No. 10-460

IN THE

Supreme Court of the United States

NOV - 5 2010

NOVARTIS PHARMACEUTICALS CORPORATION
Petitioner,

v.

SIMONA M. LOPES, CATHERINE E. WHITE, *et al.*
Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS*[1]

1. The Chamber of Commerce of the United States of America (the "Chamber") is the largest federation of businesses and associations in the world and serves as the voice of American business. It represents 300,000 direct members with an underlying membership of over three million businesses and organizations of every size, in every sector, from every region of the country.

2. An important function of the Chamber is to give voice to the interests and concerns of American business on important matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. The Chamber has advanced those interests, *inter alia*, by filing briefs in more than 1,700 cases of importance to the business community. Those cases have included many pending before the Court dealing with various aspects of federal employment law. *See, e.g.*, *Staub v. Proctor Hosp.*, No. 09-400; *Thompson v. N. Am. Stainless, LP*, No. 09-291.

SUMMARY OF ARGUMENT

1. This case concerns a number of issues of critical importance to Chamber members regarding the meaning and application of the Fair Labor Standards Act ("FLSA"). The court below construed key components of the FLSA

1. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have been given appropriate notice and letters have been filed with the Clerk of the Court reflecting the consent of the parties to the filing of this brief.

— the Act's "administrative" and "outside sales" overtime exemptions.[2] The resulting opinion overturns settled understandings established by longstanding Department of Labor ("DOL") guidance and consistent application of the Act by the courts regarding who the statute covers and how it is to be administered. The court's opinion creates or deepens intra-circuit divisions of authority on several questions of statutory construction, and it rejects — typically without even mentioning — DOL's own interpretations of the statute on which employers have long relied in structuring their affairs.

2. Most critically for employers, the decision below either directly prohibits or casts significant doubt on FLSA compliance practices that have existed for many decades in sectors of American business *unconnected* to the pharmaceutical industry. Indeed, the decision suggests that every employer in the country that has relied on the "administrative" exemption has done so incorrectly and must reconsider every employee currently classified thereunder, and must do so without meaningful guidance as to the standards that should govern the exercise.

Because employers prize stability in their efforts to comply with federal statutes — particularly complex statutes such as the FLSA — these departures from settled practices create intolerable uncertainty that only this Court can resolve.

3. The Court of Appeals also gave "controlling" deference to the contents of a brief *amicus curiae* filed by DOL relying on *Auer v. Robbins*,[3] but that reliance

2. 29 U.S.C. § 213(a)(1) (2010).

3. 519 U.S. 452 (1997).

was misplaced. The Court has previously described the preconditions for this sort of deference — including evident, careful attention to the relevant considerations and the absence of unfair surprise for the regulated community — but the Second Circuit failed even to consider these most basic requirements, and failed to consider DOL's brief in the context of all that DOL has previously said on the subject.

Although *Auer* deference may be a useful tool, the undisciplined approach to *Auer* adopted below presents serious concerns to Chamber members. DOL has announced publically that it intends to curtail the use of mechanisms through which it has traditionally provided guidance on application of the statute, while simultaneously saying that it would "reinvigorat[e]" its program of *amicus curiae* participation in court cases, presumably relying on the erroneously expansive reading of *Auer* embraced below.

If the use of *Auer* deference is not confined to the limits the Court has previously articulated — and if those standards are not made unmistakably clear by this Court — DOL's intended course of action threatens profound ramifications for Chamber members. It is one thing to expect that conscientious employers will follow DOL's opinion letters and official announcements, or even to consider the views expressed in briefs solicited from DOL by this Court, as in *Auer*; it is quite another to expect employers to monitor and digest the contents of every *amicus* brief DOL may file in any lower court anywhere in the country, briefs in which DOL can now announce new normative standards that apply retroactively to pending cases, as the brief did here.

The Court has previously warned about the potential for "unfair surprise" when an agency announces unanticipated changes to existing law through "informal" means.[4] This case represents a perfect example of that danger. DOL replaced decades of settled, well-understood standards, relied upon by employers across the country, with new, unanticipated, and far more draconian standards. DOL's decision to forsake existing, relatively transparent, easily digested mechanisms for providing guidance and instead to rely on lower court *amicus* briefs to reverse course on existing compliance standards requires the Court to mark out even more clearly the limits of deference those briefs receive.

