No. 11-204

In The Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER
and FRANK BUCHANAN,

Petitioners,

v.

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

Respondent.

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

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND NATIONAL EMPLOYMENT LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and other federal appellate courts regarding the proper interpretation of the Fair Labor Standards

[1] The parties' counsel did not author this brief in whole or in part, nor did the party or the party's counsel contribute money intended to fund the preparation or submission of the brief. No person other than the *Amici Curiae*, their members, or their counsel contributed money that was intended to fund the preparation or submission of the brief. Counsel of record for both parties have consented to the filing of this brief.

Act, 29 U.S.C. §§ 201 *et seq.*, and other federal workplace rights laws.

The National Employment Law Project ("NELP") is a non-profit legal organization with 40 years of experience advocating for the employment and labor rights of low-wage workers. In partnership with community groups, unions, and state and federal public agencies, NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the basic workplace protections guaranteed in our nation's labor and employment laws. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of workers under the Fair Labor Standards Act, as well as other federal workplace rights laws.

SUMMARY OF ARGUMENT

When Congress adopted the overtime requirements of the Fair Labor Standards Act ("FLSA") in 1938, it included a narrow exemption for a category of employees, "outside salesman," 29 U.S.C. § 213(a)(1), who under the common law were those who made sales, not those who solely promoted products. The "salesman" to whom the exemption applies means – just as the Secretary of Labor has explicitly defined it – a person who "mak[es] sales," in accordance with the purpose of the exemption and the common meaning of the term. *See* 29 C.F.R. § 541.500(a)(1)(i)-(ii) (primary duty of exempt outside sales employees must be to make sales within the meaning of section 3(k) of

the Act or to obtain orders or contracts for services); 29 U.S.C. § 203(k) (defining "sale" to "include[ ] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition").

The requirement that an employee make sales to be deemed a "salesman" has been central to limiting the reach of the "outside salesman" exemption. Honoring this requirement, in the spirit of giving exemptions to the FLSA a narrow construction, effectuates the Act's long-recognized purposes: to have the broadest impact in eliminating unhealthy labor conditions and fostering the creation of jobs. *See Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577-78 (1942) (discussing the goals of the FLSA). The requirement that outside sales employees actually make sales in order to qualify for the exemption has the virtue of providing a bright line for courts and human resource professionals to follow.

This Court should accordingly reject the Ninth Circuit's loose construction of "salesman," which stretches the term beyond its common meaning and beyond the Secretary's definition merely to rope a single, industry-specific class of employees – pharmaceutical sales representatives (also known as "detailers") – into the exemption. Diluting the requirement that an employee must make sales to fall within the exemption introduces uncertainty to the law and exposes a wide swath of other workers to exclusion from FLSA overtime and minimum wage safeguards. Any decision as to whether the "outside salesman" exemption should be modified to include an industry-specific

category of workers such as detailers is the proper domain of Congress and the Secretary of Labor.

ARGUMENT

I. Requiring Outside Sales People to Make Actual Sales Is Central to the Purpose of the Exemption.

A. The Pre-FLSA Law Governing "Traveling Salesmen" Focused on Making Actual Sales.

The meaning of the term "outside salesman" is apparent from the substantial case law involving outside sales employees decided prior to the enactment of the FLSA. *See Kasten v. Saint-Gobain Performance Plastics Corp*., 131 S. Ct. 1325, 1332 (2011) (citing pre-FLSA common law cases to construe meaning of the word "filed" in 29 U.S.C. § 215(a)(3)). When the FLSA was enacted in 1938, the "contemporaneous judicial usage," *id.*, of the term outside (or more commonly, traveling) "salesman" was someone who actually sold goods, not just promoted the sale of goods. In *United States Bedding Co. v. Andre*, 150 S.W. 413 (Ark. 1912), the Supreme Court of Arkansas expressed this consensus:

> *The purpose for which a traveling salesman is employed is to solicit orders and make sales of goods*. . . . It has been held by this court that a traveling salesman is only authorized to solicit orders and make sales. . . .

Id. at 414 (emphasis added); *see also Commerce Furniture & Undertaking Co. v. White Sewing Mach. Co*., 222 P. 516, 517 (Okla. 1924) (referring to *Andre* definition of traveling salesmen as a "well-known rule in the commercial world"). In relevant part, the *Andre* court held that a traveling salesman's authority as a company agent is confined to the sales he transacted, not to other related activities such as promotion. *Andre*, 150 S.W. at 414 (salesperson did not have implied authority to enter into contract to post buyer's advertisements on billboards; "[t]he power to make contracts for advertising cannot be implied from the power to sell goods and solicit orders").

