NO. 16–1362

In The Supreme Court of the United States

ENCINO MOTORCARS, LLC,
PETITIONER

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, AND REUBEN CASTRO,
RESPONDENTS

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

RESPONDENTS' BRIEF IN OPPOSITION

KEVEN STEINBERG
THOMPSON, COE,
COUSINS & IRONS, LLP
12100 WILSHIRE BLVD.
SUITE 1200
LOS ANGELES, CA
90025
(310) 954–2362

STEPHANOS BIBAS
Counsel of Record
JAMES A. FELDMAN
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL
SUPREME COURT CLINIC
3501 SANSOM STREET
PHILADELPHIA, PA 19104
(215) 746–2297
SBIBAS@LAW.UPENN.EDU

QUESTION PRESENTED

Service advisors at automobile dealerships meet and greet customers, write up their requests for automobile services, suggest additional work, and forward these work orders to other dealership employees. The Fair Labor Standards Act (FLSA) generally guarantees dealership employees time-and-a-half compensation for overtime, but exempts three enumerated types of dealership employees: "salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). The exemption does not mention service advisors or selling services.

The question presented is:

Does the FLSA's overtime exemption for automobile dealership salesmen, partsmen, and mechanics also exempt service advisors from overtime protections?

PARTIES TO THE PROCEEDING

Respondents Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, and Reuben Castro were plaintiffs in the district court and appellants in the court of appeals. Respondent Mike Shirinian was erroneously omitted from the caption of the court of appeals' first opinion. Thereafter, the court of appeals granted appellants' motion to correct the caption and included his name in the caption of its most recent decision, though the version printed in the petition (Pet. App. 1) erroneously omits it.

Petitioner Encino Motorcars, LLC, was defendant in the district court and appellee in the court of appeals.

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INTRODUCTION

The Fair Labor Standards Act of 1938 (FLSA) guarantees employees time-and-a-half pay for work beyond forty hours per week, with certain enumerated exemptions. 29 U.S.C. § 207. For several years beginning in 1961, the statute exempted all automobile dealership employees, but in 1966 (and again in 1974) Congress narrowed the exemption to three enumerated types of auto dealership employees: "salesm[e]n, partsm[e]n, or mechanic[s]." *Id.* § 213(b)(10)(A). The statute further requires that those employees be "primarily engaged in selling or servicing automobiles, trucks, or farm implements." *Id.*

Last Term, this Court invalidated as "procedurally defective" a Department of Labor (DOL) regulation construing this exemption. Pet. App. 39–40. This Court "remand[ed this case] for the Court of Appeals to interpret the statute in the first instance." Pet. App. 44–45. On remand, the court of appeals interpreted the statute as exempting salesmen who sell automobiles and partsmen and mechanics who service them, but not service advisors who at most sell services, not automobiles. Pet. App. 11, 15. In the alternative, the court held that DOL's explanation of its position during the briefing of this case was persuasive, and therefore merited deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Pet. App. 7 n.3.

The three allegedly contrary appellate decisions (over the past forty-four years) cited by petitioner all arose before DOL's repeated recent explanation of

why service advisors do not fall within the salesman/partsman/mechanic exemption. Apart from the decision below, no other court has considered affording *Skidmore* deference to DOL's considered explanation over the past year. In addition, the 1973 case that created the alleged split was decided under a previous version of the statute, later amended by Congress in 1974.

In any event, the decision below will have limited practical import because of the existence of another overtime exemption in the FLSA, which may apply elsewhere even though this one does not. Moreover, DOL could promulgate a new regulation to address the scope of the exemption. Finally, the skeletal record in this case makes it a poor vehicle. Further review is unwarranted.

STATEMENT

A. Statutory and Regulatory Background

1. The FLSA's purpose is to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). Thus, it generally requires employers to pay time-and-a-half for hours worked beyond forty per week. 29 U.S.C. § 207(a)(1). Congress exempted specific types of employees from this overtime-pay mandate. *See* 29 U.S.C. §§ 207, 213.

