No. 16-1362

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

REPLY BRIEF FOR PETITIONER

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August 9, 2017

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Respondents' brief in opposition denies the existence of a circuit split (even though the Ninth Circuit expressly acknowledged it was (re-)creating one) and denies the importance of the question presented (even though this Court previously granted certiorari on the exact same issue). That "sounds absurd, because it is." *Sekhar v. United States*, 133 S. Ct. 2720, 2727 (2013). This case remains every bit as certworthy as it was last January in light of both the acknowledged split of authority and the significant consequences of the Ninth Circuit's decision for thousands of dealerships and approximately 100,000 service advisors nationwide. *See* NADA Br.5-7.

Indeed, if anything, this case is even *more* deserving of this Court's review now that the Ninth Circuit has doubled down on its outlying ruling despite this Court's earlier decision. By relying (at this Court's direction) on the text of the FLSA, rather than *Chevron* deference, the Ninth Circuit has made its disagreement with every other court to consider the issue crystal clear and has potentially limited the Labor Department's regulatory options. This Court's intervention is plainly warranted to restore uniformity once and for all to this important area of the law.

I. The Ninth Circuit's Decision Openly Conflicts With The Decisions Of Every Other Court To Consider The Issue.

Before this case, every court to consider the issue, federal and state alike, had uniformly held that service advisors are exempt under §213(b)(10)(A) because they are "salesm[e]n ... primarily engaged

in ... servicing automobiles." *See* Pet.20-24; *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*, 294 P.3d 397 (Mont. 2013). The Ninth Circuit recognized as much, expressly acknowledging that its holding "conflicts with published decisions by the Fourth and Fifth Circuits and by the Supreme Court of Montana." Pet.App.30. Indeed, the split between the Ninth Circuit and the Montana Supreme Court is especially stark because it guarantees disparate outcomes *within the same State* depending on whether the FLSA claim is litigated in state or federal court.

In the face of this acknowledged split, Respondents (at 9-11) make the bold assertion that all the conflicting decisions are distinguishable because the Ninth Circuit in a footnote suggested that it would adopt the same outlying interpretation of the FLSA's text if it applied *Skidmore* deference. This argument mimics Respondents' earlier unsuccessful effort to minimize the circuit split because only the Ninth Circuit had invoked *Chevron* deference. *See* Br. in Opp. at 10-14, *Encino Motorcars v. Navarro*, No. 15-415 (Dec. 4, 2015). This reprise should fare no better than the first effort, and indeed is a far weaker basis to dispute the split. This Court's earlier decision in this case directed the Ninth Circuit to address the statutory question without affording the agency's position controlling deference, *see* Pet.App.44, and the Ninth Circuit obliged. The Ninth Circuit stated that "we assume without deciding that *we must give no weight to the agency's interpretation*," Pet.App.7 (emphasis added), and nonetheless reached a conclusion at odds with every other court to consider

the statutory question. By reaching the same result sans deference that it previously reached under *Chevron*, the Ninth Circuit eliminated any doubts about the split of authority.

The fact that the court suggested in one sentence in a footnote that it would give *Skidmore* deference to DOL's position if the court were "permitted or required" to do so, Pet.App.7 n.3, hardly changes the analysis. That dictum was avowedly irrelevant to the court's holding; indeed, the Ninth Circuit noted that the level of deference (if any) "does not affect the outcome" of the case. Pet.App.7. More to the point, since *Skidmore* directs a court to afford deference only to the degree its finds the agency's position "persua[sive]," *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), a footnoted observation that the court would reach the same conclusion by applying *Skidmore* deference adds nothing to the analysis. That the Ninth Circuit found DOL's parallel reasoning "persuasive" is hardly a game-changer and in no way lessens the circuit split. It is simply an indication that the agency has taken the same view of the statute as the Ninth Circuit.

