

2013

Not Making Sales Paid Too Well for Pharmaceutical Reps: Why the Result in Christopher v. Smithkline Beecham Corp. Makes Sense Even if Its Statutory Construction Does Not

Robert J. Hurtt Jr.
rhurtt@slu.edu

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>

 Part of the [Law Commons](#)

Recommended Citation

Hurtt, Robert J. Jr. (2013) "Not Making Sales Paid Too Well for Pharmaceutical Reps: Why the Result in Christopher v. Smithkline Beecham Corp. Makes Sense Even if Its Statutory Construction Does Not," *Saint Louis University Law Journal*: Vol. 57 : No. 4 , Article 9.

Available at: <https://scholarship.law.slu.edu/lj/vol57/iss4/9>

This Note is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact erika.cohn@slu.edu, ingah.daviscrawford@slu.edu.

**NOT MAKING SALES PAID TOO WELL FOR PHARMACEUTICAL
REPS: WHY THE RESULT IN *CHRISTOPHER v. SMITHKLINE
BEECHAM CORP.* MAKES SENSE EVEN IF ITS STATUTORY
CONSTRUCTION DOES NOT**

TABLE OF CONTENTS

INTRODUCTION 1020

I. BACKGROUND..... 1023

 A. *Contours of the FLSA* 1023

 1. The Act’s History and Rationale 1023

 2. The Secretary’s Definitions and Delimitations 1025

 B. *Interpreting the Provisions* 1027

 C. *Other Outside Sales Cases* 1029

 D. *Christopher’s Outside Sales Application* 1032

 1. The Ninth Circuit’s Approach 1032

 2. The Supreme Court’s Conservative Majority Agrees 1034

 3. The Liberal Justices’ Dissent..... 1036

II. ANALYSIS..... 1038

 A. *The Agency’s Interpretation Was Not Entitled to Deference* 1038

 B. *PSRs Do Not Fall Plainly and Unmistakably Within the
 Exemption’s Terms* 1039

 C. *What About the Exemption’s Spirit?* 1041

 1. “Excessively Low Wages 1042

 2. “Excessively Long Hours” and Job-Spreadings 1043

III. NON-JUDICIAL SOLUTIONS 1044

 A. *The Secretary Could Have Expanded the Definition of Sale* 1044

 B. *Congress Could Have Amended the Act* 1045

 C. *Or the Pharmaceutical Industry Could Have Adapted*..... 1045

CONCLUSION..... 1047

INTRODUCTION

The American pharmaceutical market, a \$300 billion industry,¹ is currently navigating a period of great uncertainty, with issues ranging from the unclear impact of the Patient Protection and Affordable Care Act² to the upcoming expiration of numerous major patents³ to continued industry consolidation.⁴ All three factors are placing an enormous strain on pharmaceutical sales representatives (“PSRs” or “Reps”), the heart of drugmakers’ sales efforts.⁵ Not long ago, these sales representatives, also known as detailers,⁶ owned highly sought-after positions with salaries sometimes reaching six figures.⁷ The enviable base pay was only part of the story; these workers commonly earned an additional twenty-five percent of their total compensation through incentive-based bonuses.⁸ At its height, the PSR job market in the U.S. comprised more than 100,000 workers.⁹ However, the field has shed more than 25,000 of those jobs since 2006 as the economy has contracted and pharmaceutical giants have merged.¹⁰ Further, doctors have become more

1. Gary Gatyas, *IMS Institute Reports U.S. Spending on Medicines Grew 2.3 Percent in 2010, to \$307.4 Billion*, IMS INSTITUTE FOR HEALTHCARE INFORMATICS (April 19, 2011), <http://www.imshealth.com/portal/site/ims> (follow “The IMS Institute” hyperlink; then follow “Biopharma Forecasts & Trends” hyperlink; then follow “19 Apr 2011” hyperlink).

2. Arthur Daemrich, *U.S. Healthcare Reform and the Pharmaceutical Industry* 22 (Harvard Bus. Sch., Working Paper No. 12-015, 2011), available at <http://www.hbs.edu/research/pdf/12-015.pdf>.

3. Barbara Martinez & Jacob Goldstein, *Big Pharma Faces Grim Prognosis*, WALL ST. J., Dec. 6, 2007, at A1, available at <http://online.wsj.com/article/SB119689933952615133.html>.

4. *Pharmaceutical Sales Representatives: A Slowly Vanishing Breed?*, INFOGROK BUSINESS INTELLIGENCE NETWORKS (July 15, 2009) [hereinafter *Vanishing*], <http://www.infogrok.com/index.php/carousel/pharmaceutical-sales-representatives-a-slowly-vanishing-breed.html>.

5. *Id.* (noting that experts point to continued industry consolidation as the largest reason the PSR field has shrunk over the past five years).

6. *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 387 (9th Cir. 2011), *aff’d*, 132 S. Ct. 2156 (2012).

7. *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 465 (S.D.N.Y. 2008) (although the plaintiff earned only \$84,000 per year, her colleagues in more senior sales positions earned more than \$100,000 annually in base pay).

8. Elliot Scott, *Pharmaceutical Sales Compensation: Past, Present and Future*, TOWERS WATSON (2010), http://www.towerswatson.com/assets/pdf/1404/WT_2010_15814.pdf (showing more than half of the PSRs who visit primary care doctors receive a 75/25 compensation split, and only four percent receive less than twenty percent of their salary through bonuses). Because PSRs cannot sell drugs directly to doctors or patients, these bonuses instead are based on the number of prescriptions of a Rep’s promoted drugs that are prescribed by physicians within a Rep’s sales territory. *Christopher*, 635 F.3d at 387.

