JAN 5 – 2011

No. 10-459

In The Supreme Court of the United States

SCHERING CORPORATION,

Petitioner,

v.

EUGENE KUZINSKI, MARC CAMPANO, JERRY HARRIS, and SHAWN JONES, on behalf of themselves and others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

MICHAEL DICHIARA
DICHIARA LAW FIRM LLC
77 Market St., Suite 2
Park Ridge, NJ 07656
(201) 746-0303

ERIC B. KINGSLEY
KINGSLEY & KINGSLEY
16133 Ventura Blvd.,
Suite 1200
Encino, CA 91436
(818) 990-8300

MATTHEW D. BRINCKERHOFF
Counsel of Record
EMERY CELLI BRINCKERHOFF
& ABADY LLP
75 Rockefeller Plaza, 20th Fl.
New York, New York 10019
(212) 763-5000
mbrinck@ecbalaw.com

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

QUESTION PRESENTED

Did the district court and court of appeals err in denying summary judgment to petitioner on its affirmative defense because respondents – pharmaceutical representatives who visit doctors and attempt to persuade them to write prescriptions for Schering products sold to consumers by pharmacies – were not plainly and unmistakably exempt from the FLSA as "outside salesm[e]n," 29 U.S.C. § 213(a)(1)?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. Introduction 1

B. Statutory and Regulatory Framework 3

C. Schering's Business and Respondents' Jobs 6

D. The District Court's Ruling 8

E. The Second Circuit's Ruling 11

REASONS FOR DENYING THE PETITION 13

I. THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH OTHER COURTS OF APPEALS OR WITH DECISIONS OF THIS COURT 13

II. PETITIONER'S CONTENTION THAT "THE SECOND CIRCUIT ERRED IN ITS CONSTRUCTION OF THE OUTSIDE SALES EXEMPTION" IS WRONG 14

A. There is no error 14

B. There has been no change 16

III. THERE IS NOTHING UNUSUAL ABOUT THE SECOND CIRCUIT'S DECISION TO DEFER, UNDER *AUER*, TO THE SECRETARY'S CONSIDERED INTERPRETATION OF HER OWN REGULATIONS 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Ackerman v. Coca-Cola Enterprises, Inc., 179 F.3d 1260 (10th Cir. 1999) 15, 18

Archuleta v. Wal-Mart Stores, Inc. (In re Wal-Mart, Inc.), 395 F.3d 1177 (10th Cir. 2005) 22

Arnold v. Ben Kanowsky, Inc., 361 U.S. 388 (1960) 9

Auer v. Robbins, 519 U.S. 452 (1997) ..... *passim*

Belt v. Emcare, Inc., 444 F.3d 403 (5th Cir. 2006) 22

Clements v. Serco, 530 F.3d 1224 (10th Cir. 2008) 10, 14

In re Novartis Wage Litig., 611 F.3d 141 (2d Cir. 2010) ..... *passim*

IntraComm, Inc. v. Bajaj, 492 F.3d 285 (4th Cir. 2007) 22

Kuzinski v. Schering, 604 F. Supp.2d 385 (D. Conn. 2009) 9

Long Island Care at Home, Ltd. v. Coke, 551 U.S. 159 (2007) 21

Rucker v. Lee Holding Co., 471 F.3d 6 (1st Cir. 2006) 22

Sec'y of Labor v. Beverly Healthcare-Hillview, 541 F.3d 193 (3d Cir. 2008) 21

Wirtz v. Keystone Readers Service, Inc., 418 F.2d 249 (5th Cir. 1969) 15

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES:

28 U.S.C. § 1292(b) 1

29 U.S.C. § 203(k) 4, 9

29 U.S.C. § 213(a)(1) 3

FEDERAL REGULATIONS:

29 C.F.R. § 541.500(a) 4

29 C.F.R. § 541.501(b) 4, 9

29 C.F.R. § 541.503(a) 4, 10

29 C.F.R. § 541.503(a)-(c) 2, 14

29 C.F.R. § 541.503(b) 5

29 C.F.R. § 541.505(c)(2) 18, 19

69 Fed. Reg. 22142 17

69 Fed. Reg. 22121 (2004) 18

STATEMENT OF THE CASE

A. Introduction

After accepting and hearing Petitioner's permissive interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the court of appeals issued a summary order (Pet. App. 1a-4a) affirming the denial of "summary judgment for the reasons stated in the district court's ruling and for the reasons stated in [its] opinion in *In re Novartis Wage Litig.*, [611 F.3d 141 (2d Cir. 2010) (Pet. App. 45a-78a)]."[1] (Pet. App. 3a).