The Ninth Circuit, after all, is not the only court to consider the statutory issue here in light of an articulated DOL position that service advisors were not exempt. The Fifth Circuit in *Brennan v. Deel Motors* rejected DOL's position in the context of an enforcement action brought by the Labor Department itself. There was thus no doubt about DOL's view of the statute and no doubt that the Fifth Circuit found it unpersuasive. DOL's position was similarly rejected in other contemporaneous enforcement actions. *See,*

e.g., *Brennan v. N. Bros. Ford*, No. 40344, 1975 WL 1074, at *3 (E.D. Mich. Apr. 17, 1975), *aff'd sub nom. Dunlop v. N. Bros. Ford*, 529 F.2d 524 (6th Cir. 1976) (Table). And there is no material difference between the DOL position the Ninth Circuit found persuasive and the earlier position the Fifth Circuit, *et al.*, found unpersuasive. *See* Br. for United States at 22, *Encino Motorcars v. Navarro*, No. 15-415 (Apr. 6, 2016) (arguing that 2011 DOL regulation "directly tracks the Department's 1970 Interpretive Bulletin's interpretation of 'salesman'"). Finally, while last time around Respondents could at least claim that *Chevron* post-dated the Fifth Circuit's *Deel* decision, *Skidmore* had been on the books for three decades when the Fifth Circuit and every other court to consider the early spate of enforcement actions found DOL's view unpersuasive.

Respondents further assert (at 9) that the Fourth and Fifth Circuits used somewhat different routes to arrive at their shared conclusion that service advisors are exempt. But the fact that all roads outside the Ninth Circuit lead to Rome is hardly a promising ground for denying a split of authority or certiorari. Any nuances in the lower courts' reasoning can be addressed at the merits stage, but the fact that different circuits had slightly different reasons to adopt a view that the Ninth Circuit has twice rejected only underscores the need for plenary review.

Finally, Respondents contend (at 9) that the decision below is not "at odds" with the Fifth Circuit's decision in *Deel Motors* because that case "predates the 1974 FLSA Amendments." But the statutory text *at issue here*—"any salesman, partsman, or mechanic

primarily engaged in selling or servicing automobiles"—was identical in the 1966 and 1974 versions of the statute. *See* Pet.App.33, 35. And DOL brought and lost enforcement actions before and after the 1974 amendments. *See supra*. The 1974 amendments addressed different issues involving trailer, boat, and aircraft dealerships, and are irrelevant to what Congress intended when it enacted the exemption for *automobile* dealerships in 1966. *See* Reply Br. for Pet'r at 19-20, *Encino Motorcars v. Navarro*, No. 15-415 (Apr. 13, 2016) ("*Encino* Merits Reply Br.").

II. Respondents' Defense Of The Ninth Circuit's Reasoning Fails.

It is no accident that the Ninth Circuit's decision is an outlier, as it rests on an untenable interpretation of §213(b)(10)(A). *See* Pet.24-31. The FLSA exempts from its overtime requirements "any salesman … primarily engaged in selling or servicing automobiles." Either gerund ("selling" or "servicing") can sensibly be applied to the noun "salesman," and a service advisor is the paradigmatic "salesman ... primarily engaged in ... servicing automobiles." *See* Pet.App.49-54 (Thomas, J., dissenting) ("That text reveals that service advisors are salesmen primarily engaged in the selling of services for automobiles.").

Respondents nonetheless assert (at 11-12) that Congress' failure to use the specific term "service advisors" in the statutory text is somehow dispositive under the canon *expressio unius est exclusio alterius*. But there is no requirement that Congress list every exempt occupation *en haec verba*, and there was no need for Congress to include the specific term "service

advisors" when they were amply covered by the broader phrase "any salesman … engaged in selling or servicing automobiles." 29 U.S.C. §213(b)(10)(A). Indeed, in order to make their *expressio unius* argument, Respondents must rewrite the statute, describing §213(b)(10)(A) as exempting only partsmen, mechanics, and "automobile salesmen." *E.g.*, BIO.8, 12. While Respondents might wish the statute were restricted to "automobile salesmen," the exemption is broader and exempts "*any salesman* ... primarily engaged in selling *or servicing* automobiles." §213(b)(10)(A) (emphasis added).

