NO. 15-415

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Respondents are "service advisors" at a car dealership whose primary job responsibilities involve identifying service needs and selling service solutions to the dealership's customers. Respondents brought suit against the dealership under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201-219, seeking time-and-a-half overtime pay for working more than 40 hours per week.

The FLSA exempts from its overtime requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* §213(b)(10)(A). Relying on an unbroken line of authority from other jurisdictions, the district court dismissed Respondents' claims, concluding that a service advisor is a "salesman ... engaged in ... servicing automobiles" and is thus exempt from the FLSA's overtime requirements. The Ninth Circuit reversed, deferring to a Department of Labor interpretive regulation stating that service advisors are not exempt under §213(b)(10)(A) because they do not *personally* service automobiles. The Ninth Circuit readily acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana," all of which hold that service advisors are exempt employees. Pet.App.11.

The question presented is whether "service advisors" at car dealerships are exempt under 29 U.S.C. §213(b)(10)(A) from the FLSA's overtime-pay requirements.

PARTIES TO THE PROCEEDING

Petitioner Encino Motorcars, LLC, was defendant in the district court and appellee in the Ninth Circuit. Respondents Hector Navarro, Anthony Pinkins, Kevin Malone, and Reuben Castro were plaintiffs in the district court and appellants in the Ninth Circuit. Respondent Mike Shirinian was erroneously omitted from the caption of the court of appeals' opinion, although the court's opinion included his name in its discussion of the factual and procedural history. The Ninth Circuit corrected the caption below on November 24, 2015.

CORPORATE DISCLOSURE STATEMENT

Encino Motorcars, LLC is a limited liability corporation doing business as Mercedes Benz of Encino. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

Respondents are "service advisors" at a car dealership whose primary job responsibilities involve identifying service needs and selling service solutions to the dealership's customers. They are integral to the servicing process and are the salespeople dedicated to the servicing business at their dealership. And, like countless other salespeople, Respondents receive commissions tied to their sales rather than being compensated exclusively by hourly wages or a salary.

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§201-219, exempts from its overtime-pay requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* §213(b)(10)(A). For more than 40 years, federal and state courts across the country uniformly held that service advisors such as Respondents are covered by the exemption because they are "salesm[e]n ... engaged in ... servicing automobiles." *See*, *e.g.*, *Walton v. Greenbrier Ford*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors*, 475 F.2d 1095 (5th Cir. 1973); *Thompson v. J.C. Billion, Inc.*, 294 P.3d 397 (Mont. 2013). Those courts also refused to defer to the sometimes view of the Department of Labor (DOL) that service advisors are not exempt because they do not *personally* service vehicles. As a consequence, DOL acquiesced in the lower courts' uniform view for over three decades.

Undeterred by the unbroken line of judicial precedents, Respondents brought suit against their employer under the FLSA, alleging that they were entitled to time-and-a-half overtime pay for time worked each week in excess of 40 hours. Relying on

the reasoning of the many cases finding service advisors to be exempt, the district court dismissed the complaint. Pet.App.25-29. The Ninth Circuit reversed. Unlike every other court to consider the issue, the Ninth Circuit held that service advisors were not exempt under §213(b)(10)(A). Pet.App.19.

The Ninth Circuit's interpretation badly misconstrues the text of §213(b)(10)(A). Congress' use of the disjunctive "or" in the phrase "primarily engaged in selling or servicing automobiles" broadens the exemption and makes clear that a salesman is exempt if he is "engaged in" *either* of those activities. And the exemption's coverage of "*any* salesman" demonstrates that Congress legislated broadly and did not intend to divide a dealership's salesforce in half, treating as exempt only those salespeople engaged in selling automobiles, and not those engaged in servicing automobiles.

Despite this clear statutory language, the Ninth Circuit insisted that service advisors were not exempt because they do not *personally* service automobiles in the same manner as a mechanic. Pet.App.13. But exempting only those employees who personally service automobiles as directly as mechanics (*e.g.*, those who themselves change spark plugs or replace brake pads) injects a word into the statute and introduces a glaring textual anomaly over the status of "partsmen," who are employees who requisition, stock, and dispense parts in the servicing process. Even though partsmen do not *personally* service automobiles as directly as mechanics, they are primarily engaged in activities related to the servicing of automobiles and are unquestionably exempt under

§213(b)(10)(A). The phrase "primarily engaged in ... servicing automobiles" is not limited to mechanics who personally go under the hood and service automobiles, but extends to partsmen and service advisors who are primarily engaged in the *servicing process*.

The Ninth Circuit's decision upends an area of law that had been settled for more than 40 years. Affirming the decision below would have significant negative consequences for the nation's 18,000 car dealerships, which currently employ an estimated 45,000 service advisors. Those dealerships and their service advisors have operated under mutually beneficial compensation plans in good-faith reliance on decades of precedent holding that such employees are exempt from the FLSA. If allowed to stand, the Ninth Circuit's decision would require a wholesale (and wholly unwarranted) restructuring of the way in which those employees are compensated, and would force dealerships to divide their salesforces into exempt and non-exempt categories in ways that are both divisive and contrary to Congress' plain intent.

* * *

This Court has repeatedly rejected plaintiffs' attempts to impose significant retroactive liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. *See*, *e.g.*, *Integrity Staffing Solutions v. Busk*, 135 S. Ct. 513 (2014); *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156 (2012). This Court should reject Respondents' attempt to impose substantial and unexpected liability on automobile dealerships based on a countertextual interpretation of the statute that

courts—and, previously, even DOL itself—had correctly and repeatedly rejected.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 780 F.3d 1267 and reproduced at Pet.App.1-19. The district court's opinion is unpublished and is reproduced at Pet.App.22-32.

JURISDICTION

The Ninth Circuit issued its opinion on March 24, 2015, and denied a timely petition for rehearing on June 1, 2015. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the FLSA, 29 U.S.C. §213, and DOL's regulations, 29 C.F.R. §779.372, are reproduced in the appendix to this brief. App.1a-28a.

STATEMENT OF THE CASE

A. Background on the FLSA and Its Many Exemptions for Salespeople

1. Congress enacted the FLSA in 1938 to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. §202(a). The statute's declared objectives were "to improve ... the standard of living of those who are now undernourished, poorly clad, and ill-housed," and to "protect this Nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health." S. Rep. No. 75-884, at 3-4 (1937).

The FLSA's objectives were modest. It was designed to establish "a few rudimentary standards" so basic that "[f]ailure to observe them [would have to] be regarded as socially and economically oppressive and unwarranted under almost any circumstance." *Id.* at 3. The Act thus proscribed the use of child labor, imposed a minimum wage for most jobs, and established a general rule requiring employers to pay overtime compensation at a rate of one-and-a-half times an employee's regular rate of pay for all hours worked in excess of 40 in a week. *See* 29 U.S.C. §§206, 207, 212. An employer that violates the FLSA can be subject to civil liability for back pay, double damages, and attorney's fees. *Id.* §216(b).

From the beginning, the FLSA included a number of exemptions for certain types of employers and employees. *See id.* §213(a), (b). Those exemptions reflect both fundamental business realities and the intuitive proposition that not all employees are best compensated in the same way. Some exemptions broadly cover an entire industry, such as the exemptions for all employees of certain rail and air carriers, *id.* §213(b)(2), (3), and all employees engaged in the "catching, taking, propagating, harvesting ... or farming of any kind of fish," *id.* §213(a)(5). Others cover more specific activities, such as the exemption for employees "engaged in the processing of maple sap into sugar," *id.* §213(b)(15). But all of the exemptions recognize that a one-size-fits-all compensation regime may be unnecessary or even counterproductive for certain types of employers and employees.

2. One common-sense judgment reflected throughout the FLSA is Congress' recognition that

individuals who are engaged in sales or are paid on a commission basis are often ill-suited for an hourly compensation regime. The FLSA thus contains a number of exemptions from its mandatory overtime rules for salespeople and employees paid on a commission basis. For example, the FLSA exempts from its overtime-pay requirements "any employee employed ... in the capacity of outside salesman." 29 U.S.C. §213(a)(1). The statute also exempts certain employees of retail or service establishments who are paid on commission. *Id.* §207(*i*).

Those exemptions reflect the basic reality that salespeople are typically "more concerned with their total work product than with the hours performed." *Deel Motors*, 475 F.2d at 1097. That is, Congress has acknowledged that it is both common and reasonable for salespeople to be compensated based on their *success at selling*, rather than the sheer number of hours worked. This Court has similarly recognized that salespeople are "hardly the kind of employees that the FLSA was intended to protect." *See, e.g.*, *Christopher*, 132 S. Ct. at 2173.

B. The "Salesman, Partsman, or Mechanic" Exemption for Automobile Dealerships

This case addresses the scope of one of the FLSA's many exemptions for salespeople. Specifically, the FLSA provides that the overtime-pay requirements do not apply to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." 29 U.S.C. §213(b)(10)(A);

Pub. L. No. 89-601, §209(b), 80 Stat. 830, 836 (1966). In other words, an employee of a car or truck dealership is exempt from the mandatory overtime rules if he or she: (1) is a "salesman, partsman, or mechanic," and (2) is "primarily engaged in selling or servicing automobiles."

