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

BRIEF FOR PETITIONER

KARL R. LINDERGREN
TODD B. SCHERWIN
WENDY MCGUIRE COATS
FISHER & PHILLIPS LLP
444 S. Flower Street
Suite 1500
Los Angeles, CA 90071

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioner

November 1, 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

On its return trip to this Court, this case presents a straightforward issue of statutory interpretation. The Fair Labor Standards Act (FLSA) exempts from its overtime-pay requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. §213(b)(10)(A). Respondents are service advisors, *i.e.*, they "sell [customers] services for their vehicles." *Encino Motorcars, LLC v. Navarro* (*Encino I*), 136 S. Ct. 2117, 2121 (2016). 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." *Id.* at 2121-22. Respondents, in other words, are "salesm[e]n … primarily engaged in … servicing automobiles," and are thus exempt under the plain language of the statute.

Consistent with that straightforward statutory analysis, for more than 40 years, including in enforcement actions brought by the Department of Labor (DOL), every court to address this issue held that service advisors are exempt under §213(b)(10)(A). *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). Undeterred by that unbroken line of precedent, Respondents brought suit, relying on a 2011 DOL interpretation of §213(b)(10)(A) deeming service advisors non-exempt to allege that they were entitled to time-and-a-half overtime pay for time worked each week in excess of 40 hours.

Invoking the reasoning of the long line of cases holding service advisors exempt, the district court dismissed the complaint. Pet.App.76-85. The Ninth Circuit reversed. Unlike every other court to consider the issue, the Ninth Circuit, relying on the 2011 DOL interpretation, held that service advisors are not exempt under §213(b)(10)(A). Pet.App.55-73.

This Court vacated that decision and remanded for the Ninth Circuit to reconsider the statutory question "without placing controlling weight on [DOL's] 2011 regulation." *Encino I*, 136 S. Ct. at 2127. The Court found deference to DOL's interpretation inappropriate because DOL had abandoned its longstanding acquiescence to the judicial consensus that service advisors were exempt sellers of servicing without "reasoned explanation," and had failed to consider "decades of industry reliance on [DOL's] prior policy." *Id.* at 2126. Two Justices, while agreeing deference was inappropriate, went further and definitively construed the statute to hold service advisors exempt. *See id.* at 2129 (Thomas, J., dissenting).

On remand, the same panel of the Ninth Circuit reverted to the same conclusion for many of the same reasons. Pet.App.1-30. Despite repeatedly acknowledging that service advisors come within the "literal" terms of §213(b)(10)(A)'s exemption, the Ninth Circuit found service advisors to be non-exempt for "the reasons stated in [its] earlier opinion (except those reasons concerning deference to the agency)." Pet.App.30.

The Ninth Circuit's decision to ignore the literal text of §213(b)(10)(A) cannot stand. Service advisors

are plainly exempt as "salesm[e]n … primarily engaged in … servicing automobiles." Congress' deliberate use of the disjunctive "or" in the phrase "primarily engaged in selling or servicing automobiles" broadens the exemption and makes clear that a salesman is exempt if he is "engaged in" *either* of those activities. And the exemption's coverage of "*any* salesman" demonstrates that Congress intended to legislate broadly.

Despite this clear statutory language, the Ninth Circuit insisted that service advisors were not exempt because they do not "actually" or "personally" service automobiles. Pet.App.13. But exempting only those employees who actually or personally service automobiles injects words into the statute that are not there and introduces an anomaly over the status of "partsmen," who are employees who requisition, stock, and dispense parts. Even though partsmen do not actually or personally service automobiles themselves, they are primarily engaged in the servicing process and are unquestionably exempt under §213(b)(10)(A). So too the service advisors who play an equally vital role in servicing automobiles.

The Ninth Circuit mistakenly believed that the word "salesman" in the exemption could only be paired with "selling," and not "servicing," because other noun-gerund combinations in §213(b)(10)(A) (such as a mechanic primarily engaged in selling automobiles) do not exist in practice. In interpreting a statute with a series of disjunctive nouns and a series of disjunctive gerunds, the courts can and should ignore any combinations that do not exist. But that is no license to ignore combinations, like a "salesman … primarily

engaged in servicing," a.k.a., a service advisor, that most certainly do exist.

The Ninth Circuit's decision upends an area of law that had been settled for more than 40 years. Affirming the decision below would have significant negative consequences for the nation's 18,000 car dealerships, which currently employ an estimated 100,000 service advisors. Those dealerships and their service advisors have operated under mutually beneficial compensation plans designed in good-faith reliance on decades of precedent holding service advisors exempt from the FLSA. This Court has repeatedly rejected plaintiffs' attempts to impose significant retroactive liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. *See, e.g.*, *Integrity Staffing Sols. v. Busk*, 135 S. Ct. 513 (2014); *Christopher v. SmithKline Beecham*, 567 U.S. 142 (2012). This Court should reject Respondents' attempt to impose substantial and unexpected liability on automobile dealerships based on a countertextual interpretation of the statute that every other court aside from the Ninth Circuit has correctly rejected.

OPINIONS BELOW

The Ninth Circuit's opinion on remand is reported at 845 F.3d 925 and reproduced at Pet.App.1-30. This Court's merits opinion in *Encino I* 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, and a petition was timely filed. 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 in the appendix to this brief.

STATEMENT OF THE CASE

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

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

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

207, 212. An employer that violates the FLSA can be subject to civil liability for back pay, double damages, and attorney's fees. *Id.* §216(b).

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

2. One common-sense judgment reflected throughout the FLSA is Congress' recognition that individuals engaged in sales or paid on a commission basis are often ill-suited for an hourly compensation regime. The FLSA thus contains several exemptions from its mandatory overtime rules for salespeople (regardless of how they are compensated) and other employees paid on a commission basis. For example, the FLSA exempts from its overtime-pay requirements "any employee employed … in the capacity of outside salesman." *Id.* §213(a)(1). The statute also exempts certain employees of retail or

service establishments who are paid on commission. *Id.* §207(*i*).

Those exemptions reflect the basic reality that salespeople are typically "more concerned with their total work product than with the [number of] hours performed." *Deel Motors*, 475 F.2d at 1097. Consistent with that reality, provisions throughout the FLSA reflect Congress' recognition that it is both common and reasonable for salespeople to be compensated based on their *success at selling* rather than the sheer number of hours worked. This Court has similarly recognized that salespeople are "hardly the kind of employees that the FLSA was intended to protect." *Christopher*, 567 U.S. at 166.

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

This case addresses the scope of one of the FLSA's many exemptions for salespeople. Under 29 U.S.C. §213(b)(10)(A), the FLSA's 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." Pub. L. No. 89-601, §209(b), 80 Stat. 830, 836 (1966). An employee of a car or truck dealership is therefore exempt from the mandatory overtime rules if he or she: (1) is a "salesman, partsman, or mechanic," and (2) is "primarily engaged in selling or servicing automobiles."

Section 213(b)(10)(A) has its origins in an earlier, broader FLSA provision that exempted "any employee" of a car dealership from the overtime-pay

requirements. 29 U.S.C. §213(a)(19) (1964); Pub. L. No. 87-30, §9, 75 Stat. 65, 73 (1961). By the mid-1960s, however, Congress concluded that it was neither necessary nor appropriate to exempt *every* employee at a dealership. Dealerships have an array of employees, many of whom perform functions indistinguishable from those performed by non-exempt workers in other contexts. For example, there is no reason a janitor or secretary working at an automobile dealership should be treated differently from a janitor or secretary employed anywhere else.

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

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

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

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

DOL further asserted that "[e]mployees variously described as service manager, service writer, service advisor, or service salesman who are not themselves 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 it recognized that service advisors are primarily engaged in the servicing of automobiles. *See id.* (noting that "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

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

work to various employees and directing and checking on the work of mechanics").