Courts of the era, in various contexts, considered selling, rather than promoting, to be the centerpiece of being a "salesman." *See*, *e.g.*, *Falletti v. Carrano*, 103 A. 753, 753 (Conn. 1918) ("Rivkin's authority was that of an outside salesman of a wholesale grocery house with unrestricted powers of sale and collection," which was "indispensable in the business which he was employed to conduct"); *Upchurch v. City of La Grange*, 125 S.E. 47, 50 (Ga. 1924) (traveling salesman is one who "travels from city to city or town to town in this state, exhibiting samples *and taking orders*") (emphasis added); *Tweedie Footwear Corp. v. Roberts-Schofield Co*., 285 P. 476, 477 (Idaho 1930) ("extent of his authority is merely to solicit orders and transmit the same to his principal for acceptance"); *Royal Indem. Co. v. Siders*, 257 Ill. App. 100, 106 (Ill. App. Ct. 1930) ("[a] traveling salesman has been defined as one who goes out and solicits business,

takes orders for goods, etc."); *Consol. Grocery Co.'s Tr. in Bankr. v. Hadad*, 53 S.W.2d 951, 952 (Ky. 1932) ("Mullins, being a traveling salesman, had no authority to do aught than solicit orders and transmit them to his principal"); *T.C. May Co. v. Menzies Shoe Co.*, 113 S.E. 593, 594 (N.C. 1922) ("a salesman who takes or solicits orders for goods and forwards them to his principal for approval or rejection"); *Floor v. Mitchell*, 41 P.2d 281, 286 (Utah 1935) ("the extent of his authority is to solicit orders and transmit them"); *Montgomery Ward & Co. v. Arbogast*, 81 P.2d 885, 890 (Wy. 1938) (collecting authority).

The Court can presume that Congress knew this background law and incorporated it when it adopted the FLSA. *See*, *e.g.*, *Utah v. Evans*, 536 U.S. 452, 475 (2002) (citing "contemporaneous general usage" in defining term in Census Act); *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000) ("when Congress uses language with a settled meaning at common law," it is presumed to adopt the widely accepted meaning); *United States v. Shabani*, 513 U.S. 10, 13-14 (1994) (following "the settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms"). Against this backdrop, therefore, inclusion of "outside salesman" among the FLSA exemptions should be understood to mean those employees whom the law regarded as falling within this category, *i.e.*, those who go out and "mak[e] sales," 29 C.F.R. § 541.500(a)(1)(i)-(ii).

B. Placing the Focus on Making Actual Sales Respects the Underlying Purpose of the Exemption.

The "executive," "administrative," "professional," and "outside salesman" exemptions in section 13(a)(1) of the FLSA are commonly referred to as the "white collar" exemptions. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004). The unifying characteristic of these types of positions is their individualized nature.[2] As the Secretary of Labor observed in the Preamble to the 2004 final rule, the legislative history indicates that the type of work performed by employees subject to the "white collar" exemptions "was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult." *Id.* at 22,123-24.

The underlying rationale for exempting outside salespersons is to exclude from the FLSA's coverage employees who work outside the supervision of the employer and whose compensation is directly tied to

[2] The Court should consider the meaning of the "outside salesman" exemption in the context of its placement within the same exemption as "bona fide executive, administrative, or professional capacity," under the maxim of *noscitur a sociis*: "that a word gathers meaning from the words around it." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702 (1995) (internal quotation marks omitted).

their ability to make their own sales. *See* Harold Stein, U.S. Dep't of Labor, "Executive, Administrative, Professional . . . Outside Salesman" Redefined at 46-47 (1940) ("Stein Report") (the exempt outside sales employee's earnings are customarily directly related to their working time, unlike outside employees who do not make sales, such as employees engaged in non-exempt promotional work). Unlike the other white collar exemptions, it is the outside sales employees' ability to make or consummate a sale and the amount of time they dedicate to their own sales efforts that determines their compensation, not their generalized executive or managerial responsibilities or their elevated status. *See* 69 Fed. Reg. at 22,177 (explaining that bona fide white collar employees are paid on a salary basis because their work is not measured by the hour or task). This rationale is reflected in the implementing regulations' requirement that the primary duty of exempt outside sales employees must be to make sales within section 3(k) of the FLSA or to obtain orders or contracts for services. 29 C.F.R. § 541.500(a)(1)(i)-(ii).

