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No. 10-460

In the
Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION,
PETITIONER,

v.

SIMONA M. LOPES, CATHERINE E. WHITE, ET AL.,
RESPONDENTS.

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

BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA (PhRMA) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. *See* http://www.phrma.org/member_company_list (listing approximately 40 members, affiliates, and research associates). PhRMA's mission is to advocate in support of public policies that encourage the discovery of life-saving and life-enhancing new medicines for patients by pharmaceutical and biotechnology research companies.

PhRMA closely monitors legal issues that impact the pharmaceutical industry. To that end, PhRMA has frequently participated in cases before this Court. *See, e.g.*, *Astra USA, Inc. v. Cty. of Santa Clara*, 131 S. Ct. __ (2011) (No. 09-1273); *Merck & Co., Inc v. Reynolds*, 130 S. Ct. 1784 (2010) (No. 08-905).

The decision below has potentially far-reaching ramifications for the pharmaceutical industry. By holding that Novartis's pharmaceutical sales representatives ("sales representatives") are not exempt from the Fair Labor Standards Act's

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[1] The parties have consented to the filing of this brief. The parties' counsel have received 10-day notice of *amicus curiae*'s intention to file pursuant to Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

overtime pay requirements, the decision unexpectedly exposes PhRMA members to potentially staggering retroactive liability from lawsuits by current and former employees. Moreover, unless reversed, the decision could require major restructuring that would have significant consequences for sales representatives, the industry, health care professionals, and patients. Worse, these serious consequences loom because of nothing more than an unexplained (and unpersuasive) change in the Department of Labor's interpretation of its regulations announced for the first time in an *amicus* brief. Rather than leave this important industry at sea, this Court should grant certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

Throughout the 70 years since the enactment of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, pharmaceutical companies have employed large numbers of sales representatives, and the settled understanding has been that those employees are exempt from overtime pay under the FLSA's "outside sales" and "administrative" employee exemptions. That view was based on an unbroken line of authority beginning with the Department of Labor's initial regulations in 1940 through to its recent reaffirmations in its 2004 rulemaking.

The current Administration, however, has apparently decided to reverse this long-settled issue. Rather than initiate a rulemaking to consider prospective changes and allow interested parties to participate, the Department simply filed an *amicus* brief below announcing its new position that sales

representatives are not exempt and never have been. To make matters worse, the Department's *amicus* brief failed entirely to acknowledge the Department's change in position, let alone grapple with contrary authority and justify a change that upsets such well-settled expectations. The Second Circuit nonetheless held that the *amicus* brief was entitled to "controlling" deference under *Auer v. Robbins*, 519 U.S. 452 (1997), and accepted uncritically the Department's new interpretations of the exemptions, giving them retroactive effect.

The Second Circuit's extreme application of *Auer* deference necessitates this Court's review. The *Auer* line of cases has generated confusion, as lower courts have wrestled with whether an agency's change in position vitiates or lessens the deference due. But whatever the open questions from this Court's precedents or divisions among the lower courts, the fundamental error of the decision below is plain: In focusing only on the Department's interpretations "on this appeal," and turning a blind eye to the dramatic change in position that the interpretations reflect, the Second Circuit allowed the Department to undo regulations promulgated through notice-and-comment rulemaking and engineer a revolution in FLSA jurisprudence via the expedient of an unsolicited *amicus* brief.

The Second Circuit's misplaced *Auer* deference drove its erroneous holdings as to each FLSA exemption. But for its deference to the Department's newly-minted interpretation of the "outside sales" exemption, the Second Circuit could not have found Novartis's sales representatives to be non-exempt. Since 1940, the regulations have embodied a functional approach under which an "outside sales"

employee need only make sales "in some sense." That approach cannot be reconciled with the Department's new wooden insistence on an actual transfer of title personally effected by the employee at issue. Novartis's "sales representatives" do engage in sales "in some sense" — in the only sense possible given the regulatory constraints on drugs' marketing and distribution. Those regulatory constraints, moreover, have nothing to do with the purposes of the FLSA and cannot obscure the reality that sales representatives do sales work — as recognized by the Department's own Bureau of Labor Statistics.