In the years after DOL promulgated these regulations, DOL attempted to vindicate its position through a series of enforcement actions, but every single court to consider the issue rejected the agency's conclusion that service advisors are non-exempt.[2] In *Deel Motors*, for example, DOL advanced the narrow interpretation of the exemption set forth in its 1970 regulation, arguing that service advisors should not be exempt because they do not personally service vehicles. *See* 475 F.2d at 1097-98. 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. The court further recognized that "service salesmen are functionally similar to the mechanics and partsmen who service the automobiles": all of those employees "work as an integrated unit, performing the services necessary for the maintenance of the customer's automobile." *Id.* at 1097. And, like countless other salespeople exempt from the FLSA's overtime rules, service advisors "are more concerned with their total work product than with the hours performed." *Id.* It would thus make no sense to treat service advisors any differently.

---

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

2. Within a few years of the Fifth Circuit's decision in *Deel Motors* and the Sixth Circuit's affirmance in *Dunlop v. North Brothers Ford*, DOL backtracked from the position advanced in its 1970 interpretive regulations and acquiesced in these adverse decisions. In 1978, the Secretary of Labor issued a policy letter changing the agency's position and providing that service advisors should be exempt as long as a majority of their sales were for non-warranty work. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on Fair Labor Standards Act, 1978 WL 51403, at *1 (July 28, 1978) (acknowledging that "[t]his position represents a change from the position set forth in" the 1970 regulations).[3]

DOL's 1987 Field Operations Handbook similarly instructed agency employees to "no longer deny the [overtime] exemption for [service advisors]." U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04-4 (Oct. 20, 1987), *available at* perma.cc/5ghd-kcjj. 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.* The Handbook acknowledged that "[t]his policy … represents a change from the position in [the 1970 regulations]," and indicated that the agency's regulations "will be revised as soon as is practicable." *Id.*

"[A]s soon as is practicable," however, turned out to be none too soon. Despite DOL's clear (and clearly

[3] DOL explained that unlike non-warranty work, which is sold by the service advisor, warranty work is sold by the car salesman "when the vehicle is sold." 1978 WL 51403, at *1.

correct) decision to acquiesce after multiple courts had rejected its initial position and to discontinue any enforcement efforts, the 1970 interpretive regulations with the now-repudiated interpretation of §213(b)(10)(A) remained on the books for decades. It was not until 2008 that DOL initiated a rulemaking proceeding to update its regulations so that, *inter alia*, they reflected the view embraced in the Secretary's 1978 Letter and the 1987 Field Operations Handbook. *See* Updating Regulations Issued Under the Fair Labor Standards Act, 73 Fed. Reg. 43,654 (2008).

As DOL explained at that time, "[u]niform appellate and district court decisions … hold that service advisors are exempt under [29 U.S.C. §213(b)(10)(A)] because they are 'salesmen' who are primarily engaged in 'servicing' automobiles." *Id.* at 43,658 (citing *Walton*, 370 F.3d at 452; *Deel Motors*, 475 F.2d at 1097; *N. Bros. Ford*, 1975 WL 1074, at *3). DOL's notice of proposed rulemaking included a modified version of 29 C.F.R. §779.372(c)(4) that would have codified this unbroken line of case law.

3. In 2011, however, DOL changed course abruptly. Rather than codify what it had proposed and what every court had held, DOL issued a final rule that neither adopted the proposed regulation nor brought the regulation into line with the governing case law. *See* Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832, 18,859 (2011). Instead, DOL reverted to the 1970 regulation's definition of "salesman." *See* 29 C.F.R. §779.372(c)(1).

In its brief explanation accompanying the final rule, DOL said nothing at all about the substantial reliance interests the new rule would upset. Instead,

DOL merely repeated its position from the 1970 regulation that service advisors should not be treated as exempt because the regulatory definitions "limit[] the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." 76 Fed. Reg. at 18,838. Indeed, the 2011 regulation eliminated the subsection from the 1970 regulation that expressly stated that service advisors "are not exempt" and provided a modest explanation for the agency's position. *See* 76 Fed. Reg. at 18,859. Thus, the agency eliminated the only regulatory text that even purported to explain the agency's atextual view of the statute. At oral argument in *Encino I*, counsel for the United States explained that this change was "'an inadvertent mistake in drafting.'" 136 S. Ct. at 2124.

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

Petitioner Encino Motorcars, LLC, sells and services new and used Mercedes Benz automobiles. Like many dealerships, Petitioner "not only sell[s] vehicles but also sell[s] repair and maintenance services." *Encino I*, 136 S. Ct. at 2121. Respondents are current and former employees of Petitioner who worked at the dealership as service advisors. In 2012, specifically invoking the 2011 DOL regulation, Respondents filed a complaint alleging several violations of the FLSA and the California Labor Code. J.A.58.

Respondents' sales activities are integral to the process of servicing vehicles at the dealership. The complaint alleges that, as service advisors, Respondents would "accept cars for service"; "meet

and greet … owners as they enter the service area"; "evaluate the service and/or repair needs" of the owner; "solicit and suggest[] that certain service be conducted on the vehicle"; "solicit and suggest that supplemental service be performed on the vehicle" (such as preventative maintenance); and prepare "estimate[s] for the repairs and services." J.A.54-55. And, like countless other salespeople in both automobile dealerships and other businesses, Respondents were "not paid a salary or an hourly wage" but were paid solely "on a pure commission basis." J.A.55. The more services a service advisor sold, "the greater his commission" would be. J.A.56.[4]

Respondents alleged that they often worked more than 40 hours per week, and that Petitioner violated the FLSA by failing to pay them overtime compensation. J.A.58. While remaining studiously vague on the details of the hours they allege to have worked and the precise damages they seek, Respondents seek time-and-a-half damages on top of the commissions they were paid. J.A.58-59.

Petitioner moved to dismiss the FLSA claims on the ground that Respondents are exempt employees under the plain language of 29 U.S.C. §213(b)(10)(A) and the numerous precedents interpreting the text of that exemption to cover service advisors. The district agreed, holding that a service advisor "falls squarely within the … positions exempted by" §213(b)(10)(A). Pet.App.81. The district court acknowledged that DOL had stated in 1970 and again in 2011 that

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

§213(b)(10)(A) did not apply to service advisors. *See* Pet.App.80-81. But the district court refused to defer to DOL's on-again-off-again interpretation, agreeing with the Fourth and Fifth Circuits that DOL's reading of the statute was objectively unreasonable. Pet.App.83 (rejecting DOL's interpretation as an "impermissibly restrictive construction of the statute" (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, it would be "unreasonable" to carve service advisors out of the exemption. *Id.* The court did not believe that "Congress intended to treat employees with functionally similar positions differently," *id.* (quoting *Deel Motors*, 475 F.2d at 1097-98), and dismissed Respondents' FLSA claims.[5]

E. The Ninth Circuit's Initial Decision

The Ninth Circuit reversed in relevant part. The panel conceded that it is "plausible" to "consider a service advisor to be a 'salesman … primarily engaged in … servicing automobiles.'" Pet.App.61. Nevertheless, repeatedly invoking 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," *see* Pet.App.60 (quoting *Haro v. City of Los Angeles*, 745 F.3d 1249, 1256 (9th Cir. 2014)); *see also* Pet.App.62 (invoking canon); Pet.App.65 (same), the court deemed the statute "ambiguous" because it could

[5] After dismissing the FLSA claims, the district court declined to exercise supplemental jurisdiction over Respondents' remaining state-law claims. Pet.App.85.

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)).

In light of that perceived ambiguity, the Ninth Circuit afforded *Chevron* deference to DOL's 2011 regulation. Pet.App.62 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). The court concluded that it was "permissible" for DOL to interpret §213(b)(10)(A) so that salesmen are exempt if they are "engaged in selling … automobiles," but not if (like service advisors) they are "engaged in … servicing automobiles." Pet.App.65-73. It acknowledged that "there are two reasonable ways to read the statutory text," but concluded that where "the agency has chosen one interpretation, we must defer to that choice." Pet.App.73. The court recognized that its holding "conflicts with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana," but it "disagree[d] with those decisions." Pet.App.65-66.[6]

F. This Court's First Decision

This Court granted certiorari and, after merits briefing and oral argument, vacated the Ninth Circuit's decision. *Encino I*, 136 S. Ct. at 2127.

