No. _____

In the
Supreme Court of the United States

ENCINO MOTORCARS, LLC,

Petitioner,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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May 10, 2017

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). In its first decision in this case, the Ninth Circuit found Respondents non-exempt by deferring to a 2011 Department of Labor regulation. This Court granted certiorari, considered merits briefing and argument, and vacated that decision, holding that "§213(b)(10)(A) must be construed without placing controlling weight on the Department's 2011 regulation." Pet.App.44.

On remand, the Ninth Circuit once again found Respondents non-exempt. As it had in its initial vacated decision, the Ninth Circuit acknowledged that its holding conflicts with published 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. Pet.App.30, 65.

As it was last time around, 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.

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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PETITION FOR WRIT OF CERTIORARI

This petition presents, for the second time, the question whether "service advisors" at car dealerships are exempt from the mandatory-overtime requirements of the Fair Labor Standards Act ("FLSA"). Respondents are service advisors whose primary job responsibilities include identifying service needs and selling service solutions to the dealership's customers. Their duties include "listening to [customers'] concerns about their cars; suggesting repair and maintenance services; selling new accessories or replacement parts; [and] recording service orders." Pet.App.32. Service advisors are an integral part of the servicing process and are the salesmen dedicated to the servicing business at their dealerships.

The 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 had uniformly held that service advisors like Respondents were covered by §213(b)(10)(A)'s 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).

Relying on that unbroken line of precedent, the district court dismissed Respondents' complaint. Pet.App.76-85. But the Ninth Circuit reversed, deferring to the Department of Labor's ("DOL") narrow interpretation of §213(b)(10)(A) under which

service advisors were not exempt because they did not *personally* sell or service automobiles. Pet.App.55-73.

This Court granted certiorari, considered merits briefing and argument, and vacated and remanded the Ninth Circuit's decision. Pet.App.31-45. The Court held that DOL's regulation was not entitled to deference because the agency had changed its previous policy regarding service advisors without "reasoned explanation." Pet.App.43. In particular, the Court emphasized that DOL had provided "barely any explanation" for its change of policy and had utterly failed to consider "decades of industry reliance on [DOL's] prior policy." Pet.App.42. The Court remanded the case to the Ninth Circuit with instructions to construe the exemption in §213(b)(10)(A) "without placing controlling weight on [DOL's] 2011 regulation." Pet.App.44. In addition, two Justices would have definitively construed the statute to hold service advisors exempt. *See* Pet.App.49-54 (Thomas, J., dissenting).

On remand, the same panel of the Ninth Circuit reached the same conclusion for largely the same reasons. Pet.App.1-30. While acknowledging that service advisors came within the "literal" terms of the exemption, the Ninth Circuit found them non-exempt for "the reasons stated in [its] earlier opinion (except those reasons concerning deference to the agency)." Pet.App.30. Just as it had done in its previous decision, the Ninth Circuit relied heavily on a purported canon of construction under which exemptions to the FLSA must be interpreted "narrowly" rather than being interpreted in accordance with their plain or literal text. Pet.App.20-

21. The court explicitly acknowledged that its decision "conflicts with published decisions by the Fourth and Fifth Circuits and by the Supreme Court of Montana." Pet.App.30.

* * *

Certiorari is plainly warranted to resolve the ongoing circuit conflict over whether service advisors are exempt under §213(b)(10)(A). Indeed, Respondents' principal (albeit unsuccessful) argument against certiorari the last time around was that DOL's 2011 regulation was a game-changer that was not available to the Fourth and Fifth Circuits, and thus the "courts are not divided on whether DOL's 2011 legislative regulation warrants *Chevron* deference." Br. in Opp. at 10, *Encino Motorcars v. Navarro*, No. 15-415 (Dec. 4, 2015) ("BIO"). Now that the 2011 DOL regulation and issues of deference are off the table, no one can seriously dispute what the Ninth Circuit has twice expressly acknowledged: the decision below squarely conflicts with the decisions of several other circuit courts, state supreme courts, and federal district courts.

It is unsurprising that the Ninth Circuit's interpretation of §213(b)(10)(A) is an outlier, as it badly misconstrues the statutory text. Congress' use of the disjunctive "or" in the phrase "primarily engaged in selling or servicing automobiles" makes clear that a salesman is exempt if he is "engaged in" *either* of those activities, which a service advisor plainly is. Every other court to consider this issue has correctly recognized that the phrase "primarily engaged in … servicing automobiles" encompasses service advisors who are engaged in the selling of the

servicing of automobiles even though they do not go under the hood and *personally* perform the service.

The Ninth Circuit's departure from nearly four decades of precedent injects uncertainty into a previously settled area of the law, and will have serious consequences for the nation's 18,000 car and truck dealerships, which collectively employ tens of thousands of service advisors. As this Court observed, "[d]ealerships and service advisors negotiated and structured their compensation plans against [the] background understanding" that service advisors were exempt from FLSA overtime rules. Pet.App.42. If allowed to stand, the Ninth Circuit's decision would require a wholesale (and wholly unwarranted) restructuring of those employees' compensation, forcing 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 attempts to impose significant FLSA liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. *See, e.g.*, *Integrity Staffing Sols. v. Busk*, 135 S. Ct. 513 (2014) (rejecting novel FLSA claims for time spent in security screenings); *Christopher v. SmithKline Beecham*, 567 U.S. 142 (2012) (rejecting FLSA claims by pharmaceutical sales representatives, who had long been treated as exempt); *see also Yi v. Sterling Collision Ctrs.*, 480 F.3d 505, 510 (7th Cir. 2007) (rejecting novel FLSA challenge to a "system of compensation [that] … is industry-wide, and of long standing"). The attempt here should fare no better. This Court should grant certiorari to correct the Ninth

Circuit's deeply flawed interpretation of §213(b)(10)(A) and restore uniformity once and for all to this important area of the law.

OPINIONS BELOW

The Ninth Circuit's opinion on remand is reported at 845 F.3d 925 and reproduced at Pet.App.1-30. The Court's previous merits opinion in this case is reported at 136 S. Ct. 2117 and reproduced at Pet.App.31-54. The Ninth Circuit's initial decision is reported at 780 F.3d 1267 and reproduced at Pet.App.55-73. The district court's opinion is unpublished and is reproduced at Pet.App.76-85.

JURISDICTION

The Ninth Circuit issued its opinion on remand on January 9, 2017. On April 3, 2017, Justice Kennedy extended the time for filing this petition to May 10, 2017. *See* No. 16A9. 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, are reproduced at Pet.App.86-110.

STATEMENT OF THE CASE

A. The "Salesman, Partsman, or Mechanic" Exemption and DOL's Shifting Interpretations

1. The FLSA generally requires 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 forty in a week. 29 U.S.C. §207(a)(1). Accompanying these overtime-pay requirements are numerous exemptions for certain

types of employees. *See id.* §213(a), (b). The exemptions range from very broad (all employees of certain rail carriers and air carriers, *id.* §213(b)(2), (3)) to very narrow (employees "engaged in the processing of maple sap into sugar," *id.* §213(b)(15)).

As relevant here, 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." *Id.* §213(b)(10)(A); *see* Pub. L. No. 89-601, 80 Stat. 830 (1966). In other words, a dealership employee is exempt from the overtime rules if he: (1) is a "salesman, partsman, or mechanic," and (2) is "primarily engaged in selling or servicing automobiles."

2. In 1970, the Secretary of Labor promulgated interpretive regulations that sought to define several terms in §213(b)(10)(A). *See* 29 C.F.R. §779.372 (1971); 35 Fed. Reg. 5856, 5895-96 (Apr. 9, 1970). Those regulations defined "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 [vehicles]." 29 C.F.R. §779.372(c)(1) (1971).[1] DOL further asserted that

[1] The regulation defined a "partsman" as "any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts." 29 C.F.R. §779.372(c)(2) (1971). It also defined a "mechanic" as "any employee primarily engaged in doing mechanical work … in the

"[e]mployees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsman, or mechanic … are not exempt." *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, numerous courts uniformly rejected the agency's narrow interpretation of the exemption in the course of rejecting DOL enforcement actions. Most significantly, the Fifth Circuit flatly rejected DOL's position and held that service advisors were exempt. *See Deel Motors*, 475 F.2d at 1097-98. DOL had 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. 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, with regard to the purpose of the exemption, the Fifth Circuit noted that "service salesmen are functionally

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servicing of an automobile, trailer, truck, farm implement, or aircraft for its use and operation as such." *Id.* §779.372(c)(3).

similar to the mechanics and partsmen who service the automobiles." *Id.* at 1097. All of these employees "work as an integrated unit, performing the services necessary for the maintenance of the customer's automobile." *Id.* And like countless other salesmen who are exempt from FLSA's overtime rules, service advisors "are more concerned with their total work product than with the hours performed." *Id.* The Fifth Circuit thus concluded that service advisors were exempt under §213(b)(10)(A).[2]

3. Within a few years of the Fifth Circuit's decision in *Deel Motors*, DOL ceased bringing enforcement actions and retreated from the position advanced in its 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 (July 28, 1978) (acknowledging that "[t]his position represents a change from the position set forth in" the 1970 regulations).

DOL's 1987 Field Operations Handbook similarly instructed agency employees to "no longer deny the [overtime] exemption for [service advisors]." Dep't of

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[2] In 1974, one year after the decision in *Deel Motors*, Congress made other changes to the §213(b)(10)(A) exemption by, for example, narrowing the exemption for trailer, boat, and aircraft dealerships. *See* Pub. L. No. 93-259, §14, 88 Stat. 55, 65 (1974). But, notably, Congress did not make any comparable changes for other types of dealerships, nor did it purport to modify or override the Fifth Circuit's interpretation of the statute in *Deel Motors*.

Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04-4 (Oct. 20, 1987), *available at* perma.cc/5ghd-kcjj. 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 "this 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.*

"[A]s soon as is practicable" turned out to be not very soon. The 1970 interpretive regulations with their repudiated interpretation of §213(b)(10)(A) remained on the books until 2008, when DOL initiated a formal rulemaking process to update the regulations to confirm that service advisors are exempt from the overtime-pay requirements. *See* Updating Regulations Issued Under the FLSA, 73 Fed. Reg. 43,654 (July 28, 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; *Brennan*, 1975 WL 1074, at *3). DOL's notice of proposed rulemaking included a

[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 Brennan v. N. Bros. Ford*, No. 40344, 1975 WL 1074, at *3 (E.D. Mich. 1975), *aff'd sub nom. Dunlop v. N. Bros. Ford*, 529 F.2d 524 (6th Cir. 1976) (Table).

modified version of 29 C.F.R. §779.372(c)(4) that would have codified this unbroken line of case law.

In 2011, however, DOL changed course yet again. It issued a final rule that neither adopted the proposed regulation nor brought the regulation in line with the governing case law. *See* Updating Regulations Issued Under the FLSA, 76 Fed. Reg. 18,832, 18,859 (Apr. 5, 2011). DOL maintained the 1970 regulation's definition of "salesman," *see* 29 C.F.R. §779.372(c)(1), but simultaneously eliminated from its regulations any explicit discussion of whether service advisors were covered by the §213(b)(10)(A) exemption, *see* 76 Fed. Reg. at 18,859.[4] In its explanation accompanying the final rule, DOL said nothing at all about the substantial reliance interests the new rule would upset. Instead, it merely stated 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.

B. 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

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[4] At oral argument before this Court, counsel for the United States represented that the elimination of any reference to service advisors in the regulations represented "an inadvertent mistake in drafting." Tr. of Oral Arg. at 50, *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117 (2016) (No. 15-415).

a complaint alleging several violations of the FLSA and California Labor Code.

Respondents' sales activities were integral to the process of servicing vehicles at the dealership. The complaint alleges that, as service advisors, Respondents would meet and greet car owners as they entered the service area; evaluate the 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 preventive maintenance); prepare price estimates for repairs and services; and inform the owner about the status of the vehicle. *See* Complaint ¶16 (DN 2). And, like countless other salesmen in both vehicle dealerships and other industries, Respondents were paid by commission. *Id.* ¶¶18-19.[5] The more services an advisor sold, the higher his or her commission. *Id.* In short, Respondents were primarily engaged in selling the servicing of automobiles.

Respondents alleged that they often worked more than 40 hours per week, and that Petitioner violated the FLSA by failing to pay them time-and-one-half overtime compensation for that excess time. *Id.* ¶¶24-31. 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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[5] Some dealerships pay their service advisors a combination of salary or hourly wages and commissions, whereas other dealerships (like Petitioner) pay service advisors solely by commission.

On January 25, 2013, the district court granted Petitioner's motion to dismiss the FLSA claims, holding that Respondents were clearly covered by the overtime-pay exemption in §213(b)(10)(A). Pet.App.76-85. The district court began by noting that several other courts "have applied this exemption to Service Advisors." Pet.App.80 (citing *Deel Motors*, 475 F.2d at 1097; *Walton*, 370 F.3d at 453).

The district court acknowledged that DOL had stated in 1970 and again in 2011 that §213(b)(10)(A) did not apply to service advisors. *Id.* But the court refused to defer to those interpretations, agreeing with the Fourth and Fifth Circuits that DOL's interpretations were an "impermissibly restrictive construction of the statute." Pet.App.83 (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.* (emphasis added). 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 district court thus dismissed Respondents' claim for overtime under the FLSA on the ground that they were exempt under §213(b)(10)(A).[6]

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

C. The Ninth Circuit's Initial Decision

The Ninth Circuit reversed in relevant part. In an opinion by Judge Graber issued on March 24, 2015, the court held that service advisors are not exempt from the FLSA's overtime-pay requirements under §213(b)(10)(A). Pet.App.55-73.

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.60 (quoting *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir. 2014)). 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.61 (quoting *Solis v. Washington*, 656 F.3d 1079, 1083 (9th Cir. 2011)).

The Ninth Circuit also disagreed with the district court's refusal to give DOL deference. The Ninth Circuit believed that there were two "plausible" interpretations of the phrase "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles"—one that extends to service advisors, and one that does not—and thus concluded that the exemption is ambiguous under *Chevron* step one. Pet.App.60-65. Turning to *Chevron*'s second step, the Ninth Circuit concluded that it was reasonable for DOL to interpret the exemption so that salesmen are exempt if they are "engaged in selling ... automobiles," but not if they (like service advisors) are "engaged in ... servicing automobiles." Pet.App.65-73.

The Ninth Circuit acknowledged that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana." Pet.App.65-66 (citing *Walton*, 370 F.3d 446; *Deel Motors*, 475 F.2d 1095; *Thompson*, 294 P.3d 397). But the court "respectfully disagree[d] with those decisions." Pet.App.66. The Ninth Circuit 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.[7]

D. This Court's Merits Decision

This Court granted certiorari in January 2016, and—after merits briefing and oral argument—vacated the Ninth Circuit's decision in an opinion issued on June 20, 2016. Pet.App.31-54. The Court did not directly address whether service advisors were exempt under the plain text of §213(b)(10)(A). Instead, the Court held that the Ninth Circuit erred by "placing controlling weight on the Department's 2011 regulation." Pet.App.44. As the Court explained, even though DOL's regulation starkly departed from more than three decades of settled law, the agency "said almost nothing" about why it had made that change. Pet.App.43. In particular, the agency wholly disregarded "decades of industry reliance on the Department's prior policy," and the fact that

[7] 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.58 n.2. And 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.*

"[d]ealerships and service advisors negotiated and structured their compensation plans against this background understanding" of what the law means. Pet.App.42.

The Court thus vacated the Ninth Circuit's decision and remanded for further consideration of the issue "without placing controlling weight on the Department's 2011 regulation." Pet.App.44. Justices Thomas and Alito agreed that no deference was owed to the DOL regulation but dissented from the decision to remand. They would have held that "service advisors are salesmen primarily engaged in the selling of services for automobiles" and thus fall within the plain text of the exemption in §213(b)(10)(A). Pet.App.49.

E. The Ninth Circuit on Remand Again Departs From Every Other Court To Consider The Scope of §213(b)(10)(A)

On remand, the Ninth Circuit again held that §213(b)(10)(A)'s exemption does not apply to service advisors. Pet.App.1-30.[8]

The Ninth Circuit conceded that, "read literally," the exemption "encompasses" a category of employee that readily describes service advisors: "Salesm[e]n primarily engaged in servicing" cars. Pet.App.16-18. The court nonetheless rejected that "literal" reading of the statute. First, relying on dictionaries from the year of the provision's initial enactment, the court

[8] The court "assume[d] without deciding that [it] must give no weight to the agency's interpretation and the regulation," and was instead required to "'interpret the statute in the first instance.'" Pet.App.7 (quoting Pet.App.44-45).

read §213(b)(10)(A)—which exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles"—to exempt *only* those salesmen, partsmen, and mechanics who either "are actually and primarily occupied in selling cars" or "are actually and primarily occupied in the repair and maintenance of cars." Pet.App.15. The court further interpreted that "actually and primarily occupied in" requirement—which does not appear in the statutory text—to mean that a salesman, partsman, or mechanic must *personally* sell cars or *personally* "perform[] any repairs []or provide[] any maintenance" in order to be exempt under §213(b)(10)(A). Pet.App.12-15.