For these reasons, the Chamber urges the Court to grant review.

REASONS FOR GRANTING THE PETITION

I. THE UNCERTAINTY CREATED BY THE DECISION BELOW WITH RESPECT TO THE FLSA'S ADMINISTRATIVE EXEMPTION CAN ONLY BE CLARIFIED BY THIS COURT

The FLSA's "administrative" exemption applies broadly to individuals "whose primary duty is the performance of non-manual work directly related to the management or general business operations of the employer." 29 C.F.R. § 541.200(2) (2010). Nearly every FLSA-covered employer in the American economy has employees currently classified as exempt from the

4. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007).

FLSA's overtime requirements under the administrative exemption. If the Second Circuit's understanding of that exemption is allowed to stand, nearly every such exemption determination will have to be reconsidered. This dramatic remaking of the exemption warrants this Court's review.

A. The Decision Below Undermines Settled Expectations Regarding The Administrative Exemption

The decision below creates one intra-circuit division of authority and deepens another. *See* Pet. at 20-24. Effectively, the Second Circuit declared that legal restrictions on sales in the pharmaceutical industry all but preclude Pharmaceutical Sales Representatives ("Sales Reps") from qualifying for the administrative exemption because they cannot exercise sufficient "discretion and judgment" in performing their primary duty,[5] when the Third Circuit held in *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010), on largely identical facts,[6] that they do qualify.

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5. For example, when describing the methods by which Sales Reps operate, the court observed that "[t]o market its pharmaceuticals, Novartis has a team of 'brand' managers who, cognizant of limitations imposed by the United States Food and Drug Administration ('FDA'), devise descriptions of the essential features of each Novartis drug .... Reps receive negative reviews if they deliver the[se] Novartis core message[s] in a way that violates FDA-imposed limitations or Novartis policies." Pet. App. at 4a, 7a.

6. *See* Pet. at 8-11.

More importantly to the Chamber's broader membership, however, the Court of Appeals embraced an idiosyncratic and potentially crippling construction of the administrative exemption. By rejecting decades of prior administrative guidance and court decisions, the court below has thrown into doubt the correctness of countless exemption decisions made by employers relying on that guidance.

Specifically, the court embraced uncritically this position urged by DOL:

> The Secretary takes the position that for the administrative exemption to apply to the Reps, the regulations require a showing of a *greater degree* of discretion, and *more authority* to use independent judgment in matters of significance, than Novartis allows the Reps. Again we find it appropriate to defer to the Secretary's interpretation.

Pet. App. at 33a (emphasis added).

This standard is both new and mistaken. First, the relevant regulation instructs employers (and the courts) to consider "*whether* [the] employee exercises discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.202(a) (2010) (emphasis added). The regulation thus asks a "*whether*" question — *whether* discretion and judgment are exercised — not a "how much" question. It directs a binary inquiry, *i.e.*, whether the employee at issue exercises some degree of discretion and independence, *not* a *quantitative* analysis into the extent to which they are exercised.

Indeed, as recently as 2004, DOL underscored the binary nature of this inquiry by expressly *refusing* during rulemaking to adopt a quantitative "'customarily and regularly' perform" standard for the exercise of discretion. The 2004 Rule was intended to "make the regulations easier to understand and decipher when applying them to factual situations." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,126 (Apr. 23, 2004). When it rejected this quantitative standard, DOL reaffirmed its longstanding view that the employee's duties need only "*include* the exercise of discretion." *Id.* at 22,142-22,143 (emphasis added).[7]

And the courts have followed that "whether" (and not a "how much") approach. Quite recently, for example, in *Robinson-Smith v. Government Employees Insurance Co.*,[8] the court considered whether auto damage adjusters qualified for the exemption. The court noted that although "the parties disagree on how much discretion the adjuster exercises, no one disputes that he exercises 'some.'" And because "some" is all the regulation requires, the court held the exemption applicable. *See also O'Dell v. Alyeska*

7. Although the current regulation on the exercise of discretion and judgment — 29 C.F.R. § 541.202 — was substantially revised in 2004, the revision was expressly intended to "retain[] th[e] standard from the existing regulations [and] reflect existing federal case law" but also to "eliminate outdated and confusing language in the existing interpretive guidelines." 69 Fed. Reg. at 22,142. Thus, this current articulation of the standard was "intend[ed] [only to] clarify the existing standard and to make the standard easier to understand and apply to the 21st Century workplace." *Id.*

8. 590 F.3d 886, 893-94 (D.C. Cir. 2010).