---

[6] The Ninth Circuit affirmed the dismissal of the other federal claims because Respondents failed to challenge the alternative grounds on which those claims were dismissed. Pet.App.58 n.2. It vacated the dismissal of Respondents' state-law claims for lack of jurisdiction. *Id.*

The Court did not resolve whether service advisors are exempt under the plain text of §213(b)(10)(A). Instead, the Court held that the Ninth Circuit erred by "placing controlling weight on" DOL's 2011 regulation. *Id.* As the Court explained, despite having sharply departed from decades of settled law, DOL "said almost nothing" about why it had made that change. *Id.*; *accord id.* at 2126 (DOL "offered barely any explanation"); *id.* at 2127 (DOL "gave almost no reasons at all"). The Court acknowledged the "serious reliance interests at stake," given that the automobile dealership industry "had relied since 1978" on DOL's position that "service advisors are exempt from the FLSA's overtime pay requirements." *Id.* at 2126-27; *accord id.* at 2126 (noting "decades of industry reliance on the Department's prior policy"); *id.* (observing that "[d]ealerships and service advisors negotiated and structured their compensation plans against this background understanding"). DOL's "lack of reasoned explication" resulted in "a rule that cannot carry the force of law." *Id.* at 2127. The Court thus vacated the Ninth Circuit's decision and remanded for the court of appeals to "interpret the statute in the first instance." *Id.*

Justice Ginsburg, joined by Justice Sotomayor, "agree[d] in full" with the Court's opinion but wrote separately "to stress that nothing in" the decision "disturbs well-established [administrative] law." *Id.* at 2127-28 (Ginsburg, J., concurring). Justice Thomas, joined by Justice Alito, likewise agreed that the DOL regulation merited no deference, but dissented from the decision to remand back to the Ninth Circuit rather than definitively resolve the statutory interpretation question itself. *Id.* at 2129-31

(Thomas, J., dissenting). Justices Thomas and Alito would have held that "service advisors are salesmen primarily engaged in the selling of services for automobiles" and thereby fall within the plain text of the exemption in §213(b)(10)(A). *Id.* at 2129. Justices Thomas and Alito observed that the exemption "contains three nouns … and two gerunds," all "connected by the disjunctive 'or,'" so "unless context dictates otherwise, a salesman can *either* be engaged in selling *or* servicing automobiles," and "[c]ontext does not dictate otherwise." *Id.* at 2130.[7]

G. The Ninth Circuit's Decision on Remand

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

At the outset, rather than begin with the statutory text, the Ninth Circuit invoked the 1966-67 edition of DOL's Occupational Outlook Handbook to suggest that "salesman" in §213(b)(10)(A) means only "automobile salesman," and not any other sort of "salesman." Pet.App.8-9. It grudgingly acknowledged, however, that "a service advisor qualifies … as a 'salesman'" under the text of §213(b)(10)(A). Pet.App.10.[8] It further conceded that, "read literally," §213(b)(10)(A)'s exemption "encompasses" a category of employee that readily

---

[7] Since the Court's decision in *Encino I*, DOL has taken no further administrative action with respect to the 2011 regulation.

[8] The court "assume[d] without deciding that [it] must give no weight to [DOL'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).

describes service advisors: "Salesm[e]n primarily engaged in servicing" automobiles. Pet.App.16.

The court nonetheless resisted that "literal" reading of the statute. Pet.App.18-19. First, the court 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 read this newly invented "actually and primarily occupied in" requirement—which does not appear in the statute—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.12-13.

Second, the Ninth Circuit observed that the "literal" reading of §213(b)(10)(A) produced 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. The court then observed that two of these categories (2 and 3) "do not exist in the real world." Pet.App.16-17. The court thus reasoned that Congress must have intended for "the gerunds—selling and servicing—to be distributed to their appropriate subjects—salesman, partsman, and mechanic." Pet.App.18. Because "[a] salesman sells; a partsman services; and a mechanic services," the court concluded, Congress must have intended not to exempt a "salesman primarily engaged in servicing." Pet.App.16-18. The court believed that

legislative history confirmed its interpretation, despite conceding once again that "the literal terms of the exemption" encompass "salesmen primarily engaged in servicing automobiles." Pet.App.27.

Finally, just as in its first opinion, the Ninth Circuit invoked 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 Ninth Circuit deemed itself bound to apply that canon and to narrow "the literal terms of the exemption" to exclude service advisors. Pet.App.20-21.

In reaffirming its initial holding, the Ninth Circuit again 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 nonetheless brushed aside that unbroken string of authority "for the reasons stated above and for the reasons stated in [its] earlier opinion (except those reasons concerning deference to the agency)." *Id.*

SUMMARY OF ARGUMENT

The FLSA exempts from its overtime-pay requirements "any salesman … primarily engaged in selling or servicing automobiles." 29 U.S.C. §213(b)(10)(A). Because service advisors are both salesmen and primarily engaged in servicing automobiles, they are exempt. That common-sense interpretation is confirmed by the statute's plain

language, basic rules of grammar, the FLSA's underlying purposes, and a practical understanding of service advisors' role within an automobile dealership. The Ninth Circuit's unjustified departure from a previously unbroken wall of precedent upsets the long-settled expectations of both dealerships and their employees and exposes employers to substantial retroactive liability, while doing nothing to advance the FLSA's purposes.

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

Basic rules of grammar reinforce that result by dictating that each combination of nouns and gerunds in disjunctive lists be given meaning when it is sensible to do so. Moreover, the statute further emphasizes the breadth of the exemption by extending it to "*any* salesman." There is no question that service advisors are salesmen. And because they sell the servicing of automobiles, they are plainly salesmen *engaged in* servicing automobiles. Indeed, it would be nonsensical to suggest that a salesman primarily engaged in the selling of automobile servicing is

engaged in *neither* selling *nor* servicing automobiles. Yet that is the position embraced by Respondents and the Ninth Circuit.

Treating service advisors as exempt also comports with the context of the broader statutory scheme. The FLSA contains many provisions designed to exempt from the overtime rules individuals engaged in sales or paid on a commission basis. *See, e.g.*, 29 U.S.C. §§207(*i*), 213(a)(1). Those exemptions reflect the basic reality that salespeople, including service advisors, "are more concerned with their total work product than with the hours performed." *Deel Motors*, 475 F.2d at 1097. Forcing dealerships to pay overtime to service advisors is a misguided attempt to fit a square peg into a round hole. Salespeople are "hardly the kind of employees that the FLSA was intended to protect." *Christopher*, 567 U.S. at 166.

II. The Ninth Circuit repeatedly acknowledged that the literal terms of §213(b)(10)(A) encompass service advisors, yet it nevertheless held that service advisors are non-exempt by employing reasoning that does not withstand scrutiny. First, rather than grapple with the statutory text, the court invoked a decades-old DOL publication to suggest that service advisors are not even "salesmen," a finding at odds with this Court's *Encino I* decision. Next, the court read into the statute the requirement that an exempt employee "actually" or "personally" repair automobiles in the same manner as a mechanic. The statutory text, of course, contains no such requirement. Worse still, the Ninth Circuit's introduction of those limiting modifiers conflicts with Congress' conscious decision to include partsmen in the exemption. Partsmen are

no more (or less) "actually" or "personally" involved in repairing automobiles than service advisors, yet the statute plainly renders partsmen exempt. Like service advisors, partsmen are primarily engaged in servicing automobiles without directly doing the servicing themselves.