The sales requirement also distinguishes outside sales employees from employees whose primary duty is something other than making individual sales. For example, employees who promote their employers' products without making sales are concerned with increasing sales *by others*: "[t]hese persons are engaged in paving the way for salesmen." Stein Report at 46. Their earnings are readily determined without reference to any individual sales efforts. Consequently,

their work is compatible with an hourly plus overtime pay structure, and it can be spread among other employees. *Cf.* 69 Fed. Reg. at 22,123-24 (the type of work performed by exempt "white collar" employees cannot easily be spread to other employees after 40 hours per week). In contrast to promotion work, outside sales employees are concerned with making their own sales *to others*. Stein Report at 46. Their individual ability and initiative determines the volume of their sales and the amount of their compensation. Thus, their sales, not just their hours, are the true measure of their work.

The proposal that the "outside salesman" exemption be expanded to include work where no accompanying sales are made was expressly rejected by the Secretary of Labor in 1940, 1949, and again in 2004. *Id.* ("Thus, inasmuch as the promotion man's earnings are normally not directly related to his working time, as is customarily the case with outside salesmen, it is doubtful that the nature of his work requires or justifies an exemption from the provisions of the act."); Harry Weiss, U.S. Dep't of Labor, Report and Recommendations on Proposed Revisions of Regulations, Part 541, at 82 (1949) ("Weiss Report") ("promotional work which is incidental to sales made, or to be made, by someone else cannot be considered as exempt work"); 69 Fed. Reg. at 22,162 (rejecting industry requests "to eliminate the emphasis upon an employee's 'own' sales" in determining whether the "outside salesman" exemption applies). Ultimately,

employees can only perform exempt outside sales work if they are actually employed to make their own sales:

> in borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt.

Weiss Report at 83. As the statutory language and the history of the exemption demonstrate, the requirement that employees make their own sales is a defining characteristic of the "outside salesman" exemption. As evidenced by cases preceding the FLSA's enactment and subsequent FLSA case law, this emphasis on individual sales has been the hallmark of the "outside salesman" exemption since its inception.

C. Over 70 Years of FLSA Case Law Reinforces That the Exemption Is Confined to Those Who Actually Make Sales.

Consistent with the pre-FLSA cases, judicial application of the "outside salesman" exemption since the earliest years of the FLSA has adhered tightly to this model, *i.e.*, one who travels to the customer and collects orders or makes sales. *See*, *e.g.*, *Jewel Tea Co. v. Williams*, 118 F.2d 202, 203-04 (10th Cir. 1941)

(salesmen made regular visits door-to-door on a route to sell "coffee, tea, extracts, baking powder, laundry and toilet soaps, and other similar merchandise"); *Green v. Terminix Int'l, Inc.*, 649 F. Supp. 243, 244 (M.D. Fla. 1986) ("plaintiff's job consisted of two activities: the actual sale of pest control services and demonstrations and inspections which were 'incidental to and in conjunction with' plaintiff's sales and solicitations"); *Hodgson v. Krispy Kreme Doughnut Co.*, 346 F. Supp. 1102, 1103-06 (M.D.N.C. 1972) (drivers sold bakery goods from trucks, met with customers and made sales); *Hodgson v. Greene's Propane Gas Serv., Inc.*, Civ. No. 2502, 1971 WL 692, at *5-6 (M.D. Ga. Feb. 16, 1971) (employees delivered and sold propane on a route); *Bradford v. Gaylord Prods.*, 77 F. Supp. 1002, 1004-05 (N.D. Ill. 1948) (sales technicians for cosmetics company took orders for supplies purchased by jobber or distributor).

Conversely, employees who otherwise share traits with outside salespeople – working in the field, moving and promoting goods, even taking orders – are routinely found non-exempt if the making of actual sales is not part of their job. *See*, *e.g.*, *Skipper v. Superior Dairies, Inc.*, 512 F.2d 409, 413-16 (5th Cir. 1975) (dairy product route man who delivered products to customers and took orders, but did not solicit, not exempt); *Wirtz v. Atlanta Life Ins. Co.*, 311 F.2d 646, 648 (6th Cir. 1963) (supervisor "assigned to work directly with one of his agents, accompanying such agent on the agent's 'debit' route and assisting him with his collections and sales" not exempt as outside salesperson); and cases cited *infra* at § II.B. As

explained below, a decision affirming the Ninth Circuit would invite a wholesale reinvention of this field by employers who, thus encouraged, would embrace the opportunity to creatively re-conceive various off-premises jobs as outside sales.