Section 213(b)(10)(A) has its origins in an earlier, broader FLSA provision that exempted "any employee" of a car dealership from the overtime-pay requirements. 29 U.S.C. §213(a)(19) (1964); Pub. L. No. 87-30, §9, 75 Stat. 65, 73 (1961). By the mid-1960s, however, Congress concluded that it was not appropriate for *every* dealership employee to be treated as exempt. Dealerships have a wide array of employees, many of whom perform functions that are indistinguishable from other non-exempt employees. For example, there is no reason why a janitor or secretary working at an automobile dealership should be compensated differently from a janitor or secretary employed elsewhere.

In 1965, Congress considered legislation to amend the blanket exemption for dealership employees. The initial proposal would have eliminated the automobile dealership exemption altogether. *See* H.R. 8259, 89th Cong., §305 (as introduced in House, May 18, 1965). But Congress quickly concluded that this proposal went too far in the other direction. Dealerships' core sales and service employees were generally well-compensated and/or worked on commission, and forcing those employees into the FLSA's mandatory overtime regime would have made little sense in terms of the broader purposes of the statute.

Congress thus decided to narrow the dealership exemption rather than repeal it. In the final legislation, Congress retained the exemption for core dealership employees, including "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." Pub. L. No. 89-601, §209(b), 80 Stat. at 836. By contrast, employees who primarily performed support services—such as janitors, cashiers, porters, and secretaries—would no longer be exempt.

C. DOL's Shifting Interpretations of Section 213(b)(10)(A)

1. In 1970, the Secretary of Labor promulgated interpretive regulations that sought to define several of the key terms in §213(b)(10)(A). *See* 29 C.F.R. §779.372 (1971).[1] DOL 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 [automobiles]." *Id.* §779.372(c)(1). It also defined a "partsman" as "any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts," *id.* §779.372(c)(2), and a "mechanic" as "any employee primarily engaged in doing mechanical work ... in the servicing of an automobile ... for its use and operation as such," *id.* §779.372(c)(3).

DOL further asserted that "[e]mployees variously described as service manager, service writer, service advisor, or service salesman who are not themselves

[1] DOL asserted that the APA's notice-and-comment procedures were inapplicable because "these are interpretive rules." 35 Fed. Reg. 5856, 5895-96 (1970).

primarily engaged in the work of a salesman, partsman, or mechanic ... are not exempt under [§213(b)(10)]." *Id.* §779.372(c)(4). DOL believed that service advisors should be deemed non-exempt even though "such an employee's principal function may be diagnosing the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics." *Id.*

In the years after DOL promulgated this interpretive regulation, every court to consider the issue rejected the agency's conclusion that service advisors were non-exempt.[2] In *Deel Motors*, for example, DOL advanced the narrow interpretation of the exemption set forth in its 1970 regulation, arguing that service advisors should not be exempt because they do not *personally* service vehicles. *See Deel Motors*, 475 F.2d at 1097-98. But the Fifth Circuit rejected that view based on both the text and purpose of the exemption. As a textual matter, the court concluded that service advisors were plainly "salesm[e]n ... engaged in selling or servicing automobiles." *Id.* at 1098. And, in considering the exemption's purpose, the Fifth Circuit noted that "service salesmen are functionally similar to the mechanics and partsmen who service the

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[2] *See, e.g.*, *Deel Motors*, 475 F.2d at 1097-98; *Yenney v. Cass Cty. Motors*, No. 76-0-294, 1977 WL 1678, at *2 (D. Neb. Feb. 8, 1977); *Brennan v. N. Bros. Ford*, No. 40344, 1975 WL 1074, at *3 (E.D. Mich. Apr. 17, 1975), *aff'd sub nom. Dunlop v. N. Bros. Ford*, 529 F.2d 524 (6th Cir. 1976) (Table); *Brennan v. Import Volkswagen*, No. W-4982, 1975 WL 1248, at *3 (D. Kan. Oct. 21, 1975).

automobiles." *Id.* at 1097. All of those employees "work as an integrated unit, performing the services necessary for the maintenance of the customer's automobile." *Id.* And, like countless other salespeople who are exempt from the FLSA's overtime rules, service advisors "are more concerned with their total work product than with the hours performed." *Id.*

2. Within a few years of the Fifth Circuit's decision in *Deel Motors*, DOL backtracked from the position advanced in its 1970 interpretive regulations. In 1978, the Secretary of Labor issued a policy letter changing the agency's position and providing that service advisors should be treated as exempt as long as a majority of their sales were for non-warranty work. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on Fair Labor Standards Act, 1978 WL 51403, at *1 (July 28, 1978) ("1978 DOL Letter") (acknowledging that "[t]his position represents a change from the position set forth in" the 1970 regulations).

Similarly, DOL's 1987 Field Operations Handbook instructed agency employees to "no longer deny the [overtime] exemption for [service advisors]." U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04-4 (Oct. 20, 1987), *available at* perma.cc/5ghd-kcjj ("DOL 1987 Field Operations Manual"). The Handbook explained that "two appellate courts (Fifth and Sixth Circuits) and two district courts (in the Eighth and Tenth Circuits)" have construed the exemption to cover

service advisors. *Id.*[3] The Handbook acknowledged that "[t]his policy ... represents a change from the position in [the 1970 regulations]," and indicated that the agency's regulations "will be revised as soon as is practicable." *Id.*

Despite those clear (and clearly correct) decisions to acquiesce after multiple courts had rejected DOL's position, the 1970 interpretive regulations with the now-repudiated interpretation of §213(b)(10)(A) remained on the books. In 2008, DOL initiated a rulemaking proceeding to update its regulations so that, *inter alia*, they reflected the view embraced in the Secretary's 1978 Letter and the 1987 Field Operations Handbook. *See Updating Regulations Issued Under the Fair Labor Standards Act*, 73 Fed. Reg. 43,654 (2008). As DOL explained, "[u]niform appellate and district court decisions ... hold that service advisors are exempt under [29 U.S.C. §213(b)(10)(A)] because they are 'salesmen' who are primarily engaged in 'servicing' automobiles." *Id.* at 43,658 (citing *Walton*, 370 F.3d at 452; *Deel Motors*, 475 F.2d at 1097; *N. Bros. Ford*, 1975 WL 1074, at *3). DOL's notice of proposed rulemaking included a modified version of 29 C.F.R. §779.372(c)(4) that would have codified this unbroken line of case law.

3. In 2011, however, DOL changed course yet again. It issued a final rule that neither adopted the proposed regulation nor brought the regulation into

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[3] In addition to the Fifth Circuit's decision in *Deel Motors*, the Sixth Circuit had summarily affirmed a district court decision finding service advisors to be exempt under §213(b)(10)(A). *See N. Bros. Ford*, 1975 WL 1074, at *3, *aff'd sub nom. Dunlop*, 529 F.2d 524.

line with the governing case law. *See Updating Regulations Issued Under the Fair Labor Standards Act*, 76 Fed. Reg. 18,832, 18,859 (2011). Instead, DOL maintained the 1970 regulation's definition of "salesman," *see* 29 C.F.R. §779.372(c)(1), but simultaneously eliminated the more extensive discussion of service advisors included in that earlier regulation, *see* 76 Fed. Reg. at 18,859. In its brief explanation accompanying the final rule, DOL merely repeated its position from the 1970 regulation that service advisors should not be treated as exempt because the regulatory definitions "limit[] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." *Id.* at 18,838.

Even though DOL identified no change in the statute or the marketplace, or any other intervening circumstances, the agency abandoned the position reflected in the Secretary's 1978 Letter and 1987 Field Operations Manual, and returned to its earlier and repudiated view that service advisors are not exempt, while simultaneously eliminating much of the reasoning that initially supported that long-discarded view. In short, despite having advised the industry for over 30 years that service advisors could be treated as exempt, DOL reversed field and returned to a position that the agency had advocated unsuccessfully in the early 1970s, while excising some of its supporting reasoning.

D. Respondents' Complaint and the District Court's Decision

Petitioner Encino Motorcars, LLC, sells and services new and used Mercedes Benz automobiles. Respondents are current and former employees of

Petitioner who worked at the dealership as "service advisors." On September 18, 2012, Respondents filed a complaint alleging several violations of the FLSA and the California Labor Code.

The complaint alleges that, as service advisors, Respondents would meet and greet car owners as they entered the service area; evaluate customers' service and repair needs; suggest services to be performed on the vehicle to address the customers' complaints; solicit supplemental services to be performed (such as preventative maintenance); prepare price estimates for repairs and services; and inform the owner about the status of the vehicle. J.A.40-41. In short, Respondents performed sales activities that were integral to the servicing of vehicles at the dealership. And, like countless other salespeople in both car dealerships and other businesses, Respondents were paid on a commission basis; the more services they sold, the higher their commissions would be. *Id.*[4]

Respondents alleged that they often worked more than 40 hours per week, and that Petitioner violated the FLSA by failing to pay them overtime compensation for that excess time. J.A.42-44. While remaining studiously vague on the details, Respondents seek "time-and-a-half" damages on top of the commissions they were paid. Petitioner moved to dismiss the FLSA claims on the ground that Respondents were exempt employees under 29 U.S.C. §213(b)(10)(A).

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[4] Some dealerships pay their service advisors a combination of salary or hourly wages and commissions, whereas other dealerships pay service advisors solely on a commission basis.