Now Schering petitions for a writ of certiorari, but it ignores all traditional criteria for evaluating such a petition. Sup. Ct. R. 10. Petitioner contends that the courts below and the Department of Labor ("DOL") incorrectly interpreted the Fair Labor Standards Act ("FLSA") and the DOL's own statutorily authorized regulations, in a manner that "changed the definition of the [outside sales] exemption itself." (Pet. 2).

Petitioner's argument is as procedurally misguided as it is wrong. It is belied by seventy years of consistent, unambiguous regulatory actions and activities undertaken by the DOL, which consistently

---

[1] The court of appeals heard and considered the appeal in this case "in tandem with the appeal in *In re Novartis*," and decided both appeals the same day. *Id.* Novartis filed a petition for certiorari on the same day as Schering, Docket No. 10-460. The opinion in *In re Novartis* is reproduced in the petition appendix. (Pet. App. 45a-78a).

confirm the crucial distinction between: (1) employees who work outside of an office and are engaged directly in consummating the sale or exchange of goods and services between their employers and consumers; and (2) those who do not themselves "make sales," but instead are engaged in activities designed to promote and encourage sales of their employer's products. *See* 29 C.F.R. § 541.503(a)-(c). The courts below did not err. The parameters of the outside sales exemption have not changed.

Petitioner also claims this Court's "guidance" is needed to "clarify" the "scope" of deference paid to the DOL's interpretation of its own regulations under *Auer v. Robbins*, 519 U.S. 452 (1997). The only thing that petitioner identifies as warranting clarification, however, is "the extent to which *Auer* deference" applies to a "change in agency interpretation" announced for the first time in an *amicus* brief." Pet. 15. This makes no sense. It assumes that "guidance" is needed in circumstances – not presented here – where an agency's interpretation of its regulations is inconsistent with the regulations themselves or prior agency interpretations. But, *Auer,* of course, addresses these exact circumstances. *Auer* teaches that an agency interpretation, whether in an *amicus* brief or somewhere else, is accorded controlling deference unless it is "inconsistent" with the agency's regulations or plainly erroneous. 519 U.S. at 461.

Auer needs no "clarification." The problem for petitioner is that the prerequisites for according controlling deference set forth in *Auer* are plainly

satisfied in this case. The DOL's interpretation of its own implementing regulations concerning the outside sales exemption have been a model of uniformity and consistency for more than seventy years. Thus, like its error correction argument, petitioner's argument that there is something wrong with *Auer* should be swiftly rejected.

The courts below properly concluded that respondents were not plainly and unmistakably engaged in "making sales" within the meaning of the FLSA and its implementing regulations. The decisions were not in error. There is no basis for issuing a writ of certiorari.

B. Statutory and Regulatory Framework

Under the FLSA, an employer bears the burden of proving that an employee is employed "in the capacity of an outside salesman" in order to treat that employee as exempt from overtime and minimum wage pay requirements. 29 U.S.C. § 213(a)(1). The FLSA specifies that the term "outside salesman" is to be interpreted as it is "defined and delimited from time to time by regulations of the Secretary [of Labor]." *Id.* The Secretary's regulations define an "outside salesman" as an employee whose primary duty is "making sales within the meaning of section 3(k) of the [FLSA] or . . . obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by the client or customer; and . . . [w]ho is customarily and regularly engaged away

from the employer's place or places of business when performing such primary duty." 29 C.F.R. § 541.500(a).

