No. 15-415

IN THE

Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

HECTOR NAVARRO; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF FOR AMICI CURIAE NATIONAL AUTOMOBILE DEALERS ASSOCIATION AND STATE AUTOMOBILE DEALERS ASSOCIATIONS FOR ALASKA, ARIZONA, CALIFORNIA, HAWAII, IDAHO, MONTANA, NEVADA, OREGON AND WASHINGTON STATE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether "service advisors" at car and truck dealerships are exempt under 29 U.S.C. § 213(b)(10)(A) from the overtime pay requirements of the Fair Labor Standards Act, which provides an exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles."

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IDENTITY AND INTEREST OF AMICI CURIAE

The National Automobile Dealers Association (NADA), and nine state automobile dealers associations for states in the Ninth Circuit (the "State Dealers Associations"), respectfully submit this brief amicus curiae in support of Petitioner Encino Motorcars LLC.[1] Amicus curiae are 501(c)(6) non-profit trade associations representing franchised automobile dealerships nationally and in each of the states comprising the Ninth Circuit, whose members are significantly impacted by the Ninth Circuit's decision, and as such have a keen interest in the issues presented.

National Automobile Dealers Association

NADA is a national non-profit trade organization, incorporated in the State of Delaware. Founded in 1917, NADA serves and represents

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for Petitioner received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Counsel of record for Respondent received notice nine days prior the due date. Respondent has already obtained an extension for responding to the petition through and including December 5, 2015, and Respondent's counsel consents to the filing of this brief.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

franchised new car and truck dealers nationwide. Its members sell new cars and trucks and related goods and services as authorized dealers of various motor vehicle manufacturers and distributors doing business in the United States. As of October 2015, there were approximately 18,000 franchised motor vehicle dealerships in the United States. Of those, approximately 16,000 are members of NADA. As an organization, NADA informs members about relevant legal and regulatory issues and closely monitors federal statutes, state statutes, and court rulings interpreting such laws. NADA appears before and submits briefs to courts and other tribunals as amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

State Dealers Associations

The following State Dealers Associations join as amici in this brief: Alaska Automobile Dealers Association; Arizona Automobile Dealers Association; California New Car Dealers Association; Hawaii Automobile Dealers Association; Idaho Automobile Dealers Association; Montana Automobile Dealers Association; Nevada Franchised Auto Dealers Association; Oregon Automobile Dealers Association; and Washington State Auto Dealers Association. Each is a non-profit trade organization, incorporated in its respective state, representing new car and truck dealerships in the state. Collectively, the State Dealers Associations represent 90% of the more than 2,500 dealerships in the nine states comprising the Ninth Circuit. Their members are franchised retail sellers of new cars

and trucks and related goods and services, serving as authorized dealers for motor vehicle manufacturers and distributors.

Each State Dealers Association provides services to its members on a state-wide basis, similar to those provided by NADA nationally. These services include informing members about relevant legal and regulatory issues and closely monitoring federal statutes, state statutes, and court rulings interpreting such laws. Each of the State Dealers Associations appears before and submits briefs to courts and other tribunals as amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

This case raises issues of substantial significance to amici and their members. The Ninth Circuit's decision, if allowed to stand, will have an adverse impact on franchised new motor vehicle dealers not only in the states comprising the Ninth Circuit, but also nationally, as it forecloses the availability of an overtime exemption on which dealerships and their employees have depended for more than 40 years in structuring their compensation plans.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 40 years, the nation's automobile dealerships have relied on the FLSA's overtime exemption for "any salesman . . . primarily engaged in selling or servicing automobiles or trucks" in section 13(b)(10) of Fair Labor Standards Act (FLSA) in classifying and compensating their Service Advisors.[2] The exemption has allowed dealerships to compensate Service Advisors – who are engaged in the sale of service solutions to dealership customers – based primarily on sales rather than on the number of hours they work. This has benefitted not only dealerships but employees as well, for Service Advisors are generally well compensated.

Dealerships have relied not only on the statutory language of the exemption in structuring their compensation programs but, as important, on a solid wall of judicial authority interpreting the exemption's scope. Until the Ninth Circuit's decision in this case, every federal and state court interpreting the exemption, including several circuit courts of appeals, had ruled that it encompassed Service Advisors.

The Ninth Circuit's decision rejecting the applicability of the exemption to these well

[2] We use the generic title "Service Advisor," but the position is also known as Service Writer or Service Manager, among other titles.

compensated employees is an outlier, threatening to disrupt what has until now been a settled, widely accepted compensation practice in the nation's car and truck dealerships.