9. Jeanne Whalen, *Drug Makers Replace Reps with Digital Tools*, WALL ST. J., May 10, 2011, at B7, available at <http://online.wsj.com/article/SB10001424052748703702004576268772294316518.html>.

10. *Id.*

resistant to visits from sales representatives,¹¹ a factor that has led drugmakers to turn increasingly to e-detailing as an alternative to employing human Reps.¹²

PSRs did not leave their jobs quietly. Some joined class action lawsuits against their former employers, claiming they were due unpaid overtime under the Fair Labor Standards Act (“FLSA” or the “Act”).¹³ The fight boiled down to the definition of “sales” and its unique application to PSRs, who are prevented by federal law from actually selling drugs.¹⁴ Because a pharmaceutical company cannot make direct sales of its prescription drugs, its sales force instead targets physicians as the necessary intermediary to reach the products’ end users.¹⁵ PSRs do not sell the drugs directly to the doctors; they can only promote the drugs, provide free samples, and sell doctors on the idea of prescribing them.¹⁶ If these activities qualify as “sales” within the Act’s definition, then PSRs meet the FLSA’s outside sales exemption requirements,¹⁷ rendering the employer exempt from paying them overtime wages.¹⁸ If the

11. *Vanishing*, *supra* note 4. Drug companies have lessened their dependence on sales representatives as their work has faced greater pushback from physicians. *Id.* A survey found twenty-three percent of doctors now totally refuse to see sales representatives, and a growing number are requiring sales representatives to set appointments in order to see them. Ben Comer, *Docs Are Visited by 20 Reps a Week, Survey Says*, MEDICAL MARKETING & MEDIA (Oct. 14, 2010), <http://www.mmm-online.com/docs-are-visited-by-20-reps-a-week-survey-says/article/180995>.

12. Whalen, *supra* note 9, at B7; *see also* Amy Barrett, *Pharmaceutical Companies Replace Sales Reps with Websites*, DAILYFINANCE (June 24, 2010, 3:20 PM), <http://www.dailyfinance.com/2010/06/24/pharmaceutical-companies-replace-sales-reps-with-websites> (noting that drugmakers such as AstraZeneca and Johnson & Johnson have begun using call centers and online operations to provide samples and drug information to doctors).

13. *See* cases cited *infra* note 20. Companies are not allowed to retaliate against employees for joining these lawsuits against them. Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (2006). Still, the fact that names of members of the plaintiff class are available on the federal court docket likely has a chilling effect on current employees. Jim Edwards, *Lay Us Off, Will You? Hundreds Axed at Pfizer Sign Up for Overtime Lawsuit*, CBS MONEYWATCH (June 13, 2011, 12:32 PM), http://www.cbsnews.com/8301-505123_162-42848716/lay-us-off-will-you-hundreds-axed-at-pfizer-sign-up-for-overtime-lawsuit/?tag=bnetdomain.

14. *See* Controlled Substances Act, 21 U.S.C. §§ 801–971 (2006). Prescription drugs cannot be dispensed to their end users without the authorization of a “practitioner, other than a pharmacist.” *Id.* § 829(b).

15. *See* Christopher v. SmithKline Beecham Corp., 635 F.3d 383, 396 (9th Cir. 2011), *aff’d*, 132 S. Ct. 2156 (2012).

16. *See id.*; *see also* Prescription Drug Marketing Act, 21 U.S.C. § 353(c)(1) (“No person may sell, purchase, or trade or offer to sell, purchase, or trade any drug sample.”).

17. 29 U.S.C. § 213(a)(1).

18. MARC LINDER, “MOMENTS ARE THE ELEMENTS OF PROFIT”: OVERTIME AND THE DEREGULATION OF WORKING HOURS UNDER THE FAIR LABOR STANDARDS ACT 213 (2000) (explaining the confusion over use of the term “exemption” in the Act by noting the legislation was written from the employer’s viewpoint: “It is therefore the employer who is exempt—from the burden of paying the minimum wage or mandatory overtime.”).

workers do not make sales, then the exemption does not cover them, entitling the Reps to overtime pay.¹⁹ The federal circuits split on the answer.²⁰

The Second Circuit, in *In re Novartis Wage and Hour Litigation*, found PSRs do not make sales, a decision that left the drugmaker open to an estimated \$100 million in liability for unpaid overtime to 2,500 sales representatives.²¹ A few months later, in *Christopher v. SmithKline Beecham Corp.*, the Ninth Circuit found PSRs do in fact qualify for the outside sales exemption.²² After denying certiorari in *Novartis*, the Supreme Court granted it in *Christopher* and affirmed that decision.²³ Although the Court resolved the split in a 5-4 decision that reached a common-sense result,²⁴ the way it achieved that result is troubling. Ruling that PSRs are not entitled to overtime pay better meshes with the policy behind the Act's exemptions, but the Court could reach that result only through a loose interpretation of the statute's terms, an approach that is discouraged when interpreting remedial legislation.²⁵ That said, the dissent's approach would not have been any better. Although its analysis of the statutory text and regulations of the Secretary of Labor ("Secretary") made more sense, the result—that highly paid sales representatives would be entitled to significant overtime pay as well—seems mostly against the spirit and purpose of the exemption.²⁶

This Note first will examine the FLSA's statutory language, as well as the Secretary's interpretations of this language, while keeping the Act's history and rationale behind its exemptions in mind. Other recent applications of the

19. 29 U.S.C. § 213(a)(1).