A "sale" is defined in the statute and regulations to require an exchange of goods or services for valuable consideration. Section (3)(k) of the FLSA defines sales to include "any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition." 29 U.S.C. § 203(k). The regulations further specify that sales under the act involve the "transfer of title to tangible property, and in certain cases tangible and valuable evidence of intangible property." 29 C.F.R. § 541.501(b).

The regulations draw a bright line distinction between non-exempt promotional work and exempt sales work.[2] "Promotional work that is actually performed incidental to and *in conjunction with an employee's own outside sales*" may be exempt work under the outside sales exemption (assuming that other elements of the exemption are met). 29 C.F.R. § 541.503(a) (emphasis supplied). "[P]romotional work that is *incidental to sales made, or to be made, by someone else* is not exempt outside sales work." *Id.* (emphasis supplied).

---

[2] "[Congress] use[d] the word 'delimited' as well as the word 'defined,'" thus the Department of Labor "is responsible not only for determining which employees are entitled to the exemption, but also for drawing the line beyond which the exemption is not applicable." *See* 1940 Stein Report, at 22 (Oct. 10, 1940).

The regulations also provide instructive examples of how the promotional/sales distinction works. One example discusses a manufacturer's representative who performs a variety of promotional tasks aimed at making his employer's products attractive and desirable to purchasers: "such an employee can be considered an exempt outside sales employee if the employee's primary duty is making sales or contracts. Promotional activities directed towards consummation of the employee's *own sales* are exempt. *Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work*." 29 C.F.R. § 541.503(b) (emphasis supplied). Another example, dealing with company representatives who visit chain stores to monitor merchandise inventory, similarly notes that "[b]ecause the employee in this instance does not *consummate the sale* . . . the work is not exempt outside sales work." *Id.* at § 541.503(c) (emphasis supplied).[3]

---

[3] Opinion Letters issued by the DOL over the years reinforce the distinction between promoting a product or service and actually consummating a sale. *See* 2006 DOLWH LEXIS 65, at *5 ("Soliciting promises of future charitable donations or 'selling the concept' of donating to a charity does not constitute 'sales' for purposes of the outside sales exemption."); 1998 DOLWH LEXIS 17, at *7 (a college recruiter was not an outside sales person where he "is engaged in identifying qualified customers, i.e., students, and inducing their application to the college, which in turn decides whether to make a contractual offer of its educational services to the applicant."); 1994 DOLWH LEXIS 65 ("Selling [the] concept [of donating human tissues] does not constitute 'sales' within the meaning of the regulations" and neither is "buying into the merits" of a product).

C. Schering's Business and Respondents' Jobs

"Schering manufactures and 'sells prescription drugs to hospitals, certain managed care organizations, wholesale distributors and retail pharmacists.' It employs . . . pharmaceutical sales representative[s] ('PSR[s]') – through whom it 'introduces and makes known its prescription drugs to physicians, pharmacists, hospitals, managed care organizations and buying groups.'" (Pet. App. 6a) (citations omitted).

Schering does not sell products directly to consumers. Instead, over 90 percent of Schering's products are sold "to wholesalers, and the remainder go to governmental entities, hospitals, and directly to chain pharmacies." (Pet. App. 7a) (citation omitted). Schering's primary customers – wholesalers – "negotiate 'inventory management agreements,' which limit their inventory levels and set prices on Schering's products, with the 'trade organization' and 'legal team' operating under Schering's managed markets group." (Pet. App. 7a-8a) (citations omitted). PSRs are not in the managed markets group and have no involvement with negotiating the agreements that establish the pricing and quantity of Schering's products. (Pet. App. 8a).

"Schering does not record income when a health care provider tells a PSR that he or she will consider using a Schering product or prescribing a Schering product, or promises a PSR that he or she will prescribe a Schering product, or commits to a PSR that he or she will prescribe a Schering product, or writes

a prescription for a Schering product." (Pet. App. 8a) (citations, internal quotation marks and brackets omitted). Nor does Schering record income when a doctor "hands a prescription to a patient, or when the prescription is filled at a pharmacy, or when a patient pays for a prescription at a pharmacy, or when an insurance company reimburses a pharmacy for a prescription for a Schering product that is filled by a patient." (Pet. App. 8a) (citations, internal quotation marks and brackets omitted). Instead, Schering records revenue when title and risk of loss pass to the wholesale purchaser. (Pet. App. 9a).