Likewise, but for its deference to the Department's new construction of the "administrative" exemption, the Second Circuit could not have found Novartis's sales representatives to be non-exempt under that exemption. Until its *amicus* brief, the Department's position was that an exempt employee need only have a primary duty that "includes" discretion, and need not "customarily and regularly" exercise discretion or meet a threshold level of discretion. Under that traditional position as reflected in the existing regulations, Novartis's sales representatives are plainly exempt. It would turn administrative law on its head if an *amicus* brief could reverse that notice-and-comment-promulgated judgment.

The proper scope of deference to an agency's interpretation of its regulations is an important question meriting certiorari in its own right. The decision below, however, raises a particularly acute need for review because of its immediate practical impact. In addition to threatening massive unforeseen liability, the decision below creates

rampant uncertainty concerning longstanding sales practices. Biopharmaceutical companies in all likelihood will not be able to simply switch to treating sales representatives as non-exempt while keeping everything else about their jobs unchanged. Such a shift, moreover, may have broader ramifications for how prescription drug information is disseminated to medical professionals. Before companies in such a large and important industry face the potential need to restructure their operations, this Court should determine whether the Second Circuit correctly held Novartis's sales representatives to be non-exempt.

ARGUMENT

I. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW ERRONEOUSLY APPLIES *AUER* DEFERENCE.

A. There Is Uncertainty Among The Circuits Over The Extent To Which Changes In Position Undermine *Auer* Deference.

In *Auer*, this Court held that an agency's interpretation of its own ambiguous regulations was entitled to "controlling" deference unless that interpretation was "'plainly erroneous or inconsistent with the regulation.'" 519 U.S. at 911. The agency, having written the regulation, was well-positioned to say what it meant. *See Bowles v. Seminole Rock*, 325 U.S. 410, 413-14 (1945). But this Court also signaled limits to that deference: In explaining why the Secretary of Labor's interpretation was worthy of deference despite being advanced in an *amicus* brief, the Court noted that there was "no reason to suspect that the interpretation d[id] not reflect the agency's

fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462 (emphasis added). Lower courts since have wrestled with what a "fair and considered" agency judgment entails. In particular, they have grappled with whether an agency's change in position about the meaning of its regulations vitiates or lessens deference under *Auer*.

The D.C. Circuit and Federal Circuit have held that a "fair and considered" agency position should be one consistent with prior interpretations. The D.C. Circuit holds that whether an interpretation is "fair and considered" turns on whether the agency has "'ever adopted a different interpretation of the regulation or contradicted its position on appeal.'" *Drake v. Fed. Aviation Admin.*, 291 F.3d 59, 68 (D.C. Cir. 2002). The Federal Circuit likewise has observed that an interpretation "'that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view.'" *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 837 (Fed. Cir. 2006). The Second Circuit appeared to take the same view until this case. *See Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 264 (2d Cir. 2006) (where interpretation is "inconsistent with the government's prior interpretations of the regulation ... the 'substantial deference' that we normally accord the [agency's] interpretation of its own regulations[] is not appropriate").

These courts have reasoned that this Court's precedents compel this focus on consistency. In *Watt v. Alaska*, 451 U.S. 259 (1981), for example, this Court held that the Department of the Interior's "current interpretation" of certain legislative amendments was "entitled to considerably less deference" because it "conflict[ed] with its initial

position." *Id.* at 273; *accord Gose*, 451 F.3d at 837. In *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987), this Court similarly held that the "inconsistency of the positions" the Board of Immigration Appeals had "taken through the years" militated against deferring to its latest statutory interpretation. *Id.* at 446 n.30. Moreover, in *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994), this Court stated that deference to an agency's interpretation of its regulations dissipates if there were "'other indications of the Secretary's intent at the time of the regulation's promulgation.'" *Id.* at 512 (citation omitted); *accord Gose*, 451 F.3d at 838. Accordingly, these courts are appropriately wary of "flip-flops" in the agency's position. *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000). And they demand that an agency, though not barred from changing its mind, at least acknowledge and offer a reasoned analysis of the change. *See, e.g., id.* (Secretary has "never grappled with—and thus never exercised her judgment over—the conundrum posed by the regulation[]").

