No. 11-204

IN THE

Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER and
FRANK BUCHANAN,

Petitioners,

v.

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

Respondent.

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

REPLY BRIEF FOR THE PETITIONERS

Michael R. Pruitt
Otto S. Shill, III
JACKSON WHITE, PC
40 N. Center St.
Mesa, AZ 85201

Jeremy Heisler
David W. Sanford
Katherine M. Kimpel
SANFORD WITTELS & HEISLER, LLP
1666 Connecticut Ave., NW
Washington, DC 20009

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
Amy Howe
Tejinder Singh
GOLDSTEIN & RUSSELL, PC
5225 Wisconsin Ave., NW
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

Eric B. Kingsley
Liane Katzenstein
KINGSLEY & KINGSLEY APC
16133 Ventura Blvd.
Encino, CA 91436

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REPLY BRIEF FOR THE PETITIONERS

Respondent and other drug manufacturers "sell" their drugs to wholesalers and pharmacies, not to physicians. They have sales forces trained for that very purpose. Respondent's argument that pharmaceutical sales representatives (a.k.a. "detailers") are "outside salesmen" because they influence a *physician's* decision to prescribe a drug is thus flawed at its very root: the detailer does not sell, and the physician does not buy, any product. A conversation between a detailer and a physician might – *might* – set in motion a chain of events in which a prescription is written, which a patient then takes to a pharmacy, which as a consequence orders more of a drug from a wholesaler, which then consummates a "sale" with the drug company. But respondent does not even seriously argue that petitioners' detailing efforts somehow "make" that sale.

Even if physicians could somehow be regarded as respondent's customers, a "sale" is more than an interaction in which one person attempts to persuade the other of the merits of a product, which is all that happens when a detailer meets with a physician. The detailer is only permitted to deliver a highly regulated, scripted promotional message about particular drugs. At the end of the detailing conversation, the very most that respondent can hope is that the physician will offer a gratuitous, unenforceable, and qualified promise: that in a medically appropriate situation, the physician will prescribe a drug. That simply is not a sale. The detailer never delivers, nor promises to deliver, the drug; the physician never pays, nor promises to pay,

any money; no particular patient is identified; and no enforceable commitment is made. Indeed, both the detailer and the physician know that any binding agreement would be unlawful and unethical.

Respondent points to the training detailers receive, to the sales skills necessary to excel at the job, to the fact that part of detailers' compensation is "incentive-based" (although not a commission), and to the fact that detailers attempt to convince particular doctors to prescribe specific products. That is just another way of saying that promotion and sales exhibit certain similarities. But promotion lacks the trait that Congress decided matters. A "sale" is not just a persuasive pitch, or even an endorsement of a particular product – otherwise, every well-crafted advertisement would be a sale. Rather, the hallmark of a sale is a *transaction* between a seller and a customer, and no transaction occurs when a detailer meets with a physician. To be sure, all of respondent's promotional efforts – including detailing, promotion to wholesalers and pharmacies, and advertising to the general public – play a role in expanding respondent's business. But that promotional work is not a "sale."

That is the better reading of the FLSA. But at the very least, it is obviously a *permissible* reading of the statute, which is the only issue before this Court. Congress expressly directed the Department of Labor (DOL) to define and delimit the term "outside salesman," a directive that necessarily contemplates that the agency will make judgments about the scope of this exemption from overtime. Applying its expertise, DOL determined to adopt a clear, bright-line rule on which employers and employees can rely

in setting the terms of their relationship. That line divides exempt work "making sales" from "promotion work" that aids, but does not consummate, sales by others. Respondent cannot and does not provide any sound basis for this Court to override the agency's judgment and eviscerate that clear distinction, a ruling that would draw the courts into unending disputes about whether innumerable classes of employees are "close enough" to the FLSA's statutory exemptions – not merely the "outside salesman" provision – to exclude them from overtime eligibility.