The impact of the Ninth Circuit's decision cannot be overstated. Every franchised dealership across the country operates a service department that employs one or more Service Advisors. An estimated 45,000 Service Advisors work in dealerships across the United States. They are generally classified as exempt employees, often under section 13(b)(10). The Ninth Circuit's decision creates significant uncertainty about the validity of the exemption, raising the specter of unanticipated liability for past pay practices and disruptions to dealerships and employees alike if Service Advisors' incentive-based compensation must be restructured to avoid that liability going forward.

Certiorari is clearly warranted to resolve the circuit split on this issue and to clarify the scope of this key exemption for the nation's car and truck dealerships.

ARGUMENT

I. Service Advisors Are Key Contributors To The Revenues of Franchised Automobile Dealerships And Have Always Been Classified As Exempt Employees

There are approximately 18,000 franchised automobile dealerships in the United States, the great majority of which are represented by amici. More than 2,500 of these dealerships are located the nine states encompassing the Ninth Circuit. Many dealerships have multiple locations, some across several states. Nationally, franchised dealerships employ nearly 1.1 million people and have a combined annual payroll of $60 billion. The overwhelming majority are small businesses as defined by the Small Business Administration.

Every franchised automobile dealership in the country has a service department. Service departments provide expert vehicle maintenance and repair services to dealership customers, and are a key revenue profit center for dealerships. No position is more crucial to this function than the position of the Service Advisor. Service Advisors provide advice and counsel to customers, selling service, maintenance and repairs through these important customer relationships. NADA estimates that 45,000 Service Advisors are employed in franchised dealerships across the United States. According to compensation data compiled by NADA, Service Advisors are well compensated. In 2014 the average annual compensation for Service Advisors

nationwide was $65,876, with the top 10% earning on average more than $99,164 per year.[3] Compensation levels are significantly higher in NADA's Pacific Region (Alaska, California, Hawaii, Oregon and Washington), where the annual average is $75,769, and the top 10% earn on average $105,583 per year.[4]

Service Advisors are typically classified as exempt from overtime, frequently based on the FLSA's section 13(b)(10), which exempts "salesmen . . . primarily engaged in selling or servicing automobiles or trucks."[5] Alternatively, Service Advisors may also be exempt from overtime under the FLSA's section 7(i) exemption. The 7(i) exemption applies to employees who (i) work in retail or service establishments; (ii) earn more than 1.5 times the minimum wage for all hours worked; and (iii) are paid commissions that comprise more than 50% of total compensation.[6] The 7(i) exemption is administratively more complex, requiring the tracking of actual work hours and a specific compensation structure comprised primarily of commissions, in contrast to the simplicity of the 13(b)(10) exemption, which does not depend on how or how much a Service Advisor is paid. Importantly, the 7(i) exemption can operate to the disadvantage of the Service Advisor, for it requires the majority of

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[3] National Automobile Dealers Assn. *et al.*, *2015 Industry Report: Dealership Workforce Study* (NADA 2014) at 13, 84.
[4] *Id.* at 80, 82.
[5] 29 U.S.C. § 213(b)(10).
[6] 29 U.S.C. § 207(i); *see Gieg v. DRR, Inc.*, 407 F.3d 1038 (9th Cir. 2005).

compensation to be in the form commissions which are inherently at risk and subject to variations. The 13(b)(10) exemption, on the other hand, provides the flexibility for a generous and predictable base wage with the option for incentive pay as an upside to sales productivity.

II. More Than Three Decades Of Jurisprudence and Agency Interpretation Confirm That Service Advisors Qualify for the 13(b)(10) Exemption.

Because of the importance of the 13(b)(10) exemption to franchised dealership businesses, over the years, amici have closely tracked the judicial decisions and agency guidance addressing the exemption in order to advise their members on their wage and hour compliance obligations with respect to Service Advisors. Beginning with the 1973 decision of the Fifth Circuit in *Brennan v. Deel Motors, Inc.*,[7] and up until the Ninth Circuit's decision in this case, the decisions of federal circuit courts,[8] federal district courts,[9] and state courts[10]

[7] 475 F.2d 1095 (5th Cir. 1973).

[8] *Deel Motors,* 475 F.2d 1095; *Walton v. Greenbrier Ford, Inc.*, 370 F.3d, 446 (4th Cir. 2004); *see Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (adopting 5th Circuit decisions prior to 9/30/81 as controlling precedent).

[9] *Clark & Day v. Palmen Motors,* No. 98-C-0548 (E.D. Wisc. 1988); *Dayton v. Coral Oldsmobile, Inc.*, 684 F. Supp. 290 (S.D. Fla. 1988); *Yenney v. Cass County Motors,* No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977); *Brennan v. Import Volkswagen, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975); *Brennan v. North Bros. Ford, Inc.*, No. 40344, 1975 WL 1074 (E.D. Mich. Apr. 17, 1975), *aff'd sub nom., Dunlop v. North Bros. Ford, Inc.* (6th Cir. 1976).

have uniformly held that Service Advisors are encompassed within the exemption.