Pipeline Serv. Co., 856 F.2d 1452, 1454 (9th Cir. 1988) (if district court had correctly applied administrative exemption, "it could only have come to the ultimate conclusion that [plaintiff] exercised *some* discretion and independent judgment during the course of his job, and therefore [he] was an exempt administrative employee.") (emphasis added).[9]

Given this well-understood construction, *even DOL* previously concluded that the work done by Sales Reps fits within the exemption. In 1945, DOL issued an opinion letter concerning medical "detailists" — the predecessor job title to Sales Rep. DOL explained that these detailists "increas[ed] the use of . . . product in hospitals and through physicians' recommendations" and cultivated relationships with doctors — precisely what Sales Reps do today. Based on these facts, DOL concluded that the detailists used "discretion and independent judgment," had "skills or knowledge acquired through special training or experience" and thus qualified for the exemption. *See* Wage and Hour Opinion Letter, *Applicability of Exemption for Administrative Employees to Medical Detailists*, [1943-48 Wages-Hours] Lab. L. Rep. (CCH) ¶ 33,093 (May 19, 1945); *see also Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883, 886 n.2 (E.D. Pa. 1982) (Sales Rep exempt; relying in part on 1945 opinion letter).

9. Indeed, the Chamber is aware of no Circuit decision other than the one below which has applied DOL's new quantitative test; the Third Circuit's recent decision granting the administrative exemption to a Sales Rep in *Johnson & Johnson*, discussed *supra*, did not apply such a test. *See* 593 F.3d at 285.

The Second Circuit conceded below that the primary duty of Sales Reps *includes* work requiring discretion and judgment: they are "ab[le] to answer questions" the physicians ask, they "develop a rapport with [the] physician[s]," "remember past conversations" so that they can move toward a commitment to prescribe, and "recognize when a message has been persuasive." Pet. App. at 34a.[10] But the court never acknowledged the existence of the "detailist" opinion letter or DOL's longstanding rejection of a "how much" approach to the discretion and judgment question. Giving uncritical deference to DOL's *amicus* brief, the Second Circuit simply declared that it wanted to see "a *greater* degree of discretion, and *more* authority to use independent judgment" — "greater" and "more" by some unstated amount. Pet. App. at 33a (emphasis added).

B. The Second Circuit's Decision Threatens Employer Practices In Every Industry

Although on its face the Second Circuit's decision deals exclusively with Sales Reps in the pharmaceutical industry, the ramifications of this decision are far-reaching and profound for American business. Employers within the Second Circuit — and, presumably, those in any

10. The Court of Appeals never defined the Sales Reps' "primary duty" with any degree of precision, but it did conclude that Novartis had failed to "show that the Reps are *sufficiently* allowed to exercise either discretion or independent judgment in the performance of their primary duties," Pet. App. at 35a (emphasis added), suggesting that the court understood that the discretionary duties relied upon by Novartis *were* part of the Sales Reps' primary duty.

circuit that can be persuaded to give the DOL's *amicus* brief in this case deference[11] — will have to reconsider every administrative exemption determination they have previously made, recalibrating each of those decisions in light of a quantitative test with no quantifiable standards, knowing only that the employer must show something "more" than Novartis did in this case.