I. Detailers Do Not Make Sales.

The categories of employees that the Fair Labor Standards Act (FLSA) exempts from overtime, which are to be read narrowly, *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), include an "outside salesman," 29 U.S.C. § 213(a). Directed by Congress to "define[] and delimit[]" that phrase, *id.*, DOL has consistently specified that a salesman has the principal responsibility of "making sales," as distinct from "promotion work" that supports sales by others, 29 C.F.R. §§ 541.501, 541.503. Pharmaceutical "detailers" engage in promotion, not sales; drug companies have separate sales forces that sell their products to wholesalers, pharmacies, and hospitals. To the extent any ambiguity remains, DOL's interpretation of its regulations is binding, *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), and the agency has concluded that pharmaceutical detailers are not outside salesmen, U.S. Br. 9; U.S. C.A. Br. 9. Respondent's contrary arguments are unpersuasive.

1. The statutory definition of a "sale" includes "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition"; it does not reach promotional activity that does not culminate in a transaction. 29 U.S.C. § 203(k). The same is true of the regulatory definition, which additionally provides that "[s]ales within the meaning of [the statute] 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).

Respondent takes issue (Resp. Br. 15, 33-37) with the Government's view that a sale requires a "transfer of title" (U.S. Br. 13), arguing that the statutory definition of "sale" includes "consignment for sale." But such consignments *do* provide for a transfer of title. Goods are consigned – *i.e.*, physically transferred pursuant to a binding agreement – to a consignee, who agrees to act as the consignor's agent by selling – *i.e.*, transferring title over – those goods to the end customer in exchange for payment. *See* BLACK'S LAW DICTIONARY 303 (7th ed. 1999) ("Consign" means "[t]o give (merchandise or the like) to another to sell, usu. with the understanding that the seller will pay the owner for the goods from the proceeds."). In any event, consignments – like every other "sale" respondent identifies (including auto leases and sales of physician-dispensed drugs) – involve a transaction, and detailing does not.

Respondent cites (Resp. Br. 22) an inapposite regulation, 29 C.F.R. § 779.241, which provides that an employee is considered to be "selling" if he "in any way participates in the sale" of goods, so long as his

role is "essential" to the sale. But the "sale" here is between the drug company and an intermediary such as a wholesaler; detailers do not play an "essential" role in that transaction. In any event, that regulation does not apply here: it addresses when an enterprise qualifies as a retailer for purposes of FLSA *coverage*. The regulations defining the outside salesman *exemption* do not incorporate the definition in § 779.241 – rather, they draw a bright line that distinguishes between employees who consummate their own sales, and employees who do not. This is consistent with the principle that courts should construe the FLSA in light of its remedial purpose by reading its coverage provisions broadly, but its exemptions narrowly.[1] Respondent also cites (Resp. Br. 23) a multi-factor, indicia-of-sales test, but that likewise relates to a regulation not at issue here. *See* U.S. Dep't of Labor, *"Executive, Administrative, Professional * * * Outside Salesman" Redefined*, *Report & Recs. of Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition* 51-52 (Oct. 10, 1940) ("Stein Report") (discussing 29 C.F.R. § 541.504, which governs drivers who also make sales).

2. DOL's "outside salesman" rules also describe *non*-exempt "promotion work," which includes a

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[1] Respondent argues (Resp. Br. 31-32) that the canon of narrow construction does not apply to the regulatory definition of "sale" because it incorporates the broadly worded statutory definition. That is a non sequitur – the question is not whether the terms in the statutory definition are narrow or broad, but rather how the exemption should be construed in the face of ambiguity.

broad range of activities that encourage, but do not consummate, sales. 29 C.F.R. § 541.503. Such work is not exempt unless it is "actually performed incidental to and in conjunction with an employee's own outside sales." *Id*. § 541.503(a). DOL has recognized that everything a detailer does in an interaction with a physician, including obtaining a nonbinding commitment to prescribe the relevant drug, constitutes "promotion work" within the meaning of this regulation. U.S. Br. 9, 14-16. That conclusion provides an independent basis to reject respondent's argument, because if everything a detailer does falls under the rubric of promotion work, then it cannot be sales.

Respondent's arguments (Resp. Br. 37-43) that detailers are not promoters are unpersuasive. It asserts first that the distinction between promotion and sales is unclear because promotion work is also sometimes exempt. Respondent misreads the regulations, which state plainly that promotion work is *only* exempt when it is "incidental to and in conjunction with an employee's own outside sales." 29 C.F.R. § 541.503(a). If the regulation is ambiguous, the Secretary of Labor has the authority and expertise to resolve that ambiguity, and she has resolved it conclusively against respondent.