On January 25, 2013, the district court granted Petitioner's motion to dismiss the FLSA claims, holding that Respondents were clearly covered by the exemption in §213(b)(10)(A). Pet.App.25-29. The district court began by noting that several other courts "have applied this exemption to Service Advisors." Pet.App.26 (citing *Deel Motors*, 475 F.2d at 1097; *Walton*, 370 F.3d at 453).

The district court acknowledged that DOL had stated in 2011 that §213(b)(10)(A) did not apply to service advisors, but refused to defer to DOL's interpretation because it was objectively unreasonable. Pet.App.28-29. The court agreed with the Fourth and Fifth Circuits that DOL's interpretations were an "impermissibly restrictive construction of the statute." Pet.App.29 (quoting *Walton*, 370 F.3d at 452). Because "Service Advisors ... are functionally equivalent to salesmen and mechanics and are similarly responsible for the 'selling and servicing' of automobiles," the district court concluded that it would be "unreasonable" to carve those employees out of the exemption. *Id.* The court did not believe that "Congress intended to treat employees with functionally similar positions differently." *Id.* (quoting *Deel Motors*, 475 F.2d at 1097-98). The court thus dismissed Respondents' claim for overtime under the FLSA on the ground that they were exempt under §213(b)(10)(A).[5]

[5] After dismissing the FLSA claims, the district court declined to exercise supplemental jurisdiction over Respondents' remaining state-law claims. Pet.App.31.

E. The Ninth Circuit's Decision

The Ninth Circuit reversed in relevant part, holding that service advisors who work at a car dealership are not exempt under §213(b)(10)(A) from the FLSA's overtime-pay requirements. Pet.App.19.

The panel relied heavily on the purported canon of construction that "[t]he FLSA is to be construed liberally in favor of employees," and "exemptions are narrowly construed against employers." Pet.App.6 (quoting *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir. 2014)). The court explained that DOL's "interpretation accords with the presumption that the §213 exemptions should be construed narrowly." Pet.App.11. Because the statute does not define "salesman, partsman, or mechanic," and does not explicitly mention "service advisors," the Ninth Circuit could not "conclude that service advisors ... are 'persons plainly and unmistakably within [the FLSA's] terms and spirit.'" Pet.App.7 (second alteration in original) (quoting *Solis v. Washington*, 656 F.3d 1079, 1083 (9th Cir. 2011)).

The Ninth Circuit also disagreed with the district court's refusal to defer, concluding that DOL had reasonably interpreted an ambiguous FLSA exemption. The court believed that there were two "plausible" interpretations of the phrase "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." Pet.App.7. Under the first interpretation, a service advisor is a "salesman ... primarily engaged in ... servicing automobiles" and is thus exempt. *Id.* Under the second interpretation, which the Ninth Circuit characterized as "at least as plausible," the nouns in

the statute would be interpreted in a "more cabined" way: "a salesman is an employee who sells cars; a partsman is an employee who requisitions, stocks, and dispenses parts; and a mechanic is an employee who performs mechanical work on cars." *Id.* Under that narrower interpretation, "[s]ervice advisors do none of those things; they sell services for cars." *Id.* The Ninth Circuit thus concluded that the exemption is ambiguous about whether it extends to service advisors. Pet.App.8.

Turning to *Chevron*'s second step, the Ninth Circuit upheld DOL's current interpretation of the exemption as reasonable. Pet.App.11-19. The court of appeals concluded that it was reasonable for DOL to read the exemption so that salesmen are exempt if they are "engaged in selling ... automobiles," but not if they are "engaged in ... servicing automobiles." Pet.App.13-15.

The Ninth Circuit readily acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana." Pet.App.11. But the court "respectfully disagree[d] with those decisions." *Id.* In particular, the panel rejected the other courts' conclusion that DOL's 1970 interpretation of §213(b)(10)(A) was "unduly restrictive." Pet.App.12-13. Those courts had held that DOL's interpretation was unreasonable because it disregarded the fact that a service advisor could be a "salesman ... primarily engaged in ... servicing automobiles." *See Walton*, 370 F.3d at 452; *Thompson*, 294 P.3d at 402.

The Ninth Circuit, however, concluded that DOL's regulation honored the disjunctive nature of the

phrase "salesman ... primarily engaged in selling or servicing automobiles." First, the court concluded that there was ambiguity as to whether the phrase "primarily engaged in selling or servicing" refers to the act of "*personally*" selling or servicing automobiles or instead to "the general business" of selling or servicing automobiles. Pet.App.12-14 (emphasis added). Second, the court identified as a potential ambiguity whether the word "salesman" was modified only by the gerund "selling" or was instead modified disjunctively by both gerunds, "selling" and "servicing." Pet.App.13-15. The court further noted that "[n]on-textual indicators of congressional intent, such as legislative history, are inconclusive." Pet.App.15.

The Ninth Circuit ultimately concluded that "there are good arguments supporting both interpretations of the exemption," but that "where there are two reasonable ways to read the statutory text, and the agency has chosen one interpretation, we must defer to that choice." Pet.App.19. The court of appeals thus held that Respondents were not exempt under 29 U.S.C. §213(b)(10)(A) and reversed the district court's dismissal of Respondents' claims.[6]

SUMMARY OF ARGUMENT

The FLSA exempts from its overtime-pay requirements "any salesman ... primarily engaged

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[6] The Ninth Circuit affirmed the district court's dismissal of the other federal claims because Respondents failed to challenge the alternative grounds on which those claims were dismissed. *See* Pet.App.3-4 n.2. Because it reinstated Respondents' federal overtime-pay claim, the Ninth Circuit vacated the district court's dismissal of Respondents' state-law claims for lack of jurisdiction. *See id.*

in selling or servicing automobiles." 29 U.S.C. §213(b)(10)(A). Because service advisors are both salesmen and primarily engaged in servicing automobiles, they are exempt. That common-sense interpretation is confirmed by the statute's plain language, basic rules of grammar, the FLSA's underlying purposes, and a practical understanding of service advisors' role within an automobile dealership. The Ninth Circuit's departure from a previously unbroken line of precedent, in which DOL had acquiesced for over 30 years, upsets the long-settled expectations of both dealerships and their employees and exposes employers to drastic retroactive liability, while doing nothing to advance the FLSA's purposes.

I. Section 213(b)(10)(A) unambiguously covers service advisors because they are "salesm[e]n ... primarily engaged in selling or servicing automobiles." The phrase "primarily engaged in selling or servicing" is disjunctive, and both gerunds—"selling" and "servicing"—can sensibly be applied to the noun "salesman." Limiting the exemption to salesmen primarily engaged in selling, but not servicing, automobiles flatly contradicts the statute, which plainly broadens the exemption. The exemption applies not just to those primarily engaged in selling, but also to those primarily engaged in servicing.

Basic rules of grammar reinforce that result by dictating that each element in a disjunctive list be given meaning when it is sensible to do so. Moreover, the statute further emphasizes the breadth of the exemption by extending it to "*any* salesman." The word "any" carries with it an "expansive meaning." *United States v. Gonzales*, 520 U.S. 1, 5 (1997). There

is no question that service advisors are salesmen. And because they sell the servicing of automobiles, they are plainly salesmen *engaged in* servicing automobiles. Indeed, it would be nonsensical to suggest that a salesman primarily engaged in the selling of automobile servicing is engaged in *neither* selling *nor* servicing automobiles. Yet that is the position embraced by Respondents and DOL.

The Ninth Circuit identified two potential "ambiguities," neither of which withstands scrutiny. First, the Ninth Circuit found it reasonable to read into the statute a restrictive modifier demanding that an exempt employee *personally* service automobiles in the same manner as a mechanic. The statutory text, of course, contains no such requirement. For example, a service advisor who sells a customer a package of services that includes the installation of new brake pads is engaged in servicing automobiles even though this employee does not personally change the brake pads. That the Ninth Circuit could create ambiguity only by adding the word "personally" to the text only underscores that the statute as written is unambiguous. Worse still, the Ninth Circuit's introduction of the limiting modifier "personally" would improperly deprive the word "partsman" of any meaning. Partsmen are no more (or less) directly involved in the hands-on servicing of automobiles than service advisors, yet the statute plainly contemplates that partsmen are exempt. Like service advisors, partsmen are primarily engaged in servicing automobiles without directly doing the servicing themselves.

Second, despite the clearly disjunctive statutory language, the Ninth Circuit concluded that the exemption could be reasonably construed so that the noun "salesman" was modified only by the gerund "selling," but not the gerund "servicing." That purported ambiguity, however, would effectively read out of the statute the phrase "*any* salesman ... primarily engaged in ... *servicing automobiles*." A one-to-one mapping of nouns to gerunds might make sense if there were the same number of nouns and gerunds. But the exemption at issue here contains three nouns and only two gerunds, making it mathematically impossible to link the nouns and gerunds on a one-to-one basis.

II. The unambiguous language of §213(b)(10)(A) obviates the need to consider any issue of agency deference, but any deference to DOL's interpretation would be misplaced for multiple reasons. First, DOL's view is patently unreasonable. DOL's interpretation is an "impermissibly restrictive construction of the statute" that is "flatly contrary to the statutory text." *Walton*, 370 F.3d at 451-52. Under the guise of interpreting the word "salesman," DOL's regulations in fact interpret the phrase "salesman ... primarily engaged in selling or servicing automobiles" in a way that denies any meaning to a portion of that phrase—"salesman ... engaged in ... *servicing* automobiles."

