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 WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amici curiae address the following issue only:

Whether deference is owed to the Secretary of Labor's interpretation of the Fair Labor Standards Act's exemption for outside sales employees and related regulations.

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INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation (WLF) is a public-interest, law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. To that end, WLF routinely litigates in cases to ensure that undue deference is not accorded to governmental agencies. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Pharm. Research & Mfrs. of Am. v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004). WLF also litigates from time to time to ensure that the important notice-and-comment protections of the Administrative Procedure Act are not improperly circumvented. *See, e.g., Prevor v. FDA*, No. 1:11-cv-1187 (RMC) (D. D.C. Jan. 9, 2012).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and letters of consent have been lodged with the Court.

dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme Court Review, and files *amicus* briefs. The present case centrally concerns Cato because it implicates the important legal limits that apply to powerful administrative agencies.

In its brief, Respondent persuasively demonstrates the myriad reasons why treating pharmaceutical sales representatives as exempt from the overtime pay requirements of the Fair Labor Standards Act is consistent with both the text and purpose of the Act, as well as with the rationale behind the "outside sales" exemption. *Amici* will not repeat those points here.

Amici write separately to emphasize that allowing regulatory agencies to freely change their interpretations of regulations and statutes, without the formal protections of notice-and-comment rulemaking, threatens to significantly undercut the predictability that has long been a hallmark of our common law system. *Amici* fear that if administrative agencies come to believe that formal rulemaking procedures are too cumbersome or inconvenient to follow, and are instead permitted to disrupt settled expectations under the pretense of merely "reinterpreting" existing regulations, an important safeguard for our representative system of government will be lost.

Amici are also concerned about the enormous upheaval that the Department's new interpretation of "outside sales" will have on legitimate reliance interests in the pharmaceutical industry—among employers *and* employees alike. Such concern is especially warranted where, as here, an agency's contradictory interpretation creates an unfair surprise for the affected stakeholders who had come to rely on that agency's earlier acquiescence for well over half a century.

STATEMENT OF THE CASE

At issue is whether pharmaceutical sales representatives are exempt from the overtime pay requirements of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq*. In answering that question, the Ninth Circuit rightly accorded no deference to the Department of Labor's novel interpretation of the FLSA's outside sales exemption, an interpretation that abruptly contradicts the Department's own regulatory and interpretative guidance to the contrary for over seventy years. *See* Pet. App. at 21a-24a.

Enacted in 1938, the FLSA imposes several minimum labor standards on employers, including a statutory overtime pay requirement for employees who work in excess of forty hours per week. *See* 29 U.S.C. § 207(a)(1). Among the many exceptions to this overtime pay requirement, the FLSA specifically exempts "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by

regulations of the Secretary [of Labor])." 29 U.S.C. § 213(a)(1). As the statute indicates, because Congress did not otherwise define the term, proper interpretation of "outside salesman" is informed by implementing regulations issued by the Secretary of Labor.

As early as 1940, the Department of Labor's regulations implementing the outside sales exemption emphasized the broad, flexible approach Congress took in defining "sales" within the meaning of section 3(k) of the FLSA. *See* 29 U.S.C. § 203(k) (defining "sale" so as to include "any sale, exchange, contract to sell, consignment for sale, *or other disposition*") (emphasis added). Some thirty years later, in 1970, the Department continued this flexible understanding of "sales" by announcing that "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 (1970) (emphasis added). And as recently as 2004, the Department's rulemaking reinforced the understanding that the FLSA's outside sales exemption applies so long as an employee "*in some sense* make[s] a sale." *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, 69 Fed. Reg. 22122, 22162 (Apr. 23, 2004) (emphasis added).

Petitioners Michael Christopher and Frank Buchanan were employed as pharmaceutical sales reps for GlaxoSmithKline (GSK), one of the world's leading research-based pharmaceutical and healthcare companies. Pet. App. at 2a. As

pharmaceutical sales reps, Petitioners worked outside of GSK's offices and spent most of their time visiting physicians located within their assigned geographic territories. *Id.* at 4a. During such visits, Petitioners were tasked with delivering accurate information to physicians about GSK's products, providing physicians with samples of GSK's products, and encouraging physicians to prescribe, when appropriate, GSK's products over competing products. *Id.* On a daily basis, over 90,000 pharmaceutical sales reps call on physicians "for the purpose of driving greater sales." *Id.* at 28a.