That said, Schering's revenue for its prescription pharmaceuticals business depends on the use of its products by retail consumers or patients, who must in turn obtain a prescription for the product from a physician. Thus, "a physician's prescription-writing practices and Schering's sales are related in a ripple effect up the supply chain, such that if physicians were to write fewer prescriptions or patients were to stop filling prescriptions written for Schering products, the demand for its products would reduce and Schering would experience lower sales to its wholesalers." (Pet. App. 9a) (citations and internal quotation marks omitted).

"To maintain or increase its market share, Schering promotes its products both through the work of PSRs and through direct-to-consumer advertising campaigns." (Pet. App. 10a). Respondents, like all Schering PSRs, were required to deliver a "core message" about a particular pharmaceutical product

to physicians "with the intent that this message will persuade physicians to prescribe products made by Schering rather than its competitors." (Pet. App. 11a-12a).

In addition to a base salary, PSRs earn "incentive payments based, roughly, on the number of prescriptions for Schering products written in the geographic area over which they have jurisdiction." (Pet. App. 13a). Direct links, however, are not, and indeed cannot, be made "between a PSR's work and a physician's prescription for a Schering product (and, thus, to resultant increases in Schering's market share), and Schering does not establish a 'one-to-one relationship' between them." (*Id.*, citations omitted). In many cases, PSRs "'work collaboratively' and in tandem with direct-to-consumer advertising campaigns, which makes specific attribution impossible." (*Id.*).

During "their visits with physicians Schering's PSRs do not enter into contracts with physicians over the price or quantity of Schering's products, obtain their orders for Schering's products, or get binding commitments from the physicians to purchase or prescribe Schering's products." (Pet. App. 17a).

D. The District Court's Ruling

The district court denied Schering's motion for summary judgment on its affirmative defense that respondents were properly classified as exempt from the FLSA as outside sales persons. (Pet. App. 5a-44a)

(*Kuzinski v. Schering*, 604 F. Supp.2d 385 (D. Conn. 2009)).

The court observed that exemptions to the FLSA's overtime protections must be "narrowly construed against the employers seeking to assert them," and then only if the employer establishes that an employee "plainly and unmistakably" fits within such an exemption. (Pet. App. 22a (citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).

The district court noted that, under the FLSA, the term "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), and also "include[s] 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). (Pet. App. 32a). Based on the nature of respondents' jobs, the district court readily concluded that "Schering's PSRs do not make, or engage in, any of these things. PSRs do not consummate or make any 'sales' of pharmaceuticals to the physicians they visit. PSRs do not 'exchange' with physicians for any drugs; they do not make any 'contract[s] to sell' drugs to physicians; they do not make any 'consignment for sale' with physicians; they do not make any 'shipment[s] for sale' to physicians; and they do not make any "other disposition" of drugs with physicians." (*Id.*).

The district court explained that "PSRs and physicians do not even have the capacity to consummate

sales," because they "are barred both by law" and by Schering "from entering into contracts for the prescription of their employer's products." (Pet. App. 33a).

The district court concluded that the "closest that Schering's PSRs come to consummating 'sales' is increasing the overall demand for its products, such that non-PSR Schering employees negotiate and commit to contracts with wholesalers – not the physicians to whom Schering's products are promoted." (Pet. App. 35a). "An employee does not consummate a 'sale' for purposes of the FLSA merely by 'lay[ing] the groundwork' for another employee to obtain a customer's commitment." (*Id.*) (citing *Clements v. Serco,* 530 F.3d 1224, 1229 (10th Cir. 2008)); 29 C.F.R. § 541.503(a) (even though promotional work can be considered exempt sales work, "promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work").

Indeed, the district court noted, "not only do the PSRs not consummate the sales, but the physicians with whom the PSRs visit are not Schering's customers." (Pet. App. 35a). Thus, insofar as "PSRs lay foundation or groundwork, it is to increase or maintain their employer's market share for the products they promote," but in "no more direct a manner" than "a pharmaceutical company's direct-to-consumer advertising, which raises demand for that company's products"; neither activity "constitutes 'sales' under the FLSA." (Pet. App. 35a-36a).