In 1978, the U.S. Department of Labor (DOL) followed suit and adopted that view as well, rescinding previous guidance and issuing an Administrator Opinion squarely holding that "service writers, service advisors, service managers, or service salesmen" qualify as "salesmen" for purposes of the exemption, and are exempt when the majority of their sales in dollar volume is for non-warranty work.[11] In 1987, the DOL revised its enforcement bible, the Wage & Hour Field Operations Handbook (FOH), to reflect that opinion and the case law on which it was based.[12] The FOH noted the DOL's intention to revise its regulations at 29 C.F.R. section 779.372 "as soon as is practicable" in accordance with this widely accepted interpretation, including the provision explicitly excluding service managers from the exemption, subsection (c)(4). That point came in 2008, when the DOL proposed regulations to formally codify its consistent interpretation of the exemption over the previous three decades to include Service Advisors.[13]

(footnote cont. for previous page)

[10] *Thompson v. J.C. Billion, Inc.*, 368 Mont. 299 (Mont. 2013).

[11] Wage & Hour Op. Ltr. WH-467, 1978 WL 51403 (July 28, 1978).

[12] U. S. Dep't of Labor, Wage & Hour Div., *Field Ops. Handbook* § 24L04(k) (October 20, 1987).

[13] 73 Fed. Reg. 49621, 43659, 43671 (July 28, 2008).

III. Recent Developments under Section 13(b)(10) Have Left Intact The Inclusion of Service Advisors in the Exemption.

In 2011, the DOL issued a final rule reflecting its current interpretation of the 13(b)(10) exemption, 29 C.F.R. § 779.372. The Final Rule rescinded subsection (c)(4) of the previous regulation, which had explicitly excluded Service Advisors from the exemption, consistent with the DOL's proposed 2008 interpretive regulation. The DOL, however, chose not to revise the remainder of the interpretive regulation in accord with its 2008 proposal, in doing so declining to explicitly clarify that the exemption encompassed Service Advisors. In explanatory remarks, the DOL stated that "there are circumstances under which the requirements for the exemption would not be met" by Service Advisors.[14]

Congress reacted swiftly and definitively to the DOL's about-face. Noting the Final Rule's impact on small businesses and expressing its profound disagreement with the action, Congress attached a limitation rider to appropriations bills for 2012 and 2013 barring the DOL from enforcing its regulatory changes with respect to Service Advisors.[15] Those actions were in accord with Congress' 1974 action implicitly approving the seminal 1973 *Deel* decision as to the scope of the exemption, when it amended section 13(b)(10) but

[14] 76 Fed. Reg. 18832 (April 5, 2011).

[15] Consolidated Appropriations Act of 2012, Pub.L. No. 112-74, Div. F § 113, 125 Stat. 786; Joint Resolution, Continuing Appropriations 2013, Pub.L. No. 112-175, 126 Stat. 1313.

saw no need to revise it to express disagreement with *Deel*.[16]

Notably, the DOL has not revised its Field Operations Handbook to exclude Service Advisors from the scope of the exemption, nor has it formally rescinded its 1978 Opinion Letter approving the application of the exemption to Service Advisors.

To summarize, until the Ninth Circuit's decision, a uniform body of judicial decisions over a period of more than 40 years held that Service Advisors are exempt under section 13(b)(10). For more than three decades, the DOL embraced those decisions and adopted that interpretation of the exemption as well. The DOL's equivocal attempt in 2011 to call its previous interpretations of the exemption into question has been roundly rejected by Congress, consistent with its historical implicit approval of the application of the section 13(b)(10) exemption to Service Advisors. The Ninth Circuit's decision rejecting this interpretation at best raises serious concerns on the merits, at worst is simply wrong.

[16] See, e.g., *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982) (when Congress amends a statute that has been subject to prior judicial interpretation, its failure to respond to that interpretation in the amendment "is itself evidence that Congress affirmatively intended to preserve the interpretation.").

IV. The Ninth Circuit Decision Creates Unanticipated Liabilities, Future Uncertainties, and Significant Burdens For The Nation's Automobile Dealerships.

Given the substantially consistent interpretation of the exemption described above, since at least 1978, NADA and other amici have advised their members that Service Advisors are encompassed within the FLSA's 13(b)(10) exemption. Amici's members and other car dealerships have relied on that advice for more than three decades in classifying Service Advisors as exempt from overtime, structuring their compensation and recordkeeping practices accordingly. The Ninth Circuit's decision threatens to upend these longstanding understandings, not only for dealerships in the Ninth Circuit but for other dealerships across the entire United States, creating potential unanticipated liability and confusion. Its impact in the real world of brick-and-mortar automobile dealerships cannot be overstated.