II. Eliminating the Requirement that an Employee Actually Make Sales Would Create a Rift in the System of Protections Afforded by the FLSA.

The Ninth Circuit opinion holds that the "outside salesman" exemption should cover employees who work outside in a capacity *close enough* to making sales for the employer, regardless of whether they actually make such sales. This judicial gloss contravenes the well-established principle that the broad and remedial purpose of the FLSA is intended to extend coverage to more workers and thus exemptions from the Act are construed narrowly. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). In that same vein, a statutory standard of *close enough* injects uncertainty. If this standard is adopted, the exemption (and many other FLSA exemptions) would bulge with no clear stopping point, sowing doubts about coverage, exempting unintended categories of workers, and rendering meaningless the principle that exemptions be construed against the employer.

A. The Ninth Circuit Decision Violates the Principle that FLSA Exemptions Should Be Read Narrowly.

On June 25, 1938, Congress enacted the Fair Labor Standards Act, creating a minimum standard for hourly wages and a maximum number of hours an employee could work without receiving overtime compensation. 29 U.S.C. §§ 206, 207. The FLSA was enacted to eliminate the labor conditions that are detrimental to the health, efficiency and general welfare of workers, 29 U.S.C. § 202, and to encourage employers to spread employment opportunities rather than to lengthen the work week. *See Missel*, 316 U.S. at 577-78.

In his message to Congress urging passage of the Act, President Roosevelt explained that the Act is intended to ensure workers "a fair day's pay for a fair day's work" because "[a] self-supporting and self-respecting democracy can plead no . . . economic reason for chiseling workers' wages or stretching workers' hours." H.R. Rep. No. 101-260, at 8-9 (Sept. 26, 1989), *reprinted in* 1989 U.S.C.C.A.N. 696, 696-97. A half-dozen years later, this Court recognized the "remedial and humanitarian . . . purpose" of the FLSA, affirming that the Act does not deal "with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others." *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944).

More particularly, the FLSA established the general rule that employees must be compensated at one and one-half times their regular rate of pay for each hour worked in excess of 40 hours per week. 29 U.S.C. § 207(a)(1). Although the Act did not prohibit overtime work, it imposed a financial disincentive to its use. *Missel*, 316 U.S. at 577-78. The overtime protections of the FLSA are meant to apply widely even to those considered well-compensated, in order to ensure that employers do not overburden such workers with long weeks and deprive others of employment opportunities.[3] The FLSA protects workers regardless of their level of income, unless they satisfy the highly paid employee exemption, which potentially applies to employees making more than $100,000 per year. *See* 29 C.F.R. § 541.601. Indeed, this Court has repeatedly held that "employees are not to be deprived of the benefits of the Act simply because they are well paid." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 741 n.18 (1981) (quoting *Jewell Ridge*

[3] Despite this Congressional purpose, studies of the American workplace have shown that the average American across every industry, occupation, and income level has seen a dramatic rise in working hours which results in the very evils that Congress sought to remedy by passing the FLSA: decreased efficiency, increased stress on the worker, and an unhealthy workplace. *See* Brief of NELP, as *Amicus Curiae* in Support of Petitioners, *Auer v. Robbins*, 519 U.S. 452 (1997) (No. 95-897), 1996 WL 492324, at *11-12 (citing, *inter alia*, Juliet Schor, "The Overworked American: The Unexpected Decline of Leisure," Basic Books (1991)).

Coal Corp. v. Local No. 6167, United Mine Workers of Am., 325 U.S. 161, 167 (1945)).

It is against these legislative purposes that the section 213 exemptions are examined. This Court holds that the Act's "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold*, 361 U.S. at 392 (concluding that the three conditions of the Section 13(a)(2) retail or service establishment exemption are "explicit prerequisites to exemptions and not merely suggested guidelines for judicial determination of employer's status"); *see also Mitchell v. Ky. Fin. Co.*, 359 U.S. 290, 296 (1959) (finding that it would be unjustified for the Court to strain to bring the employer's activities within the literal words of the exemption because FLSA exemptions are to be narrowly construed). To do otherwise would be "to abuse the interpretative process and to frustrate the announced will of the people." *A.H. Phillips*, 324 U.S. at 493.