Respondent also argues (Resp. Br. 38-39) that detailers are not promoters because promotion work generally paves the way for another person's sales, but nobody else approaches physicians, and so detailers must be "salesmen." That is incorrect for two reasons. First, there is no basis for respondent's premise that all promotional work is directly followed by an approach by a "salesman." Relatedly, not every

company that sells goods must have outside salesmen – it is entirely possible that none of respondent's employees fall within the exemption, and so the notion that detailers are the pharmaceutical industry's closest analogue to outside salesmen is irrelevant.

Second, respondent's premise is factually inaccurate because pharmaceutical companies do hire actual salesmen to sell to their actual customers. They have employees who deal with wholesale and retail distributors, hospitals, and other entities which (unlike physicians) legally can purchase drugs. Those employees negotiate prices, quantities, and other sale terms, they take orders, and they enter into contracts on the company's behalf. Importantly, those sales channels are entirely separate from the detailing visits at issue here. Respondent and its *amici* argue that this demonstrates that the distinction between sales and detailing is somehow artificial, but other than noting that the same products are involved, respondents provide no support for that contention. In reality, there are considerable differences between a detailer's job and a salesperson's job, including that detailers are required to deliver highly scripted and regulated marketing messages, and that it is impossible to precisely gauge a detailer's effectiveness in boosting sales.

Respondent counters (Resp. Br. 39) that a prescription is "the *sine qua non* of sales of prescription[] drugs." Not so. Prescriptions are several steps removed from respondent's sales. If and when the physician does prescribe the drug, there still may be no sale, because the patient may

never fill the prescription, or the pharmacy may substitute a generic equivalent. And even if the pharmacist dispenses the drug, that also does not constitute a sale for respondent or the detailer – rather, the patient buys from the pharmacy (an independent company), which might in turn purchase from a wholesaler, which might in turn purchase from respondent through an entirely separate sales channel. Additionally, respondent's emphasis on prescriptions is arbitrary. A prescription is *one* important part of a drug sale, but manufacturing and distribution are equally essential, and nobody argues that those are "sales."

Moreover, even if this Court were to accept respondent's false premise that a prescription is the one, true *sine qua non* of a drug sale, it does not follow that a detailer's interaction with a physician also qualifies as a sale, because the detailer cannot ever induce a physician to enter into a binding commitment to issue the prescription. Instead, as petitioners, the *amici* medical professionals, and PhRMA (in a brief filed just last Term) have all explained, prescribing decisions are influenced by myriad factors, including first and foremost the physician's medical judgment, but also print advertisements, peer recommendations, academic literature, and patient preferences, all of which are beyond the detailer's influence. Petr. Br. 7; *Amicus* Br. of Medical Professionals 5-6; Brief for Respondent PhRMA at 6-8, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (No. 10-779) (listing the myriad sources of influence on prescribing decisions, and highlighting that only 11% of survey respondents described detailers as important). Indeed, physicians

regularly "commit" to prescribe drugs as a pretext to get the detailer out the door, and the *amici* medical professionals explain that detailers' influence is marginal at best. *See* Petr. Br. 20 (citing *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 145 (2d Cir. 2010)); *Amicus* Br. of Medical Professionals 6-7.

Ultimately, respondent's plea to expand the outside salesman exemption replicates the argument that employers have made, without success, to Congress and DOL since 1940. Even if DOL could reasonably decide that outside promoters should be treated like outside salesmen, the contrary conclusion is also reasonable, and that is all the law requires.

3. Respondent emphasizes language in the regulatory history stating that in order for the outside salesman exemption to apply the exchange must only be a sale "in some sense." That is a significant misreading of the regulatory materials. In fact, DOL has merely recognized that – given the many ways in which sales may be effectuated (for example, by the customer over the Internet) – the employee must "*make*" the sale "in some sense." It has never deviated from its bedrock position that the "sale" in question must be a transaction with the customer. "In 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*." Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, *Report and Recommendations on Proposed Revisions of*

Regulations Part 541, 83 (June 30, 1949) ("Weiss Report").