20. Compare *Christopher*, 635 F.3d at 400–01 (finding PSRs meet the outside sales exemption), with *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 155 (2d Cir. 2010), cert. denied, 131 S. Ct. 1568 (2011) (finding PSRs do not qualify under this exemption, so they must be paid for overtime hours). For other cases that found PSRs fall under an FLSA exemption, see *Baum v. AstraZeneca LP*, 605 F. Supp. 2d 669, 687 (W.D. Pa. 2009), aff'd, 372 F. App'x 246 (3d Cir. 2010), cert. denied, 131 S. Ct. 332 (2010); *Schaefer-LaRose v. Eli Lilly & Co.*, 663 F. Supp. 2d 674, 700 (S.D. Ind. 2009), aff'd, 679 F.3d 560 (7th Cir. 2012); *Barnick v. Wyeth*, 522 F. Supp. 2d 1257, 1263–65 (C.D. Cal. 2007). For other cases ruling PSRs did not qualify under the outside sales exemption, see *Kuzinski v. Schering Corp.*, 384 F. App'x 17, 19 (2d Cir. 2010), cert. denied, 131 S. Ct. 1567 (2011); *Jirak v. Abbott Labs., Inc.*, 716 F. Supp. 2d 740, 749 (N.D. Ill. 2010), rev'd sub nom, 679 F.3d 560 (7th Cir. 2012); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 472 (S.D.N.Y. 2008); *Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F. Supp. 2d 308, 323 (D. Conn. 2008).

21. *In re Novartis*, 611 F.3d at 144, 155. In January 2012, the company reached a settlement that would provide class members with up to \$99 million. Chad Bray, *Novartis Settles U.S. Overtime Case*, WALL ST. J. ONLINE (Jan. 25, 2012, 3:37 PM), <http://online.wsj.com/article/SB10001424052970203718504577183131865055056.html>.

22. *Christopher*, 635 F.3d at 383, 400–01.

23. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2174 (2012).

24. See *infra* Part II.B.

25. See *id.*

26. See *infra* Part II.C.

outside sales exemption will be addressed, and the Ninth Circuit's *Christopher* decision will be re-examined. Finally, the Supreme Court's opinion will be analyzed with the focus on whether PSRs plainly and unmistakably fall within the statutory language for the outside sales exemption. The argument is that the Court should have found that PSRs do not plainly and unmistakably fall within the exemption's terms, and thus, they are not exempt.²⁷ This result runs counter to what the Ninth Circuit considered "common sense," but this problem's ideal solution should not have been found in the judicial branch.²⁸ Instead, both the legislature and the Department of Labor ("Department" or "DOL") were better positioned to create a solution remaining true to both the terms and spirit of the Act.²⁹

I. BACKGROUND

A. *Contours of the FLSA*

1. The Act's History and Rationale

The 1930s saw a wave of labor legislation, and numerous statutes and industry codes that directly preceded the FLSA capped the number of hours certain employees could work.³⁰ Providing overtime pay for additional hours was primarily a secondary issue.³¹ The top priority of these initiatives was to fight the staggering unemployment of the Great Depression.³² Congress showed a similar intent when it passed the FLSA in 1938. The Act's stated purpose was to promote the "health, efficiency, and general well-being of workers" by creating minimum standards for employers.³³ Further evidence that Congress intended the Act mainly to combat unemployment by spreading work can be found in the legislative record.³⁴

27. See *infra* Part II.B.

28. See *infra* Part III.

29. See *infra* Part III.A–B.

30. LINDER, *supra* note 18, at 37–39 (noting the President's Reemployment Agreement of 1933 helped prompt a variety of industry codes that limited workers' hours).

31. *Id.* Guaranteeing overtime pay was not a direct goal of these industry codes; rather, it was an indirect consequence to the codes' exceptions for work hour limits. *Id.* Most of these codes provided for additional compensation, usually at the rate of time and a half, for instances when an employee's workweek was allowed to be extended past the prescribed limit. *Id.*

32. Robert VanGiezen & Albert F. Schwenk, *Compensation From Before World War I Through the Great Depression*, U.S. BUREAU OF LABOR STATISTICS (2003). U.S. unemployment rates peaked at twenty-five percent in 1933.

33. 29 U.S.C. § 202(a).

34. While debating the Act, Senator Alben Barkley said, "I believe it will be socially, economically, and industrially more wholesome and safe for all the available labor in America to be able to work three-fourths of the time than for three-fourths of it to work all the time and one-fourth never to work." LINDER, *supra* note 18, at 43 (quoting 81 CONG. REC. 7941 (1937)). After

The key components of the Act created a standard forty-hour work week,³⁵ and employees who worked beyond that limit were entitled to extra compensation in the form of time-and-a-half overtime payment.³⁶ Although this provision, viewed from our twenty-first century perspective, seems clearly aimed at rewarding hard workers, the expected result at the time was for work to be spread to the unemployed as employers sought to avoid paying the overtime rate.³⁷

The Act includes numerous exceptions,³⁸ including ones for certain white-collar workers who are exempted from overtime pay.³⁹ In Section 13(a)(1), the Act specifically excludes “any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]).”⁴⁰

Outside salesmen were excluded from overtime pay because their work went largely unsupervised.⁴¹ This freedom made it difficult for employers to control the number of hours the salesmen worked, so it made little sense to compensate these employees on an hourly basis.⁴² Further, salesmen usually earned commissions for their sales, which would compensate them in lieu of overtime.⁴³ In fact, the Secretary recently noted that the administrative and outside sales exceptions were carved out under the rationale that white-collar workers already were paid well above the minimum wage.⁴⁴ These workers

an amendment was suggested that would require employers to also pay time and a half for graveyard shift workers, the chair of the House Labor Committee noted: “[I]f we could do this it would do more to spread employment than any other thing concerned in the bill. That is the purpose of the bill—to try to spread employment.” LINDER, *supra* note 18, at 43 (quoting 82 CONG. REC. 1696 (1937) (statement of Rep. Mary Norton)).