Unlike some of the FLSA's exemptions, which apply to a fairly narrow range of jobs or a limited slice of the American economy,[12] the administrative exemption applies to employees in nearly every American workplace — a breathtaking array of work performed across the economy in nearly every kind of business. Here are a few examples:

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11. One court has already given DOL's *amicus* brief in *Novartis* deference, and reversed its decision on the exemption status of Sales Reps on a motion for reconsideration; another court declined to do so. *Compare Harris v. Auxilium Pharm., Inc.*, No. 4:07-cv-3938, 2010 WL 3817150, at *3 (S.D. Tex. Sept. 28, 2010) (reconsidering and reversing prior decision granting the outside salesperson and administrative exemptions to Sales Reps, based on DOL *amicus* brief in *Novartis*) *with Schaefer-Larose v. Eli Lilly & Co.*, No. 1:07-cv-1133-SEB-TAB, 2010 WL 3892464, at *1-2 (S.D. Ind. Sept. 29, 2010) (refusing to reconsider prior decision that Sales Reps "came within the outside salesperson and administrative exemptions to the overtime pay provisions found in the Fair Labor Standards Act").

12. *See, e.g.*, 29 U.S.C. § 213(a)(2) (certain amusement park employees); § 213(a)(5) (certain employees in shellfish industry); § 213(a)(10) (certain switchboard operators); § 213(a)(12) (certain seamen); § 213(a)(16) (certain criminal investigators).

- union organizers[13]
- first line supervisors in a nuclear power plant[14]
- customer service employees[15]
- event planners[16]
- public relations employees[17]
- a life insurance claims coordinator[18]
- a union vice president[19]

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13. *Savage v. UNITE HERE*, No. 05-10812(LTS)(DCF), 2008 WL 1790402, at *1 (S.D.N.Y. Apr. 17, 2008).

14. *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 372-75 (7th Cir. 2005).

15. *Haywood v. N. Am. Van Lines, Inc.*, 121 F.3d 1066, 1071-74 (7th Cir. 1997).

16. *Bondy v. City of Dall.*, No. 3:01-cv-1005, 2002 WL 31906344, at *4 (N.D. Tex. Dec. 30, 2002).

17. *Copas v. E. Bay Mun. Util. Dist.*, 61 F. Supp. 2d 1017, 1023-33 (N.D. Cal. 1999).

18 *E.g., McAllister v. Transamerica Occidental Life Ins. Co.*, 325 F.3d 997, 1000-02 (8th Cir. 2003).

19. *Douglas v. Argo-Tech Corp.*, 113 F.3d 67, 71-72 (6th Cir. 1997).

- a wireless telecommunications consulting executive[20]
- an office manager for an automobile dealership[21]
- a Director of Emergency Medical Services for a municipality[22]
- production planners in a shipyard[23]
- marketing representatives for a life insurance company[24] and
- a retail store manager[25]

Thus, if the decision below is not addressed by this Court, employers in every kind of business, in every

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20. *Darveau v. Detecon, Inc.*, 515 F.3d 334, 338-39 (4th Cir. 2008).

21. *Lott v. Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326, 331-32 (5th Cir. 2000).

22. *Mayer v. Bd. of Cnty. Comm'rs of Chase Cnty.*, 5 F. Supp. 2d 914, 918-19 (D. Kan. 1998).

23. *Cowart v. Ingalls Shipbuilding, Inc.*, 213 F.3d 261, 267 (5th Cir. 2000).

24. *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 14 (1st Cir. 1997).

25. *Striker v. E. Off Road Equip.*, 935 F. Supp. 650, 656-59 (D. Md. 1996).

industry sector, and in every part of the country will have to reconsider patterns of FLSA compliance that have existed to the satisfaction of employers and employees alike for decades.

Moreover, this reevaluation would essentially be rudderless. All one can glean from DOL's *amicus* brief and from the decision below is that a quantitative analysis is now required — that the discretion and judgment inquiry has become a "how much" question rather than a "whether" question — and that something "more" than what Novartis presented in this case would be required to sustain the exemption. This effectively meaningless standard would leave even the most cautious, conscientious employer without any basis for confidently predicting how it might fare in a DOL investigation or in a lawsuit brought by employees.

One would have expected that, before DOL would embark on such a revolutionary revision to settled, successful patterns of FLSA compliance, it would have undertaken the sort of careful — and public — consideration of the consequences of such an action that is part and parcel of the Administrative Procedure Act's notice and comment rulemaking process. But in this instance, DOL announced this revolution in FLSA standards without public comment, in an unsolicited brief filed in a lower court proceeding to which the court below gave uncritical deference. Neither DOL nor the court below gave any apparent consideration to the new rule's far-reaching consequences. The Court should grant the petition in this case to give the changes this new rule portends the sort of careful consideration they deserve.