Furthermore, despite the clearly disjunctive statutory language, the Ninth Circuit interpreted §213(b)(10)(A) so that the noun "salesman" is modified only by the gerund "selling," and not the gerund "servicing." The court based this conclusion on the fact that two of the six possible noun-gerund combinations in the exemption—partsmen engaged in selling cars, and mechanics engaged in selling cars—do not exist in the real world. But the practical non-existence of some noun-gerund combinations does not justify declining to apply the exemption to all noun-gerund combinations that actually exist, such as "salesmen … engaged in servicing," *i.e.*, service advisors. That is particularly true where, as here, there are three antecedent nouns but only two consequent gerunds, defeating a one-to-one mapping of nouns to gerunds.

Finally, the Ninth Circuit relied on legislative history and the supposed rule that FLSA exemptions should be narrowly construed. Because the unambiguous statutory text exempts service advisors, resort to legislative history is inappropriate. But in all events, even the Ninth Circuit was forced to acknowledge that the legislative record is opaque and does not directly address whether the exemption applies to service advisors. The court was thus forced to rely on legislative silence, post-enactment history,

and statements by non-legislators, all of which are the kinds of extraneous materials that give legislative history a bad name. And the Ninth Circuit's use of its "rule" of narrowly construing FLSA exemptions to avoid "the literal terms" of the statute underscores the dangers of that rule. This Court has in recent decisions properly declined to apply that misguided rule, but the time has come to inter it once and for all. Like all statutes, the FLSA should be interpreted neither narrowly or broadly, but fairly and correctly.

If allowed to stand, the Ninth Circuit's erroneous interpretation of §213(b)(10)(A) would have far-reaching implications for the nation's 18,000 franchised car dealerships and 100,000 service advisors. That interpretation would result in a wholesale reworking of the service advisor position, harming dealerships and service advisors alike. This Court has been justifiably skeptical of attempts by plaintiffs to impose significant retroactive liability for settled industry practices long viewed as outside the scope of the FLSA. *See, e.g.*, *Integrity Staffing*, 135 S. Ct. at 518-19. Here, the longstanding industry practice was encouraged by settled precedent and administrative guidance for over four decades. This Court should reject Respondents' and the Ninth Circuit's attempts to impose massive retroactive liability on employers for compensation arrangements that have been repeatedly—and correctly—approved for decades by courts nationwide.

ARGUMENT

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

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

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

1. The FLSA exempts from its overtime requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." 29 U.S.C. §213(b)(10)(A). There is no dispute that Petitioner is "a nonmanufacturing establishment primarily engaged in the business of selling [automobiles] to ultimate purchasers." *Id.* The question is thus whether each Respondent is a "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.*

Service advisors are unquestionably "salesmen." As this Court previously explained, the duties of a service advisor include "listening to [customers'] concerns about their cars; suggesting repair and

maintenance services; selling new accessories or replacement parts; [and] recording service orders." *Encino I*, 136 S. Ct. at 2121-22. In short, service advisors "sell [customers] services for their vehicles." *Id.* at 2121; *see also id.* at 2127 (service advisors are "employees who sell services"). Respondents are plainly salesmen.

And Respondents are just as plainly "primarily engaged in … servicing automobiles." Most automobile dealerships offer service and sales, and Respondents are the salesmen dedicated to the servicing side of the business: they help diagnose the need for service, provide information about optional services, and, having formed a relationship with the customer, help to ensure the customer is satisfied with the service received. *See id.* at 2121-22. Indeed, Respondents' own complaint makes clear that service advisors are integral to servicing vehicles at the dealership: among other things, they "accept cars for *service*," "meet and greet … owners as they enter the *service* area," "evaluate the *service* and/or repair needs" of the owner, "solicit and suggest[] that certain *service* be conducted on the vehicle," "solicit and suggest that supplemental *service* be performed on the vehicle," and prepare "estimate[s] for the repairs and *services*." J.A.55 (emphases added). Accordingly, under the plain text of §213(b)(10)(A), service advisors like Respondents are exempt because they are "salesmen" who are "primarily engaged in … servicing automobiles."

2. Several powerful grammatical and textual indicators confirm this straightforward reading of the statutory text. First, it is a fundamental rule of

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

Here, §213(b)(10)(A) specifically exempts "any salesman … primarily engaged in selling *or* servicing automobiles." There is no question that the term "or" makes the phrase "primarily engaged in selling or servicing" disjunctive. *See Thompson*, 294 P.3d at 402 ("The use of the disjunctive 'or' between the words 'selling *or* servicing' means that the exemption applies to any 'salesman, partsman, or mechanic' who [is] primarily engaged in either of these duties."). Nor is there any question that, in the context of an exemption limited by a requirement that the employee be primarily engaged in a particular activity or activities, the use of the disjunctive broadens the exemption. An exemption provided to employees primarily engaged in X or Y is broader than one given only to employees primarily engaged in X. Thus, as long as both X and Y can be sensibly applied to a subject noun, the broader meaning promised by the use of the disjunctive must be honored.

There can be no real dispute that both gerunds ("selling" and "servicing") can sensibly be applied to

the noun "salesman." There are a variety of salespeople at automobile dealerships. Some salespeople are "engaged in selling … automobiles." But other salespeople play an integral role in the service process. In particular, there are approximately *100,000* service advisors nationwide who "engage[] in" classic sales functions just like other salespeople, but sell services instead of goods. *See* Br. for *Amici Curiae* Nat'l Auto. Dealers Ass'n et al. ("NADA Cert. Amicus Br.") at 5-6; J.A.55-56 (describing Respondents as employees who "work on a pure commission basis" and "solicit and suggest[] that certain service[s] be conducted on" cars that come in for servicing). The sale of automobile servicing by service advisors, moreover, is no trifling matter. At the average dealership, service department sales account for 44% of gross profits, while new automobile sales account for only 30%. Philip Reed, *Where Does the Car Dealer Make Money?*, Edmunds (Dec. 3, 2013), http://edmu.in/2pUoejw; *see also id.* (explaining that dealerships "know that there's a good chance that a car buyer will bring the vehicle in for regular service," so "even if the dealership only ekes out a thin margin on a new car sale, there's the possibility of continued cash flow from a service relationship"). A salesman who engages in servicing is thus not an insignificant anomaly, but an important component of the dealership model.

In short, because both parts of the disjunctive phrase "engaged in selling or servicing automobiles" can be sensibly applied to the noun "salesman," fundamental rules of grammar dictate that both parts of the phrase be given their plain meaning. A service advisor, in other words, fits comfortably within the

category of a "salesman … primarily engaged in … servicing automobiles."

At the very least, the entire phrase "primarily engaged in *selling or servicing* automobiles" applies to service advisors. Service advisors are certainly not primarily engaged in any activity *other than* selling or servicing. And they are not engaged in selling or servicing anything other than automobiles. In fact, they are engaged in the selling of the servicing of automobiles. *See, e.g.*, *Encino I*, 136 S. Ct. at 2121-22 ("Service advisors interact with customers and sell them services for their vehicles."). It would be nonsensical to suggest that an individual primarily engaged in selling the servicing of automobiles is engaged in *neither* selling *nor* servicing automobiles.

If the exemption applied only to salesmen primarily engaged in selling automobiles, it might have made sense to argue that service advisors are non-exempt because they sell services for automobiles rather than the automobiles themselves. But given that the exemption covers both selling and servicing, it makes no sense to hold that service advisors are non-exempt because they are primarily engaged in selling services and not automobiles.[9] The notion that service advisors could be non-exempt because they are

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

too involved in servicing makes nonsense of Congress' decision to employ the broadening disjunctive.