Other courts have been less explicit in describing consistency as a precondition to *Auer* deference. But they have noted the consistency (or not) of an agency's interpretation in justifying decisions to defer (or not) to the agency's interpretation. *See, e.g., Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 777 (5th Cir. 2010); *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 461 (4th Cir. 2007); *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 567 (1st Cir. 2004); *United States v. Occidental Chem. Corp.* 200 F.3d 143, 152 n.11 (3d Cir. 1999). In *Taylor*, the Fourth Circuit declined to defer to the Department of

Labor's new *amicus*-brief interpretation because it was "inconsistent with what the DOL said it intended the regulation to mean at the time it was promulgated." *Taylor*, 493 F.3d at 461; *cf. id.* at 464 (Duncan, J., dissenting) ("I am ... unpersuaded by any suggestion that the inconsistencies in the DOL's interpretation of the regulation over time must lessen the level of deference").

The Ninth Circuit, meanwhile, has held that inconsistency does *not* vitiate deference to the agency as long as the change in position causes no "unfair surprise." In *Boose v. Tri-County Metropolitan Transportation District*, 587 F.3d 997 (9th Cir. 2009), the Ninth Circuit acknowledged that the Department of Transportation "ha[d] changed its views ... over the years," but emphasized that change alone was not a "'ground for disregarding [its] present interpretation.'" *Id.* at 1005 n.13. Citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007), in which this Court deferred to an agency's changed interpretation only after noting that it was not an "unfair surprise" because it had been announced in a proposed rulemaking, the Ninth Circuit explained that the touchstone was not a change in position by itself, but rather whether the change created "unfair surprise." And as in *Coke*, there was "'no unfair surprise'" because the Department had begun a rulemaking to "'codify its new interpretation.'" *Boose*, 587 F.3d at 1005 n.13. Under the Ninth Circuit's approach, then, inconsistent prior interpretations do not necessarily defeat deference, but courts must be vigilant against agencies seeking to bypass the rulemaking process by creating a new regulation in the guise of interpreting the existing one. This Court has

emphasized that when an agency changes position through a more formal process, it must acknowledge the change and account for reliance interests. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009). *A fortiori*, an agency may not use a mere *amicus* brief to work unfair surprise in a situation like this where reliance interests are at their apex.

The decision below went well beyond any existing authority. The Second Circuit deferred uncritically without addressing the abrupt shift effected by the Department's *amicus* brief or why the court could be confident that the brief reflected the Secretary's "fair and considered" judgment. Although Novartis had traced the Secretary's contrary positions as far back as 1940, neither the Department nor the court grappled with the problem of unfair surprise. By treating everything but the "position taken by the Secretary *on this appeal*" as irrelevant, the decision below took the Second Circuit into uncharted territory. App. 25a (emphasis added).

B. The Second Circuit Compounded Its Error By Deferring To A New Agency Position Stated For The First Time In An *Amicus* Brief.

The Second Circuit's deference to the agency's changed position conflicts not only with the approach of other circuits, but with this Court's own precedents. Whatever the precise limits of *Auer* deference, this Court has made clear that agencies cannot use *Auer* to circumvent the rulemaking process. Thus, in *Coke*, when the Court held that the agency's changing views did not vitiate deference, its rationale was that the Department of Labor's

"recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation makes any [unfair] surprise unlikely." 551 U.S. at 170-71; *see also id.* at 163 (Department had considered rulemaking changes on "three separate occasions during the past 15 years"). Similarly, in *Christensen v. Harris County*, 529 U.S. 576 (2000), this Court cautioned against deferring to an interpretation in an informal opinion letter because it would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.* at 588. In his concurrence, Justice Souter made explicit the relationship between *Chevron* deference, which permits an agency to change its position on statutory interpretation issues by changing its regulation through rulemaking procedures, and *Auer* deference, which presupposes that the agency is genuinely interpreting its existing regulation. *See id.* at 589 (Department could "issue regulations" to reach the result the Court rejected under existing regulations).