The Ninth Circuit also concluded that the "literal" reading of the statute produced results that Congress would not have intended. "Read literally," §213(b)(10)(A) encompasses six categories of employees—(1) salesmen, (2) partsmen, and (3) mechanics primarily engaged in selling cars; and (4) salesmen, (5) partsmen, and (6) mechanics primarily engaged in servicing cars—two of which (categories 2 and 3) "do not exist in the real world." Pet.App.16-17. The court thus concluded that Congress must have intended for "the gerunds—selling and servicing—to be distributed" only to those subjects the court deemed "appropriate." Pet.App.16-18.

The court believed that the legislative history confirmed its reading of the exemption. According to the Ninth Circuit, both the 1966 Congress and 1974 Congress understood the term "salesman" to refer "*only* to [employees] 'selling' *goods*," not services. Pet.App.27 (second emphasis added); *see* Pet.App.23

n.17. The court also found no relevant "references to service advisors" in the legislative history, "suggest[ing] that dealerships had no concern about overtime compensation for service advisors." Pet.App.25.

Finally, just as in its first opinion, the Ninth Circuit relied on the purported "rule that the exemptions in §213 of the FLSA 'are to be narrowly construed against the employers seeking to assert them.'" Pet.App.20 (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)). While acknowledging that "some members of the Supreme Court have questioned the soundness of the rule of narrow construction," the court deemed itself bound to reject Petitioner's textual interpretation in light of the atextual narrow-interpretation canon of construction. Pet.App.20-21.

The Ninth Circuit thus reaffirmed its initial holding that §213(b)(10)(A) does not apply to service advisors. The court readily admitted that its decision "conflicts with published decisions by the Fourth and Fifth Circuits and by the Supreme Court of Montana." Pet.App.30. The court brushed aside that unbroken string of authority, however, "for the reasons stated above and for the reasons stated in [its] earlier opinion (except those reasons concerning deference to the agency)." *Id.*

REASONS FOR GRANTING THE PETITION

Even more obviously than the last time around (now that any issue of deference to the 2011 regulation is off the table), this case presents an excellent vehicle for this Court to resolve an acknowledged split of authority over whether the tens of thousands of

"service advisors" who work at vehicle dealerships across the country are exempt from the FLSA's overtime-pay requirements. The Court should once again grant certiorari to resolve the exempt status of service advisors.

I. Despite being afforded a second chance to harmonize its law with all other published authority, the Ninth Circuit doubled down on its outlying conclusion that service advisors are not exempt from the FLSA's overtime-pay requirements. As it did in its previous decision, the Ninth Circuit acknowledged that its interpretation of §213(b)(10)(A) conflicts with *every other court* to consider the issue, including the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana. Pet.App.30, 65.

That the Ninth Circuit's decision is an outlier should come as no surprise, since the court below badly misconstrued §213(b)(10)(A). As even the Ninth Circuit acknowledged, the literal text of the exemption applies to service advisors, who are unquestionably "salesm[e]n … primarily engaged in … servicing automobiles." Service advisors are salesmen primarily engaged in *selling the servicing* of automobiles, and they certainly are not primarily engaged in anything *other* than selling or servicing automobiles. Having first evaded the literal text by a misguided invocation of deference, the Ninth Circuit's latest effort to escape the literal text by reliance on a mishmash of legislative history and purported canons of narrow construction fares no better, and certainly cries out for this Court's review.

II. The Ninth Circuit's erroneous interpretation of §213(b)(10)(A) will have far-reaching implications

for the nation's 18,000 franchised car and truck dealerships, which employ tens of thousands of service advisors. As this Court has already recognized, "[d]ealerships and service advisors negotiated and structured their compensation plans against this background understanding" that service advisors were exempt from the FLSA's overtime rules. Pet.App.42. Yet the Ninth Circuit's decision would require a wholesale reworking of the service advisor position, to the detriment of dealerships and employees alike. Moreover, by injecting into the statute an artificial requirement that a service advisor *personally* service automobiles, the decision below improperly calls into question the exempt status of partsmen, many of whom do not personally service automobiles.

Lack of uniformity is especially troubling in the FLSA context because of the availability of nationwide FLSA collective actions. Because plaintiffs may file collective action claims in the most plaintiff-friendly forum, the Ninth Circuit's decision will likely become the *de facto* nationwide rule for any dealership that has operations within the Ninth Circuit. Certiorari is plainly warranted to restore national uniformity to this important area of the law.

I. The Ninth Circuit's Decision Conflicts With The Decisions Of Several Other Courts And Is Wrong On The Merits.

A. The Ninth Circuit's Decision Openly Conflicts With Decisions of the Fourth and Fifth Circuits and the Montana Supreme Court.

Despite being granted a second chance by this Court to eliminate an acknowledged circuit split, the Ninth Circuit dug in and entrenched the split by again holding that service advisors are not exempt from the FLSA's overtime-pay requirements. Just as in its initial opinion, Pet.App.65, the Ninth Circuit acknowledged in its post-remand opinion that its interpretation of §213(b)(10)(A) "conflicts with published decisions by the Fourth and Fifth Circuits and by the Supreme Court of Montana." Pet.App.30. But unlike its first opinion, which relied on DOL's 2011 regulation, which was not available to the Fourth and Fifth Circuits, the Ninth Circuit's latest decision unambiguously parts company with the statutory analysis of every other court to consider the issue. *See id.* There is no serious dispute that the lower courts are squarely divided over the meaning of §213(b)(10)(A).

1. In *Walton v. Greenbrier Ford*, 370 F.3d 446, 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 that needed to be p[er]formed." *Id.* at 449.

Under the plain text of §213(b)(10)(A), the Fourth Circuit concluded that service advisors were "salesm[e]n … primarily engaged in servicing automobiles." *Id.* at 453. Service advisors are an "integral part of the dealership's servicing of automobiles" because they are the "first line … service sales representative[s]." *Id.* at 452-53. Their role was to figure out what services the customer needed, prepare cost estimates, and sell both necessary repair services and supplemental services. *Id.* at 452. The court thus concluded that those employees were salesmen "primarily engaged in servicing automobiles." *Id.* at 453.

The Fourth Circuit also held that DOL's interpretation of the exemption in its 1970 interpretive regulation was "unreasonable" because it is "an impermissibly restrictive construction of the statute." *Id.* at 452. Under DOL's view, a salesman would be covered by the exemption only if he were primarily engaged in *selling vehicles*. But, as the Fourth Circuit explained, that interpretation effectively ignores the second half of the disjunctive clause "selling *or servicing* automobiles." 29 U.S.C. §213(b)(10)(A) (emphasis added). The court refused to defer to DOL's "restrictive regulatory definition" because it "unreasonably implements the congressional mandate." 370 F.3d at 452.

Similarly, in *Deel Motors*, 475 F.2d 1095, in the course of rejecting one of DOL's early enforcement actions, the Fifth Circuit squarely held that service advisors were exempt from the FLSA. Under the plain

text of the exemption, the court concluded that service advisors were "salesm[e]n … engaged in selling or servicing automobiles." *Id.* at 1098. And the court further noted that "service salesmen are functionally similar to the mechanics and partsmen who service the automobiles." *Id.* at 1097. All of these employees "work as an integrated unit, performing the services necessary for the maintenance of the customer's automobile." *Id.* And, like countless other salesmen 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.* The Fifth Circuit thus had little difficulty concluding that service advisors were exempt under §213(b)(10)(A).

Several other courts have reached the same conclusion. In *Thompson*, 294 P.3d 397, the Montana Supreme Court agreed with the Fourth and Fifth Circuits that §213(b)(10)(A)'s exemption covers service advisors. *Id.* at 402. The court concluded that "[a] plain, grammatical reading of 29 U.S.C. §213(b)(10)(A) makes clear that the term 'salesman' encompasses a broader category of employees than those only engaged in selling vehicles." *Id.* The court added that "[t]he 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." *Id.* (emphasis added).

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. *See, e.g.*, *Yenney v. Cass Cty. Motors*, No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977); *Brennan*

v. N. Bros. Ford, No. 40344, 1975 WL 1074 (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, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975). The district court here likewise held that service advisors were exempt. *See* Pet.App.76-85.

2. None of this was lost on the Ninth Circuit. It expressly acknowledged that its decision on remand "conflicts with" the decisions cited above. Pet.App.30. The Ninth Circuit had no choice but to acknowledge a split. Respondents perform the same job functions as the service advisors in the cases cited above, yet the Ninth Circuit (on "de novo review of congressional intent") found them to be non-exempt while every other court (on the basis of actual statutory text) has found them to be exempt. It is difficult to imagine a clearer example of "a decision in conflict with the decision of another United States court of appeals on the same important matter," and a decision that "conflicts with a decision by a state court of last resort." S. Ct. R. 10(a).

Indeed, when the case was last before this Court, Respondents' principal argument against plenary review was that there was no meaningful split of authority because the Fourth and Fifth Circuit decisions pre-dated DOL's 2011 regulation and did not apply the *Chevron* framework in analyzing the scope of §213(b)(10)(A). *See* BIO.10-11. But with both the 2011 regulation and questions of deference now off the table, there is simply no denying the existence of a square split of authority.

While a circuit split over the meaning of a federal statute would be undesirable under any circumstances, the need for a uniform rule in this context is particularly critical. The FLSA provides for nationwide collective actions "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. §216(b). Because of the availability of nationwide FLSA collective actions, the most plaintiff-friendly jurisdiction will often be able to establish the *de facto* substantive law that governs many employers throughout the entire country.

Indeed, there are hundreds of vehicle dealerships that operate at locations both within and outside the Ninth Circuit. As a result, even though the Ninth Circuit is the only court to have ever found service advisors to be non-exempt, that jurisdiction will likely become a forum of choice for plaintiffs seeking to challenge the exempt status of service advisors. One way or the other, the scope of a critical federal labor statute should not turn on the happenstance of the state in which a company is operating. Certiorari is warranted to restore a nationally uniform interpretation of §213(b)(10)(A).

B. The Ninth Circuit Badly Misconstrued Section 213(b)(10)(A).

That the Ninth Circuit is the only court to have found service advisors non-exempt should be no surprise: the decision below is unmoored from both the text and purpose of §213(b)(10)(A).

1. The FLSA exempts from the overtime-pay 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 only question is whether each Respondent is a "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* They plainly are, and the Ninth Circuit's reasons for holding otherwise do not withstand scrutiny.

A service advisor is the paradigmatic "salesman ... primarily engaged in ... servicing automobiles." According to Respondents' own complaint, their job duties included evaluating customers' service and repair needs; suggesting services to address specific problems with the vehicles; preparing cost estimates; and offering supplemental services such as preventative maintenance. *See* Complaint ¶16 (DN 2). In short, "service advisors are salesmen primarily engaged in the selling of services for automobiles." Pet.App.49 (Thomas, J., dissenting); *see also Walton*, 370 F.3d at 452-53 (service advisors exempt because they are an "integral part of the dealership's servicing of automobiles" and are the "first line … service sales representative[s]"). They are thus exempt under a straightforward textual interpretation of §213(b)(10)(A). Indeed, even the Ninth Circuit was forced to concede that service advisors come within the "literal" text of the exemption. Pet.App.16.

2. In again resisting the conclusion suggested by the plain text, the Ninth Circuit concluded that

despite the statute's disjunctive language—"any salesman, partsman, or mechanic primarily engaged in *selling or servicing* automobiles"—the exemption covers only salesmen who "are actually and primarily occupied in selling cars," and not salesmen "engaged in servicing" them. Pet.App.15, 19. That interpretation cannot be squared with the actual language of the statute.

The Ninth Circuit's interpretation flies in the face of the most basic rules of grammar and statutory construction. In interpreting a sentence with 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, there is no question that the term "or" in the phrase "salesman ... primarily engaged in selling or servicing" is disjunctive and that both gerunds can sensibly be applied to the noun "salesman." Thus, *both* parts of the disjunctive phrase "engaged in selling or servicing automobiles" can plainly be applied to the noun "salesman." That interpretation is further confirmed by Congress' use of the word "any" before "salesman," which suggests an "expansive meaning." *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

The Ninth Circuit itself acknowledged that, "[r]ead literally, the exemption encompasses … [s]alesm[e]n primarily engaged in servicing" automobiles. Pet.App.16. Yet the court departed from that straightforward, textual reading because, in addition to encompassing service advisors, the "literal" reading of §213(b)(10)(A) would also extend to partsmen and mechanics primarily engaged in selling cars—jobs that, according to the court, "do not exist in the real world." Pet.App.17.

But the theoretical possibility of such practically non-existent combinations is no excuse for declining to extend the exemption to all the noun-gerund combinations that actually exist in the real world. In implementing an instruction to feed hungry or barking cats or dogs, the non-existence of barking cats is no justification for leaving a plainly famished, but mute, dog unfed. So too in statutory construction. Where a particular theoretical combination of disjunctive nouns and gerunds produces a practical null set (*e.g.*, "partsm[e]n [or] mechanic[s] primarily engaged in selling … automobiles"), the null set, but not fundamental rules of grammar and statutory construction, can be safely ignored. Courts need not worry about the theoretical combinations because no case will raise the issue; partsmen and mechanics primarily engaged in selling cars "do not exist." Pet.App.17. But where, as here, the combinations are eminently sensible—*e.g.*, where a statutory combination reaches one of the tens of thousands of "salesm[e]n … primarily engaged in … servicing automobiles" currently at work in the United States—the "literal" reading must prevail. *See* Pet.App.52-53 (Thomas, J., dissenting) (rejecting Respondents'

"distributive canon" argument that selling is done only by salesmen and servicing is only done by mechanics).

3. Treating service advisors as non-exempt also makes little sense in the broader scheme of the FLSA. The FLSA contains numerous 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 by commission. *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 reflect the basic reality that it is both common and reasonable for salesmen 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 salesmen 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 salesmen—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. *Cf. Christopher*, 567 U.S. at 166 (noting that pharmaceutical sales representatives "are hardly the kind of employees that the FLSA was intended to protect").

The Ninth Circuit's interpretation also forces dealerships to differentiate among their employees in ways that are contrary to Congress' plain intent. Service advisors are in some sense a hybrid, since their job is to sell, but rather than sell cars, they sell services. If the salesforce were entirely exempt and the service staff (such as mechanics and partsmen) were entirely non-exempt, then the Ninth Circuit's rejection of the statute's "literal" reading might be reasonable. But here the Ninth Circuit has seized on the fact that service advisors are a hybrid between two *fully exempt* categories ("salesm[e]n" "primarily engaged … "servicing automobiles") as a ground for deeming them non-exempt. That interpretation is not just concededly atextual; it needlessly creates fissures among similar employees that Congress plainly did not intend.

None of the Ninth Circuit's various justifications for deviating from the statute's literal text holds water. As already demonstrated, the Ninth Circuit's textual analysis was flawed, and its policy concerns misplaced. *See supra* at 24-28. The Ninth Circuit also invoked legislative history to buttress its conclusion, Pet.App.22-30, but there is ample legislative history to the contrary, *see* Reply Br. for Pet'r at 16-20, *Encino Motorcars v. Navarro*, No. 15-415 (Apr. 13, 2016), and no justification for resorting to ambiguous legislative history to evade the literal text. *See Ratzlaf v. United States*, 510 U.S. 135, 147 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). The Ninth Circuit's final justification, the so-called canon favoring narrow interpretations of FLSA exemptions, is not only misguided, but a further justification for plenary review, as demonstrated next.

C. The Ninth Circuit Erred by Holding That FLSA Exemptions Should Be "Narrowly Construed."

The Ninth Circuit buttressed its untenable textual analysis by relying heavily on the purported canon of construction that "the exemptions in §213 of the FLSA 'are to be narrowly construed against the employers seeking to assert them.'" Pet.App.20 (quoting *Arnold*, 361 U.S. at 392). Although the court jettisoned the bulk of its citations from its earlier opinion, *compare* Pet.App.20-21, *with* Pet.App.60-62 & n.3, it again believed itself bound by circuit precedent under which employees must be treated as subject to the FLSA unless they "plainly and unmistakably" fall within an exemption. *Solis*, 656 F.3d at 1083.

That purported "rule of narrow construction" (Pet.App.20) is just an FLSA-specific variant of the now-repudiated 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"). And applying this misguided canon does nothing but guarantee extravagant results in FLSA cases. 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). Thus, in addition to addressing the circuit split concerning the meaning of §213(b)(10)(A), granting plenary review would give this Court an important opportunity to

clarify once and for all that the FLSA should be construed neither narrowly nor broadly, but fairly and correctly.

II. The Ninth Circuit's Erroneous Decision Will Have Far-Reaching Implications For Dealerships And Will Inject Uncertainty Into A Previously Settled Area Of The Law.