In 1961, Congress passed a blanket exemption from the FLSA for "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles." Fair Labor Stand-

ards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 65, 73 (codified at 29 U.S.C. § 213(a)(19) (1964)). Thus, the law exempted all automobile dealership employees from the overtime-pay requirement, whether they were salesmen, receptionists, managers, mechanics, partsmen, accountants, car washers, or janitors.

2. Five years later, in 1966, Congress narrowed the exemption to three types of dealership employees: "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers." Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 209, 80 Stat. 830, 836. Congress re-enacted this provision in 1974, breaking the statutory section into two subsections. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, 88 Stat. 55, 65 (adding exemption for boat salesmen and removing it for trailer and aircraft partsmen and mechanics).

3. In 1970, DOL issued an interpretive regulation clarifying that auto dealership service advisors do not qualify for the salesman/partsman/mechanic exemption. 35 Fed. Reg. 5856, 5896 (Apr. 9, 1970) (codified at 29 C.F.R. § 779.372(c)(4) (1971)). DOL noted that service advisors' main tasks of diagnosing automobiles' repair needs, writing up work orders, and assigning and supervising mechanics' work did not make them exempt. *Id.*

4. After some lower courts refused to defer to the 1970 interpretive rule, DOL issued nonbinding en-

forcement materials, declining for a time to enforce the FLSA's overtime provisions with respect to service advisors. Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter No. WH-467, 1978 WL 51403 (July 28, 1978); WAGE & HOUR DIV., U.S. DEP'T OF LABOR, INSERT NO. 1757, FIELD OPERATIONS HANDBOOK 24L04–4(k) (1987).

In 2008, DOL considered formally amending the 1970 interpretive rule to treat service advisors as exempt and issued a notice of proposed rulemaking on the subject. 73 Fed. Reg. 43,654, 43,658–59, 43,671 (July 28, 2008). In 2011, after considering all of the comments submitted, DOL declined to broaden the exemption to include service advisors. It agreed with the majority of commenters that "the exemption should not be extended to employees outside its plain language," such as service advisors, who "merely coordinate" with exempt employees. 76 Fed. Reg. 18,832, 18,838 (Apr. 5, 2011). The final regulation defined "a salesman [as] an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale *of the automobiles*, trucks, or farm implements that the establishment is primarily engaged in selling." 29 C.F.R. § 779.372(c)(1) (emphasis added).

B. Facts and Procedural History

1. Respondents work (or worked) as service advisors for petitioner, a Mercedes-Benz auto dealership in the Los Angeles area. Compl. ¶¶ 9, 10, 15, 18. Their job was to "meet and greet" customers, listen to their complaints, "evaluate the[ir] service and/or repair needs[,] . . . . solicit and suggest that supple-

mental service be performed," and "write up an estimate." *Id.* ¶ 16. Petitioner required them to work from 7:00 a.m. to 6:00 p.m. at least five days per week, totaling a weekly minimum of 55 hours. *Id.* ¶ 15.

2. In 2012, respondents sued petitioner in federal district court, alleging violations of the FLSA and state law. Count One, at issue here, alleged that petitioner violated the FLSA by failing to pay them time-and-a-half for hours worked beyond forty per week. *Id.* ¶¶ 24–31. Petitioner moved to dismiss, arguing that service advisors are exempt from the FLSA's overtime protections under § 213(b)(10)(A).

The district court acknowledged that "the statutory language of § 213(b)(10)(A) does not expressly exempt Service Advisors." Pet. App. 81. Nevertheless, because it saw service advisors as "functionally equivalent to salesmen and mechanics," the district court extended the exemption to service advisors as well. Pet. App. 83. It therefore granted petitioner's motion to dismiss.