The Department not only introduced its new interpretations in an *amicus* brief rather than a rulemaking, but its *amicus* brief broke from 2004 regulations that the agency *did* promulgate through rulemaking — indeed, after two decades' worth of input from interested parties. *Cf.* Br. of United States, *Kasten v. Saint-Gobain Performance Plastics Corp.* (No. 09-834), at 31 (seeking deference to Secretary of Labor's statutory interpretation on ground that it was not mere litigating position but rather reflected "half-century" of consistent "administrative practice"). Because the amicus brief's interpretations sharply depart from the 2004 regulations, the Second Circuit's deference

improperly allowed the Secretary to create new rules under the guise of interpreting existing ones. *See Mich. Bell Tel. Co. v. Covad Commc'ns Co.*, 597 F.3d 370, 375 n.6 (6th Cir. 2010) (*Auer* deference "unavailing" because "FCC has attempted to create a new *de facto* regulation under the guise of interpreting the regulation"); *see also Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1997); *Boose*, 587 F.3d at 997 n.13.

The problem of unfair surprise is even more acute given the Department's broader move away from a system of meaningful, advance guidance. The Department for decades issued opinion letters offering advance FLSA guidance so employers could conform their conduct to the Department's view of the law and avoid retrospective liability. In March 2010, the Department abandoned this practice, shifting to issuing general legal interpretations "applicable across-the-board" to a given industry.[2] Because of their generality, these new interpretations are likely to provide less meaningful guidance. And courts have already noted that recent interpretations have "brought into question" earlier opinion letters. *See, e.g., Henry v. Quicken Loans, Inc.*, No. 04-cv-40346 (E.D. Mich. Sept. 27, 2010) (order requesting DOL *amicus* brief to clarify impact of a new interpretation). To make matters worse, the Department appears to have abandoned its

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[2] *See* Dep't of Labor, Wage and Hour Division, *Rulings and Interpretations*, http://www.dol.gov/WHD/opinion/opinion.htm#AdmIntprt.

opinion-letter practice in favor of "reinvigorat[ing]" its *amicus*-brief practice.[3]

If the Department sought to affect the application of an exemption by promulgating new regulations, its new rules would apply prospectively only. *See Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 369 (7th Cir. 2005). By bypassing rulemaking and ending its opinion-letter practice, the Department leaves employers unable to obtain meaningful guidance — until after the employer has been sued, when the Department files an *amicus* brief arguing for retroactive liability and controlling deference. Leaving the Second Circuit's *Auer* error uncorrected would encourage what appears to be the Department's move towards a system of ambush-by-*amicus*-brief.

C. The Second Circuit's *Auer* Deference Error Drove Its Decision On Both Exemptions.

The Second Circuit's "'controlling' deference" to the Department's interpretations warrants this Court's review because that deference undergirds its problematic and expectation-upsetting decision. App. 17a.

As to the "outside sales" exemption, the Second Circuit premised its analysis on *Auer's* deferential standard — "'controlling' deference unless th[e] interpretations are 'plainly erroneous or inconsistent

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[3] *See* Richard Renner, *Solicitor of Labor Patricia Smith Speaks About Policy*, http://www.whistleblowersblog.org/2010/06/articles/department-of-labor-1/solicitor-of-labor-patricia-smith-speaks-about-policy/ (June 25, 2010).

with the regulation.'" App. 25a; *see also id.* ("We find no such inconsistency and see no such error."). The court found Novartis's sales representatives non-exempt only by limiting "sales" to reflect the Department's technical insistence on an actual, personal transfer of title. And the court dismissed contrary case law holding sales representatives exempt only by stating that those cases "do[] not persuade us that *the Secretary's interpretations* of the regulations should be disregarded." App. 29a (emphasis added). Likewise, as to the "administrative" exemption, the Second Circuit found Novartis's sales representatives non-exempt only by deferring to the Department's view that "a greater degree of discretion ... than Novartis allows" is required. App. 33a. Indeed, the court acknowledged that Novartis's sales representatives have discretion over "what order to visit physicians' offices," "how best to gain access," "how to allocate their Novartis budgets for promotional events," and "how to allocate their samples." App. 35a. Only by deferring to the Department's insistence on some threshold quantity of discretion, then, could it conclude that such discretion was not "sufficient[]." *Id.*

Thus, while the Second Circuit did not discuss *Auer* at length or address the divergence of authority concerning *Auer*'s application in the face of a changed agency interpretation, its application of *Auer* deference drove the entire decision.