The district court reviewed the plain language of the FLSA and its mandated delimiting regulations, *see supra* at 3-6, and concluded "the outside sales exemption" does not apply to Schering's PSRs because they "do not make sales or obtain orders or contracts." (Pet. App. 27a).

E. The Second Circuit's Ruling

On interlocutory appeal, the court of appeals summarily affirmed the district court's denial of summary judgment and remanded the case for proceedings on other issues. (Pet. App. 1a-4a). It did so, "for the reasons stated in the district court's ruling and for the reasons stated in [its] opinion in *In re Novartis Wage Litig.*, [611 F.3d 141 (2d Cir. 2010) (Pet. App. 45a-78a)]." (Pet. App. 3a). Thus, the court of appeals fully adopted the district court's ruling which was made in 2009 based on the FLSA and its implementing regulations, but *before* the Secretary published her industry-specific interpretation of those regulations, as applied specifically to pharmaceutical representatives, in an *amicus* brief in the case heard in tandem with this one – *In re Novartis*.

While the court of appeals quite rightly accorded "controlling" deference, under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), to the Secretary's interpretations of the regulations as set forth in an *amicus* brief in *In re Novartis*, Pet. App. 61a, the holding of the court of appeals was based on the reasoning of the district court which had interpreted the regulations

and found them plain and unambiguous even absent the Secretary's interpretation.

The court of appeals, in *In re Novartis*, noted that "Novartis sells its drugs to wholesalers; the wholesalers then sell them to pharmacies; and the pharmacies ultimately sell the drugs to patients who have prescriptions for them. The Reps promote the drugs to the physicians; the Reps do not speak to the wholesalers or to the pharmacies or to the patients." (Pet. App. 70a). The sales path for Novartis products is identical to that for Schering products. *See supra* at 6-8. The nature of the interactions between "Reps" and doctors is also the same for both Novartis and Schering. The doctors "neither buy pharmaceuticals from the Reps nor commit to buying anything from the Reps or from Novartis [or Schering]." (Pet. App. 70a). And, while the "physician is of course an essential step in the path that leads to the ultimate sale of a Novartis [or Schering] product to an end user; a patient cannot purchase the product from a pharmacy without a prescription, and it is the physician who must be persuaded that a particular Novartis [or Schering] drug may appropriately be prescribed for a particular patient." (*Id.*).

Moreover, as the court explained, the "type of 'commitment' the Reps seek and sometimes receive from physicians is not a commitment 'to buy' and is not even a binding commitment to prescribe." (*Id.* 71a). Indeed, there is "no way to know whether any physician [will] actually follow[ ] through on such a

commitment," as "a physician might answer affirmatively just to get the Rep out the door." (*Id.* 51a).

The court in *In re Novartis* thus held that where a pharmaceutical "employee promotes a pharmaceutical product to a physician but . . . cannot lawfully transfer ownership of any quantity of the drug in exchange for anything of value, cannot lawfully take an order for its purchase, and cannot lawfully even obtain from the physician a binding commitment to prescribe it," it is reasonable to conclude that an "employee has not in any sense, within the meaning of the statute or the regulations, made a sale." (Pet. App. 71a-72a).

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH OTHER COURTS OF APPEALS OR WITH DECISIONS OF THIS COURT

Petitioner does not contend that the decision of the court of appeals is in conflict with any decisions from other courts of appeals or decisions of this Court. Sup. Ct. R. 10. Nor could it. There are no such conflicts. Instead, petitioner contends that a writ of certiorari should be issued because the "Second Circuit erred." "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* It should not be granted here.

II. PETITIONER'S CONTENTION THAT "THE SECOND CIRCUIT ERRED IN ITS CONSTRUCTION OF THE OUTSIDE SALES EXEMPTION" IS WRONG

Petitioner argues that a writ of certiorari should issue because the Second Circuit's decision was error that has suddenly imposed "substantial and unexpected liabilities" on the pharmaceutical industry. Pet. at 2. There is no error. There has been no change.