After the conclusion of their employment with GSK, Petitioners filed a putative class action in the U.S. District Court for the District of Arizona, claiming that GSK had improperly classified them as exempt from the FLSA's overtime pay provision. *Id.* at 38a. Specifically, Petitioners argued that their overtime work was not exempted by the FLSA because they did not actually "sell" within the meaning of that term. *Id.* On the basis of that theory, Petitioners challenged GSK's alleged practice of requiring overtime work without paying additional overtime compensation in violation of the FLSA's statutory overtime pay requirement under 29 U.S.C. § 207(a)(1). For its part, GSK maintained that Petitioners were exempt under several longstanding interpretations of the "outside sales" exemption of the FLSA. *Id.* The parties cross moved for summary judgment.

Holding that pharmaceutical sales reps "unmistakably fit within the terms and the spirit of the exemption," the district court granted GSK's motion for summary judgment. *Id.* at 46a. Because

both the FLSA and the Department of Labor's formal rules define the word "sale" "somewhat loosely" and go "beyond a constricted, traditional sense" of the word, the district court "decline[d] to adopt a hyper-technical construction" that would "run[] counter to the purpose of the [FLSA]." *Id.*

Petitioners unsuccessfully moved the district court to alter or amend its judgment on the grounds that the court had failed to give "controlling deference" to an *amicus curiae* brief filed by the Department of Labor in another case, *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011). In that brief, the Department claimed that an employee sells goods *only* if he or she actually "transfers title" to those goods to a buyer. Otherwise, an employee who does not "transfer title" does not actually consummate a sales transaction and is thus not covered by the FLSA's "outside sales" exemption. That view, however, represented an abrupt departure from the Department's longstanding interpretation of the term "sales." The district court denied the motion, concluding that the Department's "absurd" interpretation was not only "inconsistent with the statutory language and its prior pronouncements, but . . . defies common sense." Pet. App. at 51a-52a.

Petitioners appealed to the U.S. Court of Appeals for the Ninth Circuit. In support of Petitioners, the Secretary of Labor filed an *amicus curiae* brief substantially similar to the one filed earlier in *Novartis*. On the question of whether deference—of the kind accorded in *Auer v. Robbins*, 519 U.S. 452 (1997)—should be accorded to the Secretary's newfound interpretation of the FLSA's

overtime pay exemption, the Ninth Circuit concluded that deference is not warranted where an agency "has elected merely to paraphrase the statutory language." Pet. App. at 21a. The panel criticized the Labor Secretary's new interpretation as "plainly erroneous and inconsistent with her own regulations and practices," having essentially "transform[ed] what since [the early days of the FLSA had] been recognized as a multi-factor review of an employee's functions into a single, stagnant inquiry." *Id.* at 24a, 35a. The Court of Appeals further explained that such an "about-face regulation, expressed only in ad hoc *amicus* filings, [was] not enough to overcome decades of [Department of Labor] nonfeasance and the consistent message to employers that a salesman is someone who 'in some sense' sells." *Id.*

Refusing to defer to the Department of Labor's "about-face regulation," *id.* at 35a, the Ninth Circuit affirmed the district court's grant of summary judgment. In doing so, the panel relied on the FLSA and its implementing regulations to affirm the "common sense understanding" that pharmaceutical sales reps are covered by the "outside sales" exemption. *Id.* at 26a-28a.

The Court of Appeals denied rehearing en banc. *Id.* at 53a.

SUMMARY OF ARGUMENT

This case raises important issues about the limits of agency deference and the need to maintain appropriate checks on unpredictable and disruptive agency actions. Whatever else *Auer v. Robbins* may be said to require, it has never been understood to permit an agency, under the guise of reinterpreting a regulation, to effectively create an entirely new regulation. But that is precisely what both Petitioners and the Department of Labor ask this Court to allow in this case.

Even a cursory reading of the Department's *amicus* brief reveals that the Secretary is not engaged in an effort to provide clarity to an arguably ambiguous regulation—one of the chief justifications for deference under *Auer*. Rather, the Department's newfound construction of what constitutes a "sale" under the FLSA represents an abrupt and unexpected departure from that agency's longstanding position—a position that had been adopted and reinforced by much more formal and rigorous means than the mere drafting of an *amicus curiae* brief. But as the appeals court below rightly concluded, to defer to the Secretary's new interpretation under such circumstances would be to eviscerate the protections of the Administrative Procedures Act and its notice-and-comment provisions.