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 and truck dealerships employ tens of thousands of service advisors. As this Court has recognized, "[d]ealerships and service advisors negotiated and structured their compensation plans against this background understanding" that service advisors were exempt from the FLSA's overtime rules. Pet.App.42. Yet the Ninth Circuit has now concluded—again—that this entire arrangement has been unlawful for the last four decades.

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*, 567 U.S. at 158. 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.*, *Integrity Staffing*, 135 S. Ct. at 518-19 (rejecting novel attempt to impose FLSA liability for time spent in

security screenings); *Christopher*, 567 U.S. at 157, 161-169 (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"); *see also Yi*, 480 F.3d at 510-11 (rejecting FLSA challenge to a "system of compensation [that] … is industry-wide, and of long standing").

Those concerns are particularly acute given the regulatory history here. In the immediate wake of its 1970 interpretative rule, DOL pursued enforcement actions that produced an unbroken series of court losses for the agency, including the Fifth Circuit's *Deel Motors* decision and the Sixth Circuit's summary affirmance in *North Brothers Ford*. *See supra* at 8-10 & n.3. If those decisions had gone the other way, employment relationships in this sector would have developed very differently. But DOL not only lost those cases across the country but acquiesced in those decisions, thereby creating significant and well-justified reliance interests that accumulated over the ensuing decades.

The concerns with retroactively upsetting those expectations are at their zenith in cases like this and *Christopher* where the 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*, 567 U.S. at 166 (sales work was "difficult to standardize to any time frame," which "ma[de] compliance with the overtime provisions difficult"). And, of course, the Ninth Circuit's holding would force both service advisors and dealerships into compensation plans other than the ones they had voluntarily negotiated, 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 the Ninth Circuit's decision. Under the approach adopted by every other court to consider the issue, all sales employees are treated the same, *viz.*, as exempt. The Ninth Circuit's decision, however, would grant service advisors, but not other salespeople (or others engaged in providing service, such as partsmen or mechanics), a huge windfall, which cannot help but prove to be divisive. Thus, dealers would face the prospect of not only having to pay out damages retrospectively, but also needing to deal with anomalous divisions among their salesforces going forward. To make matters worse, the Ninth Circuit's conclusion that service advisors are not exempt because they do not *personally* service automobiles throws the long-settled treatment of partsmen—many, if not most, of whom do not personally service automobiles—into disarray.

All of those concerns are magnified by the reality, noted above, that the FLSA provides for nationwide collective actions. *See* 29 U.S.C. §216(b). As a consequence, the Ninth Circuit's decision will likely become the *de facto* nationwide rule for all dealerships that have at least some operations within the Ninth

Circuit. Thus, this is not a case in which further percolation of the relevant issues would be helpful or desirable. The far better course is to grant certiorari now to restore uniformity to this important area of the law and reaffirm what numerous courts have held since the 1970s—that service advisors are exempt from the FLSA's overtime rules under the plain text of 29 U.S.C. §213(b)(10)(A).

CONCLUSION

In sum, every consideration that led this Court to grant certiorari in this case last January remains fully applicable in light of the Ninth Circuit's decision to reaffirm its outlying treatment of service advisors as non-exempt. Indeed, the statutory issue is now presented more cleanly, and any possibility of the Ninth Circuit aligning its view with its sister circuits has been exhausted. This Court should once again grant review of the important question presented by this petition.

Respectfully submitted,

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May 10, 2017

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-55323

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

Plaintiffs-Appellants,

v.

ENCINO MOTORCARS, LLC, ERRONEOUSLY SUED AS MERCEDES BENZ OF ENCINO, A CORPORATION,

Defendant-Appellee.

On Remand from the
Supreme Court of the United States

Filed: January 9, 2017

Before: Susan P. Graber and
Kim McLane Wardlaw, Circuit Judges, and
James C. Mahan,* District Judge.

OPINION

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* The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

GRABER, Circuit Judge:

On remand from the Supreme Court, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), we must consider anew whether the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, requires automobile dealerships to pay overtime compensation to service advisors. The district court held that service advisors fall within the exemption from the overtime-compensation requirement for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles," *id.* § 213(b)(10)(A), on the ground that a service advisor is a "salesman . . . primarily engaged in . . . servicing automobiles." Because we conclude that Congress did not intend for the exemption to encompass service advisors, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

Defendant Encino Motorcars, LLC, sells and services new and used Mercedes-Benz automobiles.[1] Defendant employed or employs Plaintiffs Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, and Reuben Castro as "service advisors." Plaintiffs greet Mercedes-Benz owners as they arrive in the service area of the dealership; listen to customers' concerns about their cars; evaluate the repair and maintenance needs of the cars; suggest services to be performed to remedy the customers'

[1] Because the district court dismissed this case under Federal Rule of Civil Procedure 12(b)(6), we take the facts alleged in the complaint as true. *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247 (9th Cir. 2013).

concerns; suggest supplemental services beyond those that will remedy the customers' concerns; write up estimates; and, often, follow up with the customer while the repair work is underway to suggest further repairs and maintenance.

Plaintiffs allege that Defendant has violated the FLSA by failing to pay them overtime wages. The district court dismissed the claim, and Plaintiffs timely appealed.

We reversed. *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267 (9th Cir. 2015). We held that a regulation promulgated by the Department of Labor in 2011 reasonably interpreted the statutory exemption not to encompass service advisors. *Id.* at 1271-77. Applying the principles of agency deference described in *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), we deferred to the agency's interpretation. *Navarro*, 780 F.3d at 1277.

The Supreme Court granted certiorari and held that we erred by applying the *Chevron* framework. *Encino Motorcars*, 136 S. Ct. at 2124-27. The Court concluded that

> § 213(b)(10)(A) must be construed without placing controlling weight on the Department's 2011 regulation. Because the decision below relied on *Chevron* deference to this regulation, it is appropriate to remand for the Court of Appeals to interpret the statute in the first instance. *Cf. United States v. Mead Corp*, 533 U.S. 218, 238-39 (2001).

Id. at 2127 (citation format altered).

DISCUSSION

Congress enacted the FLSA in 1938 to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). To that end, 29 U.S.C. § 206 imposes a minimum wage requirement, and § 207 requires the payment of overtime compensation for hours exceeding a standard workweek. But not all workers are covered by the Act's provisions. Subsection 213(a) lists categories of employees who are exempt from both the minimum-wage and overtime-compensation requirements. Subsection 213(b) lists categories of employees who are exempt from the overtime-compensation requirement only.

In 1961, Congress amended § 213(a) to exempt from both the minimum-wage and overtime-compensation requirements all employees of automobile dealerships. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 65, 71. New paragraph (a)(19) exempted "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements." 29 U.S.C. § 213(a)(19) (1961); 75 Stat. at 71.

In 1966, Congress repealed § 213(a)(19) but added paragraph (b)(10). Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 208, 80 Stat. 830, 836. The new provision exempted only the following employees from the overtime-compensation requirement:

> any salesman, partsman, or mechanic primarily engaged in selling or servicing

> automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers.

29 U.S.C. § 213(b)(10) (1966). In effect, unless a separate exemption applied, the 1966 amendments narrowed the 1961 exemption and required dealerships to pay a minimum wage to all employees and to pay overtime compensation to all employees except those listed in § 213(b)(10).

In 1970, the Department of Labor issued a regulation defining the terms of § 213(b)(10). 29 C.F.R. § 779.372. The agency defined "salesman" to encompass only those salesmen who sold vehicles. *Id.* § 779.372(c)(1). Under the agency's interpretation, the exemption did not encompass service advisors. *Id.*; *see also id.* § 779.372(c)(4) (1970).

In 1974, Congress amended § 213(b)(10) to its present-day form to exclude from the overtime-compensation requirement the following employees:

> (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[.]

29 U.S.C. § 213(b)(10) (2016); Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, 88 Stat. 55, 61. The 1974 amendments had no effect on the text pertinent to car dealerships—the same exemptions as in 1966 continued to apply.

In 1978, the Department of Labor issued an opinion letter stating that, contrary to the agency's regulation, service advisors were exempt under 29 U.S.C. § 213(b)(10)(A). Dep't of Labor, Wage & Hour Div., Opinion Letter No. 1520 (WH-467), 1978 WL 51403 (July 28, 1978). In 1987, the agency amended its Field Operations Handbook along the same lines, stating in an Insert that the agency would "no longer deny the [overtime] exemption" for service advisors. Dep't of Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04-4(k) (Oct. 20, 1987).

In 2008, the Department of Labor proposed to amend its formal regulation—which had remained the same since 1970 despite the agency's shift in position—to conform to its practice of allowing the exemption for service advisors. Updating Regulations Issued Under the Fair Labor Standards Act, 73 Fed. Reg. 43,654-01 (July 28, 2008). After receiving public comments, however, the agency issued a final rule in 2011 that reaffirmed the agency's original position: service advisors are not exempt under 29 U.S.C. § 213(b)(10)(A). 76 Fed. Reg. 18,832-01 (Apr. 5, 2011).[2]

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[2] The Secretary of Labor has informed us that, also in 2011, the agency amended its Field Operations Handbook by removing the

The parties dispute whether we owe deference to the Secretary of Labor's interpretation that the statute does not exempt service advisors. Plaintiffs argue that deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), is appropriate. Defendant urges us to give no weight to the agency's interpretation. We decline to resolve this dispute because, as we explain below, the answer does not affect the outcome. Instead, we assume without deciding that we must give no weight to the agency's interpretation and the regulation, and we "interpret the statute in the first instance."[3] *Encino Motorcars*, 136 S. Ct. at 2127.

The FLSA exempts from the overtime-compensation requirement "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). Defendant is an automobile dealership within the meaning of the exemption. We limit our discussion to the exemption's coverage of employees of an automobile dealership. Thus, the

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1987 Insert, thus reverting to its original enforcement practice. Brief for Sec'y of Labor as Amicus Curiae Supporting Plaintiffs-Appellants at 5 n.1.

[3] We do so out of an abundance of caution. If we have misunderstood the Court's instructions and are permitted or required to consider *Skidmore* deference, then we conclude that such deference is appropriate. Although the agency held a contrary position in intervening years, we find the agency's present reasoning persuasive and thorough. Moreover, the agency's current position is identical to the position that it took in 1970—shortly after enactment of the 1966 amendments.

relevant statutory passage is: "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles."

Unless defined by the FLSA, we consider the "ordinary, contemporary, common meaning" of the terms at the time that Congress added the relevant clause—1966. *Perrin v. United States*, 444 U.S. 37, 42 (1979). To determine the common meaning, we consult dictionaries and other sources in use in 1966. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002-04 (2012). For an understanding of job descriptions, we look to the 1966-1967 edition of the Department of Labor, Bureau of Statistics, Occupational Outlook Handbook ("OOH"). *See, e.g.*, *United States v. Charles*, 722 F.3d 1319, 1324 (11th Cir. 2013) (consulting the Occupational Outlook Handbook).

We proceed as follows. First, we conclude that, under the most natural reading of the statute, Congress did not intend to exempt service advisors. Second, even if the text were ambiguous, the legislative history confirms that Congress intended to exempt only salesmen selling cars, partsmen servicing cars, and mechanics servicing cars. Congress did not intend to exempt service advisors.

A. Statutory Text

1. "Any Salesman, Partsman, or Mechanic"

In 1966, Congress repealed the exemption for *all employees* of an automobile dealership and replaced it with a limited exemption for only *three specific vocations*: salesmen, partsmen, and mechanics. Then, as today, many different types of employees—including service advisors—worked at automobile

dealerships. The Occupational Outlook Handbook listed many common vocations. Among those categories of workers that one might have expected to find at automobile dealerships in 1966, three job titles—emphasized below—clearly align with the three job titles exempted by Congress:

- Automobile body repairmen
- **Automobile mechanics**
- Automobile painters
- **Automobile parts countermen**
- **Automobile salesmen**
- Automobile service advisors
- Automobile upholsterers
- Bookkeeping workers
- Cashiers
- Janitors
- Purchasing agents
- Shipping and receiving clerks

OOH at XIII-XVIII (Table of Contents).

Hence, looking only at the statutory exemption's list of job titles, service advisors were excluded. Congress' choice to exempt three—not four—job titles suggests that service advisors are not exempt. If, as Defendant posits, Congress intended to exempt service advisors, it could have included "service advisors" in the statutory list. In sum, the most natural reading of the exemption is that Congress exempted only three commonly understood job titles—automobile salesmen, partsmen, and mechanics—and Congress therefore excluded service advisors.

It is possible to read the exemption's list of job titles more broadly, to encompass all persons whose functional roles meet the dictionary definitions of the terms "salesman," "partsman," or "mechanic."[4] A service advisor can be considered to sell services. Accordingly, if we read the exemption's list of job titles broadly, a service advisor qualifies, in a generic sense, as a "salesman."[5]

But even assuming that Congress intended a broad interpretation of the term "salesman," not every "salesman" is exempt; the statute covers only those who are "primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). We therefore

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[4] We give the term "any" no significance. The term "any" "do[es] not broaden the ordinary meaning" of the word it modifies. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 93 (2006). That principle applies with special force here. Both before and after the 1966 amendments to the FLSA, each of the 33 exemptions in § 213(a) and § 213(b) began with the term "any." *See* 29 U.S.C. § 213(a)(1)-(22) (1965) (beginning with "any"); *id.* § 213(b)(1)-(11) (1965) (same); *id.* § 213(a)(1)-(14) (1967) (same); *id.* § 213(b)(1)-(19) (1967) (same). The word "any" was plainly a drafting convention, not an expression of congressional intent that we interpret a particular exemption expansively.

[5] *See* Random House Dictionary of the English Language ("Random House") 1262 (1966) (defining "salesman" as "a man who sells goods, services, etc."); Webster's Third New International Dictionary ("Webster's Third") 2003 (1965) ("one employed to sell goods or services either within a given territory or in a store"); 9 Oxford English Dictionary ("OED") 50 (1933) ("A man whose business it is to sell goods or conduct sales"); *see also* American Heritage Dictionary of the English Language ("American Heritage") 1144 (1st ed. 1969) ("A man employed to sell merchandise in a store or in a designated territory").

consider next whether service advisors primarily engage in selling or servicing cars.

2. "Primarily Engaged in Selling or Servicing Automobiles"

A service advisor clearly is not a "salesman . . . primarily engaged in selling . . . automobiles." That category encompasses salesmen selling a particular good—cars. It does not cover salesmen selling other goods and, critically, it does not cover salesmen selling services. Service advisors may be salesmen of a sort, but they do not qualify as salesmen primarily engaged in selling cars because they do not sell cars.

We turn, then, to whether service advisors are "primarily engaged in . . . servicing automobiles." We begin with the contemporary meaning, in 1966, of the statute's terms. "Primarily" means "essentially; mostly; chiefly; principally."[6] "To be engaged in" an activity means "to occupy oneself; become involved" in the activity.[7] In the context of an automobile dealership, to "service" means to "supply[]

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[6] Random House at 1142; *accord* 8 OED at 1358 ("In the first place, first of all, pre-eminently, chiefly, principally; essentially."); *see also* American Heritage at 1039 ("Chiefly; principally").

[7] Random House at 473; *accord* 8 OED at 174 ("to enter upon or employ oneself in an action"); Webster's Third at 751 ("to employ or involve oneself"; "to take part"); *see also* American Heritage at 433 ("To involve oneself or become occupied; participate").

maintenance and repair."[8] Thus, to be "primarily engaged in . . . servicing automobiles" means to "occupy oneself principally in maintaining and repairing cars."

Whether we look to the contemporaneous dictionary definitions or to the terms of the phrase itself, the phrase most naturally encompasses only those who are actually occupied in the repair and maintenance of cars—the partsmen and mechanics who, for example, repair defective brakes or flush the transmission. A service advisor neither performs any repairs nor provides any maintenance. Instead, a service advisor "wait[s] on customers who bring their automobiles in for maintenance and repairs." OOH at 314. The service advisor "confers with the customer to determine his service needs, and arranges for a mechanic to do the work." *Id.* Accordingly, service advisors are not primarily engaged in servicing automobiles.[9]

Defendant suggests that we adopt a more expansive definition, one that encompasses all employees who are "integral" to the customer's overall experience of having a car serviced. Supp. Brief for Defendant-Appellee at 14 (filed Aug. 16, 2016). The statutory text is arguably flexible enough to accommodate Defendant's suggestion. Using the

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[8] Random House at 1304; *accord* Webster's Third at 2075 ("to repair or provide maintenance for"); *see also* American Heritage at 1185 ("To make fit for use; adjust; repair; maintain").

[9] Service advisors may occasionally perform simple repairs or maintenance tasks before the mechanic takes over. But Defendant does not contend that Plaintiffs spend a significant amount of time on those minor tasks.

dictionary definitions most favorable to Defendant, the exemption encompasses those principally "involved" in "supplying maintenance and repair." If one interprets "supplying" to mean "the overall process of supplying," then service advisors can be said, in a general sense, to be "primarily engaged in . . . servicing automobiles."