To depart from the long-standing principle that FLSA exemptions be construed narrowly and to dilute the plain language would embolden employers to distort other exemptions and seek subsequent judicial ratification. Courts have routinely rejected a similar *close-enough* standard when analyzing other exemptions, such as the educational requirement of the "learned professional exemption," 29 C.F.R. § 541.301; 29 U.S.C. § 213(a)(1). *See*, *e.g.*, *Solis v. Washington*, 656 F.3d 1079, 1088 (9th Cir. 2011) (rejecting general

academic training as substitute for "a prolonged course of specialized intellectual instruction" in finding social workers non-exempt); *Young v. Cooper Cameron Corp.*, 586 F.3d 201, 205-06 (2d Cir. 2009) (finding exemption cannot apply to engineering-related position if advanced education is not customarily required; distinguishing skill from education); *Vela v. City of Houston*, 276 F.3d 659, 675-76 (5th Cir. 2001) (deeming educational requirements for paramedics not sufficiently extensive to satisfy exemption's advanced knowledge requirement); *Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060, 1078 (1st Cir. 1995) (finding journalists not exempt where position emphasized newsroom experience over journalism courses); *Dybach v. State of Fla. Dep't of Corrs.*, 942 F.2d 1562, 1565 (11th Cir. 1991) (finding probation officer non-exempt because job did not require specialized degree in a specific, relevant field).

Similarly, this Court and others have refused to apply a *close-enough* standard for the "retail establishment" exemption, 29 U.S.C. § 213(a)(2), *repealed* Pub. L. No. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939. *See*, *e.g.*, *A.H. Phillips*, 324 U.S. at 496-98 (strictly construing term "establishment" in deciding that the pertinent inquiry is not whether the business enterprise as a whole is engaged in retailing, but whether the particular establishment under scrutiny – a warehouse and central office – is engaged in retailing); *see also Schultz v. Adair's Cafeterias, Inc.*, 420 F.2d 390, 394 (10th Cir. 1969) (limiting a retail "establishment" to a single physical separate place of

business rather than an integrated enterprise because a broader interpretation "runs directly contrary to the letter and spirit of the [FLSA]"); *Wirtz v. Keystone Readers Svc., Inc.*, 418 F.2d 249, 255-59 (5th Cir. 1969) (following the Supreme Court's definition of an "establishment" as a distinct physical place of business and concluding that defendant's central business office and door-to-door retailing do not qualify as "retail establishments").

Consistent with this Court's mandate that FLSA exemptions are to be read narrowly, an employee must in fact make or consummate sales to fall within the "outside salesman" exemption. To hold otherwise – as the Ninth Circuit did and Respondent asks the Court to do here – contradicts the common meaning of the term and frustrates the FLSA's broad remedial purpose.

B. The Ninth Circuit's Rationale Expands the "Outside Salesman" Exemption to Engulf Employees Who Work Outside in Any Capacity Related to Selling.

The Ninth Circuit's holding, if affirmed by the Court, threatens to undermine years of fidelity by the courts to the true meaning of "salesman," and guidance from the Secretary of Labor to employers on the same subject. It would expose many low-wage workers to exclusion from both the minimum wage and overtime safeguards of the FLSA, by employers that

re-characterize their jobs as sales, even where the workers make no sales.[4]

The Ninth Circuit erred in concluding that detailers, although they do not actually make sales, were somehow uniquely comparable to sales people outside the pharmaceutical industry. *Cf. Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 398 (9th Cir. 2011) (describing the work of detailers). Like detailers, other categories of workers outside the pharmaceutical industry focus on promoting products or services with the end goal of increasing sales, and sometimes even receive payment in part on a commission basis, but do not themselves make sales. Courts and the Secretary of Labor have considered such workers to be eligible for minimum wage and overtime under the FLSA.