The breadth of the exemption is further confirmed by Congress' decision to use the broad phrase "engaged in." Congress obviously could have limited §213(b)(10)(A) to a "salesman, partsman, or mechanic who sells or services automobiles," or even a "salesman, partsman, or mechanic who primarily sells or services automobiles." That Congress instead chose to exempt a "salesman, partsman, or mechanic primarily *engaged in* selling or servicing automobiles" indicates an evident intent to broaden the category of exempt employees beyond just those dealership employees who personally go under the hood to service cars or personally go out on the lot to sell them. *Compare* 29 U.S.C. §203(j) (defining "[p]roduced" as "produced, manufactured, mined, handled, or in any other manner worked on"), *with id.* (defining "engaged in the production of goods" more broadly, as "employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any closely related process or occupation directly essential to the production thereof*" (emphasis added)).

So too with Congress' choice to extend §213(b)(10)(A) to "*any* salesman" primarily engaged in one of two defined activities (selling or servicing). This Court has repeatedly emphasized that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New Int'l Dictionary 97 (1976)); *see also Dep't of Housing & Urban Dev. v.*

Rucker, 535 U.S. 125, 130-31 (2002). Congress' use of the word "any" in §213(b)(10)(A) thus makes clear that it intended to exempt *all* salesmen working in an automobile dealership, as long as they are "primarily engaged in selling or servicing automobiles." Service advisors fall comfortably within that category of exempt employees.

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

Similarly, in *Deel Motors*, the Fifth Circuit held that service advisors are exempt from the FLSA. 475 F.2d 1095. There, too, the court recognized that service advisors perform functions that fall squarely within the statutory exemption. *Id.* at 1097-98. And, in *Thompson*, the Montana Supreme Court agreed with the Fourth and Fifth Circuits that the §213(b)(10)(A) exemption covers service advisors. 294

P.3d at 402. The court found no ambiguity in the relevant statutory text because a "plain, grammatical reading of [§213(b)(10)(A)] makes clear that the term 'salesman' encompasses a broader category of employees than those only engaged in selling vehicles." *Id.* Finally, the federal district courts that have addressed this issue—including the district court in this case—have also uniformly concluded that §213(b)(10)(A) applies to service advisors. *See, e.g.*, *Yenney*, 1977 WL 1678; *N. Bros. Ford*, 1975 WL 1074, *aff'd sub nom. Dunlop*, 529 F.2d 524; *Import Volkswagen*, 1975 WL 1248; Pet.App.76-85. All of these courts have recognized that service advisors are exempt under a straightforward textual interpretation of §213(b)(10(A).

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

Treating service advisors as exempt comports with the broader scheme of the FLSA and the broader scheme of a dealership's sales and service staff. *See Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (deeming it "fundamental" that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). The FLSA contains several provisions (in addition to §213(b)(10)(A)) designed to exclude from the mandatory overtime rules individuals engaged in sales or paid on a commission basis. *See, e.g.*, 29 U.S.C. §207(*i*) (excluding certain employees of retail or service establishments who are paid commissions); *id.* §213(a)(1) (excluding "any employee employed … in the capacity of outside salesman").

Those provisions, as well as §213(b)(10)(A), reflect the basic reality that it is both common and reasonable for salespeople to be compensated based on their *success at selling* rather than their sheer number of hours worked. As the Fifth Circuit has explained, "[t]he enactment of [§213(b)(10)(A)] was an implicit recognition by Congress of the incentive method of remuneration for salesmen, partsmen, and mechanics employed by an automobile dealership." *Deel Motors*, 475 F.2d at 1098. Like countless other salespeople treated as exempt under the FLSA, service advisors "are more concerned with their total work product than with the hours performed." *Id.* at 1097. Forcing an employer to pay service advisors—who are quintessential salespeople—overtime compensation on an hourly basis would be a misguided attempt to fit a square peg into a round hole, and would do nothing to promote the policies underlying the FLSA. *See, e.g.*, *Christopher*, 567 U.S. at 166 (noting that pharmaceutical sales representatives "are hardly the kind of employees that the FLSA was intended to protect").

That problem is particularly acute in cases like this and *Christopher*, when there is a belated effort to treat salespeople as exempt. Because their compensation is often driven by commissions, salespeople may work irregular hours and not keep meticulous records of how long they work. Based on their compensation structure, salespeople often keep closer track of their sales than their hours—much like Respondents did here. *See* J.A.56-57 (Respondents acknowledging that their "work hours" were not tracked or recorded).

Interpreting §213(b)(10)(A) to include service advisors ("salesm[e]n … primarily engaged in … servicing automobiles") would avoid forcing dealerships to differentiate among their employees in ways that are both divisive and contrary to Congress' plain intent. Service advisors are a key component of the service team, a team that includes plainly exempt partsmen and mechanics. Having one key member of the service team non-exempt, while the other two-thirds are exempt, makes little sense and could sow division. Moreover, service advisors are in some sense a hybrid, because their job is to sell, but they sell services. If the salesforce were entirely exempt and the service staff (such as mechanics and partsmen) were entirely non-exempt, there would be an argument for treating service advisors as non-exempt. But to treat a hybrid between two *fully exempt* categories as non-exempt makes no sense and needlessly creates fissures among similar employees that Congress plainly did not intend.

Finally, forcing service advisors into the FLSA's mandatory overtime regime would not advance the core policy goals underlying the FLSA. As *amici* noted in their brief supporting the petition for certiorari, service advisors in the states within the Ninth Circuit earn an average of $68,995 per year, and the top 10% earn on average $103,560. NADA Cert. Amicus Br. at 7-8. This is not a case that implicates the FLSA's core concern of protecting workers from "wages too low to buy the bare necessities of life." S. Rep. No. 75-884, at 4.

II. The Ninth Circuit's Anomalous And Far-Reaching Decision Improperly Interpreted Section 213(b)(10)(A).

The Ninth Circuit repeatedly acknowledged that under a literal reading of §213(b)(10)(A), service advisors are exempt from the FLSA's overtime-pay requirements. *See* Pet.App.16 ("Read literally, the exemption encompasses [service advisors]."); Pet.App.27 ("[T]he literal terms of the exemption could encompass [service advisors]."); *see also* Pet.App.12-13 ("[S]ervice advisors can be said, in a general sense, to be 'primarily engaged in … servicing automobiles.'"); Pet.App.21 ("[T]he statute could be construed as exempting service advisors."). It nevertheless held that service advisors are non-exempt, becoming the only court to so hold in the nearly fifty years since the exemption was enacted. That the Ninth Circuit is an outlier should be no surprise. Its decision is unmoored from both the text and purpose of §213(b)(10)(A) and would have far-reaching implications for the nation's 18,000 franchised car dealerships and 100,000 service advisors.

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

1. The Ninth Circuit's interpretation of §213(b)(10)(A) went awry right out of the gate. "Statutory interpretation … begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016); *see also, e.g.*, *Carter v. United States*, 530 U.S. 255, 271 (2000). Here, however, "following that approach at once distances us from the Court of Appeals." *Ross*, 136 S. Ct. at 1856.

Rather than begin "as … always" with the statutory text, *id.*, the Ninth Circuit looked first to a decidedly less authoritative source: the 1966-67 edition of the Occupational Outlook Handbook ("OOH"), published by the Labor Department's Bureau of Statistics. *See* Pet.App.8-11. In the Ninth Circuit's view, "three job titles" in the OOH—"Automobile mechanics," "Automobile parts countermen," and "Automobile salesmen"—"clearly align with the three job titles exempted by Congress." Pet.App.9. Therefore, the court concluded, any other dealership-related occupation listed in the OOH but not listed in the statute—like "Automobile service advisors"—is non-exempt. *Id.*

That reasoning is flawed in multiple respects. Most fundamentally, congressional intent cannot be gleaned from a document written by executive department staffers. Understandably, this Court has never relied on the OOH as evidence of congressional intent. In fact, this Court has never relied on the OOH for *anything*. It has never cited the OOH in any opinion—not a majority, plurality, concurrence, or dissent.[10] And there appears to be no evidence that Congress considered the OOH in enacting or amending §213(b)(10)(A).