3. The court of appeals reversed. Pet. App. 56. The court observed that "[petitioner] concede[d] that [respondents] do not meet the regulatory definitions" of salesmen, partsmen, or mechanics. Pet. App. 59.

Applying *Chevron*'s two-step framework, the court first rejected petitioner's argument that the statute unambiguously exempts service advisors, because it disagreed with petitioner's theory that service advisors are salesmen who service automobiles. Pet. App. 60–62 (applying *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). At *Chevron* step two, the court found DOL's

interpretation of the statute reasonable and therefore entitled to deference. Pet. App. 65–73. The noun "salesman," it noted, relates directly to the gerund "selling," but not to "servicing." Pet. App. 69–70. The court of appeals thus unanimously reversed and remanded for further proceedings. Pet. App. 73.

4. This Court granted certiorari, vacated, and remanded. Pet. App. 31, 45. The Court held that DOL's 2011 regulation did not merit *Chevron* deference because it was "procedurally defective." Pet. App. 39–40, 44 (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001)). While recognizing that DOL could have offered reasons for its 2011 rule, it noted that DOL had in fact offered almost none for its decision to reinstate its original interpretation of the statute. Pet. App. 44. This Court thus vacated and remanded for the court of appeals to construe § 213(b)(10)(A) "without placing *controlling* weight on the Department's 2011 regulation." Pet. App. 44–45 (emphasis added).

5. On remand, the court of appeals read this Court's opinion as a directive to "give no weight to the agency's interpretation" and to "'interpret the statute in the first instance.'" Pet. App. 7 (quoting this Court's decision at Pet. App. 45). The court of appeals "conclude[d] that, under the most natural reading of the statute, Congress did not intend to exempt service advisors." Pet. App. 8; *see also id.* at 30. The legislative history and an FLSA canon of construction provided additional support, but the court noted that it would have reached the same holding even without them. Pet. App. 8, 16, 21 n.14.

The court of appeals also considered DOL's reasoning, as expressed in its briefing in this Court last Term, explaining why the statute does not exempt service advisors. In its alternative holding, the court of appeals concluded that DOL's "present reasoning [is] persuasive and thorough" and merits deference under *Skidmore*. Pet. App. 7 n.3, 30.

REASONS FOR DENYING THE PETITION

There is no need for this Court's review. The decision below is based on and upholds the plain meaning of the statutory salesman/partsman/mechanic exemption. As the first decision to consider *Skidmore* deference to DOL's recent explanation of its interpretation, it does not conflict with any other decision. It also rests on a skeletal record and is of limited importance, as industry commentators themselves acknowledge. Moreover, DOL could promulgate a new regulation that would resolve the issue.

I. Petitioner overstates any division of authority. Of the three federal court of appeals and state supreme court cases cited by petitioner, spanning the past forty-four years, none arose after DOL's recent briefing explaining its position, which merits *Skidmore* deference. Additionally, the original court decision exempting service advisors predated the 1974 FLSA Amendments, which amended and cast light on the provision at issue.

II. The statute unambiguously exempts automobile salesmen, partsmen, and mechanics—but not service advisors. The exemption covers only salesmen, partsmen, and mechanics primarily engaged in selling or servicing automobiles. Service advisors

are not automobile salesmen, and selling services does not qualify as selling automobiles. Unlike mechanics and partsmen, service advisors do not service automobiles. Stretching "servicing" to include anyone who is "integral to the process of servicing," as petitioner does (at 1, 11) is inconsistent with Congress's repeal of the blanket automobile dealership exemption in 1966.

It is far more natural to read the statute as providing that salesmen sell automobiles but do not service them; each noun pairs naturally with its corresponding gerund. This Court's longstanding canon of narrowly construing FLSA exemptions simply reinforces the plain import of the text, and in any event was not outcome-determinative here.