II. THE DECISION BELOW UPSETS DECADES OF SETTLED LAW ON THE MEANING OF THE WORD "SALE," CREATING UNCERTAINTY FOR EMPLOYERS

A. Congress Defined The Term "Sale" As Broadly As Possible

This case presents only one question insofar as the "outside sales" exemption is concerned: whether the respondents "sell" the company's drugs. Common, "dictionary" understandings of the term "sell" are irrelevant to that question, as Congress defined the words "sale" and "sell" in § 3(k) of the Act, 29 U.S.C. § 203(k), embracing an unmistakably sweeping, inclusive, and open-ended notion of the terms:

> "Sale" or "sell" *includes any* sale, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition.*

29 U.S.C. § 203(k) (2010) (emphasis added).

In this definition, Congress employed four different measures to ensure that the definition of "sale" would receive the broadest possible construction. First, it used the introductory term "includes." Congress thereby instructed the courts that some activities *not* listed would nonetheless qualify as sales.

Second, Congress used the word "any" to preface the list of activities it *did* provide as examples of statutory "sales." Congress thus wanted to ensure that, even with respect to each type of "sale" activity specified in its non-

exhaustive list, the definition would extend to not just *some* possible variants — *e.g.*, "sales" in the "prototypical" or "classic" or "dictionary" sense — but to "*any*" such form.

Third, Congress defined "sale" by referring to a series of disparate activities that would all qualify as "sales." By starting with the tautology "[s]ale . . . includes any sale," Congress plainly began its litany with precisely the sort of "actual sale" to which the Second Circuit thought the statute was limited. That is, the statutory definition *begins* by including the sort of prototypical "sales" that "involv[e] a transfer of title" to which the Second Circuit would confine the definition, Pet. App. at 25a, but goes on from there to list *other* activities — activities that are *not* "actual sales" but which are nonetheless included within the statutory definition, "includ[ing] *any*" other "exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."

Finally, Congress ended its non-exhaustive, illustrative list with the definitional phrase "or other disposition," a phrase that casts — and that must have been intended to cast — an exceptionally broad net. By doing so, it declared that the range of § 203(k)-qualifying activities would include activities that were *not* "actual sales" or fully "consummated transactions" in which ownership of or "title" to goods has been transferred. Rather, Congress manifestly intended to include within its definition activities that would *not* be a "sale, exchange, contract to sell, consignment for sale, [or] shipment for sale" but that nonetheless bear indicia of sales activity.

B. For 70 Years DOL And The Courts Have Eschewed Bright Line Standards Such As The One Adopted Below

Since 1940 and until quite recently, DOL had acknowledged that "the term 'sale' does *not* always have a fixed or invariable definition" — that there is no bright line standard for identifying what is and is not "sales" activity — and that "sale" must be defined contextually and in light of the totality of the circumstances presented. U.S. Dep't of Labor Wage and Hour Opinion Letter, FLSA 2005-6, 2005 WL 330605 (Jan. 7, 2005) (emphasis added). Thus, DOL had repeatedly and consistently directed employers and the courts to construe the word sale "in a practical" rather than a technical or restrictive manner.[26]

More specifically, forty years ago, DOL promulgated a regulation that implemented the expansive statutory language and made it perfectly clear what the agency believed was required for an individual to be "considered . . . 'selling'" as that term is defined in 29 U.S.C. § 203(k):

> As long as the employee *in any way participates* in the sale of the goods he will be considered to be "selling" [as defined by § 203(k)], whether he physically handles [the goods] or not. Thus, if [that] employee performs work that, *in a practical sense, is an essential part* of

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26. U.S. Dep't of Labor, Wage and Hour and Public Contracts Division, "Executive, Administrative, Professional, Outside Salesman Redefined, Report and Recommendation of the Presiding Officer at the Hearing Preliminary to Redefinition" (Oct. 10, 1940) ("1940 Report") at pp. 45-46.