But even assuming that the OOH had some marginal relevance, the Ninth Circuit's analysis would remain unsound. The court believed that because "three job titles" in the OOH "clearly align with the three job titles exempted by Congress," any

[10] Likewise, the courts of appeals have invoked the OOH in only a handful of decisions, only one of which (besides the decision below) involved the FLSA.

other OOH job title is beyond the exemption's scope. Pet.App.9. But this reasoning assumes that Congress exempted only "three job titles" in §213(b)(10)(A), which is the very statutory interpretation question to be answered. And the actual statutory text reveals that Congress did not simply enact a provision exempting "any automobile salesman, automobile parts counterman, or automobile mechanic," *i.e.*, a statute "clearly align[ed]" with three OOH titles. Rather, Congress enacted a considerably broader provision exempting "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles," which "literally"—as even the Ninth Circuit conceded—includes a service advisor. Indeed, although there is no evidence that Congress gave the OOH even a minute of consideration in enacting or amending §213(b)(10)(A), even if it had, the fact that Congress enacted an exemption that did not follow the OOH's lead and simply list and exempt the OOH's three job titles, but instead employed different and broader language, would only strengthen the case for giving the text its literal reach. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013) ("Congress' choice of words is presumed to be deliberate[.]").

Finally, the Ninth Circuit's OOH-driven analysis cannot be reconciled with this Court's decision in *Encino I*. Under the Ninth Circuit's reasoning, service advisors do not even qualify as "salesmen" under §213(b)(10)(A), because "salesmen" means only the job title listed in the OOH—"automobile salesmen," *i.e.*, salesmen who sell cars. But this Court recognized in *Encino I* that service advisors *are* "salesmen." *See* 136 S. Ct. at 2121 (service advisors "sell [customers]

services for their vehicles"); *id.* at 2127 (service advisors are "employees who sell services"); *see also id.* at 2129 (Thomas, J., dissenting) (noting the "uncontroversial notion that a service advisor is a 'salesman'"). Perhaps for that reason, the Ninth Circuit ultimately conceded that "a service advisor qualifies, in a generic sense, as a 'salesman.'" Pet.App.10. But if that is true, there is no reason to consult extraneous sources to limit the statute to "automobile salesmen" when the statute literally extends to any salesman primarily engaged in selling *or* servicing automobiles.[11]

2. Having resisted the straightforward conclusion that service advisors are "salesmen," the Ninth Circuit then resisted the straightforward conclusion that service advisors are "salesmen … primarily engaged

---

[11] While consulting extraneous non-textual materials, the Ninth Circuit refused to give any significance to the word "any" in the text of §213(b)(10)(A). Pet.App.10 n.4. The court claimed that every FLSA exemption begins with "any," so the use of "any" was "a drafting convention, not an expression of congressional intent that we interpret a particular exemption expansively." *Id.* Even accepting the court's premise, *but see* 29 U.S.C. §213(b)(30) (exempting "*a* criminal investigator who is paid availability pay" (emphasis added)), there is no basis for disregarding the significance of the word "any" just because Congress chose to use it repeatedly in many FLSA exemptions. A "drafting convention" is still a deliberate decision—indeed, a repeated deliberate decision—to utilize a particular word that "has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997). And to the extent Congress employed this deliberate, broad phrase as a "drafting convention" in formulating virtually all FLSA exemptions, that is just one more reason the supposed canon of interpreting those exemptions narrowly is fundamentally atextual and misguided. *See* pp. 48-50, *infra*.

in … servicing automobiles." Pet.App.11-19. The court's reasoning does not withstand scrutiny.

The Ninth Circuit first offered an alternative interpretation of §213(b)(10)(A) in which the words "actually" or "personally" are injected into the statute to modify "selling" and "servicing." Pet.App.11-16. In the court's view, the phrase "primarily engaged in … servicing automobiles" encompasses "only those who are *actually* occupied in the repair and maintenance of cars." Pet.App.12 (emphasis added); *see also* Pet.App.15 ("[T]he phrase 'primarily engaged in … servicing automobiles' encompasses only those who are actually and primarily occupied in the repair and maintenance of cars."). To "primarily engage in an activity," the court further reasoned, means to "perform personally" or "actually undertake" the activity. Pet.App.13. Because a service advisor does not "actually" or "personally" perform repairs and maintenance, the court concluded, "service advisors are not primarily engaged in servicing automobiles." Pet.App.12-13.

The most obvious problem with that construction is that neither the word "actually" nor the word "personally" appears in the statute Congress enacted. The notion that an exempt employee must actually or personally service automobiles requires adding restrictive modifiers that are absent from the statutory text. It goes without saying that this Court "ordinarily resist[s] reading words … into a statute that do not appear on its face." *Dean v. United States*, 556 U.S. 568, 572 (2009). Indeed, the Ninth Circuit's felt need to inject words into the statute to produce its favored reading only underscores that the statute as

actually written exempts service advisors whether or not they actually or personally get under the hood to service automobiles themselves.[12]

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

---

[12] To the extent the Ninth Circuit would tie its atextual "actually" or "personally" requirement to the statutory phrase "primarily engaged in," that construction is doubly wrong. "Primarily" is a drafting convention employed in multiple FLSA exemptions that ensures that someone who spends only a small part of their workday on exempt activities cannot claim an exemption. *See, e.g.*, 29 U.S.C. §207(j) (exemption for "employer[s] engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises"); *see also id.* §214(a) (authorizing the Secretary to "provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages"). And, as already noted, "engaged in" is a term that broadens, rather than narrows, the reach of the exemption. *See* p. 30, *supra*.

… servicing automobiles" to "actually" or "personally" perform repairs to automobiles, the Ninth Circuit read "partsman" out of the statute.

The Ninth Circuit's only answer to this violation of the duty to "give effect to every word of a statute," *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004), is thoroughly unpersuasive. According to the Ninth Circuit, partsmen *do* "actually" and "personally" perform repairs and maintenance of cars—or, at least, enough to satisfy the court's vague conception of that supposed requirement—because they "test parts" and "repair parts." Pet.App.14-15. The problems with that argument are legion. First, for the proposition that partsmen "test parts" and "repair parts," the Ninth Circuit relied exclusively on the 1966-67 OOH, repeating all the errors of its previous reliance on that document. *See* p. 36, *supra*.[13]

Second, that proposition is at odds with DOL's regulation describing partsmen as "employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts." 29 C.F.R. §779.372(c)(2). As the DOL regulation makes clear, even if partsmen, on occasion, test and repair parts—and thus, on occasion, actually or personally repair and maintain cars (per the Ninth Circuit's definition)—partsmen are not *primarily engaged in* testing or repairing parts, and thus they are not *primarily engaged in* "servicing" under the Ninth Circuit's misguided definition.

---

[13] The Ninth Circuit also cited an *amicus* brief filed in *Encino I*, but only for the unremarkable proposition that a partsman works with both mechanics and customers. *See* Pet.App.14.

Third, the Ninth Circuit's effort to construe "actually" or "personally" broadly enough to cover partsmen would also be broad enough to bring in service advisors (contrary to the Ninth Circuit's whole purpose in injecting the words into the statute). If a partsman "actually" or "personally" services a vehicle by "determin[ing] an appropriate replacement part and locat[ing] it for a mechanic," in a manner that "contribute[s] directly to the actual repair of a car," Pet.App.15, then a service advisor also passes the test. A service advisor accepts a car for repair, evaluates repair needs, suggests certain repairs, discusses repairs with the customer and the mechanic, and ensures that the customer is satisfied with the repairs—all tasks that "contribute directly to the actual repair of a car." *See Encino I*, 136 S. Ct. at 2121-22; J.A.55. Indeed, in a contest between service advisors and partsmen as to which group spends more time under the hood, the service advisors would likely win since the initial evaluation of servicing needs often involves looking under the hood. But there is no need to settle that contest, as the proper course is not to inject words into a statute to exclude service advisors and then interpret those added terms idiosyncratically in an effort to sweep partsmen back in. In reality, both partsmen and service advisors are integral to the servicing process even though neither group spends the majority of the day under the hood in the same way as a mechanic.