For example:

- "Merchandisers," who help stimulate sales by encouraging retailers to replenish their supply and ensuring products are marketed properly at retail stores, but often do not have the authority of the upper-level sales people to negotiate sales agreements. Like the detailers, the efforts of the merchandisers

[4] The "outside salesman" exemption excludes employees within its reach from both overtime and minimum wage protection, 29 U.S.C. § 213(a), thus stripping them of the minimum protections from "substandard wages and oppressive working hours" which Congress sought to provide in the FLSA. *Barrentine*, 450 U.S. at 739.

are directed at specific retailers, but they do not complete any sales. *See*, *e.g.*, *Campanelli v. Hershey Co.*, 765 F. Supp. 2d 1185, 1191 (N.D. Cal. 2011) (holding that plaintiffs who perform merchandising work are not engaged in making actual "sales" where upper-level salespeople negotiate the sales agreements); *see also Ackerman v. Coca-Cola Enters., Inc.*, 179 F.3d 1260, 1263-64 (10th Cir. 1999) (distinguishing merchandising from sales in holding that plaintiffs were exempt because they performed merchandising tasks that were "incidental to and in conjunction with" their sales of products).

- "Recruiters" and "solicitors," who are focused on networking, giving presentations, distributing flyers, and displaying publicity materials, and may target specific audiences or geographic areas, but who may not have the authority to obtain commitments. Such individuals may be military recruiters, magazine subscription solicitors, or the people who hand out flyers on the streets. *See*, *e.g.*, *Clements v. Serco, Inc.*, 530 F.3d 1224, 1228-29 (10th Cir. 2008) (holding that military recruiters who did not have authority to enlist recruits did not fall under the outside sales exemption); *Keystone Readers Serv., Inc.*, 418 F.2d at 253, 260 (magazine subscription solicitors, who canvass houses and obtain order cards, but do not collect money, are not engaged in "sales"); Opinion Letter, Wage & Hour Div., U.S. Dep't of Labor, 2006 WL 1698305, at *2 (May 22, 2006) (soliciting and obtaining promises of future charitable donations do not constitute "sales"); Opinion Letter, Wage & Hour

Div., U.S. Dep't of Labor, 1998 WL 852683, at *3 (Feb. 19, 1998) (recruiters who identify prospective students and obtain enrollment applications, but cannot complete the enrollment contract on behalf of the college, are not engaged in "sales"); Opinion Letter, Wage & Hour Div., U.S. Dep't of Labor, 1999 WL 1002391, at *2 (Apr. 20, 1999) (same). *Cf. Nielsen v. DeVry, Inc.*, 302 F. Supp. 2d 747, 754-56 (W.D. Mich. 2003) (field representatives for a college who continued their efforts until prospective students paid tuition and began attending classes fell under the outside sales exemption).

- Deliverymen who take orders or seek new customers on their routes, but do not contract to "sell." *See*, *e.g.*, *Hodgson v. Klages Coal & Ice Co.*, 435 F.2d 377, 383-84 (6th Cir. 1970) (routemen who talk to store managers to seek new customers are not making sales because store managers alone cannot enter a binding agreement to carry the products); *Reynolds v. Salt River Valley Water Users Ass'n*, 143 F.2d 863, 867-68 (9th Cir. 1944) ("zanjeros," who take orders for and deliver water to association shareholders, do not "sell" because the association does not own the water itself).

- "Sales representatives" or marketing representatives who, instead of focusing on completing sales, create networks of dealers through which the company distributes products, educate potential buyers about the product, and boost consumer desire to buy the product. *See*, *e.g.*, *Burling v. Real Stone Source*, No. 08 Civ. 43, 2009 WL 1812785, *5 (D.

Idaho June 24, 2009) (describing duties of a sales representative working for distributor of construction materials who is not an "outside salesman").

Because the Ninth Circuit offers no clear limitation on which employees are *close enough* to making a sale to fall under the "outside salesman" exemption, its conception of the exemption threatens to exclude all of these workers, many of whom are low-wage earners who have little discretion to manage their time at work, from the minimum wage and overtime protections of the FLSA. The narrow exemption should not be expanded to encompass such employees.

III. In the Absence of Congressional or Regulatory Action, the Court Should Not Dilute or Refashion the FLSA's Explicit Requirements for One Industry.