III. The question presented is of limited importance. DOL could promulgate a new regulation to address the question presented, so this Court need not intervene. Industry commentators have asserted that another FLSA exemption, 29 U.S.C. § 207(i), may cover most service advisors regardless of § 213(b)(10)(A). Therefore, the outcome of this case would govern at most a finite number of persons in a particular occupational category at particular automobile dealerships; no more generally applicable legal principle is at stake. In addition, this case would make a poor vehicle because its facts are poorly developed. Finally, there is no danger of forum-shopping given the rigorous prerequisites for FLSA collective actions and the individualized showings required by any § 207(i) defense.

I. ANY DISAGREEMENT IS OVERSTATED AND PREDATES DOL'S RECENT, THOROUGH EXPLANATION OF ITS INTERPRETATION OF THE STATUTE

Petitioner claims that the decision below is at odds with the Fifth Circuit's 1973 decision in *Brennan* v. *Deel Motors*, 475 F.2d 1095 (5th Cir. 1973). Pet. 21–22. But *Brennan* predates the 1974 FLSA Amendments, which re-enacted and amended the provision at issue. So the court in *Brennan* had no opportunity to consider how the structure, enactment history, and legislative history of the exemption bear on the question presented. *See* 15–415 Br. for Resp'ts 30–31 (explaining the import of the 1974 FLSA Amendments).

Moreover, *Brennan* rested not on the text of the statute but on the policy argument that "service salesmen are functionally similar to the mechanics and partsmen who service the automobiles." 475 F.2d at 1097. "In the absence of clear intent to the contrary, we can not assume that Congress intended to treat employees with functionally similar positions differently." *Id.* at 1097–98. Indeed, while the Fourth Circuit in *Walton* agreed that service advisors are exempt, it disagreed with the Fifth Circuit's reasoning. The Fourth Circuit recognized that *Brennan*'s "'functionally similar' inquiry cannot be squared with [the] FLSA's plain statutory and regulatory language." *Walton* v. *Greenbrier Ford, Inc.*, 370 F.3d 446, 451 (4th Cir. 2004).

More generally, all three allegedly contrary cases were decided years ago, long before the "persuasive and thorough" reasoning that DOL provided last year in its briefing before this Court. Pet. App. 7

n.3; *see* 15–415 Gov't Br. 14–26; 13–55323 Gov't C.A. Br. 12–34. As this Court noted, before last year DOL had "g[i]ve[n] almost no reasons at all," so earlier courts lacked any expert elucidation of the statute. Pet. App. 44. Though the decision below rested primarily on the court of appeals' "de novo" interpretation of the statute, the court of appeals also relied on *Skidmore* deference to DOL's reasoning as an alternative ground for its decision. Pet. App. 7 n.3, 30.

Petitioner incorrectly asserts that because this Court held that the 2011 regulation was procedurally defective, "issues of deference are off the table." Pet. 3. This Court carefully qualified its vacatur, specifying only that "§ 213(b)(10)(A) must be construed without placing *controlling* weight on the Department's 2011 regulation." Pet. App. 44 (emphasis added). The Court's opinion addressed only the highest level of judicial deference owed to administrative regulations under *Chevron*. Deference under *Skidmore* to DOL's explanation in its briefing was neither argued by the parties nor ruled upon by the Court. Rather than applying *Skidmore*, this Court "remand[ed] for the Court of Appeals to interpret the statute in the first instance." Pet. App. 45. Indeed, this Court cited a passage at the end of *Mead* holding that "the *Skidmore* assessment called for here ought to be made in the first instance by the Court of Appeals." 533 U.S. at 238, *cited with approval in* Pet. App. 45.

The court below is the only one that has considered *Skidmore* deference to DOL's recent briefing. Further percolation is warranted so that other courts

may weigh DOL's thorough, recent explanation in the first instance.