At bottom, the Ninth Circuit's misguided attempt to salvage "partsmen" only underscores the error of its injecting "actually" or "personally" into §213(b)(10)(A). While the statute as redrafted by the Ninth Circuit creates confusion over partsmen, the statute that

Congress actually drafted unambiguously exempts both partsmen and service advisors because both types of employees are *primarily engaged in servicing automobiles*, which is all the clear statutory text requires.

3. The Ninth Circuit supported its flawed interpretation of §213(b)(10)(A) by appealing to a "holistic reading" of the exemption. Pet.App.16-19. The court was concerned that a "literal" reading of §213(b)(10)(A) produced six categories of employees, including a category of employee that readily describes service advisors: "Salesm[e]n primarily engaged in servicing" automobiles. Pet.App.16. Indeed, the court expressly conceded that by producing "the literal category of a 'salesman … primarily engaged in … servicing automobiles,'" the statute "could be construed as exempting service advisors." Pet.App.21. But because a "literal" reading also produced two categories of employees that "do not exist in the real world"—partsmen primarily engaged in selling automobiles, and mechanics primarily engaged in selling automobiles—the court believed that Congress could not have intended to pair "salesman" with "servicing." Pet.App.17. Rather, Congress intended to pair "salesman" only with "selling." Pet.App.18.

The court's conclusion is a *non sequitur*. The theoretical possibility of practically non-existent noun-gerund combinations from two disjunctive lists 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 can be safely ignored. Courts need not worry about the purely theoretical combinations because no case will raise the issue; after all, partsmen and mechanics primarily engaged in selling cars "do not exist." Pet.App.17. But where, as here, the combinations are eminently sensible—*i.e.*, where tens of thousands of "salesm[e]n … primarily engaged in … servicing automobiles" actually exist and are currently at work in the United States—the "literal" reading of the plain statutory text is the correct one.

Rather than ignore the non-existent categories produced by the two disjunctive lists, the Ninth Circuit chose to ignore the literal reach of the statute and limit the gerund "selling" to salespeople and limit the gerund "servicing" to partsmen and mechanics. But there is no cause for ignoring the literal reach of the statute, especially when any one-to-one matching of nouns and gerunds is foreclosed by the reality that the statute features three antecedent nouns but only two consequent gerunds. While the Ninth Circuit believed that "Congress trusted courts to recognize the obvious," Congress has not licensed courts to ignore the literal text of statutes. And what has been "obvious" to every other court to address the question

is that the plain meaning of §213(b)(10)(A) encompasses service advisors.[14]

4. Last, the Ninth Circuit believed that the legislative history "strongly suggests" that §213(b)(10)(A) does not encompass service advisors. Pet.App.21 n.14; Pet.App.22-30. That is a curious determination given that, last time around, the Ninth Circuit deemed the legislative history "inconclusive." Pet.App.70. While the Ninth Circuit had it right the first time, the more salient point is that courts "do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). As this Court has repeatedly observed, the process of statutory construction not only "begins with the statutory text," but "ends there as well if the text is unambiguous." *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004).

---

[14] The Ninth Circuit characterized its noun-gerund analysis as an exercise in "holistic" interpretation. Pet.App.16. But when this Court has referred to the "holistic endeavor" of statutory construction, it has meant looking to "the remainder of the statutory scheme" to clarify a provision's meaning—because, for example, "the same terminology is used elsewhere in a context that makes its meaning clear," or "one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988); *see, e.g.*, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2563 (2013); *Smith v. United States*, 508 U.S. 223, 233-34 (1993). The Ninth Circuit engaged in no such analysis; it simply (mis)interpreted §213(b)(10)(A) in isolation. A proper "holistic" reading would have taken into account other provisions in the FLSA, like §207(*i*) and §213(a)(1), that demonstrate why treating service advisors as exempt comports with the broader structure and purpose of the FLSA. *See* pp. 32-34, *supra*.

In all events, the legislative history invoked by the Ninth Circuit provides no support for finding service advisors non-exempt. Even the Ninth Circuit was forced to admit that the legislative record contains "only one probative discussion by members of Congress." Pet.App.23 (citing 112 Cong. Rec. 20,502-06 (1966)). In fact, that one discussion did not address service advisors at all, but was a Senate debate about whether to exempt partsmen in addition to automobile salesmen and mechanics. Without any discussion of service advisors, the snippet's probative value to the question at hand is nil. Moreover, as to partsmen, the Ninth Circuit's invocation of the legislative history is an object lesson in the dangers of resorting to legislative history when the text is clear. The statutory text leaves no doubt about the status of partsmen—they are plainly exempt. But the Ninth Circuit resorted to legislative history on the same subject to support an atextual reading of the statute that would engender doubt about whether partsmen are exempt if they do not actually or personally service automobiles.

The Ninth Circuit ultimately acknowledged the "legislative history's apparent silence" regarding service advisors, but it then attempted to leverage that silence, and its contrast with the explicit discussion of automobile salesmen, to support its deviation from the literal text. Pet.App.26. This Court is wary enough about drawing inferences from the absence of statutory text. *See, e.g.*, *Burns v. United States*, 501 U.S. 129, 136 (1991). Drawing inferences from gaps in the *legislative history* when the text is broad and clear is plainly a bridge too far. "An inference drawn from congressional silence

certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent." *Id.*

The acknowledged silence in the contemporary legislative history prompted the Ninth Circuit to invoke legislative history regarding the 1974 amendments to the FLSA to draw inferences about Congress' intent when it enacted the exemption in 1966. This post-enactment legislative history, better characterized as "legislative future," *United States ex rel. Long v. SCS Bus. & Tech. Inst.*, 173 F.3d 870, 878-79 (D.C. Cir. 1999) (Silberman, J.), is a remarkably poor indicator of congressional intent *at the time Congress initially acted*. "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). In all events, the materials the Ninth Circuit uncovered do not even illuminate Congress' thinking in 1974. The best the Ninth Circuit could point to were several sentences in two "written summaries of the revised exemption" prepared by two legislators (or, more likely, their staff). Pet.App.26-27; *see Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568-69 (2005) (noting that "legislative materials like committee reports, which are not themselves subject to the requirements of Article I," may be authored by "unrepresentative committee members—or, worse yet, unelected staffers and lobbyists").

Making matters worse, the Ninth Circuit invoked statements from *non-members of Congress*. Pet.App.22-23, 28-29. Those statements, made by witnesses at subcommittee hearings, shed no light on

what Congress actually intended or enacted. Worse still, the Ninth Circuit invoked witness statements from hearings that *did not even result in legislation*. *See* Pet.App.25-26 n.18 (citing witness testimony from 1957, 1958, 1959, and 1960). Plumbing the depths of witness statements when the Members are silent—and in years when Members do not even enact legislation—is truly "an exercise in 'looking over a crowd and picking out your friends.'" *Exxon Mobil*, 545 U.S. at 568. That the Ninth Circuit was "[d]riven to th[is] last ditch," *Fidelity Fin. Servs., Inc. v. Fink*, 522 U.S. 211, 218 (1998), underscores that the legislative history is indeed "inconclusive" and confirms that this Court should reject the Ninth Circuit's effort to use "ambiguous legislative history to muddy clear statutory language," *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011).

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

The Ninth Circuit buttressed its untenable construction of the statutory text by relying 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)); *see also* Pet.App.21. While the Ninth Circuit suggested that it would have reached the same conclusion even without that so-called "rule," Pet.App.21 n.14, its invocation of that interpretive crutch to deviate from the literal text underscores the weakness of its reasoning and the danger posed by this misguided rule.