Equally unavailing is Respondents' contention (at 13-14) that the exemption's use of the term "servicing" somehow excludes service advisors. Even the Ninth Circuit acknowledged that service advisors come within the "literal" text of the exemption. Pet.App.16. Although the Ninth Circuit rejected that literal reading based on a crabbed application of the distributive canon, *see* Pet.App.18-19, "the distributive canon is less helpful in cases such as this because the [three] antecedents and [two] consequents cannot be readily matched on a one-to-one basis." Pet.App.52 (Thomas, J., dissenting); *see also Encino* Merits Reply Br. at 4-7 (explaining that proper application of distributive canon here is to honor all noun-gerund combinations that do not produce a null set).

Contrary to Respondents' suggestion (at 13), the ordinary meaning of "servicing" cannot be limited to "maintaining or repairing a motor vehicle," but also extends to "providing a service." 15 Oxford English Dictionary 39 (2d ed. 1989). And, in all events, "[a]

service advisor's selling of service solutions fits both definitions." Pet.App.51 (Thomas, J., dissenting). Moreover, partsmen neither sell nor repair automobiles, yet §213(b)(10)(A) unambiguously exempts them, thereby making clear that the phrase "primarily engaged in … servicing" must cover some dealership employees who (like both partsmen and service advisors) do not personally perform repairs or maintenance. *See* Pet.33.

Respondents' suggestion (at 14) that exempting service advisors "is inconsistent with Congress's 1966 repeal of the 1961 blanket dealership exemption that covered all of a dealership's employees" likewise disregards the actual text of §213(b)(10)(A). The blanket exemption covered *everyone* working at a dealership, including typically non-exempt employees such as porters, cashiers, and janitors. *See* Act of May 5, 1961, Pub. L. No. 87-30, §9, 75 Stat. 65. Those employees are neither salesmen, partsmen, nor mechanics, and they were exempt in 1961, but not in 1966, and will remain non-exempt no matter how this Court resolves this case.

Finally, Respondents (at 16-17) turn to "that last redoubt of losing causes," *OWCP v. Newport News Shipbuilding*, 514 U.S. 122, 135-36 (1995)—the anti-employer canon that exemptions to the FLSA should be construed "narrowly." That purported canon has no basis in this Court's modern jurisprudence, and in recent years the Court has typically cited it only in the course of declining to apply it. *See, e.g.*, *Sandifer v. U.S. Steel*, 134 S. Ct. 870, 879 n.7 (2014) (reserving question of whether Court should "disapprove" anti-employer canon); *Christopher v. SmithKline Beecham*,

567 U.S. 142, 164 n.21 (2012) (canon does not apply to FLSA's definitions); *see also* Pet.App.53-54 (Thomas, J., dissenting). The fact that Respondents (and the Ninth Circuit) needed to invoke the dubious anti-employer canon to buttress their interpretation of §213(b)(10)(A) just gives this Court one more reason to grant review and underscores the Ninth Circuit's strained interpretation of the statutory text.

III. This Case Remains An Ideal Vehicle To Address The Scope of §213(b)(10)(A).

No less than last time around, this case—which raises the same question on which this Court granted certiorari last January—presents an excellent vehicle for the Court to resolve an acknowledged circuit split over whether tens of thousands of service advisors are exempt from the FLSA's overtime-pay requirements. Respondents persist in seeking to impose significant retroactive FLSA liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. This Court has repeatedly found such attempts worthy of plenary review and rejection. *See, e.g.*, *Integrity Staffing Sols. v. Busk*, 135 S. Ct. 513 (2014); *Christopher*, 567 U.S. 142.

As amici explain, there are more than 18,000 franchised car dealerships nationwide, which collectively employ approximately 100,000 service advisors. *See* NADA Br.5-7 & n.5. Those dealerships and their employees have negotiated mutually beneficial compensation plans in good-faith reliance on the unbroken line of authority spanning four decades finding service advisors exempt. If allowed to stand, the Ninth Circuit's decision would require

dealerships and their employees to rework their longstanding relationships in ways that will be harmful to both and will do nothing to advance the purposes of the FLSA.