II. THE COURT OF APPEALS CORRECTLY HELD THAT SERVICE ADVISORS ARE NOT EXEMPT AUTOMOBILE DEALERSHIP SALESMEN BECAUSE THEY DO NOT SELL AUTOMOBILES

1. The court of appeals correctly held that § 213(b)(10)(A) does not exempt service advisors from the FLSA's overtime requirement. Out of dozens of automobile dealership jobs, including porters, painters, upholsterers, leasing agents, title examiners, car washers, and warranty salesmen, Congress listed only three; service advisor is not one of them.

Moreover, the classification of service advisors was well-established in the industry when Congress enacted the overtime exemption in 1966. U.S. DEP'T OF LABOR, *Automobile Service Advisors*, *in* OCCUPATIONAL OUTLOOK HANDBOOK, BULLETIN NO. 1450, at 314, 314–17 (1966–67 ed.). As the court of appeals noted, DOL in 1966 enumerated thirteen distinct categories of employees who might work at dealerships, including "automobile mechanics," "automobile parts countermen," "automobile salesmen," and "*automobile service advisors*." *Id.* at XIII–XVIII, *quoted in* Pet. App. 9 (emphasis added). Service advisors were considered a distinct category, not a subset of "salesmen." Congress chose to exempt three and only three types of employees ("salesman, partsman, or mechanic"), not four and not all thirteen. Pet. App. 9.

That should end the matter, based on the canon *expressio unius est exclusio alterius*. "Where Congress explicitly enumerates certain exceptions to a

general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980)).

This is a textbook example of *expressio unius*. Congress selected and enumerated certain "members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States* v. *Vonn*, 535 U.S. 55, 65 (2002)). This is doubly true because Congress repealed the 1961 exemption that covered *all* dealership employees and replaced it with an exemption limited to just three enumerated types of employees. It would contradict Congress's manifest intent to expand its carefully enumerated list.

2. Petitioner erroneously asserts, however, that service advisors are clearly covered by the exemption because they are supposedly "salesmen." Pet. 25. That assertion flies in the face of the contemporaneous understanding, noted above, that "service advisors" and "salesmen" were distinct categories of employees in the automobile dealership industry. Moreover, the direct object of the gerund "selling" in the statute is "automobiles"; the statute does not exempt employees primarily engaged in selling leases, warranties, insurance, underbody coatings, or—as petitioner would have it—services. *See, e.g.*, *Chao* v. *Rocky's Auto, Inc.*, No. 01–1318, 2003 WL 1958020, at *1, *4–*5 (10th Cir. Apr. 25, 2003) (unpublished) (declining to exempt finance managers as salesmen

because they sell extended warranty options, not cars); *Gieg* v. *Howarth*, 244 F.3d 775, 776-77 (9th Cir. 2001) (same, for finance writers, because they sell financing and warranties, not cars). Petitioner's own amicus has explained that "[e]mployees primarily engaged in automobile leasing **are not** *salesmen* under this exemption, since they are not selling vehicles to ultimate purchasers." NAT'L AUTO. DEALERS ASS'N, A DEALER GUIDE TO THE FAIR LABOR STANDARDS AND EQUAL PAY ACTS 12 (2005) (emphases in original). It is not the court of appeals that has "divide[d] [dealerships'] salesforces into exempt and non-exempt categories," as petitioner argues (at 4); the statute itself limits "salesmen" to employees "selling . . . automobiles." 29 U.S.C. § 213(b)(10)(A).

3. Nor can one stretch the statutory phrase "primarily engaged in . . . servicing automobiles" to mean primarily engaged in selling services, as petitioner would have it. Pet. 29. The Oxford English Dictionary's first definition of "servicing" is "[t]he action of maintaining or repairing a motor vehicle, etc." 15 OXFORD ENGLISH DICTIONARY 39 (2d ed. 1989); *see also* 4 WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2288 (2d ed. 1956) ("To perform services of maintenance, supply, repair, installation, distribution, etc. for or upon; as, to *service* a car, a radio set, a ship, a territory.") (emphasis in original).