Thus, even if the Department's new, more constrictive definition of "sales" were a plausible interpretation of the statutory and regulatory language, the APA dictates that the Department may not adopt that interpretation without first complying with notice-and-comment rulemaking.

Those protections ensure that an administrative agency will be bound not only by the laws adopted by Congress but also by its own internal rules, unless and until that agency takes appropriate steps to change those rules—including providing affected stakeholders notice of the proposed changes and a meaningful opportunity to comment.

Auer deferred to the agency only after first determining that there was sufficient reason to believe that the views expressed in the agency's brief were reliable—that the brief gave no indication that the interpretation did not reflect the agency's "fair and considered judgment" on the matter in question. That is not the case here, where the agency appears at best to be engaging in an after-the-fact effort to justify its new litigating position and policy preference. Such an abrupt and unexpected departure cannot be said to be a "fair and considered judgment" under *Auer* and does not merit deference, much less "controlling deference," by this Court.

That is why, when deciding questions of deference, this Court has long looked to whether an agency's interpretation is consistent with that agency's earlier pronouncements. This is especially true where an agency's contradictory interpretation creates an "unfair surprise" for the affected stakeholders who, in this case, had come to rely on that agency's earlier interpretation for well over half a century. Not only would the Department's new interpretation of "sales" require a monumental restructuring of the pharmaceutical industry, it would also have a devastating impact on pharmaceutical sales employees themselves. And

where, as here, an agency's sudden change in in its own regulatory position creates an "unfair surprise" on the affected stakeholders, that abrupt change constitutes a valid reason for disregarding the new interpretation altogether.

ARGUMENT

I. AGENCIES SHOULD NOT BE PERMITTED TO USE *AUER* DEFERENCE TO CIRCUMVENT THE IMPORTANT PROTECTIONS OF THE ADMINISTRATIVE PROCEDURE ACT

The Department of Labor claims that its narrow understanding of the term "sales", as manifest in an ad hoc *amicus curiae* brief, is entitled to "controlling" deference by this Court. Not so. Simply put, the law does not permit an agency to regulate by *amicus* brief. Whatever else *Auer v. Robbins*, 519 U.S. 452 (1997), may be said to require, it has never been understood to "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000). Yet that is precisely what both the Department and Petitioners ask this Court to sanction in this case. Rather than initiate formal rulemaking to invite comment from stakeholders and further evaluate prospective changes to the definition of "sales," the Department merely filed an *amicus* brief announcing its new litigating position. As Justice Scalia warned only last Term in *Talk America v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2266 (2011), allowing an agency to both promulgate its own rules as well as interpret them "frustrates the notice and

predictability purposes of rulemaking, and promotes arbitrary government."

When the Department of Labor first promulgated regulations implementing the outside sales exemption in 1940, it gave the term "outside sales" its most natural, straightforward interpretation, emphasizing the broad, flexible approach Congress took in defining "sale." *See* 29 U.S.C. § 203(k) (defining "sale" so as to include "any sale, exchange, contract to sell, consignment for sale, or other disposition") (emphasis added). Some thirty years later, in 1970, the Department continued this flexible understanding of "sale" by announcing that "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 (1970) (emphasis added). And as recently as 2004, the Department's rulemaking reinforced the understanding that the FLSA's outside sales exemption applies so long as an employee "*in some sense* make[s] a sale." *See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, 69 Fed. Reg. 22122, 22162 (Apr. 23, 2004) (emphasis added).

Nevertheless, the Department has now abandoned that longstanding view and adopted, in the form of an ad hoc *amicus* brief, a more restrictive and narrow definition of "sales." Of course, nothing in the regulatory history suggests that the Department had based its regulations on an idiosyncratic definition of the word "sales." Nor is there anything in the Secretary's *amicus* filings to

suggest that the Department is changing its policy because, after a careful examination of the language and history of the FLSA's outside sales exemption and the regulations implementing it, the Department has suddenly discovered that its previous interpretations woefully misrepresented Congressional intent. Rather, the Secretary's discussion of the outside sales exemption appears at best to be an after-the-fact effort to justify the Department's new litigating position and policy preference. Such an unexplained departure by an agency from its own longstanding interpretation of its regulations "is likely to reflect the agency's reassessment of wise policy rather than a reassessment of what the agency itself originally meant." *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 682 (6th Cir. 2005). But an agency's policy views are not entitled to deference under *Auer*, nor should they be.