But the fact "[t]hat a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense." *Taniguchi*, 132 S. Ct. at 2003. Defendant's interpretation represents a considerable stretch of the ordinary meaning of the statute's words. We usually do not say that we primarily engage in an activity that we do not perform personally (and that we may lack the skills to perform). We typically say that we primarily engage in an activity only if we actually undertake the activity, at least in part. For example, a receptionist-scheduler at a dental office fields calls from patients, matching their needs (e.g., a broken tooth or jaw pain) with the appropriate provider, appointment time, and length of anticipated service. That work is integral to a patient's obtaining dental services, but we would not say that the receptionist-scheduler is "primarily engaged in" cleaning teeth or installing crowns. Similarly, an automobile salesman who sells custom-made cars is integral to a purchaser's receiving a specialized car, but we ordinarily would not say that the salesman is primarily engaged in manufacturing cars.

Defendant nevertheless asserts that we must adopt its broad definition because a narrower interpretation would read "partsman" out of the

statute. Defendant contends that, because partsmen do not actually perform the repairs and maintenance, Congress must have intended to include all employees involved in the overall process of providing repair and maintenance services. We are unpersuaded.

The Occupational Outlook Handbook described the position of an "automobile parts counterman" who is employed by automobile dealers. OOH at 312-14. Parts countermen may spend some time selling parts to customers. *Id.* at 312. But parts countermen "employed by automobile and truck dealers . . . may spend most of their time supplying parts to mechanics employed by the dealer." *Id.*; *see also* Brief for Int'l Ass'n of Machinists and Aerospace Workers as Amicus Curiae Supporting Respondents in *Encino Motorcars*, 2016 WL 1388060, at *28 ("A partsman generally works at one of two counters: the back counter, which opens to the shop where the mechanics work or the front counter, which opens into the dealership to an area where customers may purchase accessories or parts that will not be installed by the dealership."). "By knowing how to use parts catalogs and by knowing the layout of the stockroom, he can readily find any one of several thousand items." OOH at 312. A parts counterman also uses specialized equipment to test parts, to determine interchangeability of parts, and to repair parts. *Id.* at 312-13.

Accordingly, Defendant's premise is wrong: Partsmen "may repair parts, using equipment such as brake riveting machines, brake drum lathes, valve refacers, and engine head grinders." OOH at 313. Under any definition, fixing a defective part qualifies as servicing a car. Partsmen also "may use

micrometers, calipers, fan-belt measurers, and other devices to measure parts for interchangeability. They may also use coil-condenser testers, spark plug testers, and other types of testing equipment to determine whether parts are defective." *Id.* at 312-13. Those hands-on tasks are qualitatively indistinguishable from—if not identical to—the work of a mechanic. Similarly, partsmen use their expert knowledge of parts, parts catalogs, and the stockroom to determine an appropriate replacement part and locate it for a mechanic—tasks that contribute directly to the actual repair of a car. Because most of the common tasks of a partsman easily meet the ordinary meaning of primarily engaging in servicing, we are not compelled to accept Defendant's broad interpretation of the exemption.[10]

In sum, we conclude that the phrase "primarily engaged in selling . . . automobiles" encompasses only those who are actually and primarily occupied in selling cars, and we conclude that the phrase "primarily engaged in . . . servicing automobiles" encompasses only those who are actually and primarily occupied in the repair and maintenance of cars. Because service advisors meet neither definition, the FLSA does not exempt service advisors.

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[10] It is true, of course, that partsmen may spend some time on tasks unrelated to the servicing of an automobile: They may clean the stockroom, or they may sell parts to the public, for example. But that fact poses no interpretive problem because the exemption covers only those who "primarily" service cars. If an individual partsman spends little time servicing cars, the exemption does not apply.

Our interpretive task could end here, with the words of the statute as commonly understood in 1966. But, to ensure that we have not overlooked a relevant way of reading § 213(b)(10)(A), we will examine that provision in light of applicable principles of statutory construction.

3. Principles of Statutory Interpretation

Our interpretation comports with a holistic reading of the statutory exemption. *See, e.g.*, *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) ("Courts have a duty to construe statutes, not isolated provisions." (internal quotation marks omitted)); *see also Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context . . . " (internal quotation marks omitted)). Read literally, the exemption encompasses six categories of employees:

Salesman primarily engaged in selling	Partsman primarily engaged in selling	Mechanic primarily engaged in selling
Salesman primarily engaged in servicing	Partsman primarily engaged in servicing	Mechanic primarily engaged in servicing

Three of the literal categories describe common employees at a dealership: salesmen selling cars, partsmen servicing cars, and mechanics servicing cars. A "salesman . . . primarily engaged in selling . . . automobiles" neatly describes a car salesman.[11] As

[11] "Automobile salesmen" were "important links between the makers and buyers of new cars, and between used car dealers and buyers." OOH at 309. "The automobile salesman spends much of his time waiting on customers," trying to make a sale. *Id.* at 310.

noted above, many parts countermen likely qualify as "partsm[e]n . . . primarily engaged in . . . servicing automobiles." And it is unassailable that most (if not all) automobile mechanics service cars.[12] The remaining three literal categories are: a "salesman . . . primarily engaged in . . . servicing automobiles," a "partsman . . . primarily engaged in selling . . . automobiles," and a "mechanic primarily engaged in selling . . . automobiles." Reading the exemption as a whole, we conclude that Congress did not intend to give meaning to those categories.

A salesman is naturally understood to be someone primarily engaged in selling. After all, he is a *sales*man, defined at the relevant time as "a man who *sells*." Random House at 1262 (emphasis added). It makes little sense, in ordinary speech, to describe a salesman who *primarily* engages in work activities *other than selling*.

Moreover, we know that Congress did not intend for us to give effect to all six literal categories. Read literally, the statute exempts partsmen and mechanics primarily engaged in selling cars, but those categories do not exist in the real world. Neither partsmen nor mechanics occupy themselves regularly, let alone most of the time, with selling cars. By definition, they spend most of their time repairing cars, maintaining cars, repairing parts, determining interchangeability of parts, finding suitable replacement parts in the stockroom, and so on.

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[12] "Automobile mechanics keep the Nation's rising number of automobiles . . . in good running order. They do preventative maintenance, diagnose breakdowns, and make repairs." OOH at 477.

Congress indisputably did not intend to connect "partsman" and "mechanic" with "selling" automobiles; Congress intended to connect "partsman" and "mechanic" *only* with "servicing" automobiles.

Putting it all together, the most natural reading of the statute is that Congress intended the gerunds—selling and servicing—to be distributed to their appropriate subjects—salesman, partsman, and mechanic. A salesman sells; a partsman services; and a mechanic services.

At first blush, it may seem odd for Congress to choose phrasing that, read literally, joins nouns with inapplicable verbs. But Congress sometimes makes that choice. *See, e.g.*, 16 U.S.C. § 742c(e) (referring to "the construction or repair of vessels lost, destroyed, or damaged" by an earthquake); *see also* Brief for Respondents in *Encino Motorcars*, 2016 WL 1298032, app. D (listing scores of statutory phrases using this distributive construction). Scholars and courts have recognized this method of distributive phrasing: "Where a sentence contains several antecedents and several consequents, courts read them distributively and apply the words to the subjects which, by context, they seem most properly to relate." 2A Norman Singer et al., Sutherland Statutes and Statutory Construction § 47:26 (7th ed. Supp. Nov. 2016); *see id.* at n.1 (collecting cases); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 214 (2012) ("Distributive phrasing applies each expression to its appropriate referent."); *id.* at 214-16 (describing cases that applied the principle).

The most natural reading of these statutes is not that Congress wanted to give legal effect to each literal category. Rather, Congress merely used expedient wording to avoid tedious repetition of surrounding text, with the expectation that courts would read the statutes sensibly. This statute provides a good example. Congress could have separated out the treatment of salesmen from the treatment of partsmen and mechanics. But that would have required repeating the "primarily engaged in" text, the list of vehicles— "automobiles, trailers, trucks, farm implements, or aircraft"— and the clause concerning employment at a dealership—"if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers." 29 U.S.C. § 213(b)(10) (1966). Instead, Congress trusted courts to recognize the obvious: Congress meant to exempt salesmen selling, not repairing, cars; and Congress meant to exempt partsmen and mechanics repairing, not selling, cars. Thus, the statute leaves only three categories of exempt employees:[13]

Salesman primarily engaged in selling	~~Partsman primarily engaged in selling~~	~~Mechanic primarily engaged in selling~~
~~Salesman primarily engaged in servicing~~	Partsman primarily engaged in servicing	Mechanic primarily engaged in servicing

[13] We address here only automobile dealerships. There is some suggestion in the legislative history that partsmen employed by farm-implement dealers were understood to sell farm implements. But we have found no suggestion—in the legislative history or otherwise—that automobile partsmen sell cars.

4. Narrow Construction of the FLSA's Exemptions

We find Defendant's expansive interpretation particularly implausible in light of the longstanding rule that the exemptions in § 213 of the FLSA "are to be narrowly construed against the employers seeking to assert them." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *accord Mitchell v. Ky. Fin. Co.*, 359 U.S. 290, 295 (1959) (holding that the principle of narrow construction of the FLSA's exemptions is "well settled"). We must apply exemptions only to "those [employees] plainly and unmistakably within [the FLSA's] terms." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). In order to conclude that § 213(b)(10)(A) encompasses service advisors, we would be required to do the opposite—construe the exemption broadly. We are bound by Supreme Court precedent to construe the exemption narrowly.

In recent years, the Supreme Court has acknowledged the rule of narrow construction with respect to the exemptions listed in § 213, but the Court has held that the rule does not apply to interpretations of other provisions of the FLSA, such as the general definitions codified in § 203. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n.21 (2012). Because this case involves interpretation of terms appearing in § 213 and not defined in § 203, the Supreme Court's longstanding principle of narrow construction applies here. We recognize that some members of the Supreme Court have questioned the soundness of the rule of narrow construction. *E.g.*, *Encino Motorcars*, 136 S. Ct. at 2131 (Thomas, J.,

dissenting). But we may not disregard the Court's existing, binding precedent. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 1 (2016) (per curiam) ("It is this Court's prerogative alone to overrule one of its precedents." (internal quotation marks and brackets omitted)); *id.* ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." (internal quotation marks omitted)).[14]

In sum, we are convinced that Congress intended to exempt only salesmen selling cars, partsmen servicing cars, and mechanics servicing cars. We agree with Defendant that, under an expansive interpretation of the literal category of a "salesman . . . primarily engaged in . . . servicing automobiles," the statute could be construed as exempting service advisors. But in light of the ordinary meaning of the exemption's words and the rule that we must interpret exemptions narrowly, we find that interpretation implausible. We nevertheless assume that Defendant's interpretation creates an ambiguity. Accordingly, we examine legislative history below.

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[14] For the sake of judicial economy, we note that we would reach the same ultimate holding—that the exemption does not encompass service advisors—even if the rule of narrow construction did not apply. Defendant's interpretation creates, at most, an ambiguity. Because legislative history strongly suggests that Congress did not intend to exempt service advisors, our ultimate holding is the same, whether or not we apply the principle of narrow construction.

B. Legislative History

As we have noted, in 1966, Congress enacted new § 213(b)(10), exempting from the overtime-compensation requirement "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" at a dealership. During hearings before subcommittees of the House and the Senate, the National Automobile Dealership Association had sought an overtime exemption for two specific categories of employees: automobile salesmen and mechanics.[15] According to the Association, automobile salesmen and mechanics were well paid, and they often worked unusual hours; accordingly, overtime compensation would be both unnecessary and challenging to calculate. *1965 House Hearings* at 368-69; *1965 Senate Hearings* at 1237-38. The testimony was not new. The Association had given similar testimony in 1961, 1960, 1959, and 1957,[16] in response

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[15] *Minimum Wage-Hour Amendments: Hearings on H.R. 8259 Before the Gen. Subcomm. on Labor of the H. Comm. on Educ. & Labor*, 89th Cong. 366-77 (1965) ("*1965 House Hearings*") (statement of Sam H. White, Chairman, Govt'l Relations Comm., Nat'l Auto. Dealers Ass'n); *Amendments to the Fair Labor Standards Act: Hearings on S. 763 et al. Before the Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare*, 89th Cong. 1236-38 (1965) ("*1965 Senate Hearings*") (statement of Sam H. White, Chairman, Govt'l Relations Comm., Nat'l Auto. Dealers Ass'n).

[16] *Amendments to the Fair Labor Standards Act: Hearings on S. 256 et al. Before the Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare*, 87th Cong. 175-82 (1961) (statement of S.E. Kossman, Chairman, Nat'l Affairs Comm., Nat'l Auto. Dealers Ass'n); *Minimum Wage-Hour Legislation: Hearings Before the Subcomm. on Labor Standards of the H. Comm. on Educ. & Labor*, 86th Cong. 1391-94 (1960) ("*1960 House Hearings*") (statement of William J. Cleveland, Director, Nat'l Auto. Dealers

to earlier proposals for the FLSA to cover dealerships' employees. In sum, when the full Congress took up the proposal, the automobile-dealership industry had made clear its concerns about applying the overtime-compensation requirement to two specific categories of employees: automobile salesmen and mechanics.

The legislative history contains only one probative discussion by members of Congress: a debate in the Senate about whether to exempt partsmen in addition to automobile salesmen and mechanics. 112 Cong. Rec. 20,502-06 (1966). Everyone agreed that automobile salesmen[17] and mechanics

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Ass'n); *To Amend the Fair Labor Standards Act: Hearings on S. 25 et al. Before the Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare* , 86th Cong. 205-14 (1959) ("*1959 Senate Hearings*") (statement of William J. Cleveland, Nat'l Auto. Dealers Ass'n); *Fair Labor Standards Act: Hearings Before a Subcomm. of the H. Comm. on Educ. & Labor*, 85th Cong. 251-77 (1957) ("*1957 House Hearings*") (statement of Frederick M. Sutter, President, Nat'l Auto. Dealers Ass'n); *Proposals to Extend Coverage of Minimum Wage Protection: Hearings on S. 1135 et al. Before the Subcomm. on Labor of the S. Comm. on Labor & Pub. Welfare*, 85th Cong. 113-33 (1957) ("*1957 Senate Hearings*") (statement of Frederick J. Bell, Rear Admiral USN (Ret.), Executive Vice President, Nat'l Auto. Dealers Ass'n); *see also id.* at 1160-61 (letter dated Mar. 29, 1957, from the South Carolina Automobile Dealers Association, expressing similar sentiments).

[17] Notably, the Senators implicitly assumed that "salesman" referred to someone who sells cars. *See* 112 Cong. Rec. 20,504 ("[An amendment] would not affect the salesman. He can go out and sell an Oldsmobile, a Pontiac, or a Buick all day long and all night. He is not under any overtime." (statement of Sen. Yarborough)); *id.* ("The salesman tries to get people mainly after their hours of work. In some cases a man will leave his job, get his wife, and go to look at automobiles." (statement of Sen. Yarborough)); *id.* ("Salesmen . . . go out at unusual hours, trying to earn commissions." (statement of Sen. Bayh)). One

work irregular hours, sometimes away from the dealership. *See, e.g.*, *id.* at 20,504 ("Salesmen are a little different breed of cats, because they go out at unusual hours . . . ." (statement of Sen. Bayh)); *id.* ("My experience with automobiles has been that the mechanic goes out and answers calls in the rural areas." (statement of Sen. Yarborough)). The debate centered on whether the same was true of partsmen. Some Senators thought that partsmen had to work irregular hours and, accordingly, should also be exempt. *See, e.g.*, *id.* at 20,502 ("In many instances it is essential that partsmen work longer hours or at other than regular times. This is especially true in the farm equipment business . . . . Because of these factors, it would not be easy to place partsmen on a time-clock basis and to compute overtime compensation in an equitable manner." (statement of Sen. Bayh)); *id.* at 20,503 ("The partsman does occupy a significant and unusual position in the agricultural economy. He has to be available during the harvesting season—and before and after, to a lesser extent—at all hours of the day." (statement of Sen. Mansfield)). Other Senators thought that partsmen worked inside

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commentator has interpreted a passage by Senator Javits as implicitly mentioning service advisors as a form of salesman. Note, *Show Me the Money: On Whether Car Dealership Service Advisors Are Entitled to or Exempt From Overtime Pay Under the FLSA*, 91 Notre Dame L. Rev. 1707, 1731 (Apr. 2016). We draw the opposite inference from the transcript. Senator Javits noted that "the mechanic and the salesman [are] subject to call at any time that a fellow's car broke down." 112 Cong. Rec. 20,506. We read that comment to mean simply that, when one's car fails, there are two options—fix it (via a mechanic) or replace it (via a car salesman).

only and, accordingly, like all other ordinary employees of a dealership, should not be exempt. *See id.* at 20,504 ("The mechanics and the salesmen . . . do not get overtime because their work is outside. . . . The partsman works inside." (statement of Sen. Yarborough)); *id.* ("[A] partsman is an inside man. The reason for exempting the salesmen and the mechanics was the difficulty of their keeping regular hours." (statement of Sen. Yarborough)); *id.* at 20,505 ("[T]here is no excuse whatever for including partsmen in the overtime exemption, because the partsman, like the stenographer, would be working inside." (statement of Sen. Clark)). Nothing in the legislative record suggests that Congress thought that service advisors worked anything but ordinary business hours—to the extent that Congress thought about service advisors at all. *See* OOH at 314-17 (describing the work of service advisors without anywhere suggesting that they worked unusual hours).