Congress has repeatedly used this common-sense definition of "servicing" in the United States Code. In a statute regulating the Senate garage, for example, "the term 'servicing' includes, with respect to an official motor vehicle, the washing and fueling of such vehicle, the checking of its tires and battery,

and checking and adding oil." 2 U.S.C. § 2025(b); *see also, e.g.*, 42 U.S.C. § 7671h(c) ("[N]o person repairing or servicing motor vehicles . . . may perform such service unless such person has been properly trained and certified."). Yet petitioner claims, counterintuitively, that the statute includes the unlikely category of "salesmen primarily engaged in servicing automobiles." Pet. 25. It is far more natural to read the statute as recognizing that salesmen sell automobiles, and other employees service automobiles.

4. Petitioner mischaracterizes the court of appeals' reasoning as improperly injecting the word "personally" into § 213(b)(10)(A). Pet. 16, 19, 33. But the court of appeals used "personally" only once in passing, to emphasize the plain meaning of "servicing." Pet. App. 13.

Rather, it is petitioner who asks this Court to inject a new element into the statute to exempt service advisors, on the theory that they are "an integral part of the servicing process" or "integral to the process of servicing vehicles at the dealership." Pet. 1, 11, 21, 25. But neither the phrase "integral to" nor the word "process" appears anywhere in the statute.

Petitioner's reading is inconsistent with Congress's 1966 repeal of the 1961 blanket dealership exemption that covered all of a dealership's employees. Most employees in a dealership are "integral to the process of [selling or] servicing vehicles at the dealership," including managers, cashiers, lot attendants, porters, and advertising and marketing employees. Indeed, as noted above, many *salesmen* at auto dealerships who sell warranties, financing, leases, and the like may be viewed as an "integral

part of the [sales] process." But courts have held that they do not fall within the exemption because they do not sell automobiles. *See* pp. 12–13, *supra*. Instead of maintaining the exemption for all types of employees, Congress deliberately limited it to three enumerated types who sell autos or service them.

5. Petitioner repeatedly suggests that the decision below disregarded the "literal" words of the statute. Pet. 2, 15, 16, 18, 25, 27, 29. That implication ignores entirely the first eight pages of the court of appeals' reasoning. In sections A.1 and A.2 of its opinion, the court closely parsed the phrases "any salesman, partsman, or mechanic" and "primarily engaged in selling or servicing automobiles." Pet. App. 8–16. It held that "the most natural reading of the statute" does not exempt service advisors, and that "[petitioner's] interpretation represents a considerable stretch of the ordinary meaning of the statute's words." Pet. App. 8, 13. The decision below further stated that its "interpretive task could end here, with the words of the statute as commonly understood in 1966." Pet. App. 16.

The court of appeals thus first established the "'ordinary, contemporary, common meaning' of the terms at the time Congress added the relevant clause." Pet. App. 8 (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979) and citing *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002–04 (2012)). The court then referred to the other "literal," *i.e.*, possible, definitions of the statutory terms to confirm or disconfirm its reading. Pet. App. 16; *see Taniguchi*, 132 S. Ct. at 2003 ("That a definition is broad enough to encompass one sense of a word does not

establish that the word is *ordinarily* understood in that sense.") (emphasis in original). The court concluded that "[t]he most natural reading of the statute" follows the distributive canon, in which "salesman" pairs with "selling" just as "partsman" and "mechanic" pair with "servicing." Pet. App. 18–19 (citing, *inter alia*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 214–16 (2012)). The passages of the opinion below cited by petitioner simply explain that there is no need to force every noun to pair with every gerund. Pet. App. 18; *see also* 15–415 Br. for Resp'ts 19–29; *id.* App. D1–D41 (collecting more than 100 federal statutes that follow this distributive canon, including 53 in which the numbers of words in the first list does not equal the number in the second list).