Second, treating service advisors as non-exempt makes little sense in the context of the broader statutory scheme. The FLSA contains many provisions that are designed to exclude from the mandatory overtime rules individuals who are engaged in sales or paid on a commission basis. *See,*

e.g., 29 U.S.C. §§207(*i*), 213(a)(1). Those exemptions reflect the basic reality that salespeople, including service advisors, "are more concerned with their total work product than with the hours performed." *Deel Motors*, 475 F.2d at 1097. Forcing dealerships to pay overtime to service advisors under the one-size-fits-all FLSA regime is a misguided attempt to fit a square peg into a round hole because salespeople are "hardly the kind of employees that the FLSA was intended to protect." *Christopher*, 132 S. Ct. at 2173.

Finally, DOL's complete lack of justification for its about-face in the 2011 interpretive regulation should be fatal to any plea for deference. In the first few years of DOL's 1970 interpretation, every court to consider the issue rejected DOL's position. DOL acquiesced in those decisions in the Secretary's 1978 Letter and the 1987 Field Operations Manual, and for over 30 years service advisors and dealerships operated under mutually beneficial compensation plans in good-faith reliance on both judicial precedent and administrative guidance. Then, after promising to formalize its change in position, DOL instead reverted to its long-discarded and oft-rejected view. Rather than carefully explaining its re-reversal or addressing the serious reliance interests engendered by its flip-flop-flip, DOL actually trimmed its already-thin justification for treating salesmen primarily engaged in the servicing of automobiles as non-exempt. There is no basis for deference to DOL under these circumstances.

III. If allowed to stand, the Ninth Circuit's erroneous interpretation of §213(b)(10)(A) would have far-reaching implications for the nation's 18,000 franchised car dealerships and 45,000 service

advisors. That interpretation would result in a wholesale reworking of the service advisor position, harming dealerships and service advisors alike.

This Court has been justifiably skeptical of attempts by plaintiffs to impose significant retroactive liability for settled industry practices that had long been viewed as outside the scope of the FLSA. *See*, *e.g.*, *Integrity Staffing*, 135 S. Ct. at 518-19. Here, the longstanding industry practice was encouraged by administrative guidance for over 30 years. This Court should reject Respondents' attempts to impose massive retroactive liability on employers for compensation arrangements that have been repeatedly—and correctly—approved for decades by courts nationwide.

ARGUMENT

I. Service Advisors Are Unambiguously Exempt Because They Are Salesmen Primarily Engaged In Servicing Automobiles.

Service advisors are unambiguously exempt from the FLSA's overtime-pay requirements. The statute exempts "any salesman ... primarily engaged in selling or servicing automobiles," and service advisors are salesmen primarily engaged in servicing automobiles. It is unsurprising that every court to consider this issue, save the Ninth Circuit, has found service advisors to be exempt.

A. Service Advisors Are Exempt Under the Plain Language of Section 213(b)(10)(A).

1. The FLSA exempts from its overtime requirements "any salesman, partsman, or mechanic

primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." *Id.* §213(b)(10)(A). There is no dispute that Petitioner is "a nonmanufacturing establishment primarily engaged in the business of selling [automobiles] to ultimate purchasers." *Id.*

The question is thus whether each Respondent is a "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* Service advisors are unquestionably "salesmen"; they sell services to the dealership's customers. Respondents evaluate customers' service and repair needs, suggest services to address specific problems, prepare cost estimates, and offer supplemental services such as preventative maintenance. *See* J.A.40-41. All of those activities facilitate the customers' purchase of the dealership's service offerings. Respondents are plainly salesmen.

And Respondents are just as plainly "primarily engaged in ... servicing automobiles." Most automobile dealerships offer service and sales, and Respondents are the salesmen dedicated to the servicing side of the business. They help diagnose the need for service, provide information about optional services, and, having formed a relationship with the customer, help to ensure the customer is satisfied with the service received. As Respondents' own complaint makes clear, service advisors are integral to the process of servicing vehicles at the dealership. *See id.* Thus, under the unambiguous text of §213(b)(10)(A), service advisors are exempt because they are

"salesmen" who are "primarily engaged in ... servicing automobiles."

2. Several powerful grammatical and textual indicators confirm this straightforward reading of the statutory text. First, it is a fundamental rule of grammar that, when a sentence has multiple disjunctive nouns and multiple disjunctive direct-object gerunds, each noun is linked to each gerund as long as that noun-gerund combination has a sensible meaning. *See*, *e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise...."); *FCC v. Pacifica Found.*, 438 U.S. 726, 739-40 (1978) ("The words ... are written in the disjunctive, implying that each has a separate meaning.").

Here, §213(b)(10)(A) specifically exempts "any salesman ... primarily engaged in selling *or* servicing automobiles." There is no question that the term "or" makes the phrase "primarily engaged in selling or servicing" disjunctive. *See Thompson*, 294 P.3d at 402 ("The use of the disjunctive 'or' between the words 'selling *or* servicing' means that the exemption applies to any 'salesman, partsman, or mechanic' who [is] primarily engaged in either of these duties."). And in the context of an exemption limited by a requirement that the employee be primarily engaged in a particular activity or activities, there is no question that the use of the disjunctive broadens the exemption. An exemption provided to employees primarily engaged in X or Y is broader than one given only to employees primarily engaged in X. Thus, as long as both X and

Y can be sensibly applied to a noun, then the broader meaning promised by the use of the disjunctive must be honored.

There is little doubt here that both gerunds can sensibly be applied to the noun "salesman." There are a variety of salespeople at automobile dealerships. Some salespeople are "engaged in selling ... automobiles." But other salespeople play an integral role in the service process. In particular, service advisors engage in classic sales functions just like other salespeople, but they sell services rather than automobiles. *See* J.A.40-41 (describing Respondents as employees who "work on a pure commission basis" and "solicit and suggest[] that certain service[s] be conducted on" cars that come in for servicing). They are thus "salesmen ... primarily engaged in ... servicing automobiles." Because both parts of the disjunctive phrase "engaged in selling or servicing automobiles" can be sensibly applied to the noun "salesman," fundamental rules of grammar dictate that both parts of the phrase be given their plain meaning.

At the very least, the entire phrase "primarily engaged in *selling or servicing* automobiles" applies to service advisors. Service advisors are certainly not primarily engaged in any activity *other than* selling or servicing. And they are not engaged in selling or servicing anything other than automobiles. In fact, they are engaged in the selling of the servicing of automobiles. It would be nonsensical to suggest that an individual who is primarily engaged in selling the servicing of automobiles is engaged in *neither* selling *nor* servicing automobiles.

If the exemption applied only to salesmen primarily engaged in selling automobiles, it might have made sense to argue that service advisors are non-exempt because they sell services for automobiles rather than the automobiles themselves. But given that the exemption covers both selling and servicing, it makes no sense to hold that service advisors are non-exempt because they are primarily engaged in selling services and not automobiles.[7] The notion that service advisors could be non-exempt because they are too involved in servicing makes nonsense of Congress' decision to employ the disjunctive.

The breadth of the exemption is further underscored by its exemption of "*any* salesman." This Court has repeatedly emphasized that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Gonzales*, 520 U.S. at 5 (quoting Webster's Third New Int'l Dictionary 97 (1976)); *see also Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 130-31 (2002). Congress' use of the word "any" in §213(b)(10)(A) makes clear that it intended to exempt *all* salesmen working in an automobile dealership, as long as they were "primarily engaged in selling or servicing automobiles." Service advisors fall

[7] Similarly, if an employee spent 40% of his time engaged in selling automobiles, 30% of his time engaged in selling servicing, and 30% of his time doing something else, he would still be primarily engaged in selling or servicing automobiles, even though he might not be primarily engaged in one or the other. Congress' use of the disjunctive necessarily broadens the exemption.

comfortably within that category of exempt employees.

3. Given the clarity of the statutory text, it is unsurprising that every court to consider this issue—until the Ninth Circuit in the decision below—concluded that service advisors were exempt. For example, in *Walton*, the Fourth Circuit held that service advisors fall within the plain text of the FLSA's overtime-pay exemption. The *Walton* plaintiff's job duties were identical to Respondents' job duties here: he would "greet customers, listen to their concerns about their cars, write repair orders, follow-up on repairs, ... keep customers informed about maintenance, [and] ... suggest to customers additional services...." *Walton*, 370 F.3d at 449. The Fourth Circuit correctly recognized that service advisors are "primarily engaged in servicing automobiles" because they are an "integral part of the dealership's servicing of automobiles" and are the "first line ... service sales representative[s]." *Id.* at 452-53.

Similarly, in *Deel Motors*, the Fifth Circuit held that service advisors were exempt from the FLSA. 475 F.2d 1095. In that case, too, the court recognized that service advisors perform functions that fall squarely within the statutory exemption. *Id.* at 1097-98. And, in *Thompson*, the Montana Supreme Court agreed with the Fourth and Fifth Circuits that the §213(b)(10)(A) exemption covers service advisors. 294 P.3d at 402. The court found no ambiguity in the relevant statutory text because a "plain, grammatical reading of [§213(b)(10)(A)] makes clear that the term 'salesman' encompasses a broader category of employees than those only engaged in selling

vehicles." *Id.* As those courts—and others[8]—have uniformly recognized, service advisors are exempt under a straightforward textual interpretation of §213(b)(10)(A).