35. 29 U.S.C. § 207(a). Actually, the Act created a forty-four hour week for the first year it was in effect, followed by a decline to forty-two hours in its second year. *Id.* Today’s standard forty-hour work week began in the third year after the Act’s passage. *Id.*

36. *Id.*

37. See *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 577–78 (1942) (finding that the intent of the Act was not solely to boost substandard wages, but also to apply financial pressure on businesses to “spread employment to avoid the extra wage”).

38. LINDER, *supra* note 18, at xvii (calling the Act “profoundly flawed” because of “an enormous number of exclusions and exemptions”).

39. See 29 U.S.C. § 213(a)(1).

40. *Id.*

41. *Jewel Tea Co. v. Williams*, 118 F.2d 202, 207–08 (10th Cir. 1941).

42. *Id.* (explaining that an outside salesman “can earn as much or as little, within the range of his ability, as his ambition dictates”).

43. *Id.*

44. *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,123–24 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541).

also frequently received more fringe benefits due to their positions.⁴⁵ The Secretary further explained:

[T]he type of work [white-collar workers] performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium.⁴⁶

2. The Secretary's Definitions and Delimitations

Congress did not define the white-collar exemption terms and instead explicitly left that job to the Secretary.⁴⁷ In *Auer v. Robbins*, the Supreme Court recognized the Secretary's "broad authority to 'defin[e] and delimi[t]' the scope of the exemption for executive, administrative, and professional employees."⁴⁸ Under the Secretary's published regulation, "outside salesman" is defined as an employee:

- (1) Whose primary duty is: (i) making sales within the meaning of section 3(k) of the Act, or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- (2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.⁴⁹

"Primary duty" is defined as "the principal, main, major or most important duty that the employee performs."⁵⁰

Section 3(k) of the FLSA explains that "'[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."⁵¹ The Secretary's regulations provide:

Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that 'sale' or 'sell' includes

45. *Id.* at 22,124.

46. *Id.*

47. 29 U.S.C. § 213(a)(1).

48. 519 U.S. 452, 456 (1997). Although the Court in *Auer* did not expressly address the outside sales exemption, there should be no doubt that the Secretary's authority to define terms extends to that exemption as well since the statutory phrase "as such terms are defined and delimited" immediately follows the outside sales portion of the exemption.

49. 29 C.F.R. § 541.500(a)(1) (2011). This note does not address the requirement to be "regularly engaged" away from the employer's place of business because that issue is not in dispute for PSRs, who spend the majority of their workdays visiting doctors. Likewise, there is no argument about the inapplicability of the "placing orders" prong, since PSRs do not take drug orders from doctors. The entire issue centers on the first part: whether PSRs make sales within the statutory definition. *See supra* notes 14–20 and accompanying text.

50. 29 C.F.R. § 541.700(a).

51. 29 U.S.C. § 203(k).

any sale, exchange,⁵² contract to sell, consignment for sale, shipment for sale, or other disposition.

In 2004, the Secretary released further guidance on what an employer must do to show an employee falls under one of the FLSA's white-collar exemptions.⁵³ Those guidelines note that "[a]n employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales."⁵⁴ "Employees have a primary duty of making sales if they 'obtain a commitment to buy' from the customer and are credited with the sale."⁵⁵ Thus, sales and promotional work are differentiated under the regulations. The regulation explains that people who make sales also commonly perform promotional work, but whether that promotional work is exempt depends on whether it is performed "incidental to and in conjunction with an employee's own outside sales."⁵⁶ If the promotional work is incidental to sales made by someone else, it is not exempt.⁵⁷ Further, the Secretary's 2004 guidance emphasized that the Department did not "intend to change any of the essential elements required for the outside sales exemption."⁵⁸ To qualify, the "employee's primary duty must be to make sales Extending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test."⁵⁹

Because the FLSA is remedial legislation,⁶⁰ its language should be construed liberally to advance its purpose:⁶¹ spreading labor to protect workers "unable to protect themselves from excessively low wages and excessively

52. 29 C.F.R. § 541.501(b).

53. Defining and Delimiting the Exemptions, 69 Fed. Reg. at 22,122.

54. *Id.* at 22,162 (distinguishing sales from pure promotional work).

55. *Id.* at 22,162–63 (citation omitted) ("In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt.").

56. 29 C.F.R. § 541.503(a) (emphasis added).

57. *Id.*

58. Defining and Delimiting the Exemptions, 69 Fed. Reg. at 22,162.

59. *Id.*

60. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) ("[T]hese provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect.").

61. *Id.* ("Such a statute must not be interpreted or applied in a narrow, grudging manner."); *see also Ne. Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 268 (1977) (broadly defining "employee" because it found clear legislative intent in the amendment to protect longshoremen).

long hours.”⁶² Likewise, exceptions within remedial legislation should be construed narrowly in order to achieve their legislative purpose.⁶³ Thus, the FLSA’s outside sales exemption should be narrowly construed against the employer seeking to assert it.⁶⁴ The exemption applies only to employees “plainly and unmistakably within [the] terms and spirit” of the exemption.⁶⁵ Further, the employer bears the burden to prove the employee does in fact qualify for an exemption.⁶⁶

B. *Interpreting the Provisions*

Statutory interpretation always begins by examining the text,⁶⁷ and statutory language is to be followed when clear.⁶⁸ However, when statutory language is ambiguous, an agency’s interpretation of a statute it administers may be entitled to deference.⁶⁹ This *Auer* deference is given so long as the agency’s interpretation is “based on a permissible construction of the statute.”⁷⁰ Likewise, an agency’s interpretation of its own ambiguous regulation receives deference unless “plainly erroneous or inconsistent with the

62. LINDER, *supra* note 18, at 48 (quoting “Message from the President,” in 82 CONG. REC. 9, 11 (1937)).

63. *Brennan v. Keyser*, 507 F.2d 472, 477 (9th Cir. 1974) (finding a towing company did not fall clearly within both the terms and spirit of the FLSA’s exemption for retail or service establishments).

64. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

65. *Id.*

66. *Id.* at 394 n.11; *see also* *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 391 (9th Cir. 2011), *aff’d*, 132 S. Ct. 2156 (2012).

67. William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1557 (1998) (“The plain meaning of a text as applied to a set of facts is the focal point for attention, whether one is a textualist, intentionalist, or pragmatic interpreter of statutes.”).

68. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

69. *Id.* at 843–44. The rationale behind agency deference boils down to two concepts: competence and delegation. Melanie E. Walker, Comment, *Congressional Intent and Deference to Agency Interpretations of Regulations*, 66 U. CHI. L. REV. 1341, 1341 (1999). The first point rests on the contention that an agency has greater expertise of the subject matter it covers, which should make it more competent than a court to clarify the ambiguous language. *Id.* The second point flows out of the belief that if Congress did not expressly address an issue, it left the power to the appropriate agency to handle those details. *Id.* (citing *Chevron*, 467 U.S. at 843–44) (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”).

70. *Chevron*, 467 U.S. at 842–44 (deciding to defer to the agency interpretation of an ambiguous statute); *see also* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 569 (1985) (“[C]ourts do not necessarily abdicate a Marshallian duty to ‘say what the law is’ by deferring to agencies. Courts retain the authority to control administrative abuses of power; deferential review simply recasts the question of ‘law’ as whether the agency’s interpretation is ‘reasonable.’”).

regulation.”⁷¹ The interpretation need not be the only one possible, nor does it need to be the conclusion the court would have reached if the question had originated there without any agency interpretation.⁷² The court serves as an “important check on the agency’s decisionmaking [sic] process, but ultimately the agency’s judgment, if reasonable, must prevail.”⁷³ Still, unchecked deference to agency decisions could foster political conflict as an agency might attempt to change an interpretation created under a previous administration.⁷⁴

Although courts interpreting the FLSA should narrowly construe its exemptions against the employer, the Secretary has no such limitation and is bound solely by the statutory language.⁷⁵ The fact that an agency’s interpretation is provided in a legal brief rather than a federal rule does not necessarily make it unworthy of deference,⁷⁶ although this interpretation may

71. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation omitted) (finding the Secretary’s interpretation, given in an amicus brief, was controlling).

72. *Chevron*, 467 U.S. at 843 n.11.

73. *Brodsky v. U.S. Nuclear Regulatory Comm’n*, 578 F.3d 175, 182 (2d Cir. 2009).

74. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1180 (2008) (noting that agency decisions “sometimes reflect a partisan perspective”). For instance, the Department of Labor’s interpretation of the definition of “clothes” has changed twice in the past decade. Under the FLSA, time spent “changing clothes or washing at the beginning or end of each workday” is not compensable time and would not be factored into measuring a worker’s hours. 29 U.S.C. § 203(o). In 1997, under a Democratic administration, the Secretary issued an opinion letter explaining that the “plain meaning” of “clothes” did not include protective equipment, so workers would be compensated for their time putting on and taking off this work equipment. *See* U.S. DEP’T OF LABOR WAGE & HOUR DIV., ADMINISTRATOR’S INTERPRETATION NO. 2010-2, 1 (2010). In 2002, under a Republican administration, the new Secretary issued an opinion letter stating that protective equipment should be considered “clothes,” so employees would not be compensated for this time. *See* WAGE & HOUR DIV., U.S. DEP’T OF LABOR, WAGE AND HOUR OPINION LETTER, FLSA2002-2, 3 (2002). In 2010, the Department of Labor, under a Democratic administration again, reversed course and reaffirmed the 1997 interpretation that “clothes” are different from protective equipment required by law, the employer, or the nature of the job. U.S. DEP’T OF LABOR WAGE & HOUR DIV., ADMINISTRATOR’S INTERPRETATION NO. 2010-2, 1 (2010). That document noted the fact that the majority of courts that had addressed the issue since the 2002 letter had rejected its interpretation, including the Ninth Circuit Court of Appeals. *Id.* at 1–2.

75. *Auer*, 519 U.S. at 463 (“A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute.”).

76. *Id.* at 462 (differentiating between a brief providing an interpretation that reflects the agency’s “fair and considered judgment” and one that is merely a “post hoc rationalization” in which an agency attempts to defend its past action); *see also* *Bigelow v. Dep’t of Def.*, 217 F.3d 875, 878 (D.C. Cir. 2000) (noting that *Auer* deference does not even require an agency “to demonstrate affirmatively that its interpretation represents its fair and considered judgment”).

encounter greater scrutiny if the agency is a party to the lawsuit.⁷⁷ The Supreme Court also has found that an agency's interpretation is not owed deference when "instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language."⁷⁸ This result logically flows from the concept that an agency's interpretation is unnecessary when statutory language is clear, so the interpretation will be used only when the statute is unclear.⁷⁹ Merely repeating the language of an unclear statute does nothing to illuminate its intended meaning.

C. Other Outside Sales Cases

The reasoning that courts have employed in other outside sales cases, both outside and within the pharmaceutical industry, can shed light on the PSRs' situation. The best place to start is *Jewel Tea Co. v. Williams*, which the Ninth Circuit considered the "paradigm" outside sales case.⁸⁰ The employees in *Jewel Tea* were "route salesmen" who distributed tea and coffee products to customers, while they also took orders for future deliveries.⁸¹ They claimed to be merely "delivery men" who should be paid overtime, but the court found them exempt because their work was "chiefly devoted to effect sales."⁸² They spent more time "devoted to salesmanship" than to delivering the goods, and in addition, the men received commissions for their sales and were selected for their ability as salesmen.⁸³

In determining whether a "sale" is present, some recent decisions focused on the employee's ability, or lack thereof, to close a sale.⁸⁴ For those courts, no commitment meant no sale.⁸⁵ Others looked past this inability and focused

77. *See* *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *Robinson Knife Mfg. Co., Inc. v. Comm'r*, 600 F.3d 121, 134 n.11 (2d Cir. 2010) (refusing to apply *Auer* deference to the interpretation of the Commissioner of Internal Revenue when the Commissioner was a party to the lawsuit).