A. There is no error. The decisions below contain a straightforward application of this Court's longstanding precedents and of the uniform precedents of the courts of appeals concerning the discrete and limited application of the FLSA's outside sales exemption.

For more than seventy years, the DOL and the courts have consistently interpreted the outside sales exemption narrowly, in a manner that has maintained a readily identifiable line between: (1) employees who work outside of an office and are engaged directly in consummating the sale of goods and services between their employers and consumers; and (2) those who are engaged generally in activities designed to promote, encourage and drive sales consummated by others. *See* 29 C.F.R. § 541.503(a)-(c).[4]

---

[4] *See also Clements v. Serco, Inc.*, 530 F.3d 1224, 1229 (10th Cir. 2008) (Private recruiters who "sold" idea of joining the army to potential enlistees, but did not obtain binding commitments, were not outside salesmen; the enlistees signed up at U.S. Army

(Continued on following page)

This makes perfect sense. Absent the long-existing, plain and easily ascertainable line between actually closing a deal on one's own sales versus simply promoting an employer's goods or services, confusion would reign. Employers would not know which employees engaged in promotional, marketing, advertising and similar types of work outside a place of business and would be exempt from coverage by the FLSA. Moreover, an exemption that included all employees engaged in activities designed to increase demand for their employer's goods or services – like the one urged by petitioner – would swallow the rule. It would include all manner of marketing and promotion employees. Indeed, relatively few employees are engaged in activities that are not designed to increase demand for their employer's goods or services.

For example, under petitioner's understanding, employees distributing promotional literature or wearing sandwich boards on the sidewalk would be exempt from the FLSA as outside sales persons. They could be paid less than the minimum hourly wage and be denied overtime pay. No rational

---

stations and thus, the recruiters merely promoted sales made by someone else); *Ackerman v. Coca-Cola Enterprises, Inc.*, 179 F.3d 1260 (10th Cir. 1999) (promotional work performed by delivery route drivers in support of their own sales is subject to outside sales exemption); *Wirtz v. Keystone Readers Service, Inc.*, 418 F.2d 249, 260 (5th Cir. 1969) ("To the extent that [Plaintiffs] are engaged in promotional activities designed to stimulate sales which will be made by someone else the work [is] non-exempt.").

interpretation of the FLSA could allow for such a result, and it has never been the law.

B. There has been no change. While Schering's petition is long on assertions that the decisions below and the Secretary's *amicus* brief in *In re Novartis*, "changed the definition of the exemption itself," Pet. at 2, or worked "a clear departure from the [Secretary's] past position," Pet. at 12, or constituted a "new and heightened requirement that a direct transaction be consummated between sales representative and customer," Pet. at 13, it is entirely lacking in any concrete support.

The undeniable truth is that, for over seventy years, consistent with the language of the FLSA, the DOL has held firm to the bright line it sensibly created in its first delimiting regulations in 1940. As explained in the 1940 Stein Report:

> A further group of persons for whom exemptions has been asked and who are admittedly not outside salesmen, in that they do not make actual sales, are sales promotion men and missionary men. These persons are engaged in paving the way for salesmen. . . . [I]t is clear that it would be an unwarrantable extension . . . to describe as a salesman anyone who does not in some sense make a sale. *Sales promotion and missionary men are persons who normally make no sales at all.*

Id. at 46-47 (emphasis supplied).

Sixty-four years later, in the most recent iteration of the regulations, the DOL explained that:

> The Department does not intend to change any of the essential elements required for the outside sales exemption. . . . An employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales. *See* 1940 Stein Report at 46 (outside sales exemption does not apply to an employee "who does not *in some sense* make a sale") (emphasis added). 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. *See* 1940 Stein Report at 46 (outside sales exemption does not extend to employees "engaged in paving the way for salesmen, assisting retailers, and establishing sales displays, and so forth").

Pet. App. 104a; *see also* 69 Fed. Reg. 22142.