Even a casual reading of the Department's *amicus* brief makes clear that this is not an effort by the Secretary to provide clarity to an arguably ambiguous statute and regulation—one of the chief justifications for deference under *Auer*. Rather, the Department's newfound construction of what constitutes a "sale" under the FLSA represents an abrupt and unexpected departure from that agency's longstanding position—a position that had been adopted and reinforced by much more formal and rigorous means than the mere drafting of an *amicus curiae* brief. But, as the appeals court below rightly concluded, to defer to the Secretary's new interpretation under such circumstances would be to "sanction bypassing of the Administrative Procedure Act and notice and comment rulemaking." Pet. App.

at 24a. (citing *Christensen*, 529 U.S. at 576).

It is true that Congress, in enacting the FLSA in 1938, provided that the meaning of the term "outside sales" should be informed by implementing regulations promulgated by the Secretary of Labor. But that was not Congress's final word on the matter; for only eight years later, in 1946, Congress also enacted the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.*, which requires that all federal agencies provide notice to, and invite comment from, the affected stakeholders before formulating regulations. *See* 5 U.S.C. § 553 (mandating notice, comment, and consideration in agency rulemaking). Importantly, that notice-and-comment requirement applies to all "repeals" as well as "amendments." *See* 5 U.S.C. § 551(5).

Congress, then, acting through the APA, has sought to guard against arbitrary and capricious regulation by requiring that an agency's modification of its prior interpretation of a regulation may be accomplished only pursuant to the APA's notice-and-comment procedures. "Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir 1997); *Shell Offshore, Inc. v. Babitt*, 238 F.3d 622, 629 (5th Cir. 2001) ("[T]he APA requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation."). Unless an agency's modification of its prior interpretation of a formal regulation is subject to equally formal rulemaking requirements,

"the agency could evade its notice and comment obligation by 'modifying' a substantive rule that was promulgated by notice and comment rulemaking." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997) (quoting *Paralyzed Veterans of Am.*, 117 F.3d at 586).

Thus, even if the Department's new, more constrictive definition were a plausible interpretation of the statutory and regulatory language, the APA dictates that the Department may not adopt that interpretation without first complying with notice-and-comment rulemaking. "To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements." *Paralyzed Veterans of Am.*, 117 F.3d at 586. That is why this Court has emphasized that APA rulemaking is required whenever an agency interpretation "adopt[s] a new position inconsistent with . . . existing regulations." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995).

Indeed, this Court has refused to defer to an agency's *amicus* brief for the very reason that such informal interpretations (e.g., interpretations, such as those contained in *amicus* briefs, made outside the strictures of the APA) "lack the force of law." *Christensen*, 529 U.S. at 587. In that same vein, this Court held in *Long Island Care at Home, Ltd. v. Coke*, 55 U.S. 158, 170-71 (2007), that deference to the Department of Labor's views on the "domestic service" exemption to the FLSA's minimum wage requirements was not vitiated by the Department's change in position, since the agency had taken

"recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation."

This Court has also held that "[w]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)). Despite numerous opportunities to do so, Congress never acted to "correct" the Department's 70-year regulatory interpretation of the FLSA's "outside sales" exemption, which had been in effect since the time of the statute's enactment. That it chose not do so should be regarded as a deliberate policy choice, not as a deferral to the Department of Labor that it should feel free to impose a contrary policy instead. *See, e.g., Leary v. United States*, 395 U.S. 6, 25 (1969) ("[A] long-standing, contemporaneous construction of a statute by the administering agencies is entitled to great weight.") (internal quotation marks omitted).

In *Wyeth v. Levine*, 555 U.S. 555 (2009), this Court considered whether to accord deference to the Food and Drug Administration's (FDA) interpretation of the scope of its own preemption authority. Even though the FDA provided a formal notice of proposed rulemaking, it chose not to seek comment on the scope of permissible preemption. *Wyeth*, 555 U.S. at 1201. When the FDA ultimately promulgated a final rule that "articulated a sweeping position on the [FDA's] preemptive effect in the regulatory preamble," this Court refused to

give those pronouncements deference in light of the FDA's "procedural failure," which made those pronouncements "inherently suspect." *Id*. The same result should obtain here.