78. *Gonzales v. Oregon*, 546 U.S. 243, 244, 257 (2006) (deciding not to defer to the Attorney General's Interpretive Rule when its language was the "near equivalen[t]" of the statute); *see also* *N. Cal. River Watch v. Wilcox*, 620 F.3d 1075, 1088 (9th Cir. 2010) (finding the disputed rules "essentially parrot" the statute's language).

79. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

80. *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 397 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012).

81. *Jewel Tea Co. v. Williams*, 118 F.2d 202, 203 (10th Cir. 1941).

82. *Id.* at 208.

83. *Id.*

84. *See* *Clements v. Serco, Inc.*, 530 F.3d 1224, 1227 (10th Cir. 2008) (finding that military recruiters who "sold" the idea of enlisting were not outside salespeople because they could not "close the sale").

85. *Id.* at 1227, 1228–29 (explaining that the touchstone for making a sale is "obtaining a commitment").

more on the end result.⁸⁶ For instance, a marketing director at a title company merely referred customers to her employer.⁸⁷ That court, however, emphasized the fact that she was still the one credited with the sale, and no further sales efforts were necessary after her interaction with customers.⁸⁸ In addition, the court noted that the employee was hired for her sales experience, and her compensation was entirely connected to how many orders she provided.⁸⁹

Of the dozens of PSR cases, *Novartis* likely provides the best background to understand *Christopher*. The Novartis Reps, like those at any pharmaceutical company, could provide doctors with free samples and drug information,⁹⁰ but they were prevented from selling prescription drugs, either to the public or to physicians.⁹¹ Since they could not sell drugs, the Reps could receive, at most, a non-binding commitment from doctors to prescribe a drug, and there was no way to see whether the doctors followed through on that commitment.⁹² The Novartis Reps' incentives were based on the number of prescriptions of their drugs filled within a representative's territory.⁹³ Each of the Reps earned at least \$455 per week in base pay.⁹⁴ Some earned more than \$100,000 annually, and the average total compensation in 2005 was \$91,539.⁹⁵ The Reps' workdays consisted of being in the field from eight a.m. to five

86. See *Gregory v. First Title of Am., Inc.*, 555 F.3d 1300, 1301, 1310 (11th Cir. 2009) (finding the employee made sales under the exemption by obtaining orders for services).

87. *Id.* at 1301.

88. *Id.* at 1309.

89. *Id.*

90. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 144 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011).

91. *Id.*; see also 21 U.S.C. § 353(c)(1).

92. *In re Novartis*, 611 F.3d at 145.

93. *Id.* at 146. This calculation required some estimation because not all pharmacies participate with the reporting services that track this information for the pharmaceutical companies. *Id.* For example, Novartis received data covering only about seventy-two percent of sales and extrapolated from there. *Id.*

94. *Id.* This figure has no effect on whether the outside sales exemption would apply. See 29 C.F.R. § 541.500(c) (explaining that the salary requirements for other exemptions in this section do not apply to outside sales employees). The \$455 level is important, however, for the other FLSA exemptions. See 29 C.F.R. § 541.100(a)(1) (setting \$455 per week as the baseline for an employee to qualify under the executive exemption); 29 C.F.R. § 541.200(a)(1) (setting the same level for the administrative exemption); 29 C.F.R. § 541.300(a)(1) (setting the same level for the professional exemption).

95. *In re Novartis*, 611 F.3d at 146. The \$100,000 level is relevant because it could allow an otherwise non-exempt employee to be exempt. See 29 C.F.R. § 541.601(a). Under that section, an employee with at least \$100,000 in total annual compensation who "customarily and regularly performs any one or more of the exempt duties" required under the executive, administrative, or professional exemptions would be exempt from overtime pay. *Id.* Further, the regulation comes close to setting a presumption that an employee compensated at that level is exempt. See *id.* § 541.601(c) ("A high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties.").

p.m., and they also occasionally attended mandatory dinner events that would last until nine or ten p.m.⁹⁶

The trial court in *Novartis* decided that excluding the Reps from exemption would “ignore[] the Act’s spirit, purpose, and goals.”⁹⁷ It reasoned that “Reps make sales in the sense that sales are made in the pharmaceutical industry.”⁹⁸ The appellate court, after receiving the Secretary’s amicus brief, reversed the decision and deferred to the agency’s interpretation that the Reps were not exempt.⁹⁹ The court found the interpretation was consistent with the regulations because someone who “merely promotes a product that will be sold by another person does not, in any sense intended by the regulations, make the sale.”¹⁰⁰ The court also found the interpretation was not erroneous: “[a]lthough the phrase ‘other disposition’ is a catch-all [sic] that could have an expansive connotation, we see no error in the regulations’ requirement that any such ‘other disposition’ be ‘in some sense a sale.’”¹⁰¹ The court further found the interpretation consistent with the call to narrowly construe exemptions to remedial statutes.¹⁰² Whereas other courts had been willing to declare a doctor’s commitment to prescribe sufficient to constitute a sale, the Second Circuit in *Novartis* emphasized that the Secretary’s 2004 guidelines required not just any commitment, but a “commitment to buy.”¹⁰³ PSRs do not receive such a commitment; instead, the best they can hope for is a non-binding commitment to prescribe.¹⁰⁴ The court summarized:

[W]here the employee promotes a pharmaceutical product to a physician but can transfer to the physician nothing more than free samples and cannot lawfully transfer ownership of any quantity of the drug in exchange for anything of value, cannot lawfully take an order for its purchase, and cannot lawfully even obtain from the physician a binding commitment to prescribe it, we conclude that it is not plainly erroneous to conclude that the employee has not in any sense, within the meaning of the statute or the regulations, made a sale.¹⁰⁵

96. *In re Novartis*, 611 F.3d at 146.