The legislative history thus contains repeated, detailed concerns about applying the overtime-compensation requirement to automobile salesmen, partsmen, and mechanics. By contrast, Defendant does not direct us to any portion of the legislative history that reveals a similar concern for applying the overtime-compensation requirement to service advisors, and we have found none. To the contrary, the only references to service advisors that we have found suggest that dealerships had no concern about overtime compensation for service advisors.[18]

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[18] *See 1960 House Hearings* at 1393 (testimony by a Ford dealer from rural Louisiana, merely comparing the average pay at his

Viewed in light of the clear concerns about overtime compensation for automobile salesmen, partsmen, and mechanics, the legislative history's apparent silence on concerns about overtime pay for service advisors strongly suggests that Congress did not intend to exempt service advisors. If Congress meant for the exemption to encompass service advisors, we would expect that concern to be plain from—or at least mentioned in—the legislative record of the 1966 amendments.

In 1974, Congress amended paragraph (b)(10) to its present-day form. 29 U.S.C. § 213(b)(10) (2016); 88 Stat. at 61. The law created new subparagraph (b)(10)(A), which exempted "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, farm implements" and new subparagraph (b)(10)(B), which exempted "any salesman primarily engaged in selling trailers, boats, or aircraft."

Both the House and the Senate were provided with written summaries of the revised exemption. In the House, Representative Dent's report described the overall effect of the new § 213(b)(10)(A) & (B):

> Provides an overtime exemption for *any salesmen primarily engaged in selling*

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dealership with the average pay at dealerships in New Orleans for mechanics, painters, body repairmen, upholsterers, parts-department men, and "service salesmen [service advisors]"); *1959 Senate Hearings* at 208 (same); *1957 House Hearings* at 1188 (same); *1957 Senate Hearings* at 1160-61 (letter from the South Carolina Auto. Dealership Ass'n expressing no concern about paying overtime to its employees other than automobile salesmen and mechanics).

> *automobiles*, trailers, trucks, farm implements, boats, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers. Also provides an overtime exemption for partsmen and mechanics of automobile, truck, and farm implement dealerships.

120 Cong. Rec. 8602 (1974) (emphasis added). That summary makes clear that "salesman" applies *only* to "selling" goods. There is no mention of salesmen primarily engaged in servicing automobiles, even though the literal terms of the exemption could encompass that category. Instead, the summary applied only the verb "selling" to the subject "salesman."

In the Senate, Senator Williams' report described the changes between the then-existing exemption and the new § 213(b)(10)(A) & (B):

> [A]mends section 13(b)(10) relating to salesmen, partsmen, and mechanics by repealing the overtime exemption for partsmen and mechanics in nonmanufacturing establishments primarily engaged in selling trailers; by repealing the overtime exemption for partsmen and mechanics in nonmanufacturing establishments engaged in selling aircraft; and by providing an overtime exemption for salesmen engaged in the sale of boats.

120 Cong. Rec. 8763 (1974). That summary also makes clear that "salesman" applies *only* to "selling" goods. Reviewing the words of the statute literally, as

Defendant urges us to do, the amendment also repealed the exemption for salesmen primarily engaged in servicing trailers and aircraft. But the summary does not mention such an effect, strongly suggesting that Congress did not think that "salesman" connected to "servicing." Thus, the summaries of the 1974 amendments before the House and the Senate both understood the exemption to encompass only salesmen "selling," not salesmen "servicing."

So, too, did the National Automobile Dealers Association. During hearings before subcommittees of the House and the Senate, the Association submitted a prepared statement that urged Congress not to change § 213(b)(10) as it applied to salesmen, partsmen, and mechanics at automobile dealerships.[19] The statement explained that Congress' 1966 creation of the exemption in § 213(b)(1) "was a recognition of the fact that these categories of employees work long hours during peak periods, but receive high commissions, and, accordingly should not be subject to overtime requirements." *1970 House Hearings* at 109, 259. To prove the high-pay assertion, the statement then detailed the average earnings of "*all car and truck* salesmen," "mechanics," and "partsmen." *Id.* (emphasis added). To prove that salesmen, mechanics, and partsmen work long hours, the statement

[19] *To Amend the Fair Labor Standards Act: Hearings on H.R. 10948 and H.R. 17596 Before the Gen. Subcomm. on Labor of the H. Comm. on Educ. & Labor*, 91st Cong. 109-11, 259-61 (1970) ("*1970 House Hearings*"); *Fair Labor Standards Amendments of 1971: Hearings on S. 1861 and S. 2259 Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare*, 92nd Cong. 789-94 (1971) ("*1971 Senate Hearings*").

described each position. The paragraph describing salesmen plainly refers to persons who sell cars, not to service advisors. *Id.* The statement summarized:

> The primary purpose of minimum wage and overtime legislation is to take care of people who receive substandard salaries. As already noted, *automobile salesmen* average $10,036 per year, automobile mechanics average $5.00 per hour and partsmen average $3.42 per hour.

Id. (emphasis added).

As with the 1966 amendments, Defendant has not pointed us to any passage of the legislative history suggesting that Congress intended to exempt service advisors, and we have found none. To the contrary, the only reference to service advisors that we have found suggests that Congress had no concern about overtime compensation for service advisors.[20]

In sum, the legislative history of the 1966 amendments and of the 1974 amendments reveal clear concerns with applying the overtime-compensation requirement to exactly three categories of a dealership's employees: automobile salesmen, partsmen, and mechanics. The extensive legislative record—tens of thousands of pages spanning a decade and a half—contains hardly a mention of service advisors, and the few references that exist display no

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[20] We found only one portion of the legislative record that mentions a "service adviser." *1971 Senate Hearings* at 780-81. That testimony merely described what a service advisor does; it does not suggest that the exemption applied to service advisors. *Id.*

concern about overtime compensation for service advisors. We are firmly persuaded that Congress did not intend to exempt service advisors.

C. Conclusion

After a thorough, de novo review of congressional intent, we hold that the exemption in § 213(b)(10)(A) does not encompass service advisors. We acknowledge that our holding conflicts with published decisions by the Fourth and Fifth Circuits and by the Supreme Court of Montana. *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095 (5th Cir. 1973); *Thompson v. J.C. Billion, Inc.*, 294 P.3d 397 (Mont. 2013). We are unpersuaded by the analysis of those decisions for the reasons stated above and for the reasons stated in our earlier opinion (except those reasons concerning deference to the agency). *Navarro*, 780 F.3d at 1274-77.

This opinion addresses only Plaintiffs' federal claim for overtime compensation. For the reasons given in our earlier opinion, *id.* at 1270 n.2, we affirm the dismissal of all other federal claims, and we reverse the dismissal of the state-law claims.

AFFIRMED in part, REVERSED in part, and REMANDED. Costs on appeal awarded to Plaintiffs-Appellants.

Appendix B

SUPREME COURT OF THE UNITED STATES

No. 15-415

ENCINO MOTORCARS, LLC,
Petitioner,
v.
HECTOR NAVARRO, et al.,
Respondents.

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

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Decided: June 20, 2016

OPINION

JUSTICE KENNEDY delivered the opinion of the Court.

This case addresses whether a federal statute requires payment of increased compensation to certain automobile dealership employees for overtime work. The federal statute in question is the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, enacted in 1938 to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981). Among its other provisions, the

FLSA requires employers to pay overtime compensation to covered employees who work more than 40 hours in a given week. The rate of overtime pay must be "not less than one and one-half times the regular rate" of the employee's pay. § 207(a).

Five current and former service advisors brought this suit alleging that the automobile dealership where they were employed was required by the FLSA to pay them overtime wages. The dealership contends that the position and duties of a service advisor bring these employees within § 213(b)(10)(A), which establishes an exemption from the FLSA overtime provisions for certain employees engaged in selling or servicing automobiles. The case turns on the interpretation of this exemption.

I

A

Automobile dealerships in many communities not only sell vehicles but also sell repair and maintenance services. Among the employees involved in providing repair and maintenance services are service advisors, partsmen, and mechanics. Service advisors interact with customers and sell them services for their vehicles. A service advisor's duties may include meeting customers; listening to their concerns about their cars; suggesting repair and maintenance services; selling new accessories or replacement parts; recording service orders; following up with customers as the services are performed (for instance, if new problems are discovered); and explaining the repair and maintenance work when customers return for their vehicles. *See* App. 40-41; *see also Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1096 (CA5 1973); 29 CFR

§ 779.372(c)(4) (1971). Partsmen obtain the vehicle parts needed to perform repair and maintenance and provide those parts to the mechanics. *See* § 779.372(c)(2). Mechanics perform the actual repair and maintenance work. *See* § 779.372(c)(3).

In 1961, Congress enacted a blanket exemption from the FLSA's minimum wage and overtime provisions for all automobile dealership employees. Fair Labor Standards Amendments of 1961, § 9, 75 Stat. 73. In 1966, Congress repealed that broad exemption and replaced it with a narrower one. The revised statute did not exempt dealership employees from the minimum wage requirement. It also limited the exemption from the overtime compensation requirement to cover only certain employees—in particular, "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft" at a covered dealership. Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836. Congress authorized the Department of Labor to "promulgate necessary rules, regulations, or orders" with respect to this new provision. § 602, *id.*, at 844.

The Department exercised that authority in 1970 and issued a regulation that defined the statutory terms "salesman," "partsman," and "mechanic." 35 Fed. Reg. 5896 (1970) (codified at 29 CFR § 779.372(c)). The Department intended its regulation as a mere interpretive rule explaining its own views, rather than a legislative rule with the force and effect of law; and so the Department did not issue the regulation through the notice-and-comment procedures of the Administrative Procedure Act. *See*

35 Fed. Reg. 5856; *see also* 5 U.S.C. § 553(b)(A) (exempting interpretive rules from notice and comment).

The 1970 interpretive regulation defined "salesman" to mean "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 vehicles or farm implements which the establishment is primarily engaged in selling." 29 CFR § 779.372(c)(1) (1971). By limiting the statutory term to salesmen who sell vehicles or farm implements, the regulation excluded service advisors from the exemption, since a service advisor sells repair and maintenance services but not the vehicle itself. The regulation made that exclusion explicit in a later subsection: "Employees variously described as service manager, service writer, service advisor, or service salesman . . . are not exempt under [the statute]. This is true despite the fact that such an employee's principal function may be disagnosing [*sic*] 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." § 779.372(c)(4).

Three years later, the Court of Appeals for the Fifth Circuit rejected the Department's conclusion that service advisors are not covered by the statutory exemption. *Deel Motors*, *supra*. Certain District Courts followed that precedent. *See Yenney v. Cass County Motors*, 81 CCH LC ¶ 33,506 (Neb. 1977); *Brennan v. North Bros. Ford, Inc.*, 76 CCH LC ¶ 33,247 (ED Mich. 1975), *aff'd sub nom. Dunlop v.*

North Bros. Ford, Inc., 529 F.2d 524 (CA6 1976) (table); *Brennan v. Import Volkswagen, Inc.*, 81 CCH LC ¶ 33,522 (Kan. 1975).

In the meantime, Congress amended the statutory provision by enacting its present text, which now sets out the exemption in two subsections. Fair Labor Standards Amendments of 1974, § 14, 88 Stat. 65. The first subsection is at issue in this case. It exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements" at a covered dealership. 29 U.S.C. § 213(b)(10)(A). The second subsection exempts "any salesman primarily engaged in selling trailers, boats, or aircraft" at a covered dealership. § 213(b)(10)(B). The statute thus exempts certain employees engaged in servicing automobiles, trucks, or farm implements, but not similar employees engaged in servicing trailers, boats, or aircraft.

In 1978, the Department issued an opinion letter departing from its previous position. Taking a position consistent with the cases decided by the courts, the opinion letter stated that service advisors could be exempt under § 213(b)(10)(A). Dept. of Labor, Wage & Hour Div., Opinion Letter No. 1520 (WH-467) (1978), [1978-1981 Transfer Binder] CCH Wages-Hours Administrative Rulings ¶ 31,207. The letter acknowledged that the Department's new policy "represent[ed] a change from the position set forth in section 779.372(c)(4)" of its 1970 regulation. In 1987, the Department confirmed its 1978 interpretation by amending its Field Operations Handbook to clarify that service advisors should be treated as exempt under § 213(b)(10)(A). It observed that some courts

had interpreted the statutory exemption to cover service advisors; and it stated that, as a result of those decisions, it would "no longer deny the [overtime] exemption for such employees." Dept. of Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04-4(k)(Oct. 20, 1987), online at https://perma.cc/5GHD-KCJJ (all Internet materials as last visited June 16, 2016). The Department again acknowledged that its new position represented a change from its 1970 regulation and stated that the regulation would "be revised as soon as is practicable." *Ibid.*

Twenty-one years later, in 2008, the Department at last issued a notice of proposed rulemaking. 73 Fed. Reg. 43654. The notice observed that every court that had considered the question had held service advisors to be exempt under § 213(b)(10)(A), and that the Department itself had treated service advisors as exempt since 1987. *Id.*, at 43658-43659. The Department proposed to revise its regulations to accord with existing practice by interpreting the exemption in § 213(b)(10)(A) to cover service advisors.

In 2011, however, the Department changed course yet again. It announced that it was "not proceeding with the proposed rule." 76 Fed. Reg. 18833. Instead, the Department completed its 2008 notice-and-comment rulemaking by issuing a final rule that took the opposite position from the proposed rule. The new final rule followed the original 1970 regulation and interpreted the statutory term "salesman" to mean only an employee who sells automobiles, trucks, or farm implements. *Id.*, at 18859 (codified at 29 CFR § 779.372(c)(1)).

The Department gave little explanation for its decision to abandon its decades-old practice of treating service advisors as exempt under § 213(b)(10)(A). It was also less than precise when it issued its final rule. As described above, the 1970 regulation included a separate subsection stating in express terms that service advisors "are not exempt" under the relevant provision. 29 CFR § 779.372(c)(4) (1971). In promulgating the 2011 regulation, however, the Department eliminated that separate subsection. According to the United States, this change appears to have been "an inadvertent mistake in drafting." Tr. of Oral Arg. 50.

B

Petitioner is a Mercedes-Benz automobile dealership in the Los Angeles area. Respondents are or were employed by petitioner as service advisors. They assert that petitioner required them to be at work from 7 a.m. to 6 p.m. at least five days per week, and to be available for work matters during breaks and while on vacation. App. 39-40. Respondents were not paid a fixed salary or an hourly wage for their work; instead, they were paid commissions on the services they sold. *Id.*, at 40-41.

Respondents sued petitioner in the United States District Court for the Central District of California, alleging that petitioner violated the FLSA by failing to pay them overtime compensation when they worked more than 40 hours in a week. *Id.*, at 42-44. Petitioner moved to dismiss, arguing that the FLSA overtime provisions do not apply to respondents because service advisors are covered by the statutory exemption in

§ 213(b)(10)(A). The District Court agreed and granted the motion to dismiss.

The Court of Appeals for the Ninth Circuit reversed in relevant part. It construed the statute by deferring under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the interpretation set forth by the Department in its 2011 regulation. Applying that deference, the Court of Appeals held that service advisors are not covered by the § 213(b)(10)(A) exemption. 780 F.3d 1267 (2015). The Court of Appeals recognized, however, that its decision conflicted with cases from a number of other courts. *Id.,* at 1274 (citing, *inter alia*, *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446 (CA4 2004); *Deel Motors*, 475 F.2d 1095; *Thompson v. J. C. Billion, Inc.*, 368 Mont. 299, 294 P. 3d 397 (2013)). This Court granted certiorari to resolve the question. 577 U.S. ___ (2016).

II

A

The full text of the statutory subsection at issue states that the overtime provisions of the FLSA shall 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." § 213(b)(10)(A).

The question presented is whether this exemption should be interpreted to include service advisors. To resolve that question, it is necessary to determine what deference, if any, the courts must give to the Department's 2011 interpretation.

In the usual course, when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable. This principle is implemented by the two-step analysis set forth in *Chevron*. At the first step, a court must determine whether Congress has "directly spoken to the precise question at issue." 467 U.S., at 842. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.,* at 842-843. If not, then at the second step the court must defer to the agency's interpretation if it is "reasonable." *Id.,* at 844.