Ultimately, this case presents an issue that is far broader than the fate of one industry and its efforts to prevent the Department of Labor from unilaterally overhauling the FLSA. As the size of the administrative state continues to grow, it is vitally important that stakeholders continue to have a meaningful opportunity to participate in the operation of their government. The protections of the APA are an important part of that effort. They ensure that administrative agencies will be bound not only by the laws adopted by Congress but also by their own internal rules, unless and until the agencies take appropriate steps to change those rules—including providing affected citizens notice of the proposed changes and a meaningful opportunity to comment.

But if administrative agencies come to believe that formal rulemaking procedures are too cumbersome or inconvenient to follow (as the Department of Labor apparently has), and are instead permitted to disrupt settled expectations under the pretense of merely "reinterpreting" existing regulations, an important safeguard of our representative system of government will be lost. Only this Court can ensure that agencies produce rules and interpretations of those rules that are sufficiently "clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994)

(Thomas, J., dissenting).

II. THE DEPARTMENT'S ABRUBT CHANGE IN HOW IT INTERPRETS ITS OWN REGULATIONS IMPLEMENTING THE FLSA'S "OUTSIDE SALES" EXEMPTION CONSTITUTES AN "UNFAIR SURPRISE" THAT IS UNDESERVING OF DEFERENCE

The pragmatic view that pharmaceutical sales reps are properly exempted from the FLSA's overtime pay provisions held sway for over 70 years, that is, until October 2009, when the Secretary of Labor suddenly abandoned that view in an *amicus* brief in *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011). In that brief, the Secretary opined that an employee sells goods *only* if he actually "transfers title" to those goods to a buyer. Otherwise, according to the Secretary, an employee who does not "transfer title" does not actually consummate a sales transaction and is thus not covered by the FLSA's "outside sales" exemption. The Secretary subsequently doubled down on that novel interpretation in her *amicus* filing in this case. Such an abrupt and unexpected departure from longstanding positions, however, does not merit deference, much less "controlling deference," by this Court.

"[D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases." *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring). Although

this Court in *Auer* deferred to an agency's *amicus* brief "in the circumstances of [that] case," 519 U.S. at 462, it did *not* create a blanket rule requiring deference to every such brief that purports to interpret a regulation. Rather, *Auer* deferred to the agency only after first determining that there was sufficient reason to believe that the views expressed in the agency's brief were reliable—in other words, that the brief gave "no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question." *Id.* That is not the case here.

Under *Auer*, an agency's interpretation of an ambiguous regulation is sometimes entitled to deference because it is presumed that the agency is best situated to interpret its own words. But an agency cannot properly claim to be "interpreting" a regulation when it is in effect *changing* that regulation. Where, as here, an agency's *amicus* brief drastically deviates from that agency's own longstanding views, that brief cannot be said to be a "fair and considered judgment" under *Auer*. This is especially true where that agency's contradictory interpretation creates an unfair surprise for the affected stakeholders who, in this case, had come to rely on that agency's earlier interpretation for well over half a century.

That is why, when deciding questions of deference, this Court has long looked to whether an agency's interpretation is consistent with that agency's own earlier pronouncements. *See, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due.");

Pauley v. BethEnergy Mines, 501 U.S. 680, 698 (1991) ("As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views."); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988) (refusing to defer to an agency's interpretation that was "contrary to [its] narrow view . . . advocated in past cases"); *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446 n.30 (1987) (stating that an "agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held view") (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

Many lower courts have similarly held that *Auer* deference is available only when the agency's "position is not inconsistent with [its] prior statements and actions regarding the disputed regulation." *Drake v. FAA*, 291 F.3d 59, 67 (D.C. Cir. 2002). They accord such deference only when an agency's interpretation of its regulation is "constant and unchanging." *U.S. Steel Mining Co. v. Director, OWCP*, 386 F.3d 977, 986 (11th Cir. 2004). *See also Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 461 (4th Cir. 2007) (declining to defer to the Department of Labor's regulatory interpretation in an *amicus* brief because it was "inconsistent with what the [Department] said it intended the regulation to mean at the time it was promulgated").

Concomitantly, an agency's "fair and considered judgment" is one that is in harmony with that agency's prior interpretations. *See, e.g., U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1016 n.15 (D.C.