97. *In re Novartis Wage & Hour Litig.*, 593 F. Supp. 2d 637, 648 (S.D.N.Y. 2009), *rev’d*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011).

98. *In re Novartis*, 593 F. Supp. 2d at 650.

99. *In re Novartis*, 611 F.3d at 149.

100. *Id.* at 153.

101. *Id.*

102. *Id.*

103. *Id.* at 154 (emphasis omitted) (citing *Defining and Delimiting the Exemptions*, 69 Fed. Reg. at 22,162–63).

104. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 154 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011).

105. *Id.*

D. Christopher's Outside Sales Application

1. The Ninth Circuit's Approach

The Ninth Circuit saw things differently in *Christopher* despite the fact that the Glaxo (SmithKline) PSRs encountered comparable duties and limitations.¹⁰⁶ When visiting doctors, the Glaxo PSRs provided product information and drug samples for a specific “drug bag” of medications, and they answered questions about the products.¹⁰⁷ The PSRs could not sell samples, nor could they take drug orders or negotiate contracts with physicians.¹⁰⁸ The representatives worked mostly outside the office and often worked an additional ten to twenty hours each week outside normal business hours.¹⁰⁹ When hiring PSRs, the company sought applicants with previous sales experience.¹¹⁰ Glaxo aimed for an ideal compensation breakdown that would provide seventy-five percent of a PSR's compensation in salary, with the other twenty-five percent based on incentives.¹¹¹ These incentives were calculated by increases in market share, sales volume, sales revenue, and dose volume for products within a PSR's territory.¹¹² Based on these facts, the Ninth Circuit determined the PSRs qualified as outside salespeople, making them ineligible for overtime pay.¹¹³

Reaching this conclusion required the court first to decide it need not defer to the Secretary's interpretation. It relied on *Gonzales v. Oregon* to determine that an agency is not owed deference when its interpretation merely paraphrases statutory language, since the agency would not be using any expertise to interpret the statute.¹¹⁴ The Ninth Circuit found that to be the case here.¹¹⁵ The court said the Secretary's regulation provided no additional guidance, such as factors or a test to help determine whether a “sale” is

106. *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 387–88 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012) (noting that PSRs' work generally was the same throughout the industry and had changed very little over the previous sixty years).

107. *Christopher*, 635 F.3d at 386. The defendant corporation does business as GlaxoSmithKline, so the *Christopher* court routinely referred to the employer as Glaxo.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 387.

112. *Christopher*, 635 F.3d at 387.

113. *Id.* at 400–01.

114. *Id.* at 393 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (“An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”)).

115. *Id.* at 395 (“The failure to add specificity to the statutory scheme that troubled the *Gonzales* Court, indeed the ‘parroting’ of statutory language, is present in the Secretary's outside sales regulations.”).

present, and it merely directed employers back to the statute.¹¹⁶ The court reasoned it could not give *Auer* deference to such an interpretation.¹¹⁷

Once it decided not to defer to the Secretary's interpretation, the Ninth Circuit was free to interpret the language itself, and it concluded that PSRs "in some sense make a sale."¹¹⁸ The court relied on the Act's inclusion of "other disposition[s]" to find the definition covered PSR activities.¹¹⁹ Although other courts had avoided this result because doctors' commitments to prescribe drugs are non-binding,¹²⁰ the Ninth Circuit found it irrelevant that the doctors are not legally bound.¹²¹ It determined that the transaction still amounted to a "meaningful exchange" between the Reps and doctors, and this exchange was enough to treat it as a transaction covered by the statute.¹²²

Although the FLSA is to be narrowly construed against the employer, the court sidestepped this hurdle by declaring that the "general principle does not

116. *Id.* at 394–95 ("A definition dependent almost entirely on Congress's seventy-two-year old statutory language is not an example of the DOL employing its 'expertise' to elucidate meaning to which we owe *Auer* deference.").

117. *Christopher*, 635 F.3d at 395 ("Given the admonition in *Gonzales*, we are unable to accord *Auer* deference to a regulation written in this manner Were we to accept the Secretary's offer, and give controlling deference even where there exists no meaningful regulatory language to interpret, we would unduly expand *Auer's* [sic] applicability to interpretations of statutes expressed for the first time in case-by-case amicus filings.").

118. *Id.* at 395–96 (citing *Defining the Exemptions*, 69 Fed. Reg. 22,122, 22,122 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541)).

119. *Id.* at 395 (citing Steven I. Locke, *The Fair Labor Standards Acts Exemptions and the Pharmaceuticals Industry: Are Sales Representatives Entitled to Overtime?*, 13 BARRY L. REV. 1, 25 (2009) ("Applying these [common-usage] definitions, it is logical to conclude that the term 'other disposition,' as it is used to define a 'sale' under the Act, includes a physician's decision to write a prescription for a particular medication.")).

120. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 154 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011) (emphasizing that the commitment required is one "to buy," not a non-binding commitment to prescribe); *Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F. Supp. 2d 308, 322 (D. Conn. 2008) (finding no commitment because PSRs did not take orders from doctors); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 464 n.5 (S.D.N.Y. 2008) (wondering what a commitment would entail since doctors remain free to prescribe any medication they think will help an individual patient).