In fact, DOL has used the phrase "in some sense" only twice, and both times in order to explain why promoters like detailers do *not* qualify as outside salesmen. First was the 1940 Stein Report, in which DOL rejected employers' attempt to expand the exemption to cover "promotion men and missionary men" – employees who visit retailers, help those retailers sell the company's products, and encourage them to, for example, place the products prominently. The employers acknowledged that these employees were "admittedly not outside salesmen, in that they do not make actual sales," but argued that because of their role in sales, they should be exempt from overtime. Stein Report 46. DOL declined the employers' request, noting that promotion men are distinct from salesmen because "the promotion man is primarily interested in sales *by* the retailer, not *to* the retailer," and because the promotion man himself "makes no sales at all." *Id*. at 46-47. DOL thus concluded 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." *Id*. at 46.

In response to a separate question, "What Are Sales?," the Stein Report noted that "[g]enerally speaking, the Division has interpreted section 3(k) of the act to include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." Stein Report 45. There was never any suggestion that promotion work, even if regarded as "sales" by the employer, would qualify.

Second was a 2004 notice-and-comment exchange relating to a request from employers and trade associations to expand the outside salesman exception to include promotional employees. The commenters made two arguments: first, "that promotional activities, even when they do not culminate in an individual sale, are nonetheless an integral part of the sales process," and second, that "employees who have long functioned as 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*." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004) (emphasis added). DOL rejected the first argument, but accepted the second. It modified its regulations, reasoning that "technological changes in how orders are taken and processed should not preclude the exemption for employees who in some sense make the sales." *Id*. But it stressed that:

> [T]he Department does 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 . . . . Extending 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.

Id. Thus, under the 2004 regulations, as before, "[e]mployees have a primary duty of making sales if they 'obtain a commitment to buy' from the customer and are credited with the sale." *Id.* (quoting Weiss Report at 83). Although "[e]xempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button," mere promoters simply are not covered by the exemption. *Id*. at 22,163.

Respondent also cites (Resp. Br. 5, 24) a DOL opinion letter for the proposition that "the term 'sale' does not always have a fixed or invariable meaning." Respondent wrenches that language from its context. DOL actually said: "Though the term 'sale' does not always have a fixed or invariable meaning, it is generally held to be 'a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold.'" Opinion Letter from the Wage & Hour Division, U.S. Dep't of Labor, 2005 WL 330605 (Jan. 7, 2005) (quoting *Wirtz v. Charleston Coca-Cola Bottling Co., Inc.*, 237 F. Supp. 857, 866 (E.D.S.C. 1965)). The letter thus does not support respondent's argument that the term "sale" is malleable enough to include detailers' activities.

Respondent's interpretation is not only contrary to authority, but also unwise. To hold that an employee is a salesman so long as his duties can "in some sense" be described as sales – even if the employee engages in no transactions – would cast a cloud of uncertainty over the scope of the exemption. Every outside marketing employee and promoter would suddenly face the risk of losing overtime eligibility. The inevitable disputes would result in

either workers accepting less pay (likely given the precariousness of the current job market) or costly litigation. On the other hand, requiring that "sales" include transactions preserves the existing bright-line rule so that employees understand their rights and employers their obligations. That rule allows the market to efficiently set base wages that can account for the overtime the employee is likely to receive, and to determine how many employees should fill a particular role.

4. In its brief, respondent does not dispute that it and others in the pharmaceutical industry have repeatedly insisted that detailers are not salesmen. *See* Petr. Br. 35 (citing products liability actions in which respondent argued that detailers did not sell its products). The following is a direct quote from a brief filed by respondent in a products liability action: "Pharmaceutical sales representatives, unlike other sales personnel, are unique in that they do not personally 'sell' the product; rather, they are merely a conduit for information between the manufacturer and the physician . . . ." J.A. 157a. PhRMA recently made the same point to this Court. Brief for Respondent PhRMA at 46, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (No. 10-779) ("The State . . . offers a misplaced analogy to a car salesman . . . . Pharmaceutical representatives do not haggle with doctors over price, and the doctor does not consume the drug but instead receives medical information relevant to courses of treatment for her patients."). Moreover, as petitioners have explained, while compensation for detailers has never been on a commission basis, companies including respondent are now further revising their compensation practices

to reflect the fact that detailers simply do not sell drugs. *See* Petr. Br. 30. In light of these undisputed and indisputable facts, it is simply disingenuous for respondent to now argue that detailers are salesmen.