The FLSA statutory exemptions contained in 29 U.S.C. § 213 are products of Congressional drafting and compromise over a period of many years. They have been amended some twenty times since their enactment in light of modern business and industrial developments – eight times in the past twenty years alone.[5] The Secretary of Labor, in turn, has issued

[5] June 25, 1938, c. 676, § 13, 52 Stat. 1067; Aug. 9, 1939, c. 605, 53 Stat. 1266; Oct. 26, 1949, c. 736, § 11, 63 Stat. 917; Aug. 8, 1956, c. 1035, § 3, 70 Stat. 1118; Aug. 30, 1957, Pub. L. No. 85-231, § 1(1), 71 Stat. 514; July 12, 1960, Pub. L. No. 86-624, § 21(b), 74 Stat. 417; May 5, 1961, Pub. L. No. 87-30, §§ 9, 10, 75 Stat. 71, 74; Sept. 23, 1966, Pub. L. No. 89-601, Title II, §§ 201

(Continued on following page)

and updated her own detailed regulations enforcing, defining, and interpreting the various FLSA exemptions.

In light of this dynamic history, the notion that the pharmaceutical industry requires *judicial* modification of the FLSA to bring the act up-to-date is unsustainable. Congress has time and again granted industry- and profession-specific exemptions under the FLSA. *See*, *e.g.*, 29 U.S.C. § 213(a)(5) ("any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life"); § 215(a)(8) ("any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper

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to 204(a), (b), 205 to 212(a), 213 to 215(b), (c), 80 Stat. 833 to 838; Oct. 15, 1966, Pub. L. No. 89-670, § 8(e), 80 Stat. 943; 1970 Reorg. Plan No. 2, § 102, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085; June 23, 1972, Pub. L. No. 92-318, Title IX, § 906(b)(1), 86 Stat. 375; Apr. 8, 1974, Pub. L. No. 93-259, §§ 6(c)(2), 7(b)(3), (4), 8, 9(b), 10, 11, 12(a), 13(a) to (d), 14 to 18, 20(a) to (c), 21(b), 22, 23, 25(b), 88 Stat. 61 to 69, 72; Nov. 1, 1977, Pub. L. No. 95-151, §§ 4 to 8, 9(d), 11, 14, 91 Stat. 1249, 1250 to 1252; Sept. 27, 1979, Pub. L. No. 96-70, Title I, § 1225(a), 93 Stat. 468; Nov. 17, 1989, Pub. L. No. 101-157, § 3(c), 103 Stat. 939; Sept. 30, 1994, Pub. L. No. 103-329, Title VI, § 633(d), 108 Stat. 2428; Dec. 29, 1995, Pub. L. No. 104-88, Title III, § 340, 109 Stat. 955; Aug. 6, 1996, Pub. L. No. 104-174, § 1, 110 Stat. 1553; Aug. 20, 1996, Pub. L. No. 104-188, § 2105(a), 110 Stat. 1929; Oct. 11, 1996, Pub. L. No. 104-287, § 7(5), 110 Stat. 3400; Nov. 13, 1997, Pub. L. No. 105-78, Title I, § 105, 111 Stat. 1477; Oct. 31, 1998, Pub. L. No. 105-334, § 2(a), 112 Stat. 3137; Jan. 23, 2004, Pub. L. No. 108-199, Div. E, Title I, § 108, 118 Stat. 236.

with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto"); § 215(a)(10) ("any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations"); § 215(b)(5) ("any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state"). There is no need for courts to carve out additional exemptions to cover industry-specific conditions. Judicial intervention, if anything, might upset deliberate legislative compromises that are an important part of the FLSA history, as the Department of Labor has chronicled. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, Monthly Labor Review, July 1978, *available at* http://www.dol.gov/oasam/programs/history/flsa1938.htm.

This Court considers Congressional activity upon a statute as evidence of its meaning. *See*, *e.g.*, *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338-39 (1988) (noting numerous amendments to Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq*. as providing guidance to Congressional intent); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987) (diversity jurisdiction, 28 U.S.C. § 1332); *McCain v. Lybrand*, 465 U.S. 236, 248 (1984) (Voting Rights Act, 42 U.S.C. § 1973c). That neither Congress nor the Executive branch has taken any action against the backdrop of years of litigation about the classification of detailers suggests that the definition of "outside salesman"

requires no update at all. To the extent that GlaxoSmithKline and others in the pharmaceutical industry seek an "outside salesman" exemption specific to their industry, they should approach Congress instead of this Court. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010) ("[E]ditorial freedom [over a statute] belongs to the Legislature, not the Judiciary").

CONCLUSION

This Court should reverse the Ninth Circuit's ruling and recognize that the FLSA's exemption for "outside salesm[e]n" should apply only to those who make sales.

Respectfully submitted,

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