A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme. *See id.*, at 843-844; *United States v. Mead Corp.*, 533 U.S. 218, 229-230 (2001). When Congress authorizes an agency to proceed through notice-and-comment rulemaking, that "relatively formal administrative procedure" is a "very good indicator" that Congress intended the regulation to carry the force of law, so *Chevron* should apply. *Mead Corp.*, *supra*, at 229-230. But *Chevron* deference is not warranted where the regulation is

"procedurally defective"—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation. 533 U.S., at 227; *cf. Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174-176 (2007) (rejecting challenge to procedures by which regulation was issued and affording *Chevron* deference). Of course, a party might be foreclosed in some instances from challenging the procedures used to promulgate a given rule. *Cf., e.g., JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 324-326 (CADC 1994); *cf. also Auer v. Robbins*, 519 U.S. 452, 458-459 (1997) (party cannot challenge agency's failure to amend its rule in light of changed circumstances without first seeking relief from the agency). But where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation. Respondents do not contest the manner in which petitioner has challenged the agency procedures here, and so this opinion assumes without deciding that the challenge was proper.

One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). That requirement is satisfied when the agency's explanation is clear enough that its "path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281,

286 (1974). But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law. *See* 5 U.S.C. § 706(2)(A); *State Farm*, *supra*, at 42-43.

Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. *See*, *e.g.*, *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981-982 (2005); *Chevron*, 467 U.S., at 863-864. When an agency changes its existing position, it "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). But the agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Ibid.* (emphasis deleted). In explaining its changed position, an agency must also be cognizant that long standing policies may have "engendered serious reliance interests that must be taken into account." *Ibid.*; *see also Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742 (1996). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, *supra*, at 515-516. It follows that an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Brand X*, *supra*, at 981. An arbitrary and capricious regulation

of this sort is itself unlawful and receives no *Chevron* deference. *See Mead Corp.*, *supra*, at 227.

B

Applying those principles here, the unavoidable conclusion is that the 2011 regulation was issued without the reasoned explanation that was required in light of the Department's change in position and the significant reliance interests involved. In promulgating the 2011 regulation, the Department offered barely any explanation. A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry reliance on the Department's prior policy—the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position.

The retail automobile and truck dealership industry had relied since 1978 on the Department's position that service advisors are exempt from the FLSA's overtime pay requirements. *See* National Automobile Dealers Association, Comment Letter on Proposed Rule Updating Regulations Issued Under the Fair Labor Standards Act (Sept. 26, 2008), online at https://www.regulations.gov/#!documentDetail;D=WHD-2008-0003-0038. Dealerships and service advisors negotiated and structured their compensation plans against this background understanding. Requiring dealerships to adapt to the Department's new position could necessitate systemic, significant changes to the dealerships' compensation arrangements. *See* Brief for National Automobile Dealers Association et al. as *Amici Curiae* 13-14. Dealerships whose service advisors are not compensated in accordance with the Department's

new views could also face substantial FLSA liability, *see* 29 U.S.C. § 216(b), even if this risk of liability may be diminished in some cases by the existence of a separate FLSA exemption for certain employees paid on a commission basis, *see* § 207(i), and even if a dealership could defend against retroactive liability by showing it relied in good faith on the prior agency position, *see* § 259(a). In light of this background, the Department needed a more reasoned explanation for its decision to depart from its existing enforcement policy.

The Department said that, in reaching its decision, it had "carefully considered all of the comments, analyses, and arguments made for and against the proposed changes." 76 Fed. Reg. 18832. And it noted that, since 1978, it had treated service advisors as exempt in certain circumstances. *Id.*, at 18838. It also noted the comment from the National Automobile Dealers Association stating that the industry had relied on that interpretation. *Ibid.*

But when it came to explaining the "good reasons for the new policy," *Fox Television Stations*, *supra*, at 515, the Department said almost nothing. It stated only that it would not treat service advisors as exempt because "the statute does not include such positions and the Department recognizes that there are circumstances under which the requirements for the exemption would not be met." 76 Fed. Reg. 18838. It continued that it "believes that this interpretation is reasonable" and "sets forth the appropriate approach." *Ibid.* Although an agency may justify its policy choice by explaining why that policy "is more consistent with statutory language" than alternative policies, *Long*

Island Care at Home, 551 U.S., at 175 (internal quotation marks omitted), the Department did not analyze or explain why the statute should be interpreted to exempt dealership employees who sell vehicles but not dealership employees who sell services (that is, service advisors). And though several public comments supported the Department's reading of the statute, the Department did not explain what (if anything) it found persuasive in those comments beyond the few statements above.

It is not the role of the courts to speculate on reasons that might have supported an agency's decision. "[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S., at 43 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Whatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all. In light of the serious reliance interests at stake, the Department's conclusory statements do not suffice to explain its decision. *See Fox Television Stations*, 556 U.S., at 515-516. This lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law. *See* 5 U.S.C. § 706(2)(A); *State Farm*, *supra*, at 42-43. It follows that this regulation does not receive *Chevron* deference in the interpretation of the relevant statute.

* * *

For the reasons above, § 213(b)(10)(A) must be construed without placing controlling weight on the Department's 2011 regulation. Because the decision below relied on *Chevron* deference to this regulation,

it is appropriate to remand for the Court of Appeals to interpret the statute in the first instance. *Cf. Mead*, 533 U.S., at 238-239. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG with whom JUSTICE SOTOMAYOR joins, concurring.

I agree in full that, in issuing its 2011 rule, the Department of Labor did not satisfy its basic obligation to explain "that there are good reasons for [a] new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The Department may have adequate reasons to construe the Fair Labor Standards Act automobile-dealership exemption as it did. The 2011 rulemaking tells us precious little, however, about what those reasons are.[1]

I write separately to stress that nothing in today's opinion disturbs well-established law. In particular, where an agency has departed from a prior position, there is no "heightened standard" of arbitrary-and-

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[1] Unlike Justice Thomas, I am not persuaded that, sans *Chevron*, the Ninth Circuit should conclude on remand that service advisors are categorically exempt from hours regulations. As that court previously explained, "[s]ervice advisors may be 'salesmen' in a generic sense, but they [may fall outside the exemption because they] do not personally sell cars and they do not personally service cars." 780 F.3d 1267, 1274 (2015). Moreover, in its briefing before this Court, the Department of Labor responded to the argument that "the exemption's application to a 'partsman'" "confirm[s] that a service advisor is a salesman primarily engaged in servicing automobiles." *Post,* at 3-4 (Thomas, J, dissenting). *See* Brief for United States as *Amicus Curiae* 22-23 (maintaining that partsmen, unlike service advisors, actually engage in maintenance and repair work); Brief for Respondents 11 (contending that partsmen "ge[t] their hands dirty" by "work[ing] as a mechanic's right-hand man or woman"); *id.,* at 32-35 (cataloguing descriptions of partsmen responsibilities drawn from occupational handbooks and training manuals). The Court appropriately leaves the proper ranking of service advisors to the Court of Appeals in the first instance.

capricious review. *Id.*, at 514. *See also ante,* at 9. An agency must "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Fox*, 556 U.S., at 515 (emphasis deleted). "But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Ibid.*

The Court's bottom line remains unaltered: "'[U]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Ante*, at 10 (quoting *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981 (2005)). Industry reliance may spotlight the inadequacy of an agency's explanation. *See ante*, at 10 ("decades of industry reliance" make "summary discussion" inappropriate). But reliance does not overwhelm good reasons for a policy change. Even if the Department's changed position would "necessitate systemic, significant changes to the dealerships' compensation arrangements," *ante,* at 10, the Department would not be disarmed from determining that the benefits of overtime coverage outweigh those costs.[2] "If the action rests upon . . . an exercise of

[2] If the Department decides to reissue the 2011 rule, I doubt that reliance interests would pose an insurmountable obstacle. As the Court acknowledges, *ante,* at 11, an affirmative defense in the Fair Labor Standards Act (FLSA) protects regulated parties against retroactive liability for actions taken in good-faith reliance on superseded agency guidance, 29 U.S.C. § 259(a). And

judgment in an area which Congress has entrusted to the agency[,] of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

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a separate FLSA exemption covers many service advisors: retail or service workers who receive at least half of their pay on commission, so long as their regular rate of pay is more than 1½ times the minimum wage. *Ante,* at 11 (citing § 207(i)); *see* Brief for Petitioner 13, n. 4 (many service advisors are paid on a commission basis). Thus, the cost of the Department's policy shift may be considerably less than the dealerships project. Finally, I note, the extent to which the Department is obliged to address reliance will be affected by the thoroughness of public comments it receives on the issue. In response to its 2008 proposal, the Department received only conclusory references to industry reliance interests. *See ante,* at 10 (citing comment from National Automobile Dealers Association). An agency cannot be faulted for failing to discuss at length matters only cursorily raised before it.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

The Court granted this case to decide whether an exemption under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, "requires payment of increased compensation to certain automobile dealership employees"—known as service advisors—"for overtime work." *Ante*, at 1; *see also ante,* at 2, 7. The majority declines to resolve that question. Instead, after explaining why the Court owes no deference to the Department of Labor's regulation purporting to interpret this provision, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), the majority leaves it "for the Court of Appeals to interpret the statute in the first instance." *Ante,* at 12.

I agree with the majority's conclusion that we owe no *Chevron* deference to the Department's position because "deference is not warranted where [a] regulation is 'procedurally defective.'" *Ante,* at 8. But I disagree with its ultimate decision to punt on the issue before it. We have an "obligation . . . to decide the merits of the question presented." *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 472 (2008) (Thomas, J., dissenting). We need not wade into the murky waters of *Chevron* deference to decide whether the Ninth Circuit's reading of the statute was correct. We must instead examine the statutory text. That text reveals that service advisors are salesmen primarily engaged in the selling of services for automobiles. Accordingly, I would reverse the Ninth Circuit's judgment.

Federal law requires overtime pay for certain employees who work more than 40 hours per week.

§ 207(a)(2)(C). But the FLSA exempts various categories of employees from this overtime requirement. § 213. The question before the Court is whether the following exemption encompasses service advisors:

> "The provisions of section 207 of this title shall not apply with respect to—
>
> . . . . .
>
> "(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." § 213(b).

I start with the uncontroversial notion that a service advisor is a "salesman." The FLSA does not define the term "salesman," so "we give the term its ordinary meaning." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. ___, ___ (2012) (slip op., at 5). A "salesman" is someone who sells goods or services. 14 Oxford English Dictionary 391(2d ed. 1989) ("[a] man whose business it is to sell goods or conduct sales"); Random House Dictionary of the English Language 1262 (1966) (Random House) ("a man who sells goods, services, etc."). Service advisors, whose role it is to "interact with customers and sell them services for their vehicles," *ante,* at 2, are plainly "salesm[e]n." *See ibid.* (cataloguing sales-related duties of service advisors).

A service advisor, however, is not "primarily engaged in selling . . . automobiles." § 213(b)(10)(A).

On the contrary, a service advisor is a "salesman" who sells servicing solutions. *Ante,* at 2. So the exemption applies only if it covers *not only* those salesmen primarily engaged in selling automobiles *but also* those salesmen primarily engaged in servicing automobiles.

The exemption's structure confirms that salesmen could do both. The exemption contains three nouns ("salesman, partsman, or mechanic") and two gerunds ("selling or servicing"). The three nouns are connected by the disjunctive "or," as are the gerunds. So unless context dictates otherwise, a salesman can *either* be engaged in selling *or* servicing automobiles. *Cf. Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

Context does not dictate otherwise. A salesman, namely, one who sells servicing solutions, can be "primarily engaged in . . . servicing automobiles." § 213(b)(10)(A). The FLSA does not define the term "servicing," but its ordinary meaning includes both "[t]he action of maintaining or repairing a motor vehicle" and "the action of providing a service." 15 Oxford English Dictionary 39; see also Random House 1304 (defining "service" to mean "the providing . . . of . . . activities required by the public, as maintenance, repair, etc."). A service advisor's selling of service solutions fits both definitions. The service advisor is the customer's liaison for purposes of deciding what parts are necessary to maintain or repair a vehicle, and therefore is primarily engaged in "the action of maintaining or repairing a motor vehicle" or "the action of providing a service" for an automobile.

Other features of the exemption confirm that a service advisor is a salesman primarily engaged in servicing automobiles. Consider the exemption's application to a "partsman." Like a service advisor, a partsman neither sells vehicles nor repairs vehicles himself. *See* 29 CFR § 779.372(c)(2) (2015) (defining "partsman" as "any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts"). For the provision to exempt partsmen, then, the phrase "primarily engaged in . . . servicing" must cover some employees who do not themselves perform repair or maintenance. So "servicing" refers not only to the physical act of repairing or maintaining a vehicle but also to acts integral to the servicing process more generally.

Respondents' contrary contentions are unavailing. They first invoke the distributive canon: "Where a sentence contains several antecedents and several consequents," the distributive canon instructs courts to "read [those several terms] distributively and apply the words to the subjects which, by context, they seem most properly to relate." 2A N. Singer & S. Singer, Sutherland on Statutory Construction § 47.26, on p. 448 (rev. 7th ed. 2014). Respondents accordingly maintain that 29 U.S.C. § 213(b)(10)(A) exempts *only* salesmen primarily engaged in selling automobiles. Brief for Respondents 20-26. But the distributive canon is less helpful in cases such as this because the antecedents and consequents cannot be readily matched on a one-to-one basis. Here, there are three nouns to be matched with only two gerunds, so the canon does not overcome the exemption's plain meaning. Perhaps respondents might have a better argument if the statute exempted "salesman or

mechanics who primarily engage in selling or servicing automobiles." In such a case, one might assume that Congress meant the nouns and gerunds to match on a one-to-one basis, and the distributive canon could be utilized to determine how the matching should occur. But that is not the statute before us. For the reasons explained, *supra,* at 3-4, the plain meaning of the various terms in the exemption establish that the term "salesman" is not limited to only those who sell automobiles. It also extends to those "primarily engaged in . . . servicing automobiles." § 213(b)(10)(A).

Respondents also resist this natural reading of the exemption by invoking the made-up canon that courts must narrowly construe the FLSA exemptions. Brief for Respondents 41-42. The Ninth Circuit agreed with respondents on this score. 780 F.3d 1267, 1271-1272, n. 3 (2015). The court should not do so again on remand. We have declined to apply that canon on two recent occasions, one of which also required the Court to parse the meaning of an exemption in § 213. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. ___, ___-___, n. 21 (2012) (slip op., at 19-20, n. 21); *see also Sandifer v. United States Steel Corp.*, 571 U.S. ___, ___, n. 7 (2014) (slip op., at 11, n. 7). There is no basis to infer that Congress means anything beyond what a statute plainly says simply because the legislation in question could be classified as "remedial." *See* Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 581-586 (1990).Indeed, this canon appears to "res[t] on an elemental misunderstanding of the legislative process," viz., "that Congress intend[s] statutes to extend as far as possible in service of a

singular objective." Brief for Chamber of Commerce of the United States of America et al. as *Amici Curiae* 7.

* * *

For the foregoing reasons, I would hold that the FLSA exemption set out in § 213(b)(10)(A) covers the service advisors in this case. Service advisors are "primarily engaged in . . . servicing automobiles," given their integral role in selling and providing vehicle services. Accordingly, I would reverse the judgment of the Ninth Circuit.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-55323

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

Plaintiffs-Appellants,

v.

ENCINO MOTORCARS, LLC, ERRONEOUSLY SUED AS MERCEDES BENZ OF ENCINO, A CORPORATION,

Defendant-Appellee.

Argued: February 11, 2015
Filed: March 24, 2015

Before: Susan P. Graber and
Kim McLane Wardlaw, Circuit Judges,
and James C. Mahan,* District Judge.

OPINION

GRABER, Circuit Judge:

We consider here a question of first impression for our circuit: Are "service advisors" who work at a car

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* The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

dealership exempt from the overtime pay requirements of the Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 201-219, under 29 U.S.C. § 213(b)(10)(A), which exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles"? Reviewing de novo, *Fortyune v. City of Lomita*, 766 F.3d 1098, 1101 (9th Cir. 2014), *petition for cert. filed*, __U.S.L.W.__ (U.S. Jan. 26, 2015) (No. 14-920), we answer that question "no" and, accordingly, reverse the district court's holding to the contrary.

FACTUAL AND PROCEDURAL HISTORY

Defendant Encino Motorcars, LLC, sells and services new and used Mercedes-Benz automobiles.[1] Defendant employed or employs Plaintiffs Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, and Reuben Castro as "service advisors." The complaint alleges:

> The job duties and obligations of Service Advisors . . . are to meet and greet Mercedes Benz owners as they enter the service area of the dealership and then to evaluate the service and/or repair needs of the vehicle owner in light of complaints given them by these vehicle owners. Upon evaluation of the service deeds of the vehicle, the Service Advisors … then solicit and suggest[] that certain service[s] be conducted on the vehicle

[1] Because the district court dismissed this case under Federal Rule of Civil Procedure 12(b)(6), we take the facts alleged in the complaint as true. *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247 (9th Cir. 2013).

> to remedy the complaints of the vehicle owner by conducting certain repairs at [Defendant's dealership] and through [Defendant's] own mechanics. The Service Advisors … are also duty bound and obligated by [Defendant] to solicit and suggest that supplemental service be performed on the vehicle above and beyond that which is required in response to the initial complaints of the vehicle owner. The Service Advisors . . . then write up an estimate for the repairs and services and provide[] that to the vehicle owner. The vehicle is then taken to the mechanics at [Defendant] for repair and maintenance.
>
> As required by [Defendant] and oftentimes while the vehicle is with [Defendant's] mechanics, the Service Advisors . . . will then call the vehicle owner and solicit and suggest that additional work be performed on the vehicle at additional cost.