1. The Second Circuit Erred In Deferring To The Department's New Interpretation Of The "Outside Sales" Exemption.

The Department's newly restrictive definition of "sale" requires that the employee actually and personally transfer title. *See* App. 166a-167a & n.14. The decision below ignored the unfair surprise caused by the Department's adoption of that position at this late date. By focusing solely on the Department's position "on this appeal," App. 25a-26a, the Second Circuit did not grapple with the Department's abandonment of the flexible, functional understanding of "sale" that it had espoused for decades.

In 1940, the Department promulgated regulations making clear that an "outside salesman" under the exemption is one "who is customarily and regularly engaged away from his employer's place or places of business in making sales within the meaning of section 3(k) of the Act." 29 C.F.R. § 541.5 (1940). Section 3(k), in turn, defined "sale" in flexible and expansive terms to "*include*[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition*." 29 U.S.C. § 203(k) (emphases added). The Department underscored this non-technical approach by explaining that a "salesman [must] *in some sense* make a sale." Dep't of Labor, *Executive, Administrative, Professional, Outside Salesman Redefined* (Oct. 10, 1940) ("Stein Report") at 45-46 (emphasis added). Nothing in the regulatory or statutory language hinted at the hypertechnical reading now pressed by the Department.

In 1970, the Department reiterated this flexible understanding when it promulgated 29 C.F.R. § 779.241, entitled "Selling." Although § 779.241 appears in regulations discussing retailers, it interprets "[t]he statutory definition of the term 'sale' or 'sell' ... quoted in § 779.15" — namely, 29 U.S.C § 203(k), the precise statutory definition at issue here. In interpreting that statutory definition of "sale" — "includ[ing] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition" — the Department took a broad and explicitly practical approach that is the polar opposite of its *amicus*-brief interpretation:

> As long as the employee *in any way participates* in the sale of the goods he will be considered to be "selling" the goods, whether he physically handles them or not. Thus, if the employee performs any work that, *in a practical sense* is an essential *part* of consummating the "sale" of the particular goods, he will be considered to be "selling" the goods.

29 C.F.R. § 779.241 (emphases added). Congress provided that definitions in § 203 would apply uniformly throughout the FLSA. *See* 29 U.S.C. § 203 ("Definitions ... [a]s used in this chapter"). But the Department's *amicus* brief did not even acknowledge, much less successfully explain away, this expansive understanding of a "sale" in its own still-extant regulation.

Next, in its 2004 rulemaking, the Department emphasized that it "did not intend any substantive changes." Dep't of Labor, Preamble, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and*

Computer Employees (Apr. 23, 2004), 69 Fed. Reg. 22122, 22,161-22,162. The Department did not alter the definition of "sale." Indeed, the Department explicitly reaffirmed the statement in the 1940 Stein Report that all that is required for the exemption to apply is that the employee "'*in some sense* make a sale.'" *Id.* at 22,162 (emphasis in original).

Based on that expansive understanding, courts have long found transactions that do not involve actual, personal transfers of title to qualify. *See* Pet. 26 (citing cases). In *Gregory v. First Title of America, Inc.*, 555 F.3d 1300 (11th Cir. 2009), for example, the Eleventh Circuit held that a title marketing employee fell within the "outside sales" exemption. The plaintiff argued that she "never actually consummated a sale," that she was tasked only with "inducing" realtors and brokers to refer their customers who were the actual "end user[s]," and that she was not licensed to "directly s[ell]" to any end-user. *Id.* at 1303. But the Eleventh Circuit reasoned that the plaintiff was not "'paving the way' for others to consummate the sale"; she functioned as the "conduit through which orders for services flowed" in the industry and "received credit and payment for those orders that flowed through her." *Id.* at 1309.