In recent years, the Court has cited this anti-employer "canon" of interpreting the FLSA only in the course of declining to apply it. *See, e.g.*, *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 879 n.7 (2014) (reserving question of whether Court should "disapprove" anti-employer canon); *Christopher*, 567 U.S. at 164 n.21 (canon does not apply to FLSA's definitions in §203). It has been at least several decades, if not longer, since the Court has actually invoked this principle as even a partial basis for its construction of the FLSA.

That should come as no surprise. In interpreting a statute, a court's goal "should be neither liberally to expand nor strictly to constrict [the statute's] 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). Applying the purported canon of broad construction of the FLSA (or narrow construction of the FLSA's exemptions), however, inevitably leads courts to subordinate that principal concern. Indeed, this supposed "rule" is just an FLSA-specific variant of the disfavored notion that courts should interpret remedial statutes broadly—a notion this Court has rightly dubbed "that last redoubt of losing causes." *OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-36 (1995).

Even though this Court has largely disregarded the anti-employer canon, a number of lower courts—including the Ninth Circuit here—have seized upon outdated dicta from this Court and used it to interpret the FLSA in ways that tip the scales in favor of employees claiming to be covered by the statute. *See*

Pet.App.21 (agreeing that "literal" reading of statute exempts service advisors, but finding service advisors non-exempt because of "the rule that we must interpret exemptions narrowly"); *see also, e.g.*, *Morrison v. Cty. of Fairfax*, 826 F.3d 758, 761, 768 (4th Cir. 2016); *Lawrence v. City of Philadelphia*, 527 F.3d 299, 310 (3d Cir. 2008); *Miller v. Team Go Figure*, No. 3:13-CV-1509-O, 2014 WL 1909354, at *7 (N.D. Tex. May 13, 2014); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 472 (S.D.N.Y. 2008). While the plain text of §213(b)(10)(A) clearly encompasses service advisors, such that a balance-tipping canon would not benefit Respondents here in any event, the Court should nevertheless take this opportunity to make clear to lower courts that this "last redoubt of losing causes" is no substitute for careful statutory interpretation. Having bedeviled the legal profession for decades and having led numerous lower courts astray, the time has come to formally inter the anti-employer canon. The FLSA and its exemptions should be construed neither narrowly nor broadly, but fairly and correctly.[15]

---

[15] The Ninth Circuit acknowledged that this Court has recently declined to employ the canon in FLSA decisions, but it distinguished those decisions because they did not involve §213 exemptions. Pet.App.20. But whether one is interpreting a statutory definition in §203 (as in *Sandifer* and *Christopher*) or a statutory exemption in §213 (as here), applying an anti-employer canon of construction produces the same result: an "exemption from … humanitarian and remedial legislation," to quote an early case announcing the canon. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Whatever the category of statutory provision, there is no basis for interpreting the statutory text more or less broadly than customary and appropriate canons of construction permit.

C. If Allowed to Stand, the Ninth Circuit's Erroneous Decision Will Produce Far-Reaching Consequences for Both Dealerships and Service Advisors.

As this Court recognized in *Encino I*, affirming the decision below would disrupt decades of settled expectations and open employers to substantial retroactive liability, something this Court has been loath to do in the FLSA context. The Ninth Circuit's decision has the potential to cause serious harm to automobile dealerships and service advisors alike, without any countervailing benefits in terms of the FLSA's goals. Remarkably, however, the Ninth Circuit did not even address these far-reaching consequences in the decision below—even though this Court repeatedly acknowledged them in *Encino I* and even though they are obvious in light of nearly four decades of agency acquiescence in the courts' heretofore uniform conclusion that service advisors are exempt from the FLSA's overtime requirements. *See Encino I*, 136 S. Ct. at 2126-27 (noting the "serious reliance interests at stake"); *id.* at 2126 (noting "decades of industry reliance on the Department's prior policy"); *id.* (observing that "[d]ealerships and service advisors negotiated and structured their compensation plans against this background understanding").

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 an estimated 100,000 service advisors. NADA Cert. Amicus Br. at 5-6. Based on decades of settled

precedent treating those employees as exempt and agency guidance to the same effect, many dealerships have offered compensation packages based primarily on sales commissions rather than hourly wages. Yet the Ninth Circuit has now concluded that those longstanding compensation arrangements have been unlawful from the start.

This Court has not looked favorably upon attempts by plaintiffs to use novel theories of FLSA liability to upset long-settled industry practices. As the Court has explained, it may be "possible for an entire industry to be in violation of the [FLSA] for a long time" with no one noticing, but the "more plausible hypothesis" is that the industry's practices simply were not unlawful. *Christopher*, 567 U.S. at 158 (quoting *Yi v. Sterling Collision Ctrs.*, 480 F.3d 505, 510-11 (7th Cir. 2007)). The Court has thus repeatedly rejected FLSA claims that would have exposed settled industry practices to potentially significant retroactive liability (including back pay and double damages). *See, e.g.*, *id.* at 157 (rejecting FLSA liability for pharmaceutical sales representatives where "the pharmaceutical industry had little reason to suspect that its longstanding practice of treating [sales representatives] as exempt … transgressed the FLSA"); *Integrity Staffing*, 135 S. Ct. at 518-19 (rejecting novel attempt to impose FLSA liability for time spent in security screenings); *see also Yi*, 480 F.3d at 510 (rejecting FLSA challenge to a "system of compensation [that] is industry-wide, and of long standing").

Those reliance concerns are at their zenith in cases like this and *Christopher*, where plaintiffs seek

to have employees who were actually paid on a commission basis retroactively reclassified as non-exempt employees. Not only were workers focused on earning commissions, rather than working a set number of hours, but employers did not have an incentive to strictly track the number of hours worked, which creates both evidentiary difficulties and the prospect of wholly unjustified windfalls. *See Christopher*, 567 U.S. at 166 (sales work was "difficult to standardize to any time frame," which "ma[de] compliance with the overtime provisions difficult"). This problem is evident in Respondents' admission that their hours were not tracked or recorded, J.A.56-57, and in their studious ambiguity concerning the damages they seek. Having received commissions based on their sales, they are in no position to ask for 150% of those commissions, but any effort to attribute a different type of compensation to previously commissioned salespeople is artificial. And moving forward, the Ninth Circuit's holding would force both service advisors and dealerships into compensation plans other than the ones they had voluntarily accepted, to the detriment of employers and employees alike.

The problems with allowing Respondents to reap such windfalls are exacerbated by the differential treatment implicit in the Ninth Circuit's interpretation of the exemption. Under the approach adopted by every other court to consider the issue, the vast majority of salespeople and all three core components of the service team at a dealership are treated the same, *viz.*, as exempt. The Ninth Circuit's decision, however, would grant service advisors, but not partsmen or mechanics, a huge windfall. Those

windfalls cannot help but prove to be divisive, especially because service advisors are already compensated better on average than partsmen and mechanics. *See* Nat'l Auto. Dealers Ass'n, *2016 Dealership Workforce Study: Automotive Retail National & Regional Trends in Compensation, Benefits & Retention* 11 (2016), http://bit.ly/2zSedFA (service advisors' average compensation almost 30% higher than partsmen's). Thus, dealers would face the prospect of not only having to pay out damages retrospectively, but also having to deal with anomalous divisions among their core service employees going forward.

* * *

Treating service advisors as non-exempt would do nothing to advance the purposes of the FLSA. It would, however, impose significant and unnecessary burdens and costs on dealerships and service advisors alike. The Ninth Circuit's novel and unprecedented interpretation of §213(b)(10)(A) works a fundamental, unnecessary, and unauthorized change in the law. It should be reversed.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

KARL R. LINDERGREN
TODD B. SCHERWIN
WENDY MCGUIRE COATS
FISHER
& PHILLIPS LLP
444 S. Flower Street
Suite 1500
Los Angeles, CA 90071

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
MATTHEW D. ROWEN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioner

November 1, 2017

STATUTORY APPENDIX

TABLE OF CONTENTS

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.