II. This Court Should Defer To The Secretary's Determination That Detailers Are Not Outside Salesmen.

Respondent launches an assault on the well-established principle that courts should defer to an agency's interpretation of its own rules, whether expressed in an *amicus* brief or other authoritative guidance. Respondent argues first that DOL's position in this case somehow constitutes a deviation from its past interpretation of the overtime regulations. It then argues that deference is inappropriate because the regulations parrot the statute. In the alternative, respondent argues that this Court should overturn *Auer v. Robbins*, 519 U.S. 452 (1997). None of those arguments has merit.

1. Under this Court's jurisprudence, an agency's interpretation of its own ambiguous regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotation marks omitted). The rule has a long pedigree, *see, e.g.*, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), and this Court has consistently deferred to agency interpretations of regulations set forth in *amicus* briefs. *See, e.g.*, *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2575, n.3 (2011); *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011); *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285,

296, n.7 (2009); *Auer*, 519 U.S. at 462. The Court has also deferred to agency interpretations in other informal documents. *See, e.g.*, *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2469-70 (2009); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007).

2. Respondent's argument (Resp. Br. 44-48) that deference is unwarranted in this case because DOL has changed its position is simply wrong. Respondent has not cited any authority – be it a regulation, interpretive rule, field manual, informal memorandum, or legal brief – in which DOL ever took the position that an employee who does not even attempt to consummate a sale can be treated as an "outside salesman" for overtime purposes. As demonstrated in Part I, *supra*, the agency's position on this issue has been consistent since 1940: salesmen are exempt, and promotion workers are not. The language that respondent criticizes (Resp. Br. 45) as "new," *i.e.*, that a sale requires a "transfer of title," comes from the 1940 Stein Report, which stated that "[g]enerally speaking, the Division has interpreted section 3(k) of the act to include the transfer of title to tangible property . . . ." Stein Report 45.

The fact that DOL has not previously pursued the pharmaceutical industry's overtime violations does not mean that it acquiesced in the industry's violations. *Contra* Resp. Br. 46-47. At most, it means that the pharmaceutical industry managed to underpay its workers for far longer than it should have. *See* U.S. Br. 28-29 (explaining that the paucity of enforcement does not signal acquiescence).

Further, decades ago, many pharmaceutical sales representatives actually made sales. *See* Petr. Br. 49.

3. Respondent's contention (Resp. Br. 48-51) that *Auer* deference is unwarranted because the regulations merely parrot the statutory definition of a "sale" is likewise incorrect. While the regulation does incorporate the statutory definition, it also adds the significant interstitial requirement that the employee in question must actually "make" the sales. 29 C.F.R. § 541.501(a)(1). The regulation further provides that sales "include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of individual property." *Id*. § 541.501(b). It also explains that the regulation applies to the sale of services as well as goods. *Id*. § 541.501(c). Those additional provisions reflect the Secretary's considerable experience and expertise in administering the FLSA, and speak to the key issue before the Court (whether a transfer of title is required). This case is therefore easily distinguishable from *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006), in which the relevant regulation did "little more than restate the terms of the statute itself," and gave "little or no instruction on a central issue" in the case.

Even if the "making sales" regulation, 29 C.F.R. § 541.501, tracks the statutory language too closely to merit *Auer* deference, the "promotion work" regulation, 29 C.F.R. § 541.503, does not, as it does not incorporate *any* statutory provision. Instead, the regulation explains that promotion work is distinct from sales, and provides that when promotion work is not "actually performed incidental to and in conjunction with an employee's own outside sales or

solicitations," that work is not exempt. 29 C.F.R. § 541.503(a). The regulation also provides that an employee who "does not consummate the sale nor direct efforts toward the consummation of a sale" does not fall within the outside salesman exception. *Id*. § 541.503(c) In this case, the Secretary has determined that detailers' activities fall within the category of promotion work, and are therefore not exempt. *See* U.S. Br. 9, 14-16. Thus, even if this Court does not credit the Secretary's determination that a sale must involve the transfer of title, it should still defer to the Secretary's explanation that obtaining a non-binding commitment to prescribe a drug constitutes promotion, and not sales.