Likewise, the pharmaceutical industry for decades has treated sales representatives as exempt outside salespersons. To be sure, industry practice does not establish the law. But it strains credulity to imagine that the industry uniformly misread the regulations and yet the Department never said anything, in any manner, to suggest it disagreed at any point over 70 years. As Judge Posner explained for the Seventh Circuit, 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 it was compliant. *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510-11 (7th Cir. 2007).

The Department seeks to analogize sales representatives to promoters or merchandisers who interact with customers but pave the way for sales to be made by others. App. 166a-167a; *see also* 29 C.F.R. § 541.503(c) ("promotional work that is incidental to sales made, or to be made, *by someone else* is not exempt outside sales work"). The analogy fails, however, because sales representatives do not pave the way for other salespersons. It is one thing to say that a merchandiser who does advance promotion to lay the groundwork for an outside salesperson is not himself an outside salesperson. *Cf. Skipper v. Superior Dairies, Inc.*, 512 F.2d 409, 414-16 (5th Cir.1975). But it is quite another thing to deny that pharmaceutical sales representatives make sales in any sense. The former suggests that not everyone involved in the sales process is a salesperson for purposes of the FLSA. The latter means that an industry that employs tens of thousands of individuals who always have been viewed as sales representatives has been magically deemed to have no "salespersons" at all.

The Department's new position defies the reality of how and why sales representatives operate the way they do. The mechanics of how prescription drugs are shipped and paid for have everything to do with FDA regulations and nothing to do with the purposes of the FLSA's overtime requirements — "'to

apply financial pressure to 'spread employment'" and "combat 'labor conditions detrimental to the maintenance of the minimum standard of living'" for workers' health and well-being. App. 19a, 45a; *see* App. 29a (sales representatives "cannot lawfully transfer ownership of any quantity of the drug" to doctors). That is presumably why neither the Department nor the Second Circuit even attempted to articulate a *reason*, grounded in the FLSA, why it would make sense to classify sales representatives as non-exempt on this technical ground.

Worse, the Department upended decades-long understandings without so much as acknowledging the change, its definition of "selling" in § 779.241, or contrary case law. Indeed, the *amicus* brief did not even acknowledge the Department's "in some sense" language evidencing its functional approach dating back to 1940. If the Department wishes to adopt this new hypertechnical definition of "sale," it could notify regulated actors of a proposed rulemaking, consider their comments, and then seek to justify prospective application of the resulting rule under *Chevron*. What the Department cannot do is purport to interpret its existing regulations to reach that result under *Auer* with the consequence that an entire industry loses an exemption retroactively.[4]

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[4] Even if *Auer* deference applied despite the Department's stark and unacknowledged change in position, the Department's new interpretation would fail under *Auer* itself. Requiring an actual, personal transfer of title is not only plainly contrary to prior interpretations, but also plainly contrary to the regulations themselves. The regulations' expansive and practical definitions of "sale" and "selling" in §§ 541.5 and 779.241 establish that, as the 2004 rulemaking reaffirmed, an

2. The Second Circuit Erred In Deferring To The Department's New Interpretation Of The "Administrative" Exemption.

The Department's new definition of "administrative" work similarly marks a sharp and unacknowledged break with its longstanding interpretation. The Department's actual regulation does not suggest that any particular quantum of discretion is required. It merely states that an employee is exempt if his "primary duty *includes* the exercise of discretion" — not that his primary duty must uniformly or routinely demand discretion, or that he must exercise discretion in some undefined proportion of work tasks. 29 C.F.R. § 541.200(a)(3) (emphasis added). In accordance with that plain language, the Department's longstanding position had been that only "some" discretion was required. The Department's *amicus* brief, however, contended that "some" discretion is not enough, that a higher (and undefined) quantum of discretion is required, and that Novartis's sales representatives do not exercise "sufficient[]" discretion to meet that threshold. App. 35a; *see also* App. 178a. The Second Circuit erred by deferring to that new interpretation and thus allowing an *amicus* brief to trump decades of consistently-stated regulatory views.