6. Finally, the court of appeals briefly and correctly noted this Court's "'well settled'" and "longstanding rule that the exemptions in § 213 of the FLSA 'are to be narrowly construed against the employers seeking to assert them.'" Pet. App. 20 (quoting *Mitchell* v. *Kentucky Fin. Co.*, 359 U.S. 290, 295 (1959) (Harlan, J.) and *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)). That "longstanding rule" was part of the backdrop against which Congress enacted the 1966 and 1974 FLSA Amendments, so Congress expected the statute to be read in that light.

Nor is there any conflict about whether the canon applies; the Fourth Circuit's decision in *Walton* invoked the same principle. 370 F.3d at 450. Moreover, the decision below expressly stated that its holding did not rest on that canon: "we would reach the same ultimate holding—that the exemption does

not encompass service advisors—even if the rule of narrow construction did not apply." Pet. App. 21 n.14.

7. A service advisor's compensation by commission does not make him ineligible for overtime. *Contra* Pet. 28. Though the FLSA does "exclud[e] *certain* employees of retail or service establishments who are paid commissions," *id.* (emphasis added), it contains no blanket exemption from overtime pay for all commission-based employees. On the contrary, employees are exempt only if they fall within a statutory exemption. One exemption is the salesman/partsman/mechanic exemption. Another exemption requires that the employer show that employees (a) work for a "retail or service establishment"; (b) receive more than one-and-a-half times the minimum wage; and (c) receive more than half of their compensation as "commissions on goods or services." 29 U.S.C. § 207(i). Commission-based employees who do not satisfy these requirements are entitled to overtime pay. *See* 29 C.F.R. § 779.416(c) (providing examples of nonexempt commission-based employees). And to qualify for enumerated exemptions such as § 207(i), employers must not only satisfy the statutory prerequisites, but also document them by keeping appropriate records. 29 C.F.R. § 515.16.

Nor does an employer's "negotiated" compensation with employees, Pet. 4, 15, 19, 31, 33—in the sense of having hired employees on terms inconsistent with the FLSA—have any relevance. Employers cannot evade the overtime requirement by paying employees on a piecework or commission basis; unless employees fall within an enumerated exemption, they are entitled to overtime.

III. THE QUESTION PRESENTED IS OF LIMITED SIGNIFICANCE, AS INDUSTRY COMMENTATORS ACKNOWLEDGE, AND THIS CASE IS A POOR VEHICLE FOR ADDRESSING IT

1. Any decision in this case would have limited effect. The decision below addresses only a particular overtime-pay requirement for a particular category of employees at particular kinds of vehicle dealerships. Even as to this limited category of employees, employers may choose alternative ways to qualify for exemption from the FLSA's overtime-pay requirement. Thus, as even industry observers agree, in practice the decision below matters little.

As noted, service advisors may be exempt from overtime pay under § 207(i), the exemption for certain commission-based retail employees. As an industry website asserts, "[c]onsidering that most dealerships pay their service advisers using some sort of commission or flat-rate pay plan specifically designed to qualify the service adviser for the [§ 20]7(i) commissioned sales exemption, . . . the *Navarro* decision likely affects very few, if any, employers." John Huetter, *Sky NOT Falling on Overtime for Service Advisers, Auto Body Estimators after* Navarro, REPAIRER DRIVEN NEWS (Apr. 22, 2015), https://perma.cc/Z96W-QY62. As a law firm reassured its automobile dealership clients, the original panel decision below need not occasion "panic," because "[m]any, if not most, auto dealerships already use commission pay structures for service advisors that comply with . . . Section 207(i)." Scali Law Firm, Navarro *Decision Should Have Little Effect on California Auto Dealers* (Mar. 29, 2015), https://perma.cc/ETD4-MEK5.

As both the opinion of the Court and the concurrence noted, § 207(i) often obviates recourse to the salesman/partsman/mechanic exemption, and 29 U.S.C. § 259(a) guards against retroactive liability for reliance on past agency interpretations. Pet. App. 43; *id.* at 47–48 n.2 (Ginsburg, J., concurring).