4. Respondent argues that if *Auer* deference applies, then the Court should overturn *Auer*, along with the long and uninterrupted line of cases that precedes it. That argument is flawed at the outset because *stare decisis* protects deeply embedded legal principles like *Auer* deference. *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 827 (1991). Any party seeking to overrule precedent must bear "the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). The key factors are "workability, . . . the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89

(2009). There is no doubt that the rule of *Seminole Rock* and *Auer* is workable, is not antiquated, and is relied upon by courts, agencies, and regulated parties alike. As explained in greater detail *infra*, the rule is also well reasoned. Moreover, if agency deference were overturned, it would expose the marketplace to uncertainty and critically undermine a principal goal of federal regulation: uniformity across jurisdictions.

In arguing to the contrary, respondent hypothesizes two objections: first, that deference promotes unreasoned, spur-of-the-moment agency decision making without appropriate procedural safeguards; and second, that agencies abuse deference by promulgating vague regulations. Critically, respondent argues both of these points at a high level of abstraction, essentially speculating about agency temptations. But despite the decades-long pedigree of the rule affording controlling deference to an agency's interpretation of its own regulations, respondent and its *amici* cannot supply any evidence that agencies actually engage in this sort of chicanery, and the record of this case demonstrates that DOL does not. Respondent's argument would thus fail even on a blank slate. In light of *stare decisis*, it is a non-starter.

First, this case is a bad vehicle to test the validity of *Auer* because the issue is not squarely presented. Petitioners submit that the Court can best decide this case by holding that DOL bears principal responsibility for interpreting FLSA's various overtime exemptions, and deferring to its interpretation. But, for the reasons stated in Part I, *supra*, the Secretary's reading of the regulations is the one the Court should adopt in any event, so that

the Court need not actually even rely on *Auer* to resolve this case. Additionally, all of the rules that respondent complains about – *i.e.*, the "transfer of title" / "consummation of sales" requirement, and the determination that detailers are engaged in promotion work – are either expressly stated in the regulations themselves or represent straightforward applications of the rules. And the question presented in this case – whether an employee who does not consummate actual sales, but whose job shares some traits with a sales job, should be regarded as exempt outside salesman – has been an issue since 1940, and DOL has been completely consistent in refusing to recognize promoters as outside salesmen. So the regulated community and the public have had ample notice of DOL's position, as well as opportunity to comment on it.

Respondent suggests that DOL has deliberately attempted to circumvent administrative procedures. There is no evidence to support that claim. Nor is there any reason to believe that agency interpretive guidance will on the whole be less – rather than more – favorable to regulated parties.

Respondent stresses (Resp. Br. 44-45) that the *amicus* briefs filed in the courts of appeals were uninvited. But respondent provides no sensible reason (much less authority) that the lack of an invitation matters. No decision of this Court has ever drawn such a distinction, and the Court presumably does not "invite" merits *amicus* participation by the United States only because it is familiar with the Solicitor General's practice of participating in such cases as a matter of course. Respondent also notes (Resp. Br. 48) that the DOL Solicitor created an

"*amicus* program" in 2004. While respondent contends (Resp. Br. 48, 54) that DOL seeks to "change the law" through litigation, the very announcement that respondent quotes establishes that the *amicus* program was adopted at the same time as the 2004 regulations, and that DOL's only goal is to enforce those regulations, which were promulgated after full notice and comment, according to their terms. The *amicus* program assists in the implementation of the new rules by "allow[ing] the Solicitor's Office in appropriate cases to share with courts the Department's view of the proper application of the new Part 541 rule." Solicitor of Labor, Overtime Security *Amicus* Program, http://www.dol.gov/sol/541amicus.htm (last visited Apr. 6, 2012). Enforcing the law is not improper.

Respondent's argument also fails on its own terms. Contrary to respondent's insinuations, *Auer* deference is not *carte blanche* for agencies. First, if an agency position is plainly erroneous or inconsistent with the relevant regulations, then deference is not warranted. *Auer*, 519 U.S. at 461. Second, *Auer* does not authorize deference when a regulation merely parrots the statute. Third, courts need not defer when "faced with a post-hoc rationalization . . . of agency action that is under judicial review," or if there is "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.*, 131 S. Ct. at 2263 (internal quotation marks omitted). Fourth, before the agency can interpret its regulations, it must enact them. Any efforts to enact broad or vague regulations will meet with stiff resistance during the

rulemaking process. The Court's existing precedents thus protect against agency abuse; and the fact that courts rarely reject deference demonstrates that agencies are not engaging in the sort of overreaching that respondent identifies.