B. The Ninth Circuit's Reasons for Finding Ambiguity in the Statutory Text Do Not Withstand Scrutiny.

The Ninth Circuit identified two bases for perceiving ambiguity where every other court saw clarity. Neither withstands scrutiny.

1. Service advisors need not personally service automobiles to be exempt.

First, the Ninth Circuit offered an alternative interpretation of §213(b)(10)(A) in which the word "personally" was injected into the statute to modify "selling" and "servicing." *See* Pet.App.12-13 (statute can be interpreted to exempt only "any salesman, partsman, or mechanic primarily [and personally] engaged in selling or servicing automobiles" (alterations in original)). Under that view, because a service advisor does not personally service vehicles in the same manner as a mechanic—*i.e.*, does not personally rotate the tires or change the transmission fluid—he cannot be "primarily engaged in ... servicing automobiles."

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[8] The federal district courts that have addressed this issue have also uniformly concluded that the exemption in §213(b)(10)(A) applies to service advisors at car dealerships. *See, e.g.*, *Yenney*, 1977 WL 1678; *N. Bros. Ford*, 1975 WL 1074, *aff'd sub nom. Dunlop*, 529 F.2d 524; *Import Volkswagen*, 1975 WL 1248. The district court here likewise held that service advisors were exempt. *See* Pet.App.29.

The principal and obvious problem with that construction is that the word "personally" does not appear in the statute Congress enacted. The notion that an exempt employee must personally service automobiles requires adding a restrictive modifier that is absent from the statutory text. Needless to say, creative redrafting of statutory language is strongly disfavored. This Court "ordinarily resist[s] reading words ... into a statute that do not appear on its face." *Dean v. United States*, 556 U.S. 568, 572 (2009). And if a word must be added to a statute to render it ambiguous, that is a sure sign that the text as originally drafted is clear. Under the statutory text as written, a service advisor who sells services to a customer is *primarily engaged in* servicing even though he does not get under the hood and personally perform those services.

The injection of a new word into the statute alone would be problematic enough, but the Ninth Circuit and DOL would add one word to the statute only to render another word that is actually there superfluous. Partsmen are plainly exempt employees under the statute, but they do not personally sell or personally service automobiles the way mechanics do. Instead, as DOL itself has recognized, partsmen are "employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts." 29 C.F.R. §779.372(c)(2); *see also* 112 Cong. Rec. 20,502 (1966) (statement of Sen. Birch Bayh) (describing a partsman as one who "classifies, shelves and dispenses parts used by mechanics and sold to customers who come into establishments to make purchases").

The Ninth Circuit had no answer at all to the fact that its interpretation of "engaged in selling or servicing automobiles" would effectively write partsmen out of the statute. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (statute or regulation must be construed "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"). It cannot seriously be contended that the exemption covers only partsmen who *personally* service automobiles the way a mechanic does, for that is nearly a null set. Even DOL's regulations do not attempt to impose such a requirement. *See* 29 C.F.R. §779.372(c)(2) (partsman defined as any employee "primarily engaged in requisitioning, stocking, and dispensing parts").

Partsmen fall within the express terms of the exemption even though they are only engaged in the *process* of servicing automobiles and do not join the mechanics in directly servicing them. The same is true of service advisors. Both the partsman and the service advisor are integral to the servicing process even though neither employee is under the hood performing the service. Indeed, if anything, service advisors—who diagnose problems, recommend service solutions, and ensure the customer is satisfied with the service—are arguably more personally involved in servicing than the plainly exempt partsmen. No canon of construction permits interpreting the concept of "servicing" broadly for partsmen and narrowly for salesmen. *See*, *e.g.*, *FCC v. AT&T*, 562 U.S. 397, 408 (2011) ("identical words and phrases within the same statute should normally be given the same meaning" throughout the statute).

In all events, even if the Ninth Circuit were correct to read the word "personally" into the statute, that modifier would presumably apply to the entire phrase "primarily engaged in ... servicing automobiles" rather than just the phrase "servicing automobiles." For all the reasons noted above, there is no question that service advisors (like partsmen) personally are primarily *engaged in* the servicing of automobiles even though they do not personally get under the hood. *See supra* Part I.A.

In short, while the statute as redrafted by the Ninth Circuit creates ambiguity over partsmen, the statute Congress actually drafted unambiguously exempts both partsmen and service advisors even though they do not personally service automobiles to the same degree as a mechanic. Both types of employees are *primarily engaged in servicing automobiles*, which is all the clear statutory text requires.

2. The exemption unambiguously covers salesmen engaged in either selling or servicing automobiles.

In its other attempt to conjure up ambiguity in the clear statutory text, the Ninth Circuit asserted that the exemption could be construed so that the noun "salesman" is modified exclusively by "selling," rather than by both gerunds disjunctively, "selling" or "servicing." Pet.App.13-15. This was also DOL's primary justification for depriving the phrase "salesman ... primarily engaged in ... servicing automobiles" of any meaning back in 1970. According to DOL, despite the statute's plainly disjunctive language, the exemption covers salesmen "engaged in

selling" cars, but not salesmen "engaged in servicing" them. *See* 76 Fed. Reg. at 18,838 (asserting that exemption is limited to "salesmen who sell vehicles and partsmen and mechanics who service vehicles").

The Ninth Circuit provided two stylized analogies that, in its view, highlighted this purported ambiguity. The Ninth Circuit first presented the sentence, "if my dogs or cats are eating or drinking, then I know not to pet them." Pet.App.14. In this sentence, it is clear from the context that both "eating" and "drinking" can apply to both "dog" and "cat." The court contrasted that sentence with the sentence, "if my dogs or cats are barking or meowing, then I know that they need to be let out." *Id.* It is equally clear from the context of this sentence that "barking" applies only to dogs and "meowing" applies only to cats. Reasoning by analogy, the Ninth Circuit concluded that the phrase "salesman, partsman, or mechanic primarily engaged in selling or servicing" could be understood as akin to either the "barking or meowing" sentence or the "eating or drinking" sentence, thereby resulting in ambiguity for DOL to fill.

There are two serious problems with the Ninth Circuit's examples and reasoning. First, rather than demonstrating any ambiguity, those examples simply underscore that context matters and can provide clear answers. Neither dog/cat example is actually ambiguous. The first illustrates the default grammatical rule that unless the disjunctive gerund is distinct to one of the disjunctive nouns, then the gerund modifies all the nouns to which it could apply. An effort to limit that phrase to eating dogs and

drinking cats would be nonsensical. Put differently, there is no ambiguity as to whether that phrase covers drinking dogs and eating cats. They are plainly covered. The second example demonstrates that the default rule can be overcome when the gerunds are by their nature limited to a particular noun. Meowing dogs and barking cats are not covered because there are no such animals. Once again, the phrase is unambiguous. But there is nothing oxymoronic or even anomalous about a salesman primarily engaged in the servicing of automobiles. That is exactly what 45,000 service advisors do, and they are unambiguously covered by the exemption. Based on context, the exemption here cannot possibly be interpreted so that only "selling," but not "servicing," modifies "salesman."

Second, the Ninth Circuit's reasoning is yet again devastated by the exemption's undeniable coverage of partsmen. Congress' inclusion of partsmen is fatal to the Ninth Circuit's theory that Congress intended to limit the application of each of the disjunctive gerunds to only one of the listed nouns. In the "dog-cat" analogy, the partsman is the figurative "horse" (or any other animal) in the sentence that confirms that the gerunds are more similar to generic "eating or drinking" than to species-particular "barking or meowing." Indeed, the FLSA exemption in §213(b)(10)(A) contains *three* nouns but only *two* gerunds, which makes it mathematically impossible to link the nouns to the gerunds on a one-to-one basis. Context matters, and the number and positioning of the nouns and gerunds make clear that a salesman—like a partsman or mechanic—can be "primarily engaged in ... servicing automobiles."

C. FLSA Exemptions Should Be Interpreted Fairly and Correctly, Not Narrowly or Broadly.

The Ninth Circuit buttressed its untenable interpretation of the statutory text by relying heavily on the purported canon of construction that "the FLSA is to be construed liberally in favor of employees," and that "exemptions are narrowly construed against employers." Pet.App.6 (quoting *Haro*, 745 F.3d at 1256). Indeed, the Ninth Circuit effectively applied a clear statement rule, holding that employees must be treated as subject to the FLSA's overtime rules unless they "plainly and unmistakably" fall within an exemption. *Id.* (quoting *Solis*, 656 F.3d at 1083).

The purported canon of broad construction of the FLSA (and narrow construction of its exemptions) is just an FLSA-specific variant of the disfavored notion that courts should interpret remedial statutes broadly. *See*, *e.g.*, *OWCP v. Newport News Shipbuilding*, 514 U.S. 122, 135-36 (1995) (describing broad-construction canon as "that last redoubt of losing causes"). But applying this misguided canon does nothing but guarantee extravagant results in FLSA cases. And it makes least sense of all when Congress has clearly and plainly manifested its intent to *narrow* the scope of the FLSA's protections through an exemption. The goal of a court interpreting a statute "should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right." Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 582 (1990).