Defendant pays service advisors on a commission basis only; Plaintiffs receive neither an hourly wage nor a salary.

In 2012, Plaintiffs filed this action alleging, among other things, that Defendant has violated the FLSA by failing to pay overtime wages. The district court dismissed the overtime claim because, the court concluded, Plaintiffs fall within the FLSA's exemption for "any salesman, partsman, or mechanic primarily

engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). Plaintiffs timely appeal.[2]

DISCUSSION

Title 29 U.S.C. § 207(a)(1) requires that employers pay time-and-a-half for hours worked in excess of 40 per workweek. But § 213(b)(10)(A) provides that "[t]he provisions of section 207 of this title 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." Defendant, as a car dealership, is a "nonmanufacturing establishment primarily engaged in the business of selling . . . vehicles . . . to ultimate purchasers." *Id*. The question is whether each Plaintiff is a "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id*.

Plaintiffs argue that we must defer to the United States Department of Labor's 2011 regulatory definitions, set out at 29 C.F.R. § 779.372(c). 76 Fed. Reg. 18,832-01 (Apr. 5, 2011). Those regulations state, in relevant part:

Salesman, partsman, or mechanic.

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[2] The court dismissed Plaintiffs' other federal claims (claims 3, 5, and 7) on alternative grounds not challenged on appeal. For that reason, we affirm the court's dismissal of those claims. The court also exercised its discretion under 28 U.S.C. § 1367(c) to dismiss Plaintiffs' state-law claims for lack of supplemental jurisdiction. Because we reverse the dismissal of the overtime claim (claim I), we also reverse the dismissal of the state-law claims.

> (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 . . . .
>
> (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 . . . .

29 C.F.R. § 779.372(c). As the agency explained in 2011, the regulatory definitions "limit[] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." 76 Fed. Reg. at 18,838. Because Plaintiffs do not fit within any of those definitions, they are not exempt from the FLSA's overtime wage provisions. Defendant concedes that Plaintiffs do not meet the regulatory definitions, but counters that we should not defer to the regulation.

We conduct the familiar two-step inquiry to determine whether to defer to the agency's interpretation. *McMaster v. United States*, 731 F.3d

881, 889 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 160 (2014). "At step one, we ask 'whether Congress has directly spoken to the precise question at issue.'" *Id.* (quoting *Chevron*, *U.S.A, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). If so, then the inquiry is over, and we must give effect to the "unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. But if the statute is silent or ambiguous, then we must determine, before step two, what level of deference applies. *McMaster*, 731 F.3d at 889. "If we determine that *Chevron* deference applies, then we move to step two, where we will defer to the agency's interpretation if it is 'based on permissible construction of the statute'". *Id.* (quoting *Chevron*, 467 U.S. at 843).

A. At *Chevron* Step One, the Statute is Ambiguous.

When construing a congressional enactment, "our inquiry begins with the statutory text." *BedRoc Ltd. v. United States*, 541. U.S. 176, 183 (2004). In addition, in the present context we must apply the background rule that "[t]he FLSA is to be construed liberally in favor of employees; exemptions are narrowly construed against employers." *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir.), *cert. denied*, 135 S. Ct. 138 (2014). "FLSA exemptions . . . are to be withheld except as to persons plainly and unmistakably within their terms and spirit."[3] *Solis v.*

[3] The rule that courts should construe the FLSA's exemptions narrowly originated in *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). In recent years, the Supreme Court has clarified that the presumption applies only to the exemptions in § 213 and not more generally. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870,

Washington, 656 F.3d 1079, 1083 (9th Cir. 2011) (internal quotation marks omitted). "An employer who claims an exemption from the FLSA bears the burden of demonstrating that such an exemption applies." *Id.* (internal quotation marks omitted).

As noted, the statute exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). The statute does not define the terms "salesman, partsman, or mechanic." Examining the statutory text and applying canons of statutory interpretation, we cannot conclude that service advisors such as Plaintiffs are "persons plainly and unmistakably within [the FLSA's] terms and spirit," *Solis*, 656 F.3d at 1083 (internal quotation marks omitted).

It is plausible to read the term "salesman" broadly and to connect the term to "servicing automobiles"; that is, one could consider a service advisor to be a "salesman . . . primarily engaged in . . . servicing automobiles." But, as explained in more detail below, in Part C, it is at least as plausible to read the nouns 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. Service advisors do none of those things; they sell services for cars. They do not sell cars; they do not stock parts; and they do not perform mechanical work on cars.

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879 n.7 (2014); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n.21 (2012).

It is not clear from the text of the statute whether Congress intended broadly to exempt any salesman who is involved in the servicing of cars or, more narrowly, only those salesmen who are selling the cars themselves. Certainly Congress did not exempt all employees of a car dealership; for example, a bookkeeper who tracks invoices for car sales and servicing is plainly not exempt, nor is a secretarial employee who routes calls to the salesmen, partsmen, and mechanics. Nor do canons of statutory interpretation aid Defendant. To the contrary, the § 213 "exemptions are narrowly construed against employers." *Haro*, 745 F.3d at 1256.

In sum, the statutory text and canons of statutory interpretation yield no clear answer to whether Congress intended to include service advisors within the exemption. Because Congress has not "directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842, the statute is ambiguous.

B. *Chevron* Provides the Appropriate Lens.

When a statute is ambiguous, then we must determine, "prior to step two," the appropriate standard: either the *Chevron* test of reasonableness or a lower standard under *United States v. Mead Corp.*, 533 U.S. 218 (2001). *McMaster*, 731 F.3d at 889. Because we consider here a regulation duly promulgated after a notice-and-comment period, *Chevron's* "reasonableness" standard applies. *See, e.g.*, *Renee v. Duncan*, 623 F.3d 787, 795 (9th Cir. 2010) ("The challenged federal regulation interprets a federal statute. The regulation was adopted by the responsible federal agency through notice and

comment rulemaking. We therefore apply the analytical framework outlined in *Chevron*.").

Nothing in the history of the regulation undermines that conclusion. Indeed, the original version of the regulation, promulgated in 1970, contained the same narrow definitions of "salesman," "partsman," and "mechanic." *See* 29 C.F.R. § 779.372(c)(1)-(3) (1970); *see also* Dep't of. Lab., Wage & Hour Div., Opinion Letter No. 660, 66-69 Lab. Cas. (CCH)¶ 30,652 (Aug. 4, 1967) (also providing the same narrow definitions). Those regulatory definitions have not changed in any relevant way since 1970. Because the agency's formal, regulatory position has not changed, the cases cited by Defendant are not on point. In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2165 (2012), the Supreme Court addressed what level of deference to give to an agency's interpretation of its own regulations. Importantly, the parties agreed that "the regulations themselves . . . [were] entitled to deference under *Chevron*." *Id*. Similarly, *U.S. Steel*, 678 F.3d at 598-99, involved only opinion letters; the agency had not issued formal regulations.

It is true that the Department of Labor occasionally has adopted the broader definitions, urged by Defendant here, in documents other than regulations. For example, the agency issued an opinion letter in 1978 that defined a "salesman" to encompass service advisors. Dep't of Lab. Opinion Letter No. WH-467, 1978 WL 51403 (July 28, 1978). Similarly, the agency amended its Field Operations Handbook in 1987 along the same lines. Field

Operations Handbook, Dep't of Lab., Wage & Hour Div., 24L04-4, Insert No. 1757 (Oct. 20, 1987).

The agency even proposed amending the formal regulation to adopt the broader definitions. 73 Fed. Reg. 43,654-01, 43,658-59, 43,671 (July 28, 2008). But it ultimately decided *against* making that change after receiving comments from the public and considering the relevant court decisions. 76 Fed. Red. at 18,838. The agency "acknowledge[d] that there are strongly held views on several of the issues presented in this rulemaking, and it has carefully considered all of the comments, analyses, and arguments made for and against the proposed changes in developing this final rule." *Id*. at 18,832. The regulatory history shows that the Department of Labor has given this particular issue considerable thought and has concluded that the better reading of the statute is to "limit[] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." *Id*. at 18,838.

Moreover, even if we were to consider the agency's 2011 final rule a change of position, we still would conclude that *Chevron* supplies the appropriate standard of deference. As the Supreme Court explained in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), an agency is permitted to change its position. Consistent with *Fox*, the agency here expressly acknowledged that its position was contrary to its earlier opinion letter, and the agency rationally explained why, in its view, the court decisions to the contrary were erroneous. Under *Fox*, 556 U.S. at 515-18, nothing more is required. *Cf. Perez v. Mortg. Bankers Ass'n*, No. 13-1041, 2015 WL 998535 (U.S. Mar. 9, 2015) (holding that an agency may change its

position in an interpretive rule without notice and comment).

The Department of Labor's regulations consistently—for 45 years—have interpreted the statutory exemption to apply narrowly. The agency reaffirmed that interpretation most recently in 2011, after thorough consideration of opposing views and after a formal notice-and-comment process. Under these circumstances, *Chevron* provides the appropriate legal standard.

C. At *Chevron* Step Two, the Regulation is Reasonable.

"Under *Chevron* step two, if the agency's interpretation is a reasonable one, this court may not substitute its own construction of the statutory provision." *CHW W. Bay v. Thompson*, 246 F.3d 1218, 1223 (9th Cir. 2001) (brackets and internal quotation marks omitted). Here, the Department of Labor has interpreted the statutory exemption to exclude service advisors by choosing the narrower definition of the term "salesman." For the reasons described below, we conclude that the agency has made a permissible choice. The interpretation accords with the presumption that the § 213 exemptions should be construed narrowly. *Haro*, 745 F.3d at 1256. Moreover, we are mindful of our role as a reviewing court: "The agency's interpretation need not be the best construction of the ambiguous statute." *Cervantes v. Holder*, 772 F.3d 583, 591 (9th Cir. 2014).

We recognize that our decision to uphold the agency's interpretation conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana. *Walton v. Greenbrier*

Ford, Inc., 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095 (5th Cir. 1973); *Brennan v. N. Bros. Ford, Inc.*, No. 40344, 1975 WL 1074 (E.D. Mich. Apr. 17, 1975) (unpublished), *aff'd sub. nom Dunlop v. N. Bros. Ford, Inc.*, 529 F.2d 524 (6th Cir. 1976) (table); *Brennan v. Import Volkswagen, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975) (unpublished); *Yenney v. Cass Cnty. Motors Co.*, No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977) (unpublished); *Thompson v. J. C. Billion, Inc.,* 294 P.3d 397 (Mont. 2013). We respectfully disagree with those decisions.

In *Deel Motors* and the district court opinions following that case in the 1970s, courts held that service advisors are exempt because their duties and pay structure are "functionally similar" to those of the salesmen, partsmen, and mechanics whom the statute expressly exempts. 475 F.2d at 1097. But those cases pre-dated *Chevron* and the modern framework for deferring to an agency's interpretation. *See id.* (asking not whether the agency's interpretation was reasonable but, instead, determining for itself "the best interpretation," "the better reasoned interpretation," and "a common sense interpretation"); *see also id.* at 1098 (concluding that "[t]he intended scope of [the exemption] is not entirely clear" but not considering deference to the agency's position). In that regard, we agree with the Fourth Circuit that "[the] 'functionally similar' inquiry cannot be squared with FLSA's plain statutory and regulatory language." *Walton*, 370 F.3d at 451. Nothing in the statutory text suggests that Congress meant to exempt salesmen, partsmen, mechanics, and any other employees with functionally similar job duties and pay structure; the

text exempts only certain salesmen, partsmen, and mechanics.

The closer question is whether the agency's interpretation is unreasonable because it is unduly restrictive, as the Fourth Circuit held in *Walton* and the Montana Supreme Court held in *Thompson*.[4] Those courts read § 213(b)(10)(A) as follows: "any salesman, partsman, or mechanic primarily engaged in [the general business of] selling or service automobiles." Service advisors are "salesmen" because their job is to sell services for cars. And service advisors are involved in the general business of "servicing automobiles," because their role is to help customers receive mechanical work on their cars. Accordingly, service advisors fall within the statutory definition. In effect, those courts held that that is the only reasonable reading of the statute.

The agency reads the statute differently: "any salesman, partsman, or mechanic primarily [and personally] engaged in selling or servicing automobiles." Service advisors may be "salesmen" in a generic sense, but they do not personally sell cars and they do not personally service cars. Accordingly, service advisors fall outside the statutory definition. In effect, the agency reads the statute as exempting salesmen who sell cars and partsmen and mechanics who service cars.

The Fourth Circuit rejected that interpretation as unreasonable because, with respect to "salesman," it

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[4] *Walton* considered the issue at *Chevron* step two, whereas *Thompson* considered the issue at *Chevron* step one. Otherwise, the reasoning of both courts is largely the same.

purportedly reads out of the statute the second half of the disjunctive clause "'selling *or servicing automobiles*.'" *Walton*, 370 F.3d at 452 (emphasis by *Walton*) (quoting § 213(b)(10)(A)); *see also Thompson*, 294 P.3d at 402 ("A plain, grammatical reading of [the statute] makes clear that the term 'salesman' encompasses a broader category of employees than those only engaged in selling vehicles" because of "[t]he use of the disjunctive 'or' between the words 'selling *or* servicing'"). The Fourth Circuit's point is that, when Congress uses a list of disjunctive subjects (here, "salesman, partsman, or mechanic") followed by a list of disjunctive verbs (here, "selling or servicing"), the ordinary interpretation of that construction is that each subject is linked with each verb. For example, if someone says, "if my dogs or cats are eating or drinking, then I know not to pet them," we understand that phrase to be all-encompassing: the speaker refrains from petting a dog that is eating or drinking and a cat that is eating or drinking. It would contravene the speaker's intent to include, for example, only cats that were eating but to exclude dogs that were eating.

Critically, however, that analysis depends on context. Consider this slightly modified hypothetical: "if my dogs or cats are barking or meowing, then I know that they need to be let out." The Fourth Circuit's grammatical interpretation of that phrase would include a meowing dog and a barking cat. But most English speakers would interpret the sentence to refer only to a barking dog and a meowing cat. At a minimum, that implicit limitation would offer a reasonable interpretation of the speaker's intent.

Returning to the statute at hand, the agency's interpretation is reasonable. A natural reading of the text strongly suggests that Congress did not intend that both verb clauses would apply to all three subjects. For example, it is hard to imagine, in ordinary speech, a "mechanic primarily engaged in selling … automobiles." That is, it seems that Congress intended the subject "mechanic" to be connected to only one of the two verb clauses, "servicing." The nature of the word "mechanic" strongly implies the actions that the person would take—servicing. *See American Heritage College Dictionary* 842 (3d ed. 2000) (defining "mechanic" as a "worker skilled in making, using, or repairing machines, vehicles, and tools"). The same can be said of the subject "salesman." It is hard to imagine, in ordinary speech, "salesman . . . primarily engaged in . . . servicing automobiles." Congress likely intended the subject "salesman" to be connected to only one of the two verb clauses, "selling." The nature of the word "salesman" strongly implies the actions that the person would take—selling. *See id*. at 1203 (defining "salesman" as a "man who sells merchandise").

It is important to note that the agency's reading does not render any term meaningless or superfluous. All three subjects (salesman, partsman, and mechanic) and both verbs (selling and servicing) retain meaning; it is just that some of the verbs do not apply to some of the subjects. If the agency read out a word altogether, its interpretation likely would be unreasonable. *See, e.g., Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 966 (9th Cir.

2013) ("It is a well-established rule of statutory construction that courts should not interpret statutes in a way that renders a provision superfluous."), *cert. denied*, l34 S. Ct. 906 (2014). But the regulation does not run afoul of that doctrine.

Non-textual indicators of congressional intent, such as legislative history, are inconclusive. *See Fournier v, Sebelius*, 718 F.3d 1110, 1123 (9th Cir. 2013) (holding that, at *Chevron* step two, "legislative history permissibly may be considered"), *cert. denied*, 134 S. Ct. 1501 (2014). We have found no mention, in the relevant reports or hearings, of service advisors, by name or by role. All references to "salesman" appear to refer to an employee who sells cars only. *See, e.g.*, 112 Cong. Rec. S20,504 (Aug. 24, 1966) (statement of Sen. Yarborough) ("It would not affect the salesman. He can go out and sell an Oldsmobile, a Pontiac, or a Buick all day long and all night."); *id.* ("The salesman tries to get people mainly after their hours of work. In some cases a man will leave his job, get his wife, and go to look at automobiles. So the hours of a salesman are different.").