Furthermore, there have been only three published federal court of appeals decisions and one state supreme court decision addressing this issue over the last half-century. The paucity of precedent underscores that the question presented is hardly one of national concern.

2. A skeletal record makes this case a poor vehicle. The district court granted petitioner's motion to dismiss before any discovery took place. This Court would thus lack concrete evidence contextualizing service advisors' roles and responsibilities within a particular auto dealership.

3. Moreover, even if the court of appeals' decision were to create confusion or difficulty for auto dealers, DOL could promulgate a new regulation to resolve any disagreement. This Court vacated and remanded only because of a procedural defect in the rulemaking process, Pet App. 40–45, leaving DOL free to issue a new regulation if any further clarification is needed.

4. Finally, petitioner's dire predictions about forum-shopping and nationwide FLSA collective actions are unwarranted. *Contra* Pet. 19, 24, 33. FLSA plaintiffs in collective actions must affirmatively opt in, and they also bear the burden of proving that they are "similarly situated." 29 U.S.C.

§ 216(b). District courts within the Ninth Circuit enforce this burden rigorously, decertifying plaintiffs' classes unless they can "provide[] substantial evidence that their claims arise out of a single policy, custom, or practice that led to FLSA violations." *Beauperthuy* v. *24 Hour Fitness USA, Inc.*, 772 F. Supp. 2d 1111, 1118, 1122 (N.D. Cal. 2011) (collecting citations); *accord Reed* v. *Cty. of Orange*, 266 F.R.D. 446, 449–50 (C.D. Cal. 2010). Because automobile dealerships are often autonomous and the industry is fragmented, collective actions are unlikely to remain certified. *See Brewer* v. *Gen. Nutrition Corp.*, No. 11–CV–3587 YGR, 2014 WL 5877695, at *15 (N.D. Cal. Nov. 12, 2014) ("[E]mployees are not similarly situated in that they are required to work unpaid overtime, if at all, as a result of individual managers' decisions as opposed to a single corporate policy."); *Ellersick* v. *Monro Muffler Brake, Inc.*, No. 10-CV-6525-FPG-MWP, 2017 WL 1196474, at *7 (W.D.N.Y. Mar. 31, 2017) (denying class certification because courts must individualize the FLSA exemption inquiry employee by employee, week by week).

This obstacle is compounded by the possibility that defendants may raise the § 207(i) exemption for certain commission-based retail employees as an affirmative defense to collective action certification. Section 207(i) "is a highly individualized defense because its application requires week-by-week and other periodic calculations . . . specific to each individual Plaintiff and his or her particular circumstances." *Beauperthuy*, 772 F. Supp. 2d at 1126 (internal quotation marks omitted); *accord id.* at 1132–33. "The need for such individualized inquiries would make proceeding by representative testimony

impracticable," even against a single nationwide corporate defendant. *Id.* at 1127–28. Thus, district courts within the Ninth Circuit have decertified FLSA collective actions that may implicate § 207(i). *See, e.g.*, *id.* at 1134–35.

The court of appeals rendered its original decision well over two years ago; in the meantime, the sky has not fallen. Petitioner cites no contrary evidence of a rush to file or transfer FLSA suits into the courts below. Nor do petitioner and its amici cite any evidence that the panel decision has actually disrupted dealerships over the past two years. Petitioner's floodgates fears are groundless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KEVEN STEINBERG
THOMPSON, COE,
COUSINS & IRONS, LLP
12100 WILSHIRE BLVD.
SUITE 1200
LOS ANGELES, CA
90025
(310) 954–2362

STEPHANOS BIBAS
Counsel of Record
JAMES A. FELDMAN
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL
SUPREME COURT CLINIC
3501 SANSOM STREET
PHILADELPHIA, PA 19104
(215) 746–2297
SBIBAS@LAW.UPENN.EDU

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