In recent years, the Court has cited this anti-employer "canon" only in the course of *declining* to apply it. *See*, *e.g.*, *Sandifer v. U.S. Steel*, 134 S. Ct. 870, 879 n.7 (2014) (reserving question of whether Court should "disapprove" anti-employer canon); *Christopher*, 132 S. Ct. at 2172 n.21 (canon does not apply to FLSA's definitions). It has been at least several decades, if not longer, since the Court has cited this canon as even a partial basis for ruling in favor of an FLSA plaintiff.

Even though this Court has largely disregarded the anti-employer canon, a number of lower courts—including the Ninth Circuit here—have seized upon this Court's dictum and used the outdated "canon" to interpret the FLSA in ways that tip the scales in favor of employees claiming to be covered by the statute. *See* Pet.App.11 (DOL's "interpretation accords with the presumption that the §213 exemptions should be construed narrowly"); *see also, e.g.*, *Lawrence v. City of Philadelphia*, 527 F.3d 299, 310 (3d Cir. 2008); *Miller v. Team Go Figure*, No. 3:13-CV-1509-O, 2014 WL 1909354, at *7 (N.D. Tex. May 13, 2014); *Amendola v. Bristol-Myers Squibb*, 558 F. Supp. 2d 459, 472 (S.D.N.Y. 2008). The Court should take this opportunity to make clear to lower courts that this "last redoubt of losing causes" is no substitute for careful statutory interpretation. The FLSA and its exemptions should be construed neither narrowly nor broadly, but fairly and correctly.

II. DOL's Interpretation Is Profoundly Mistaken And Is Not Entitled To Deference.

Because the text of §213(b)(10)(A) unambiguously exempts service advisors, there is no reason for this

Court to consider whether DOL's wavering interpretation is entitled to deference. But even if the statute were less clear, DOL's interpretation would not be entitled to deference, both because it is unreasonable and because DOL has not adequately explained its revival of its long-discarded position nor adequately accounted for the reliance interests engendered during the three decades when DOL signaled that service advisors, like the rest of the dealership's salesforce and service teams, were exempt.

A. DOL's Interpretation Unreasonably Deprives a Key Portion of the Exemption of Its Plain Meaning.

Even if the Ninth Circuit were correct that there is some ambiguity in the text of §213(b)(10)(A), there would still be no basis for deferring to DOL's interpretation of the exemption. Unlike other subsections of the FLSA, Congress did not expressly delegate to DOL authority to interpret §213(b)(10)(A). *Compare*, *e.g.*, 29 U.S.C. §213(a)(1) (granting DOL authority to "define[] and delimit[] from time to time by regulations" the definition of "outside salesman"), *and id.* §213(b)(14) (granting DOL authority to define the phrase "area of production"), *with id.* §213(b)(10)(A) (no comparable grant of authority). DOL's 1970 and 2011 regulations are not legislative, but merely interpretive. *See Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 843-44 (1984). Interpretive regulations, even when consistently applied, are accorded less deference than legislative regulations, and may be upheld by a court only if they "implement the congressional mandate in a

reasonable manner." *Walton*, 370 F.3d at 452; *see also Chevron*, 467 U.S. at 843-44; Pet.App.29 ("mere interpretation" is "accorded lower deference").

DOL's interpretation of §213(b)(10)(A) fails that test. All of the arguments for why the text of the exemption is unambiguous apply with equal, if not greater, force in explaining why DOL's interpretation is objectively unreasonable. As the Fourth Circuit has explained, DOL's interpretation is unreasonable because it is an "impermissibly restrictive construction of the statute" that is "flatly contrary to the statutory text." *Walton*, 370 F.3d at 451-52.

The principal problem with DOL's interpretive regulation is that it unreasonably defines "salesman" to include salesmen primarily engaged in *selling* automobiles, but not salesmen primarily engaged in *servicing* automobiles. DOL defines "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).

That narrow regulatory definition is little more than an interpretive bait-and-switch. Under the guise of defining the word "salesman," DOL has in fact interpreted the entire phrase "salesman ... primarily engaged in selling or servicing automobiles." And, in doing so, the agency has unduly restricted the types of salesmen covered by the exemption to only those salesmen engaged in selling, but not servicing, automobiles. Even Respondents have recognized that "a salesman is one who sells something, making a

sale," Resp.BIO.18, yet DOL impermissibly defines "salesman" in a manner that reads out of the statute the second half of the disjunctive phrase "selling *or servicing* automobiles." Because DOL's regulation "unreasonably implements the congressional mandate," *Walton*, 370 F.3d at 452, and conflicts with the crystal-clear statutory text, it is entitled to no deference.

B. Treating Service Advisors As Exempt Is Consistent With the FLSA's Structure and Broader Purposes.

DOL's position must also be rejected as unreasonable because treating service advisors as non-exempt makes little sense in either the broader scheme of the FLSA or the broader scheme of a dealership's sales and service staff. The FLSA contains several provisions (in addition to §213(b)(10)(A)) that are designed to exclude from the mandatory overtime rules individuals who are engaged in sales or paid on a commission basis. *See*, *e.g.*, 29 U.S.C. §207(*i*) (excluding certain employees of retail or service establishments who are paid commissions); *id.* §213(a)(1) (excluding "any employee employed ... in the capacity of outside salesman").

Those provisions, as well as §213(b)(10)(A), reflect the basic reality that it is both common and reasonable for salespeople to be compensated based on their *success at selling*, rather than the sheer number of hours worked. As the Fifth Circuit has explained, "[t]he enactment of [§213(b)(10)(A)] was an implicit recognition by Congress of the incentive method of remuneration for salesmen, partsmen, and mechanics employed by an automobile dealership." *Deel Motors*,

475 F.2d at 1098. Like countless other salespeople who are treated as exempt under the FLSA, service advisors "are more concerned with their total work product than with the hours performed." *Id.* at 1097. Forcing an employer to pay service advisors—who are quintessential salespeople—overtime compensation on an hourly basis would be a misguided attempt to fit a square peg into a round hole, and would do nothing to promote the policies underlying the FLSA. *See*, *e.g.*, *Christopher*, 132 S. Ct. at 2173 (noting that pharmaceutical sales representatives "are hardly the kind of employees that the FLSA was intended to protect").

That problem is particularly acute in cases like this and *Christopher*, when there is a belated effort to treat salespeople as exempt. Because their compensation is often driven by commissions, salespeople may work irregular hours and not keep meticulous records of how long they work. Based on their compensation, salespeople often keep closer track of their sales than their hours.

DOL's interpretation also forces dealerships to differentiate among their employees in ways that are both divisive and contrary to Congress' plain intent. Service advisors are in some sense a hybrid, since their job is to sell, but they sell services. If the salesforce were entirely exempt and the service staff (such as mechanics and partsmen) were entirely non-exempt, there might be a boundary question on which DOL would be due some deference. But here DOL has seized on the fact that service advisors are a hybrid between two *fully exempt* categories as a ground for deeming them non-exempt. That interpretation

makes no sense and needlessly creates fissures among similar employees that Congress plainly did not intend.

Finally, forcing service advisors into the FLSA's mandatory overtime regime would not advance the core policy goals underlying the FLSA. As amici noted in their brief in support of the petition for certiorari, service advisors in several states within the Ninth Circuit earn an average of $75,769 per year, and the top 10% earn on average $105,583. NADA Cert. Amicus Br. 7. This is hardly a case that implicates the FLSA's core concern of protecting workers from "wages too low to buy the bare necessities of life," S. Rep. No. 75-884, at 4.

C. DOL Failed to Adequately Justify Its Adoption of an Interpretation That Upsets the Long-Settled Expectations of Both Employers and Employees.

DOL's flimsy justification for reversing its interpretation of §213(b)(10)(A) in 2011 only compounds the unreasonableness of its position and highlights the inappropriateness of deference here. For over 30 years, service advisors and car dealerships have operated under mutually beneficial compensation plans in good-faith reliance on DOL's repeated assertion that service advisors are exempt. *See* 1978 DOL Letter, 1978 WL 51403, at *1 (service advisors exempt from FLSA as long as their sales are primarily for non-warranty service); DOL 1987 Field Operations Manual, 24L04-4 (instructing DOL employees to "no longer deny the [overtime] exemption for" service advisors). After proposing in 2008 to formalize that longstanding view, DOL in 2011

reverted to its discredited and discarded view from 1970. In doing so, it did not offer a new interpretation that explained the changes in policy and accounted for reliance interests. Rather, in reverting to its earlier view, DOL relied on the same countertextual reading of the statute that the courts had long rejected, and actually subtracted some of its earlier reasoning. *See* 76 Fed. Reg. at 18,838 (limiting exemption to "salesmen who sell vehicles and partsmen and mechanics who service vehicles," and removing language explaining treatment of service advisors).

DOL's specious justification for its (most recent) change of position falls far short of the type of reasoned decisionmaking expected of an agency before it upends a policy that "has engendered serious reliance interests." *FCC v. Fox Television Stations*, 556 U.S. 502, 515-16 (2009); *see also Smiley v. Citibank (S.D.)*, 517 U.S. 735, 742 (1996) (a "change that does not take account of legitimate reliance on prior interpretation[s] ... may be 'arbitrary, capricious [or] an abuse of discretion'").