> consummating the "sale" of particular goods, he will be considered to be "selling" the goods.

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

Thus, for decades, DOL has acknowledged that an employee engages in "sales" as defined by § 203(k) whenever the employer can demonstrate "that the employee, *in some sense*, has made sales." 69 Fed. Reg. at 22,162; *see also* 1940 Report at p. 46 ("salesman [must] in some sense make a sale"). The italics here — "*in some sense*" — come from DOL, which used them to emphasize that exemption-qualifying activity would include tasks that are like sales *in some ways*, but are *not* sales "*in every sense*" or in a narrow *prototypical* "sense."

Consider the work of the Sales Reps through this lens. Novartis hires individuals for a job denominated as a "sales" position and trains them in sales techniques. Pet. App. at 41a-43a. They are given sales territories that they are then expected to develop. *Id.* They educate customers about the advantages of their employer's products, "qualify" those customers to determine existing physician barriers to the use of those drugs, work to overcome those barriers through techniques of persuasion, and attempt to "close" each sales call, ultimately seeking a commitment from the physician to prescribe those drugs for patients who will benefit. They do so because, to a substantial degree, Sales Rep compensation is determined by success in increasing the rate at which the physicians in their territory prescribe Novartis drugs.

Given these undisputed facts, Sales Reps unquestionably do work that is, "*in some sense*," sales

work. Indeed, in *nearly every sense*, this is "sales" work. *Only one* aspect of this process distinguishes the Sales Rep's work from that of other exemption-qualifying outside salespersons: Novartis Sales Reps are prohibited by federal law from calling on the ultimate consumer, and the sales order — the prescription — is generally redeemed at the pharmacy, not in the doctor's office. When a Sales Rep makes her sale, no money changes hands at that point in the process.

Sales Reps are trained as salespersons, and perform jobs that are, in nearly every respect, sales jobs. And given the breadth of the statutory definition and DOL's regulatory guidance, it is not surprising that pharmaceutical manufacturers have for decades uniformly classified their Sales Reps as exempt outside sales persons. And for decades, DOL never challenged — or even questioned — this industry-wide practice.

C. The Standard Adopted Below Undermines 70 Years Of Settled Expectations

DOL and the Second Circuit together have overturned this unbroken, decades-long settled practice. On the precise question posed here — whether Sales Reps are prevented from engaging in statutory "sales" because federal law prohibits them from personally consummating a transaction that results in a transfer of title — there is no division of authority among the circuits. Waiting for such a split to develop, however, would likely be futile. It seems almost certain that every pharmaceutical company doing business in the United States can be sued somewhere in the Second Circuit. It seems just as certain that, with the new standards announced below, plaintiffs are unlikely to

pursue these claims against these employers anywhere else. Thus, the Second Circuit's decision seems destined to become the nominal national standard if not addressed by this Court.

For the first time, DOL insisted, and giving uncritical deference, the Second Circuit held, that "a 'sale' [by a Sales Rep would] require[] a *consummated* transaction *directly* involving the employee" at issue.[27] As the Second Circuit put it, the Sales Reps at issue here did not "sell" within the meaning of § 203(k) because they themselves "cannot transfer ownership of any quantity of the drug in exchange for anything of value."[28] As the Secretary would have it, no Rep "consummate[s]" *his or her own specific* "'sale'" and thus they cannot qualify for the exemption.[29] This is incompatible with § 799.241's more flexible standard, which requires only that the employee *in some way participate* in the sale of the goods to be considered to be "selling."

The difference between the historic context-dependent and flexible understanding of "sale" and this entirely new, mechanistic formulation could hardly be clearer. Before, under existing regulatory and statutory standards, an individual was "selling" within the meaning of the FLSA if he or she "perform[ed] work that, *in a practical sense*, [plays any] essential *part* of consummating the 'sale' of particular goods"; under the new standard urged by DOL and adopted below, "a 'sale' [by a Sales Rep would]

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27. Pet. App. at 167a (emphasis added).

28. *Id.* at 27a.

29. *Id.* at 167a.

require[] a *consummated* transaction *directly* involving the employee" at issue.