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employee need only "'*in some sense* make a sale.'" 69 Fed. Reg. at 22,162; *see also id.* ("Employees have a primary duty of making sales if they 'obtain a commitment to buy' from the customer and are credited with the sale."). The Department's new position that only an actual transfer of title suffices contradicts that plain text and could not survive even the most deferential review.

In 1940, the Department adopted regulations broadly defining "administrative" employees to cover any persons earning over $200 monthly whose work involved "the execution under only general supervision of special non-manual assignments ... involving the exercise of discretion and independent judgment." 29 C.F.R. § 541.2 (1940). The Department established that only minimal "discretion and independent judgment" was required. *See* Pet. 5-6; Stein Report at 26. In 1945, the Department issued an opinion letter declaring medical "detailists" to be exempt "administrative" employees. *See* Dep't of Labor, Wage and Hour Opinion (May 19, 1945), *available at* Lab. L. Rep. (CCH), Wage and Hour, v.1, ¶ 25,210.41. Describing the detailists' duties as working to "increas[e] the use of ... product in hospitals and through physicians' recommendations" and maintain relationships with doctors — precisely what sales representatives do today — the Department reasoned that the detailists performed "administrative" work because, among other things, they used "discretion and independent judgment," and had "skills or knowledge acquired through special training or experience." *Id.*

In 2004, the Department reaffirmed that, consistent with "current law," an "administrative" employee's "primary duty must 'include' the exercise of discretion," and expressly rejected a requirement that the employee "'*customarily and regularly*' exercise discretion." 69 Fed. Reg. at 22,142-22,143 (emphasis added); *see* 29 C.F.R. § 541.202(a)(3). Notably, one of the cases the Department invoked to illustrate the proper application of the "discretion" requirement involved insurance marketing representatives closely analogous to Novartis's sales

representatives. In *Reich v. John Alden Life Insurance Co.*, 126 F.3d 1 (1st Cir. 1997), the First Circuit highlighted the representatives' freedom to "choos[e] which agents to contact on any given day" and their "rel[iance] on their own knowledge of an agent's business to help tailor proposals for the agent's end-customers." *Id.* at 13. Although the representatives applied techniques "learned in training sessions," the important point was that they "nonetheless exercise[d] discretion in applying this instruction — for instance, in determining which agent may have an interest in that product, or in fashioning bid proposals that meet the needs of the agent's customers." *Id.* at 14.

That interpretation of the discretion requirement makes particular sense because the limits on sales representatives' discretion reflect FDA policies and companies' strong commitment to comply with those policies — not considerations relevant to labor law or the purposes of the FLSA. Just as it defies reality to treat sales representatives as not engaged in sales because the need for a prescription affects the mechanics of the transaction, it makes no sense to conclude that they lack meaningful discretion because industry-specific compliance considerations limit and channel their discretion. *See Roe-Midgett v. CC Services, Inc.*, 512 F.3d 865, 875 (7th Cir. 2008) ("independent judgment is not foreclosed by the fact that an employee's work is performed in accordance with strict guidelines").

The Department's *amicus* brief is irreconcilable with its previous interpretation of the discretion requirement. In place of its previous emphasis on the "includes" standard, the Department now

contends that employees must exercise a greater quantum of discretion. *Some* discretion used to be sufficient; now, suddenly, it is not. This change is critical, because no one can dispute that sales representatives exercise at least some discretion. The Second Circuit reasoned, for example, that although Novartis's sales representatives are "ab[le] to answer questions," "develop a rapport with a physician," "remember past conversations," and "recognize when a message has been persuasive," that was insufficient because those skills are "honed in [sales representatives'] Novartis training sessions." App. 34a. Without specifying how much discretion would be enough, the Second Circuit deferred to the Department's view that the amount exercised by Novartis's sales representatives was not "sufficient[]." App. 35a.[5]

Nothing but the Second Circuit's extreme version of *Auer* deference can explain the anomalous decision below. Under the Department's longstanding view, the undisputed existence of some discretion is the end of the analysis. The D.C. Circuit's decision in *Robinson-Smith v. Gov't Emps. Ins. Co.*, 590 F.3d 886 (D.C. Cir. 2010), perfectly illustrates that understanding: The "parties disagree[d] on how much discretion the [auto damage] adjuster exercises," but that was beside the point because "no one disputes that he exercises 'some.'" *Id.* at 893-94. The D.C. Circuit thus held