The impact of the decision will be felt most immediately by dealerships within the Ninth Circuit. There are more than 2,500 dealerships in the nine states located within the Circuit. As a result of the Ninth Circuit's decision, dealerships that have relied solely on the 13(b)(10) exemption in classifying their Service Advisors now face unanticipated overtime liability. In making the exemption unavailable, the decision puts dealerships that have relied on this exemption, rather than the 7(i) exemption, at risk for private FLSA back pay claims. To address future liability, these

dealerships will have come into the compliance with this new interpretation. It is highly unlikely, however, that dealerships will reclassify Service Advisors as non-exempt. Instead, they will look to the 7(i) exemption, which could entail reconfiguring their compensation plans to put more of their Service Advisors' compensation into commissions and instituting the extra recordkeeping required to qualify for that exemption. There is nothing more disruptive to an employee than changing her compensation plan, even when the result is that her net income is roughly equivalent. Commissions, of course, carry both an upside advantage and a downside risk for employees. The downside risk is that in leaner economic times when commission earnings fall, the only compensation guarantee under the 7(i) exemption is 1.5 times the minimum wage, whereas the base salary of Service Advisors whose exemption does not depend on section 7(i) is typically far higher. The Ninth Circuit's decision, if allowed to stand, therefore, is unlikely to benefit Service Advisors in any way.

There is a subgroup of dealerships in the Ninth Circuit states for which the impact will be even more onerous: those dealerships that individually operate stores both inside and outside the Ninth Circuit. NADA's membership data indicates that these multi-Circuit dealers operate a total of 1,444 stores, 517 of which are within the Ninth Circuit and 927 outside of it. These numbers are just the tip of the iceberg, given the limitations of NADA's ability to identify smaller groups of commonly owned, inter-circuit dealerships with centralized ownership, payroll and human resources

functions, which fall into this category as well. These multi-circuit dealerships face greater hurdles in establishing uniform payroll and compensation practices, which will now have to make distinctions in how Service Advisors are compensated based on whether they work in a Ninth Circuit state or not.

But the impacts of this outlier decision will be felt far beyond the Ninth Circuit, where it has already created substantial uncertainty, reopening an issue that had long since been considered settled and encouraging more litigation over the exemption. Many dealerships outside the Ninth Circuit may proactively choose to restructure compensation and recordkeeping to meet the 7(i) exemption, which as discussed above may well be to the disadvantage of all involved. There will be no winners.

V. The Petition for Certiorari Should Be Granted Because The Decision Creates a Conflict with Every Other Circuit as to the Scope of the Section 13(b)(10) Exemption.

Given the foregoing merits issues and negative impact on automobile dealerships, the petition should be granted to resolve a conflict among the circuits on an important matter.

Only the grant of certiorari and resolution by this Court can avoid the inequity that a circuit conflict creates, because until then, the parties' rights and duties depend upon where a case is litigated. Left unresolved, circuit conflicts feed on themselves, generating additional litigation in the other circuits.

The Ninth Circuit's decision conflicts with the decisions of all of the circuits that have considered the applicability of the section 13(b)(10) exemption to service providers: the Fifth Circuit's decision in *Brennan v. Deel Motors, Inc.*,[17] the Fourth Circuit's decision in *Walton v. Greenbrier Ford, Inc.*,[18] and the Eleventh Circuit's adoption of the *Deel Motors* decision pursuant to *Bonner v. City of Prichard*.[19] It also conflicts with the numerous federal district and state appellate court decisions in these and other circuits, including the Montana Supreme Court's *Thompson v. J.C. Billion*[20] decision. Indeed, the Ninth Circuit decision stands alone in holding that Service Advisors are not encompassed within the section 13(b)(10) exemption as a matter of law.

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[17] 475 F.2d 1095.

[18] 370 F.3d, 446 (4th Cir. 2004).

[19] 661 F.2d 1206 (11th Cir. 1981) (adopting 5th Circuit decision prior to 9/30/81 as controlling precedent).

[20] 368 Mont. 299.

CONCLUSION

The Ninth Circuit's decision creates a conflict with every other circuit to have addressed the section 13(b)(10) exemption for Service Advisors. Given the national scope of the issue, and the many inequities and disruptions resulting from the circuit conflict, certiorari is both appropriate and necessary. Amici curiae urge the Court to grant Petitioner Encino Motorcars' Petition for Certiorari.

Respectfully submitted,

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