More fundamentally, the decision below adopts precisely the sort of bright line standard DOL has previously rejected: § 203(k)-qualifying sales occur only when the individual in question *transfers title* to the goods involved to the purchaser. Pet. App. at 27a. But the statute expressly includes within the definition of "sale" a "consignment for sale," in which by definition no transfer of title occurs. Because the statute expressly contemplates transactions in which title does *not* transfer, several circuits have concluded, *e.g.*, that *leases* of various sorts qualify as "sales."[30] These holdings cannot be reconciled with the decision below.

D. The Construction Of "Sale" Adopted Below Will Have Profound Implications For Employers And Employees Beyond The Pharmaceutical Industry

The Second Circuit's departure from the long-understood application of § 203(k) threatens to make unlawful a sales structure in the pharmaceutical industry

30. *See, e.g., Brennan v. Dillion*, 483 F.2d 1334, 1337 (10th Cir. 1973) (leasing apartment space was "sell[ing]" under § 203(k)); *Montalvo v. Tower Life Bldg.*, 426 F.2d 1135, 1141-42 (5th Cir. 1970) (rejecting argument that renewal payments on existing insurance policies were not "sales" because there was no "new" transaction; dubbing such arguments a "hypertechnical approach to the buying and selling of insurance protection which is totally unwarranted by economic reality" under § 203(k)).

that has existed for decades without challenge from DOL[31] or, for that matter, serious court challenges by private plaintiffs. That sort of upheaval in such an important sector of the American economy would, itself, justify issuing the writ.

But DOL's revisionist approach to § 203(k) will have ramifications far beyond the pharmaceutical industry. The word "sale" and its various permutations are used no fewer than 37 times in the FLSA in a wide variety of contexts, and thus the Second Circuit's new construction of that term cannot be easily cabined.[32] For example, in 29 U.S.C. § 215(a)(1), Congress made it unlawful for "any person . . . to . . . sell" or to deliver goods "sold" in violation of the Act's minimum wage or overtime provisions. Applying the Second Circuit's constricted definition of the word "sale" in this context would limit the scope of the FLSA's protections, *excluding* from coverage a large number of employees who are currently covered.

Similarly, if the Second Circuit's construction of the term "sale" were used everywhere it appears in the FLSA, it would *remove* many employers from coverage — and thus many *employees* from the Act's protections — because coverage often depends on the employer reaching

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31. *See Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510-11 (7th Cir. 2007) (Posner, J.) (while it is "possible for an entire industry to be in violation of the Fair Labor Standards Act for a long time without the Labor Department noticing[, the] more plausible hypothesis is that the . . . industry has been left alone" because DOL considered its practices lawful).

32. "Sale" (or its variants) appears only once in the statutory exemption and five times in § 203(k) itself.

a certain minimum levels of "sales." *See, e.g.*, 29 U.S.C. § 207(b)(3) (2010) (establishing coverage threshold by certain "sales" figures).

DOL urged the Second Circuit to consider the reach of the term "sale" solely in the "context" of the exemption which, the Secretary contended, required a "narrow construction." The court below obliged by ignoring the possible ramifications its construction of § 203(k) might have in other contexts. *See* Pet. App. at 25a-26a (construing the term "sale" only within the "outside sales" exemption context).

But Congress precluded such an inconsistent result in the statute's text when it declared that all definitions in Section 203 were to be applied uniformly wherever the defined terms appeared "in this chapter" (*i.e.*, the FLSA). 29 U.S.C. § 203 (2010). Even if Congress had not said so, this Court has instructed the lower courts to presume that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986) (citation omitted).

By adopting this mechanistic construction of the word "sale," the opinion below threatens to destabilize the operations of a critical industry. More broadly, it draws into question the reasonable expectations of employers (who have established practices that will be undermined by the ruling) *and employees* (who could lose FLSA coverage as a result) in nearly every sector of the American economy. It introduces uncertainty into questions of FLSA coverage and administration that employers and employees have long considered settled. The Second Circuit did not acknowledge that its opinion

had implications beyond the pharmaceutical industry or the outside sales exemption, and apparently did not consider how the use of that statutorily defined term *outside* of the exemption context reflects Congress's intent in adopting the broad definition it wrote. The court thus erred, and that error will have profound implications beyond the pharmaceutical industry.