Respondents nonetheless contend that this Court's review is unnecessary because (1) service advisors might also fall within the more general exemption for commissioned employees under §207(i); (2) there have been few recent cases addressing whether service advisors are exempt; and (3) there are other limitations on FLSA claims that will deter vexatious litigation. BIO.18-20. But this Court granted certiorari over those *precise* objections just last year, and Respondents do not argue that anything has changed in the meantime. *See* Br. in Opp. at 26-28, No. 15-415 (raising same arguments, unsuccessfully, in opposition to certiorari).

First, the potential availability of a different—more general and more burdensome, *see* NADA Br.15-16—exemption cannot justify ongoing disuniformity over the scope of §213(b)(10)(A). Indeed, in both this case and *Christopher*, the Court granted certiorari to resolve a circuit split regarding one of the FLSA's enumerated exemptions notwithstanding the potential availability of another exemption. *See*, *e.g.*, Br. for United States at 16 n.3, *Christopher v. SmithKline Beecham*, No. 11-204 (Feb. 6, 2012) (arguing that the employees in question would potentially qualify for exemptions under "other provisions of the FLSA" in addition to the exemption at issue).

Second, Respondents (at 19) bemoan the recent "paucity of precedent" regarding the scope of

§213(b)(10)(A). But plaintiffs had no great temptation to bring such cases before the 2011 DOL regulation because, for more than forty years, *every court* to consider the issue had found service advisors to be exempt. Yet now that one pioneering set of plaintiffs has procured an outlying circuit precedent—by the most populous circuit in the Nation, no less—there will be no shortage of plaintiffs willing to seek windfall recoveries for long-established compensation practices.

Third, Respondents (at 19-21) offer vague assurances that other FLSA provisions may lessen the threat of collective actions or the sting of retroactive liability. For example, they assert (at 20) that it may be difficult to certify a collective action in light of "autonomous" dealerships and a "fragmented" industry. Notably, however, Respondents do not forswear seeking certification of a collective action *in this case*. So, too, with Respondents' invocation of 29 U.S.C. §259(a), which we are told "guards against retroactive liability for reliance on past agency interpretations." BIO.19. But while Respondents invoke §259(a) in an attempt to avoid plenary review, they stop short of conceding that §259(a) would bar retroactive liability in this case or in any other.

Finally, Respondents assert (at 19) that this Court's intervention is unnecessary because DOL is "free to issue a new regulation" that could offer "further clarification." But that option is almost always available when the circuits are split in interpreting a statute overseen by a federal agency, and yet this Court routinely grants certiorari to resolve such circuit splits. *See, e.g.*, *Sandifer*, 134 S.

Ct. 870 (FLSA §203(o)). Moreover, now that the Ninth Circuit has offered its definitive interpretation of §213(b)(10)(A) giving "no weight to the agency's interpretation," Pet.App.7, DOL's interpretative options are more constrained than in the ordinary case. Respondents and other plaintiffs would almost certainly argue that the Ninth Circuit's decision amounts to a step-one determination of the statute's meaning and *forecloses* DOL from reaching any other result.[1] Thus, if anything, the Ninth Circuit's latest sans-deference ruling limits the options for regulatory change and magnifies the importance of this Court's review.

* * *

In sum, Respondents may not believe the issue presented here to be significant, but Congress deemed the treatment of certain dealership employees sufficiently important to provide a specific exemption for them, and this Court has already found it worthy of plenary review. None of that has changed now that the Ninth Circuit has doubled down on its outlying result. This Court should not allow a single circuit to render §213(b)(10)(A) a dead letter for service advisors, and should once again grant certiorari to resolve the ongoing circuit conflict and make clear that

[1] To be sure, if DOL promulgated a new regulation finding service advisors to be non-exempt, opponents of that rule would have a strong argument that DOL's position was foreclosed by precedent in the Fourth, Fifth, and Sixth Circuits. The fact that *both* sides would be able to seek review of an adverse DOL ruling in a circuit with favorable precedent only underscores why this Court's review is imperative.

service advisors are covered by the exemption's plain text regardless of the location of their employer.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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