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[5] As the Petition explains, the Third Circuit held, in contrast, that a Johnson & Johnson sales representative was an exempt administrative employee. *See* Pet. 21-22 (discussing *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d. Cir. 2010)).

adjusters to be exempt "[e]ven assuming ... that the vast majority of adjusters' work" did not require discretion. *Id.* at 894. The Second Circuit erred by allowing the Department to use an *amicus* brief to upend settled expectations by abandoning that longstanding interpretation and imposing retroactive liability.

II. CERTIORARI TO CONSIDER THE PROPER APPLICATION OF THESE EXEMPTIONS IS CRITICALLY IMPORTANT.

In light of the pharmaceutical industry's universal and longstanding practice of treating sales representatives as exempt, the Second Circuit's decision threatens untold costs in unforeseen liability. Counsel for respondents estimates that damages from this suit alone (involving 2,500 sales representatives) could reach $100 million. *See* Mark Hamblett, *2nd Circuit Finds Novartis Drug Reps Not Exempt From Overtime Law*, http://www.law.com/jsp/article.jsp?id=1202463314353 (July 7, 2010). There are tens of thousands of pharmaceutical sales representatives working in the United States. *See* Linda Wang, *Prescription For Success In Sales*, 85 Chem. & Engineering News, no. 8, at 43-46 (2007). Over a dozen FLSA cases have been filed in recent years against pharmaceutical companies, "almost all cast as class actions." Steven Blackburn, *In re Novartis Wage & Hour Litigation*, in Top 20 Food and Drug Cases, 2009 & Cases To Watch, 2010, at 169 (John B. Reiss ed., 2010). Moreover, the impact of the Second Circuit's decision could be even greater, because many States' wage and hour laws are interpreted to track the FLSA. *E.g.*, 820 Ill. Comp. Stat. 105/4a(2)(E) (West 2000) (state overtime

laws inapplicable to white-collar workers "as defined by or covered by the Federal [FLSA]"). Because the decision below, if left unreviewed, "could have a wide-ranging impact, suddenly imposing upon businesses across the country a [substantial] liability," this Court should grant certiorari to determine whether such a "groundbreaking" result is truly warranted. *See Singh v. City of New York*, 524 F.3d 361, 369-70 (2d Cir. 2008) (Sotomayor, J.).

Beyond the financial exposure, a change in the exempt status of sales representatives would have broader ramifications. It is exceedingly unlikely that biopharmaceutical companies could shift to treating sales representatives as non-exempt without altering the fundamental nature of the position. For example, if non-exempt, sales representatives would have to maintain more precise work hours and would lose the flexibility they currently enjoy. *Cf. Jewel Tea Co. v. Williams*, 118 F.2d 202, 207-08 (10th Cir. 1941). Other attractive aspects of sales representatives' jobs could also be revisited, including the commission model that allows motivated and skilled sales representatives to earn compensation well into the six figures.

Before pharmaceutical companies potentially undertake far-reaching restructuring in response to the decision below and the Department's new position, this Court should grant certiorari to consider whether the Second Circuit was correct to defer to the Department's *amicus* brief. The decision below also threatens to upend settled understandings in other industries as well. If only a technical transfer of title satisfies the "outside sales" exemption, many businesses will be affected. *See, e.g., Gregory*, 555 F.3d at 1303-04 (title marketing

companies); *Wirtz v. First Nat'l Bank & Trust Co.*, 365 F.2d 641, 645 (10th Cir. 1966) (management company renting office space). Likewise, if "some" discretion is no longer sufficient under the administrative exemption and an undefined but higher quantity of discretion is required, employers in all manner of industries face uncertainty about a vast spectrum of employee positions. *See, e.g., John Alden*, 126 F.3d at 13 (insurance salespersons); *Robinson-Smith*, 590 F.3d at 892 (auto damage adjusters). The Court should grant review of these important and cleanly-presented questions now.

CONCLUSION

The petition should be granted.

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