In promulgating its 2011 interpretive rule, DOL made no attempt to justify its disregard of the legitimate reliance interests of employers and employees. Indeed, the agency gave no weight whatsoever to those reliance interests. DOL also failed to identify a single change in the FLSA, the automobile marketplace, or industry practices that would have justified an abrupt about-face after 30 years of acquiescence in the lower courts' treatment of service advisors as exempt. Rather than add language explaining the change and accounting for reliance interests, DOL actually *stripped* from the text of its

2011 regulation the agency's earlier justifications for not exempting service advisors. *Compare* 29 C.F.R. §779.372(c)(4) (1971) (1970 DOL rule explaining why service advisors are not exempt), *with* 29 C.F.R. §779.372(c) (2012) (deleting any specific reference to service advisors' status). There is no basis for deferring to DOL's latest reversion under circumstances like these.

III. If Allowed To Stand, The Ninth Circuit's Erroneous Decision Would Produce Far-Reaching Consequences For Both Dealerships And Service Advisors.

Affirming the decision below would disrupt decades of settled expectations and open employers to substantial retroactive liability, something this Court has been loath to do, particularly in the FLSA context. The Ninth Circuit's decision has the potential to cause serious harm to automobile dealerships and service advisors alike, without any countervailing benefits in terms of the FLSA's goals.

The scope of the FLSA exemption under §213(b)(10)(A) is of tremendous practical significance to the automobile industry nationwide. The nation's 18,000 franchised car dealerships employ an estimated 45,000 service advisors. Based on decades of settled precedent treating those employees as exempt—and DOL's multiple assurances of the same, *see* 1978 DOL Letter, 1978 WL 51403, at *1; DOL 1987 Field Operations Manual, 24L04-4—many dealerships have offered compensation packages based primarily on sales commissions rather than hourly wages. Yet the Ninth Circuit has now

concluded that those longstanding compensation arrangements have been unlawful from the start.

This Court has not looked favorably upon attempts by plaintiffs to use novel theories of FLSA liability to upset long-settled industry practices. As the Court has explained, it may be "possible for an entire industry to be in violation of the [FLSA] for a long time" with no one noticing, but the "more plausible hypothesis" is that the industry's practices simply were not unlawful. *Christopher*, 132 S. Ct. at 2168 (quoting *Yi v. Sterling Collision Centers*, 480 F.3d 505, 510-11 (7th Cir. 2007)). The Court has thus repeatedly rejected FLSA claims that would have exposed settled industry practices to potentially significant retroactive liability (including back pay and double damages). *See*, *e.g.*, *id.* at 2167 (rejecting FLSA liability for pharmaceutical sales representatives where "the pharmaceutical industry had little reason to suspect that its longstanding practice of treating [sales representatives] as exempt ... transgressed the FLSA"); *Integrity Staffing*, 135 S. Ct. at 518-19 (rejecting novel attempt to impose FLSA liability for time spent in security screenings); *see also Yi*, 480 F.3d at 510 (rejecting FLSA challenge to a "system of compensation [that] is industry-wide, and of long standing"). And here this longstanding industry practice was encouraged by DOL in both the Secretary's 1978 Letter and the 1987 Field Operations Handbook.

Those reliance concerns are at their zenith in cases like this and *Christopher*, where plaintiffs seek to have employees who were actually paid on a commission basis retroactively reclassified as non-

exempt employees. Not only were workers focused on earning commissions, rather than working a set number of hours, but employers did not have an incentive to strictly track the number of hours worked, which creates both evidentiary difficulties and the prospect of wholly unjustified windfalls. *See Christopher*, 132 S. Ct. at 2173 (sales work was "difficult to standardize to any time frame," which "ma[de] compliance with the overtime provisions difficult"). This problem is evident in Respondents' studious ambiguity of the damages they seek. Having received commissions based on their sales, they are in no position to ask for 150% of those commissions, but any effort to attribute a different type of compensation to previously commissioned salespeople is artificial. And in all events, the Ninth Circuit's holding would force both service advisors and dealerships into compensation plans other than the ones they had voluntarily accepted, to the detriment of employers and employees alike.

The problems with allowing Respondents to reap such windfalls are exacerbated by the differential treatment implicit in DOL's approach. Under the approach adopted by every other court to consider the issue, all core sales and service employees at a dealership are treated the same, *viz.*, as exempt. The Ninth Circuit's decision, however, would grant service advisors, but not other core salespeople (or others engaged in providing services, such as partsmen or mechanics), a huge windfall. Those windfalls cannot help but prove to be divisive. Thus, dealers would face the prospect of not only having to pay out damages retrospectively, but also having to deal with

anomalous divisions among their core employees going forward.

* * *

At bottom, DOL's (and the Ninth Circuit's) attempt to bring service advisors within the FLSA regime after more than three decades of treating them as exempt is a burdensome "solution" in search of a non-existent "problem." Treating service advisors as non-exempt would do nothing to advance the purposes of the FLSA, yet would impose significant and unnecessary burdens and costs on dealerships and service advisors alike. The Ninth Circuit's novel and unprecedented interpretation of §213(b)(10)(A) works a fundamental, unnecessary, and unauthorized change in the law and should be reversed.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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STATUTORY APPENDIX

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29 U.S.C. § 213
EXEMPTIONS

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub. L. 101–157, §3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than

seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 331/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub. L. 101–157, §3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five

hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than

four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub. L. 93–259, §23(a)(1), Apr. 8, 1974, 88 Stat. 69.

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub. L. 93–259, §10(a), Apr. 8, 1974, 88 Stat. 63.

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub. L. 93–259, §§9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69.

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of title 5; or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is—

(A) the application of systems analysis techniques and procedures, including

consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour.

(b) Maximum hour requirements

The provisions of section 207 of this title shall not apply with respect to—

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49; or

(2) any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of title 49; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act [45 U.S.C. 181 et seq.]; or

(4) Repealed. Pub. L. 93–259, §11(c), Apr. 8, 1974, 88 Stat. 64.

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) Repealed. Pub. L. 93–259, §21(b)(3), Apr. 8, 1974, 88 Stat. 68.

(8) Repealed. Pub. L. 95–151, §14(b), Nov. 1, 1977, 91 Stat. 1252.

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Office of Management and Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment

primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207(a) of this title; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during

his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206(a)(1) of this title; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18), (19) Repealed. Pub. L. 93–259, §§15(c), 16(b), Apr. 8, 1974, 88 Stat. 65.

(20) any employee of a public agency who in any workweek is employed in fire protection

activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22) Repealed. Pub. L. 95–151, §5, Nov. 1, 1977, 91 Stat. 1249.

(23) Repealed. Pub. L. 93–259, §10(b)(3), Apr. 8, 1974, 88 Stat. 64.

(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

(A) who are orphans or one of whose natural parents is deceased, or

(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or

(25), (26) Repealed. Pub. L. 95–151, §§6(a), 7(a), Nov. 1, 1977, 91 Stat. 1249, 1250.

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

(30) a criminal investigator who is paid availability pay under section 5545a of title 5.

(c) Child labor requirements

(1) Except as provided in paragraph (2) or (4), the provisions of section 212 of this title relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee—

(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of subsection (a)(6)(A) of this section) required to be paid at the wage rate prescribed by section 206(a)(5) of this title,

(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

(C) is fourteen years of age or older.

(2) The provisions of section 212 of this title relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(3) The provisions of section 212 of this title relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(4)(A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 212 of this title to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that—

(i) the crop to be harvested is one with a particularly short harvesting season and the application of section 212 of this title would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that—

(i) the individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver (I) for not more than eight weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(5)(A) In the administration and enforcement of the child labor provisions of this chapter, employees who are 16 and 17 years of age shall be permitted to load materials into, but not operate or unload materials from, scrap paper balers and paper box compactors—

(i) that are safe for 16- and 17-year-old employees loading the scrap paper balers or paper box compactors; and

(ii) that cannot be operated while being loaded.

(B) For purposes of subparagraph (A), scrap paper balers and paper box compactors shall be considered safe for 16- or 17-year-old employees to load only if—

(i)(I) the scrap paper balers and paper box compactors meet the American National Standards Institute's Standard ANSI Z245.5–1990 for scrap paper balers and Standard ANSI Z245.2–1992 for paper box compactors; or

(II) the scrap paper balers and paper box compactors meet an applicable standard that is adopted by the American National Standards Institute after August 6, 1996, and that is certified by the Secretary to be at least as protective of the safety of minors as the standard described in subclause (I);

(ii) the scrap paper balers and paper box compactors include an on-off switch incorporating a key-lock or other system and the control of the system is maintained in the custody of employees who are 18 years of age or older;

(iii) the on-off switch of the scrap paper balers and paper box compactors is maintained in an off position when the scrap paper balers and paper box compactors are not in operation; and

(iv) the employer of 16- and 17-year-old employees provides notice, and posts a notice, on the scrap paper balers and paper box compactors stating that—

(I) the scrap paper balers and paper box compactors meet the applicable standard described in clause (i);

(II) 16- and 17-year-old employees may only load the scrap paper balers and paper box compactors; and

(III) any employee under the age of 18 may not operate or unload the scrap paper balers and paper box compactors.