With those safeguards in mind, deference to agency interpretations of regulations does far more good than harm. Administrative agencies supervise vast and complex systems, from the U.S. labor market to the environment to the military, to name just a few. Agencies inevitably must react to unforeseen circumstances. And agencies know this, and so they sometimes enact flexible standards rather than rigid rules. When applying those standards, deferring to the agency makes sense, as the agencies possess expertise that generalist courts do not, and it will not always (or even typically) be practical or desirable to test agency action in court before allowing it to proceed.[2]

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[2] In fact, although *Auer's* principal critics rest their case on separation of powers arguments, *see* John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996), it is worth asking whether a dramatically more activist judiciary is truly the best answer to an unproven claim of agency overreaching. By empowering courts to second-guess agencies' interpretations of their own rules, this Court could risk undercutting the agencies' delegated authority to interpret and enforce the law. Overturning *Auer* would also invite parties disappointed with the results they obtain in administrative processes to redirect their lobbying efforts from agencies to the courts, forcing judges to take on increased policymaking responsibilities.

Auer deference also promotes uniformity in the application of federal laws. If courts routinely second-guessed agency judgments, the resulting patchwork of interpretations would inject uncertainty into the marketplace, encourage forum shopping, and increase litigation costs. Affording deference to agency interpretations permits regulated parties to act based on a confident understanding of their legal obligations, without fearing the significant costs and uncertain outcome of potentially conflicting court rulings. Uniformity is especially important in economically sensitive areas such as the labor market, where prolonged uncertainty can have grave consequences for citizens' material well-being.

Respondent's proposed rule also admits no limiting principle. While respondent argues that *amicus* briefs should not receive deference, there is no basis to limit judicial skepticism. Any guidance issued without full notice and comment – for example, DOL opinion letters on which the regulated community heavily relies – would raise the concerns that respondent identifies. But to deny deference to all such guidance would unravel decades of settled administrative practice.

Respondent's rule is also impractical. It presumably would require agencies to engage in notice-and-comment rulemaking for every decision, or forgo judicial deference. Such an approach would squander agency resources, diminish agency flexibility, and generally render governance more difficult. Also, to the extent that existing regulations have been promulgated in reliance on *Auer*, the continued enforcement of those rules might become

needlessly complicated as courts begin to second-guess agency pronouncements.

Respondent finally argues that a ruling for petitioners would have negative practical consequences. It begins by implying that the FLSA simply should not apply to employees like detailers, who are well paid. But the FLSA protects employees "from the evil of overwork as well as underpay." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942). Importantly, its overtime provisions not only compensate employees for overwork, but also "spread employment" by making chronic overtime more expensive than hiring an additional employee. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948). Consequently, "employees are not to be deprived of the benefits of the Act simply because they are well paid." *Jewell Ridge Coal Corp. v. Local No. 6167, United Mineworkers*, 325 U.S. 161, 167 (1945); Stein Report 8.

Respondent also warns (Resp. Br. 58-59) that employees will suffer because the degree of independence and flexibility they supposedly enjoy is inconsistent with a "rigid overtime regime." It is unclear whether this is a threat or merely paternalism, but the Court should reject it either way. Employers must track the hours of the many classes of non-exempt "outside" employees, 29 C.F.R. § 516.2(a)(7), and to the extent that employees must assist in that, the associated administrative burden pales in comparison with working a 60-hour week for 40 hours' pay. Two *amicus* briefs filed by detailers from other pharmaceutical companies confirms that detailers do not share respondent's view that the

denial of overtime pay is part of a benevolent plan to protect their flexible lifestyle.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Michael R. Pruitt
Otto S. Shill, III
JACKSON WHITE, PC
40 N. Center St.
Mesa, AZ 85201

Jeremy Heisler
David W. Sanford
Katherine M. Kimpel
SANFORD WITTELS & HEISLER, LLP
1666 Connecticut Ave., NW
Washington, DC 20009

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
Amy Howe
Tejinder Singh
GOLDSTEIN & RUSSELL, PC
5225 Wisconsin Ave., NW
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

Eric B. Kingsley
Liane Katzenstein
KINGSLEY & KINGSLEY APC
16133 Ventura Blvd.
Encino, CA 91436