In 1961, Congress exempted "any employee" of a car dealership. 29 U.S.C. § 213(a)(19) (1961); Pub. L. No. 87-30, § 9, 7S Stat. 65 (1961). A few years later, the Eighty-Ninth Congress considered three bills on this topic. The first bill, introduced in 1965, would have repealed altogether the exemption for employees of dealerships. H.R. 8259, 89th Cong. § 305 (introduced in House on May 18, 1965). The next bill, also introduced in 1965, would have exempted from overtime requirements "any salesman or mechanic employed by" a car dealership. H.R. 10,518, 89th

Cong. § 209 (introduced in House on Aug. 17, 1965); H.R. 10,518, 89th Cong. § 209 (reported in House on Aug. 25, 1965). Neither of those bills passed.

The final bill—H.R. 13,712—was enacted into law on September 23, 1966.[5] The first three versions, introduced in the first half of 1966, exempted either "any salesman or mechanic" or "any salesman, mechanic, or partsman" employed by a car dealership. H.R. 13,712, 89th Cong. § 209 (introduced in House on Mar. 16, 1965); *id.* (reported in House on Mar. 29, 1966); *id.* (referred in Senate on May 27, 1966). The final three versions all qualified the list of employees with the phrase, "primarily engaged in selling or servicing automobiles." *Id.* (reported in Senate on Aug. 23, 1966); *id.* (ordered to be printed in Senate on Aug. 25, 1966); Pub. L. No. 89-601 (Sept. 23, 1966). We know, then, that sometime in 1966 between May 27 and August 23, the Senate added that phrase. Unfortunately, the legislative history is silent on its meaning. *See, e.g.*, 112 Cong. Rec. H21,940 (Sept. 7, 1966) (House Conference Report: "The conference substitute conforms to the House provision regarding

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[5] Defendant cites recent actions by the House of Representatives' Committee on Appropriations in an apparent attempt to prevent enforcement by the agency of the 2011 rule. That appropriations rider is not relevant. What one house of Congress thinks, in the 2010s, about enforcement priorities for the agency is entirely uninformative about the intent of Congress when it enacted a statute in 1966. Moreover, enforcement priorities do not change the content of the statute. If the Appropriations Committee were to instruct, for instance, that it did not want money spent on enforcing the statutes forbidding cultivation of fewer than five marijuana plants on federal lands, such cultivation would not become lawful.

partsmen, except that such exemption shall be available only to salesmen, partsmen, and mechanics primarily engaged in selling or servicing such vehicles."); 112 Cong. Rec. S22,651 (Sept. 14, 1966) ("The resulting language follows the House exemption— including the Senate floor amendment— but with a somewhat narrower scope."); Sen. Comm. on Lab. & Pub. Welf., Report: No. 1487, p. 14, 89th Cong. (Aug. 23, 1966) ("Committee Report") ("Section 13(b) is amended to provide an overtime exemption for salesmen and mechanics who are primarily engaged in selling or servicing automobiles . . . .").

The only possible exception, noted by *Deel Motors*, 475 F.2d at 1097 n.2, is found in the Committee Report on August 23, 1966:

> It is the intent of this exemption to exclude from the coverage of section 7 all mechanics and salesmen (other than partsmen) employed by an automobile, trailer, truck, farm implement or aircraft dealership 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.

Committee Report at 32. The Fifth Circuit quoted selectively from that passage for the proposition that the committee intended to exempt all mechanics and salesmen. *Deel Motors*, 475 F.2d at 1097 n.2. But the quoted passage also is found in earlier committee

reports, which were written *before* the limiting phrase was added. *E.g.*, Sen. Comm. on Educ. & Lab., Report No. 871, p. 38, 89th Cong. (Aug. 25, 1965). Because the passage appeared both before and after the addition of the "primarily" proviso, the best reading of that passage is that the committee was addressing what provisions apply to employees who work in separate buildings, not what types of salesmen are exempt.

In sum, there are good arguments supporting both interpretations of the exemption. But where there are two reasonable ways to read the statutory text, and the agency has chosen one interpretation, we must defer to that choice. *Chevron*, 467 U.S. at 844. Accordingly, we hold that Plaintiffs are not exempt under 29 U.S.C. § 213(b)(10)(A).

Dismissal of claims 3, 5, and 7 AFFIRMED; dismissal of claim 1 and the supplemental state-law claims REVERSED; case REMANDED. Costs on appeal awarded to Plaintiffs.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-55323

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

Plaintiffs-Appellants,

v.

ENCINO MOTORCARS, LLC, ERRONEOUSLY SUED AS MERCEDES BENZ OF ENCINO,

Defendant-Appellee.

Filed: June 1, 2015

Before: GRABER and WARDLAW, Circuit Judges, and MAHAN,* District Judge.

ORDER

Judges Graber and Wardlaw have voted to deny Appellee's petition for rehearing en banc, and Judge Mahan has so recommended.

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* The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellee's petition for rehearing en banc is DENIED.

Appendix E

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 2:12-cv-08051-RGK-MRW

NAVARRO, ET AL.,

Plaintiffs

v.

MERCEDES BENZ OF ENCINO,

Defendant.

Filed: January 25, 2013

(IN CHAMBERS) ORDER RE: DEFENDANT'S MOTION TO DISMISS

R. Gary Klausner, United States District Judge.

I. Introduction

On September 18, 2012, Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, and Reuben Castro (collectively "Plaintiffs") filed this complaint alleging nine claims against Mercedes Benz of Encino ("Defendant") for various violations of the Fair Labor Standards Act ("FLSA") and the California Labor Code.

On November 16, 2012, Defendant filed this Motion to Dismiss. The Court reviews Defendant's Motion to Dismiss as to four of the nine claims: (1)

First Claim: violation of FLSA 29 U.S.C. § 207 for failure to pay overtime wages,[1] (2) Third Claim: violation of FLSA 29 U.S.C. § 206 for failure to pay minimum wage, (3) Fifth Claim: violation of FLSA 29 U.S.C. § 207 for failure to provide extra compensation for work completed during mandatory meal and rest periods, and (4) Seventh Claim: violation of FLSA 29 U.S.C. § 211 for failure to provide a written, itemized statement detailing hours worked and compensation received.

For the reasons stated below, the Court GRANTS Defendant's Motion to Dismiss. Additionally, the remaining claims are state claims over which the Court will not exercise supplemental jurisdiction. Therefore, the Court dismisses those claims for lack of subject matter jurisdiction.

II. Factual Background

With the exception of Plaintiff Reuben Castro, Plaintiffs are all current employees of Defendant. Plaintiff Reuben Castro is a former employee. Defendant owns and operates a Mercedes Benz automobile dealership in Encino, California. This business sells and services both new and used Mercedes Benz automobiles. Plaintiffs work (or have worked) at the dealership as Service Advisors.

As Service Advisors, the Plaintiffs must: (1) meet and greet Mercedes Benz owners as they enter the service area and evaluate their service and repair needs; (2) solicit service to be conducted on the vehicle;

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[1] The Court notes that Plaintiffs' Complaint alleges a violation of 29 U.S.C. § 201; however, the proper statutory basis for the allegations asserted in the first claim is 29 U.S.C. § 207.

(3) solicit supplemental service to be performed on the vehicle; and (4) inform the vehicle owner about the status of the vehicle while Defendant's mechanics repair and service the vehicle. For every additional service or repair provided, the commission increases. Defendant pays Service Advisors, such as Plaintiffs, solely on this commission.

On September 18, 2012, Plaintiffs filed a complaint against Defendant alleging violations of both federal and state laws for failure to pay overtime, failure to pay minimum wage, failure to provide extra compensation for Plaintiffs' work during mandatory meal and rest periods, and failure to provide itemized wage statements to Plaintiffs. Additionally, Plaintiffs allege that because of these practices, Defendant has engaged in unfair competition in violation of California Business & Professions Code § 17200.

III. Judicial Standard

To comply with Federal Rules of Civil Procedure 8, a complaint must allege "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Under Rule 12(b)(6), a party may move to dismiss a claim for failure to allege enough facts to comply with Rule 8.

In deciding a Rule 12(b)(6) motion, a court must assume allegations in the challenged complaint are true, and must construe the complaint in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *See W. Mining Council v. Watt*, 643

F.2d 618, 624 (9th Cir. 1981). The complaint need not contain detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a claim." *Twombly*, 550 U.S. at 555.

IV. Discussion

Defendant argues Plaintiffs' claims should be dismissed for the following reasons: (1) Plaintiffs' First, Third, and Fifth Claims fail because Plaintiffs are exempt from the FLSA's maximum hour and minimum wage requirements; (2) alternatively, Plaintiffs' Third Claim fails because the Complaint pleads insufficient facts; (3) alternatively, Plaintiffs' Fifth Claim fails because § 207 does not require meal and rest periods; and (4) Plaintiffs' Seventh Claim fails because a violation of § 211 does not create a private right of action. The Court agrees.

A. First, Third, Fifth Claims Fail Based on Exemptions

Section 206 states, in pertinent part, that every employer shall pay to each of his employees not less than $7.25 an hour. 29 U.S.C. § 206(a)(1)(C). Section 207 states no employer shall employ any employee for a workweek longer than forty hours unless the employee receives additional compensation specified at a rate not less than one-half the regular rate at which the employer generally pays the employee. 29 U.S.C. § 207(a).

Section 213 creates an exemption to the above provision for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles . . . if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements

to ultimate purchasers." Courts have applied this exemption to Service Advisors. See *Brennan v. Deel Motors*, 475 F.2d 1095, 1097 (5th Cir. 1973) (" . . . a common sense interpretation and application of this exemption mandates inclusion of service salesmen within its scope."); *Walton v. Greenbrier Ford*, 370 F.3d 446, 453 (4th Cir. 2004).

The Department of Labor ("DOL"), however, has expressly rejected this interpretation. The DOL defines a salesman as an employee "primarily engaged in making sales or obtaining orders or contracts for sale of automobiles." 29 C.F.R. § 779.372(c)(1). A mechanic is an employee "primarily engaged in doing mechanical work in the servicing of an automobile." 29 C.F.R. § 779.372(c)(3). In a "final rule," the Wage and Hour Division of the DOL explained that "[t]he Department notes that current § 779.372(c)(1) . . . limit[s] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18832-01 (April 5, 2011). Thus, under the DOL's enforcement of § 213(b)(10)(A), Service Advisors are not exempt from the hour/wage requirements set forth in §§ 206 and 207.

Given the conflicting interpretations, the Court must first look to the statutory language. Where the statutory language is clear, the Court is bound by such language as a clear expression of legislative intent. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Where the statutory language is ambiguous, however, the Court accords deference to the DOL action based on the nature of that action. "Legislative regulations" are

given a high level of judicial deference, and will stand unless arbitrary or capricious. *Id*. at 844. Mere "interpretations," however, are accorded lower deference, and will stand only so long as they are reasonable. *Id*.

1. The Statutory Language is Ambiguous as Applied to Service Advisors

Here, the statutory language of § 213(b)(10)(A) does not expressly exempt Service Advisors. However, the job description of a Service Advisor encompasses those of both a salesman and a mechanic, and falls squarely within the category of positions exempted by the provision. The legislative history demonstrates an intent to "narrow significantly the reach of the automobile dealership employee exemption." *Gieg v. Howarth*, 244 F.3d 775, 776 (9th Cir. 2001). Nonetheless, it is not clear that Congress intended Service Advisors to be excluded, particularly when their job duties are simply a hybrid of two jobs expressly listed within the exemption. For this reason, the Court finds § 213(b)(10)(A) ambiguous as applied to Service Advisors. See *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1098 (5th Cir. 1973) ("The intended scope of [the exemption] is not entirely clear. Indeed, the Secretary's own interpretation of the coverage of that section is not altogether consistent.").

2. The DOL's Interpretation is not Reasonable

In light of the finding above, the Court's role is to "determine whether the agency's interpretation is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. As previously stated, the permissiveness of the agency's construction depends

upon the nature of the agency action, as allowed by Congress. When Congress has "explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency." *Id.* at 844. In such a case, agency decisions are "legislative regulations" that are given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* When Congress has not left such an explicit gap, agency actions are mere interpretations that are upheld only if reasonable. *Id.*

Within the § 213 arena, the U.S. Supreme Court has found agency action to constitute "legislative regulation." See *Auer v. Robbins*, 519 U.S. 452 (1997); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). However, in those cases, the specific provisions being reviewed expressly grant the Secretary of Labor the power to "defin[e] and delimi[t]" the terms in the section. *Id.* As such, the Court found that the statute creates an explicit gap for the agency to fill. *Id.* at 172. This case is distinguishable. Here, the applicable section, § 213(10)(b)(A), does not contain any such language. It is clear that where Congress intended to grant the agency power to create legislative regulation, it included language to that effect. In the absence of similar language, this Court will not read into the statute the grant of such power. Therefore, the Court finds that the agency action is not a legislative regulation, but rather, a mere interpretation, which is accorded lower deference.

Having established that the DOL's action is an interpretation, the Court is bound to the DOL interpretation only if the interpretation is reasonable. *Chevron*, 467 U.S. at 844. The Court agrees with both

the Fourth and Fifth Circuits, and holds that the DOL interpretation of § 213(b)(10)(A) is unreasonable. When faced with facts nearly identical to those of the present case, the Fourth Circuit concluded that the "Secretary's interpretation of . . . [salesman] is unreasonable, as it is an impermissibly restrictive construction of the statute." *Walton*, 370 F.3d at 452. Similarly, the Fifth Circuit explained that "[i]n the absence of clear intent to the contrary, we cannot assume that Congress intended to treat employees with functionally similar positions differently." *Brennan*, 475 F.2d at 1097-98. Service Advisors, such as Plaintiffs, are functionally equivalent to salesmen and mechanics and are similarly responsible for the "selling and servicing" of automobiles. Accordingly, the Court finds the DOL's interpretation unreasonable. As such, the Court finds that Service Advisors fall within the exemption of § 213(b)(10)(A).

The Court dismisses Plaintiffs' first, third, and fifth claims, which all allege violations of §§ 206 and 207.

B. Third Claim Fails to Allege Sufficient Facts

As discussed above, the minimum wage requirements established in § 206 do not apply to Plaintiffs because Service Advisors are exempt under § 213(b)(10)(A). Even if they did apply, however, Plaintiff's Third Claim fails to plead sufficient facts to survive a Rule 12(b)(6) Motion.

Legal conclusions alone, without some factual allegations, do not provide fair notice of the nature of the claim nor the grounds on which the claim rests. *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 556. Here, Plaintiffs allege only that Defendant (1) failed to

provide an hourly wage, (2) paid Plaintiffs on a pure commission basis, (3) required Plaintiffs to work for wages less than the legal minimum, and (4) refused to pay minimum wages. A salary based solely on commission can still satisfy the minimum wage requirement. See 29 C.F.R. § 778.117. No facts demonstrate that the commissions Plaintiffs earned do not satisfy the minimum wage requirements. Even if a Motion to Dismiss is not designed to correct inartistic pleading, as Plaintiff argues, these legal conclusions alone are insufficient to survive a Rule 12(b)(6) Motion.

C. Fifth Claim Fails to State a Claim

To the extent Plaintiffs' Fifth Claim alleges that Defendant failed to provide Plaintiffs with overtime compensation in violation of § 207, this Section does not apply to Service Advisors. As discussed above, Plaintiffs are exempt under § 213(b)(10)(A).

To the extent Plaintiffs' Fifth Claim alleges that Defendant failed to provide Plaintiffs with meal or rest periods, neither § 207 nor the cited DOL regulations mandate rest and meal periods. Section 785.18 simply states that: "Rest periods of short duration, running from 5 minutes to about 20 minutes . . . must be counted as hours worked." 29 C.F.R.§ 785.18. Section 785.19 states that "[b]ona fide meal periods are not worktime . . . The employee must be completely relieved from duty for the purposes of eating regular meals . . . The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating." 29 C.F.R. § 785.19. These statutes simply determine when employees must be compensated for working during these periods, but do

not require an employer to provide their employees with meal or rest periods. On this ground, the Court dismisses Plaintiff's Fifth Claim.

D. Seventh Claim Fails Because § 211 Does Not Create a Private Right of Action

Section 29 U.S.C. § 211 states: "Every employer subject to any provision of this chapter . . . shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records . . . " Section 217 authorizes only the Secretary to initiate injunction proceedings involving an employer's failure to comply with the record keeping requirements. 29 U.S.C. § 217. Put simply, § 211(c) does not create a private action against an employer for failure to comply with the record-keeping provisions. *Elwell v. University Hospitals Home Care Services*, 276 F.3d 832, 843 (6th Cir. 2002). Therefore, the Court dismisses Plaintiff's Seventh Claim.

E. The Remaining State Law Causes of Action

Having dismissed all federal claims alleged, the Court exercises its discretion under 28 U.S.C. § 1367(c) to dismiss the remaining state law causes of action for lack of subject matter jurisdiction.

V. Conclusion

The Court GRANTS Defendant's Motion to Dismiss as to Plaintiffs' First, Third, Fifth, and Seventh claims. The Court *sua sponte* DISMISSES the remaining state law causes of action. As such, Plaintiffs' Complaint is dismissed in its entirety.

IT IS SO ORDERED.

Appendix F

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.