The Secretary shall publish in the Federal Register a standard that is adopted by the American National Standards Institute for scrap paper balers or paper box compactors and certified by the Secretary to be protective of the safety of minors under clause (i)(II).

(C)(i) Employers shall prepare and submit to the Secretary reports—

(I) on any injury to an employee under the age of 18 that requires medical treatment (other than first aid) resulting from the employee's contact with a scrap paper baler or paper box compactor during the loading, operation, or unloading of the baler or compactor; and

(II) on any fatality of an employee under the age of 18 resulting from the employee's contact with a scrap paper

baler or paper box compactor during the loading, operation, or unloading of the baler or compactor.

(ii) The reports described in clause (i) shall be used by the Secretary to determine whether or not the implementation of subparagraph (A) has had any effect on the safety of children.

(iii) The reports described in clause (i) shall provide—

(I) the name, telephone number, and address of the employer and the address of the place of employment where the incident occurred;

(II) the name, telephone number, and address of the employee who suffered an injury or death as a result of the incident;

(III) the date of the incident;

(IV) a description of the injury and a narrative describing how the incident occurred; and

(V) the name of the manufacturer and the model number of the scrap paper baler or paper box compactor involved in the incident.

(iv) The reports described in clause (i) shall be submitted to the Secretary promptly, but not later than 10 days after the date on which an incident relating to an injury or death occurred.

(v) The Secretary may not rely solely on the reports described in clause (i) as the basis for making a determination that any of the employers described in clause (i) has violated a provision of section 212 of this title relating to oppressive child labor or a regulation or order issued pursuant to section 212 of this title. The Secretary shall, prior to making such a determination, conduct an investigation and inspection in accordance with section 212(b) of this title.

(vi) The reporting requirements of this subparagraph shall expire 2 years after August 6, 1996.

(6) In the administration and enforcement of the child labor provisions of this chapter, employees who are under 17 years of age may not drive automobiles or trucks on public roadways. Employees who are 17 years of age may drive automobiles or trucks on public roadways only if—

(A) such driving is restricted to daylight hours;

(B) the employee holds a State license valid for the type of driving involved in the job performed and has no records of any moving violation at the time of hire;

(C) the employee has successfully completed a State approved driver education course;

(D) the automobile or truck is equipped with a seat belt for the driver and any passengers and the employee's employer has instructed the employee that the seat belts must be used when driving the automobile or truck;

(E) the automobile or truck does not exceed 6,000 pounds of gross vehicle weight;

(F) such driving does not involve—

(i) the towing of vehicles;

(ii) route deliveries or route sales;

(iii) the transportation for hire of property, goods, or passengers;

(iv) urgent, time-sensitive deliveries;

(v) more than two trips away from the primary place of employment in any single day for the purpose of delivering goods of the employee's employer to a customer (other than urgent, time-sensitive deliveries);

(vi) more than two trips away from the primary place of employment in any single day for the purpose of transporting passengers (other than employees of the employer);

(vii) transporting more than three passengers (including employees of the employer); or

(viii) driving beyond a 30 mile radius from the employee's place of employment; and

(G) such driving is only occasional and incidental to the employee's employment.

For purposes of subparagraph (G), the term "occasional and incidental" is no more than one-third of an employee's worktime in any workday and no more than 20 percent of an employee's worktime in any workweek.

(7)(A)(i) Subject to subparagraph (B), in the administration and enforcement of the child labor provisions of this chapter, it shall not be considered oppressive child labor for a new entrant into the workforce to be employed inside or outside places of business where machinery is used to process wood products.

(ii) In this paragraph, the term "new entrant into the workforce" means an individual who—

(I) is under the age of 18 and at least the age of 14, and

(II) by statute or judicial order is exempt from compulsory school attendance beyond the eighth grade.

(B) The employment of a new entrant into the workforce under subparagraph (A) shall be permitted—

(i) if the entrant is supervised by an adult relative of the entrant or is supervised by an adult member of the same religious sect or division as the entrant;

(ii) if the entrant does not operate or assist in the operation of power-driven woodworking machines;

(iii) if the entrant is protected from wood particles or other flying debris within the workplace by a barrier appropriate to the potential hazard of such wood particles or flying debris or by maintaining a sufficient distance from machinery in operation; and

(iv) if the entrant is required to use personal protective equipment to prevent exposure to excessive levels of noise and saw dust.

(d) Delivery of newspapers and wreathmaking

The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

(e) Maximum hour requirements and minimum wage employees

The provisions of section 207 of this title shall not apply with respect to employees for whom the Secretary of Labor is authorized to establish minimum wage rates as provided in section 206(a)(3) of this title, except with respect to employees for whom such rates are in effect; and with respect to such employees the

Secretary may make rules and regulations providing reasonable limitations and allowing reasonable variations, tolerances, and exemptions to and from any or all of the provisions of section 207 of this title if he shall find, after a public hearing on the matter, and taking into account the factors set forth in section 206(a)(3) of this title, that economic conditions warrant such action.

(f) Employment in foreign countries and certain United States territories

The provisions of sections 206, 207, 211, and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462) [43 U.S.C. 1331 et seq.]; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.

(g) Certain employment in retail or service establishments, agriculture

The exemption from section 206 of this title provided by paragraph (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross

volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated).

(h) Maximum hour requirement: fourteen workweek limitation

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who—

(1) is employed by such employer—

(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 207 of this title.

(i) Cotton ginning

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

(j) Processing of sugar beets, sugar beet molasses, or sugar cane

The provisions of section 207 of this title shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any period of fifty-two consecutive weeks to any employee who—

(1) is engaged in the processing of sugar beets, sugar beet molasses, or sugar cane into sugar (other than refined sugar) or syrup; and

(2) receives for any such employment during such workweeks—

(A) in excess of ten hours in any workday, and

(B) in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed. No week included in any fifty-two week period for purposes of the preceding sentence may be included for such purposes in any other fifty-two week period.

29 C.F.R. § 779.372 NONMANUFACTURING ESTABLISHMENTS WITH CERTAIN EXEMPT EMPLOYEES UNDER SECTION 13(b)(10).

(a) *General.* A specific exemption from only the overtime pay provisions of section 7 of the Act is provided in section 13(b)(10) for certain employees of nonmanufacturing establishments engaged in the business of selling automobiles, trucks, farm implements, trailers, boats, or aircraft. Section 13(b)(10)(A) states that the provisions of section 7 shall not apply with respect to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." Section 13(b)(10)(B) states that the provisions of section 7 shall not apply with respect to "any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers." This exemption will apply irrespective of the annual dollar volume of sales of the establishment or of the enterprise of which it is a part.

(b) *Character of establishment and employees exempted.* (1) An establishment will qualify for this exemption if the following two tests are met:

(i) The establishment must not be engaged in manufacturing; and

(ii) The establishment must be primarily engaged in the business of selling

automobiles, trucks, or farm implements to the ultimate purchaser for section 13(b)(10)(A) to apply. If these tests are met by an establishment the exemption will be available for salesmen, partsmen and mechanics, employed by the establishment, who are primarily engaged during the work week in the selling or servicing of the named items. Likewise, the establishment must be primarily engaged in the business of selling trailers, boats, or aircraft to the ultimate purchaser for the section 13(b)(10)(B) exemption to be available for salesmen employed by the establishment who are primarily engaged during the work week in selling these named items. An explanation of the term "employed by" is contained in §§779.307 through 779.311. The exemption is intended to apply to employment by such an establishment of the specified categories of employees even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership.

(2) This exemption, unlike the former exemption in section 13(a)(19) of the Act prior to the 1966 amendments, is not limited to dealerships that qualify as retail or service establishments nor is it limited to establishments selling automobiles, trucks, and farm

implements, but also includes dealers in trailers, boats, and aircraft.

(c) *Salesman, partsman, or mechanic.* (1) As used in section 13(b)(10)(A), a salesman is 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. As used in section 13(b)(10)(B), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of trailers, boats, or aircraft that the establishment is primarily engaged in selling. Work performed incidental to and in conjunction with the employee's own sales or solicitations, including incidental deliveries and collections, is regarded as within the exemption.

(2) As used in section 13(b)(10)(A), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.

(3) As used in section 13(b)(10)(A), a mechanic is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive, truck, or farm implement mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile, truck or farm implement for its use and operation as such. This includes mechanical work required for safe operation, as an automobile, truck, or farm implement. The term does not include employees primarily performing such nonmechanical work as washing, cleaning,

painting, polishing, tire changing, installing seat covers, dispatching, lubricating, or other nonmechanical work. Wrecker mechanic means a service department mechanic who goes out on a tow or wrecking truck to perform mechanical servicing or repairing of a customer's vehicle away from the shop, or to bring the vehicle back to the shop for repair service. A tow or wrecker truck driver or helper who primarily performs nonmechanical repair work is not exempt.

(d) *Primarily engaged.* As used in section 13(b)(10), primarily engaged means the major part or over 50 percent of the salesman's, partsman's, or mechanic's time must be spent in selling or servicing the enumerated vehicles. As applied to the establishment, primarily engaged means that over half of the establishment's annual dollar volume of sales made or business done must come from sales of the enumerated vehicles.