III. CERTIORARI IS WARRANTED TO CLARIFY AND REINFORCE CURRENT LIMITATIONS ON *AUER* DEFERENCE

In *Auer v. Robbins*, 519 U.S. 452 (1997), this Court solicited a brief *amicus curiae* from the Secretary of Labor regarding proper application of a DOL regulation interpreting the FLSA's "salary basis" test. The Court gave deference to the resulting brief, concluding that an agency's views about its own regulations do not necessarily become "unworthy of deference" simply because they are expressed in an *amicus* brief. Given that the brief was solicited by the Court and filed by the Acting Solicitor General of the United States and the Acting Solicitor of Labor, the Court saw no reason to doubt that the brief "reflect[ed] the agency's fair and considered judgment on the matter in question." *Id.* at 462.

The *amicus* brief at issue in this case bears none of the indicia of a "fair and considered judgment" so evident in *Auer*. As explained above, with respect to each exemption, DOL's *amicus* brief disregards settled expectations, ignores the agency's own prior and existing regulatory guidance, and embarks on entirely new and unprecedented revisions of key aspects of the Act. While an agency is entitled to change its view about an existing

regulation and can dispense with long-established guidance, it seems impossible to characterize such an effort as "fair and considered" when the vehicle in which the new standard is articulated — here an *amicus* brief — does not mention, much less grapple with, the agency's traditional approach. It is not enough to *suppose* that the agency has given the matter some thought; the brief or rulemaking that announces the change of direction must explicitly "articulate a satisfactory explanation for [the agency's] action including a rational connection between the facts found and the choice made." *Cf. Motor Vehicles Mfrs. Ass'n v. State Farm Ins. Co.*, 463 U.S. 29, 43 (1983) (notice and comment case).

The unquestioning deference the *amicus* brief earned in this case is of particular concern to Chamber members because DOL has recently eliminated its long-standing practice of issuing opinion letters to provide guidance to the regulated community on FLSA compliance.[33] Apparently to replace this easily accessed, organized, and understood source of information, *inter alia*, the Solicitor of Labor is reported to have recently told an audience of lawyers representing employees in litigation that she intends to "reinvigorate" DOL's use of *amicus* briefs, and she openly solicited the audience for cases in which DOL might file.[34]

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33. *See* Wage & Hour Division, Rulings and Interpretations, *available at* http://www.dol.gov/WHD/opinion/opinion.htm#AdmIntprt (last visited Nov. 3, 2010).

34. Richard Renner, *Solicitor of Labor Patricia Smith Speaks Out About Policy*, Whistleblowers Protection Blog (posted June 25, 2010), *available at* http://www.whistleblowersblog.org/2010/06/

(Cont'd)

It seems inconceivable that employers can be expected to follow the activities of DOL in countless pieces of litigation around the country and accommodate their practices to new normative standards announced in any briefs DOL may file. In *Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158 (2007), the Court recognized that unanticipated, informal agency interpretations can pose significant risks to the regulated community, and cautioned that deference is appropriate only "as long as interpretive changes create no unfair surprise." *Id.* at 170. In this instance, DOL has attempted to undo existing guidance without even acknowledging that prior guidance exists, using a brief that purports to establish normative standards binding on countless employers who do not routinely follow the dockets of the lower courts.

There are mechanisms available to the Secretary to reverse course on existing regulations and retract guidance that has been the basis of reliance by the regulated community for decades. DOL's attempt to do so in a lower court *amicus* brief, without public involvement, and without acknowledging its own prior guidance on the issue is not a permissible vehicle for such an effort. Rather, it represents the prototypical "unfair surprise" about which the Court warned in *Coke.* The Court should grant the petition to ensure that existing guidelines for the application of *Auer* deference are more clearly defined.

(Cont'd)
articles/department-of-labor-1/solicitor-of-labor-patricia-smith-speaks-about-policy/ (last visited Oct. 26, 2010) (recounting quotations and statements of the Solicitor of Labor from her speech to the annual convention of the National Employment Lawyers Association).

CONCLUSION

The petition should be granted.

Respectfully Submitted,

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