Notwithstanding the Secretary's decades long, unbroken and unambiguous regulatory line drawing, petitioner argues that "[b]efore DOL's appearance in the court below, the outside sales exemption did not impose a requirement that sales employees consummate direct transactions with their customers." Pet. 29. The excerpts from the regulatory interpretations in 1940 and 2004 cited above conclusively refute this claim.

When the DOL regulations were updated in 2004, the substance of the outside sales exemption was expressly left unchanged.[5] Indeed, for many years before the non-substantive update in 2004, the DOL's regulation concerning the important line between actual sales and promotional work provided an illustration that undoubtedly put the pharmaceutical industry on notice that sales representatives could not possibly be exempt from the FLSA.

The example explained that "a manufacturer's representative who visits retailers accompanied by a salesman for a distributor (or 'jobber')" was not exempt as an outside sales person, if "the manufacturer's representative does preliminary work ('which may include . . . talking to the retailer for the purpose of getting him to place the order for the product'), but the distributor's salesman actually takes the order after the preliminary work is done, . . . *See* 29 C.F.R. § 541.505(c)(2)." *Ackerman v. Coca-Cola Enterprises, Inc.*, 179 F.3d 1260, 1265 (10th Cir. 1999).

---

[5] As the DOL explained: "[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." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22121 (2004).

Like the 1940 Stein Report,[6] former 29 C.F.R. § 541.505(c)(2) could not have been more clear. When a manufacturer of tangible products, like Schering, has a business model where it sells only to wholesale distributors or "jobbers" (or even retailers, as Schering occasionally does) – but never to actual consumers of Schering's products – the fact that the manufacturer's representatives, here PSRs like respondents, engage in activities designed to encourage someone to place an order with the wholesaler (or even the retail pharmacy) does not qualify that person as an exempt outside sales person.

This is so, explained the DOL in the illustration, because the actual sale is not made by the employer-manufacturer to the person interacting with the employee, but rather by an independent wholesaler (or pharmacy) that actually sells the employer-manufacturer's product to the retailer (or the end user or consumer), after the work to drive demand for the sale has been completed by the employee.

---

[6] The exclusion from exemption of sales promotion employees who attempt to influence the buying habits of those who do not purchase directly from their employers, but rather from middlemen, distributors, wholesalers or "jobbers," dates back to the inception of the FLSA. "Frequently the sales promotion man deals with retailers who are not customers of his own employer but of his employer's customer, the jobber." 1940 Stein Report at 46. Such, "sales promotion men" do "not make actual sales," and thus "it would be an unwarrantable extension . . . to describe as a salesman anyone who does not in some sense make a sale." *Id.*

No one could have read this illustrative example and concluded that Schering's PSRs were exempt from the FLSA as outside sales persons. After all, PSRs promote Schering products to doctors in an effort to persuade them to prescribe Schering products to patients. If PSRs are successful and a doctor prescribes a Schering product as a result of their efforts, the patient may or may not fill the prescription at a retail pharmacy. If the prescription is filled, it may influence the independent pharmacy to buy more Schering products from the independent wholesaler (or possibly directly from Schering). And, if the independent pharmacy buys more Schering products from the independent wholesaler, it may influence the independent wholesaler to buy more products from Schering. As explained above, Schering does sell its products, but not directly to consumers.

PSRs are no more exempt as outside sales representatives than a person employed by the Kellogg Company to play "Tony the Tiger" on visits to supermarkets promoting Kellogg's Frosted Flakes. Tony the Tiger may increase sales by influencing children to beg their parents to purchase Frosted Flakes. And, that may, in turn, mean that supermarkets purchase more Frosted Flakes from wholesalers or "jobbers," but that does not make the person playing the mascot exempt from the FLSA's minimum wage and mandatory overtime requirements as an outside sales person.

III. THERE IS NOTHING UNUSUAL ABOUT THE SECOND CIRCUIT'S DECISION TO DEFER, UNDER *AUER*, TO THE SECRETARY'S CONSIDERED INTERPRETATION OF HER OWN REGULATIONS

Petitioner argues that this Court's "guidance" is needed to "clarify" the "scope" of deference owed the DOL's interpretation of its own regulations under this Court's unanimous decision in *Auer v. Robbins*, 519 U.S. 452 (1997). Pet. 14. Petitioner does not explain, however, just what it is about *Auer* that warrants "clarification."

