside salesman" if he obtains a commitment to buy and is credited by his employer with a sale, even if it is the customer "who types the order into a computer system and hits the return button." 69 Fed. Reg. at 22,163. In accommodating the modern reality that salesmen may make sales without executing written contracts or orders, the Department did not discard—indeed, it expressly retained—the longstanding bedrock requirement that an outside salesman's efforts must be directed "toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling." *Ibid.*

3. The Wage and Hour Division (WHD) has issued opinion letters addressing the applicability of the "outside salesman" exemption to other classes of employees. The Division has consistently concluded that when such employees do not consummate sales transactions by obtaining commitments to buy from customers, they are

not exempt as outside salespeople under the FLSA. See WHD Opinion Letter 2006-16, 2006 WL 1698305 (May 22, 2006) (professional fundraisers who solicited promises of charitable donations were not exempt outside salespeople); WHD Opinion Letter, 1999 WL 1002391 (Apr. 20, 1999) (same for college recruiters); WHD Opinion Letter, 1998 WL 852683 (Feb. 19, 1998) (same); WHD Opinion Letter, 1994 WL 1004855 (Aug. 19, 1994) (same for organ-donation solicitors).

4. Until the recent set of private actions brought by employees, the Department had not addressed the applicability of the "outside salesman" exemption to PSRs. In this and other cases, however, the Secretary has filed amicus briefs arguing, consistent with Department regulations, that PSRs are not "outside salesm[e]n" for purposes of the FLSA because they promote pharmaceutical products rather than selling them. This Court recently reaffirmed that deference is due "to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is plainly erroneous or inconsistent with the regulation[s] or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011) (internal quotation marks and citations omitted; brackets in original); see *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 880 (2011); *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 397 (2008). Neither of those conditions is present here. The position expressed in this and other amicus briefs reflects a straightforward application of the regulatory text and of the Department's longstanding approach to the "outside salesman" exemption, and it is accordingly entitled to deference under *Auer*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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