Cir. 2002) (whether an agency's interpretation is "fair and considered" hinges on whether the agency has "ever adopted a different interpretation of the regulation or contradicted its position on appeal") (internal quotations omitted). Indeed, as Judge Richard Posner has observed, while it may be "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 fully compliant. *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510-11 (7th Cir. 2007). Here, the Department's 70-year acquiescence in the pharmaceutical industry's exempt classification of its outside sales reps only further confirms the validity of the Department's former, expansive understanding of "sales."

Like all regulated entities, the pharmaceutical industry structures its affairs in reliance on the assumption that regulatory agencies will not arbitrarily and without explanation abandon their long-held interpretative views of fixed statutory and regulatory language. Yet it was not until 2009 that the Department of Labor first announced that pharmaceutical sales reps are ineligible for the FLSA's "outside sales" exemption for the idiosyncratic reason that they do not actually "transfer title" in the course of their outside sales duties. Such an abrupt change in policy, if accorded deference by this Court, will require a seismic shift in the structure of the outside sales force in the pharmaceutical industry—an industry that employs more than 90,000 outside sales reps each year. But, as the appeals court below rightly concluded, courts should not accord deference to an agency's "about-

face regulation, expressed only in ad hoc *amicus* filings," which in this case depart from "decades of [agency] nonfeasance and the consistent message to employers that a salesman is someone who 'in some sense' sells." Pet. App. at 35a.

Not only would the Department's new interpretation of "sales" require a monumental restructuring of the pharmaceutical industry, it would also have a devastating impact on pharmaceutical sales *employees* themselves. Indeed, Petitioners hardly speak for all pharmaceutical sales reps, most of whom greatly value the autonomy and flexibility their position affords them. Like other outside sales professionals, pharmaceutical reps work with very little direct supervision, manage their own schedules, and receive generous incentive-based compensation based on their performance.

As exempt employees, pharmaceutical sales reps enjoy the independence that comes with being "off the clock." As Carol Maasz, an outside sales rep for Abbott Laboratories, explained in another lawsuit concerning the scope of the FLSA's outside sales exemption:

> One of my favorite things about my job is the flexibility it provides. As long as I accomplish my goals, I can arrange my appointments at institutions in a manner that is convenient for me. That is, I do not need to report to my manager, or to anyone else, if I need to run a personal errand during the day.

Declaration of Carol Maasz, *Jirak v. Abbott Laboratories*, No. 07-cv-3626 (N.D. Ill. Mar. 6, 2008),

at ¶ 12. This view echoes another made in a similar setting by AnnTherese Mulryan, an outside sales rep for sanofi-aventis, who expressed her displeasure with litigious attempts to alter her pay structure:

> I took this job knowing full well that it was an exempt position and that I would not receive overtime pay. I believe that I am compensated appropriately. I appreciate the flexibility that comes with an exempt position and I have no interest in seeing the compensation arrangement changed. Further, I am bothered by the fact that a handful of mostly former employees can challenge a compensation system that works well for thousands of current employees.

Declaration of AnneTherese Mulryan, *Evancho v. sanofi-aventis U.S. Inc.*, No. 07-cv-2266 (D. N.J. June 18, 2007), at ¶ 5. *Amici* would respectfully submit that these views, rather than those of Petitioners, more accurately represent those of the over 90,000 pharmaceutical sales reps employed throughout the country.

But if the Department's new interpretation of "outside sales" is given deference by this Court, it would effectively eliminate the most desirable aspects of the pharmaceutical sales rep's position: supervisory independence, a flexible work schedule, the ability to earn a high salary, and a favorable work-life balance. After all, a sudden shift by pharmaceutical firms in their classification of outside sales reps from exempt to non-exempt would almost certainly result in a more structured and regimented work schedule, closer supervision,

monitoring on a daily basis, and a loss of the ability to perform key job tasks at times most convenient for the employee. Moreover, it is likely that pharmaceutical sales reps would stand to lose their incentive-based compensation, which strives to reward the efforts of highly motivated and skilled sales professionals.

The Department of Labor's sudden change in interpreting its own regulation creates an "unfair surprise" on the affected stakeholders in the pharmaceutical industry and constitutes a valid reason for disregarding that new interpretation altogether. *See Long Island Care at Home, Ltd.*, 55 U.S. at 170-71.

CONCLUSION

For the foregoing reasons, the Court should affirm the Ninth Circuit's holding and refuse to defer to the Secretary of Labor's newfound interpretation of the FLSA's outside sales exemption.

Respectfully submitted,

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