This Court's teaching in *Auer* is straightforward. Insofar as an agency interpretation of its own regulations is "not plainly erroneous or inconsistent with the regulation," the agency's interpretation should be granted controlling deference. 519 U.S. at 461 (internal citations omitted). In *Auer,* as in *In re Novartis*, the DOL's interpretation was provided in the form of an *amicus* brief. More recently, and consistent with the holding in *Auer,* this Court gave controlling deference to a DOL Advisory Memorandum issued during pending litigation. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 159, 171 (2007).

The "scope" of *Auer* deference is plain and unambiguous. Indeed, courts of appeals throughout the country have handily applied *Auer's* holding. *See, e.g., Sec'y of Labor v. Beverly Healthcare-Hillview*, 541 F.3d 193, 200 (3d Cir. 2008) (holding that the Secretary of Labor's interpretation of an OSHA regulation was reasonable and therefore

entitled to *Auer* deference because it did not impermissibly strain the plain language of the regulation and the interpretation was consistent with the purpose of the regulation); *IntraComm, Inc. v. Bajaj*, 492 F.3d 285, 295-96 (4th Cir. 2007) (deferring to the DOL's interpretation of its regulation in an amicus brief); *Rucker v. Lee Holding Co.*, 471 F.3d 6, 12 (1st Cir. 2006) (granting controlling weight to the DOL's interpretation of its regulation where the DOL's position was consistently held and consonant with the language of the regulation); *Belt v. Emcare, Inc.*, 444 F.3d 403, 415-16 (5th Cir. 2006); *Archuleta v. Wal-Mart Stores, Inc. (In re Wal-Mart, Inc.)*, 395 F.3d 1177, 1185 (10th Cir. 2005) ("We see no reason to accord less deference to [DOL] Wage & Hour opinion letters than the Supreme Court gave to the position of the DOL set forth in an amicus brief to the Court, . . . particularly when, as shown below, the letters reflect a consistent view over an extended period of time").

Insofar as Schering takes a stab at explaining what it was about the *In re Novartis* court's application of *Auer* deference that warrants certiorari, it says that this Court's guidance is "needed to clarify the extent to which *Auer* deference" applies to a "change in agency interpretation" announced "for the first time in an *amicus* brief." Pet. 15. This argument is deeply flawed as a matter of both fact and law.

It is factually wrong because, as explained *supra* at 16-20, the DOL's interpretation of its outside sales regulations does not depart in any way from the plain

language of the regulations themselves or past DOL interpretations of those regulations.

It is legally wrong because it assumes that "guidance" is needed in circumstances – not presented here – where an agency's interpretation of its regulations is inconsistent with the regulations themselves or prior agency interpretations. But, *Auer,* of course, addresses that exact circumstance. *Auer* teaches that an agency interpretation, whether in an *amicus* brief or something else, is *not* to be given controlling deference precisely because it is "inconsistent." 519 U.S. at 461.

For reasons canvassed above, the conditions for *Auer* deference are present here. Indeed, the district court rejected petitioner's interpretation without the benefit of the Secretary's deference-deserving interpretation, and the Second Circuit expressly endorsed the district court's independent interpretation. At most, petitioner's quarrel is not with *Auer*, but rather with the court of appeals' application of it here. Needless to say, a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MATTHEW D. BRINCKERHOFF
Counsel of Record
EMERY CELLI BRINCKERHOFF
& ABADY LLP
75 Rockefeller Plaza, 20th Fl.
New York, New York 10019
(212) 763-5000
mbrinck@ecbalaw.com

Counsel for Respondents

MICHAEL DICHIARA
DICHIARA LAW FIRM LLC
77 Market St., Suite 2
Park Ridge, NJ 07656
(201) 746-0303

ERIC B. KINGSLEY
KINGSLEY & KINGSLEY
16133 Ventura Blvd.,
Suite 1200
Encino, CA 91436
(818) 990-8300

January 5, 2011