121. *Christopher*, 635 F.3d at 396; *see also Schaefer-LaRose v. Eli Lilly & Co.*, 663 F. Supp. 2d 674, 686 (S.D. Ind. 2009) ("[T]o the extent that sales are made in the pharmaceutical industry, Ms. Schaefer-LaRose made sales whenever she received commitments from physicians to prescribe Lilly drugs.").

122. *Christopher*, 635 F.3d at 396 (quoting *Baum v. AstraZeneca LP*, 605 F. Supp. 2d 669, 681 (W.D. Pa. 2009), *aff'd on other grounds*, 372 F. App'x 246 (3d Cir.), *cert. denied*, 131 S. Ct. 332 (U.S. 2010) ("This Court believes that other courts, and perhaps regulatory agencies, underestimate the significance of this oral commitment from physicians Sometimes lawyers and judges forget that a person's word means something; remarkably, many people do not actually need a 400-page contract to bind themselves to their word.")).

mean that every word must be given a rigid, formalistic interpretation.”¹²³ The court considered its interpretative approach to be commonsensical,¹²⁴ and it found the rationale for using the exemption as “apparent” as it was in *Jewel Tea*.¹²⁵

2. The Supreme Court’s Conservative Majority Agrees

Before interpreting the provisions, the Court had to decide not to defer to the agency’s interpretation. The majority opinion listed a number of reasons for finding *Auer* deference unwarranted. For one, although the Department of Labor’s conclusion had remained the same since 2009, its reasoning had changed after the Court granted certiorari.¹²⁶ In addition, the Court found no “fair warning,” given that the interpretation would impose massive liability on Glaxo for conduct that had occurred before the agency’s interpretation had been advanced.¹²⁷ The majority found it particularly noteworthy that for decades the Department never initiated any enforcement related to detailers’ lack of overtime pay.¹²⁸ It emphasized that although it is possible an entire industry could escape the agency’s notice for a long time, it is much more plausible that the activity was never considered unlawful.¹²⁹ The majority determined that “[o]ther than acquiescence, no explanation for the DOL’s inaction is plausible.”¹³⁰

The majority examined the Department’s interpretation with fresh eyes and found it “quite unpersuasive.”¹³¹ The agency’s brief for the Court argued that its sales regulation, § 541.501(b), required a transfer of title in order to have a “sale,” but the Court found no such requirement.¹³² A consignment for sale includes no transfer of title, but it is clearly included in the “sale” definition.¹³³ The Court concluded that the regulation merely notes that a transaction involving a transfer of title would be included in a “sale,” not that it is

123. *Christopher*, 635 F.3d at 397.

124. *Id.* at 395–96.

125. *Id.* at 398 (quoting *Jewel Tea Co. v. Williams*, 118 F.2d 202, 208 (10th Cir. 1941) (“To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.”)).

126. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2165–66 (2012).

127. *Id.* at 2168 (“It is one thing to expect regulated parties to conform their conduct to an agency’s interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.”).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Christopher*, 132 S. Ct. at 2169.

132. *Id.*

133. *Id.*

necessary for a sale.¹³⁴ The Department suggested that the Court could look past that regulation and focus instead on its promotional work regulation, § 541.503(a).¹³⁵ The Court found that regulation's interpretation depended almost entirely on the "flawed" transfer-of-title reasoning.¹³⁶ These determinations left the Court free to perform its own independent interpretation of the FLSA.

In examining the Act's text, the majority emphasized the part of the definition that looks for people employed "in the capacity of" outside salesmen, and it reasoned that this language favored a functional rather than formal inquiry.¹³⁷ The federal regulation provided other textual clues, including use of the word "includes" rather than "means."¹³⁸ The language choice significantly hinted at a non-exhaustive list, particularly since the Act used "means" in other instances in order to limit lists to the items enumerated within them.¹³⁹ The majority found the word "any" was best read as "one or some indiscriminately of whatever kind," since the Act included both sales and transactions that would not technically be sales, such as exchanges or consignments to sell.¹⁴⁰ The final textual clue was one the Ninth Circuit advanced: the inclusion of "other disposition" as a catchall.¹⁴¹ Although the majority said it agreed that the rule of *ejusdem generis*¹⁴² should be applied, it found the Department's interpretation of "other disposition" too narrow.¹⁴³ If the phrase was meant to include only "contract[s] for the exchange of goods or services in return for value," as the Department argued, then there would be nothing caught by this term that had not already been covered by other terms in the list.¹⁴⁴ Instead, the majority took a functional reading of this term to allow industry-by-industry variations.¹⁴⁵ It found no requirement for a narrower construction and argued away *Arnold* by saying it was inappropriate where the interpretation was for a general definition applied throughout the Act.¹⁴⁶ No support was provided for this contention, which was dropped inside a footnote.

134. *Id.*

135. *Id.* at 2170–72.

136. *Christopher*, 132 S. Ct. at 2170.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 2170–71.

141. *Christopher*, 132 S. Ct. at 2171.

142. The Latin phrase is translated as meaning "of the same kind." *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994).

143. *Christopher*, 132 S. Ct. at 2171.

144. *Id.*

145. *Id.* The dissent found no need for such an industry-specific approach, saying it was "wrong to assume" that "there is in nearly every industry an outside salesman lurking somewhere (if only we can find him)." *Id.* at 2179 (Breyer, J., dissenting).

146. *Id.* at 2172 n.21 (majority opinion).

This broader definition for “other dispositions” was enough for the majority to find PSRs made “sales” and qualified for the outside salesman exemption.¹⁴⁷

In reaching its conclusion, the majority noted that PSRs “bear all of the external indicia” of salespeople, such as being hired for their sales experience, working away from the office, and being compensated with significant incentive pay.¹⁴⁸ The majority said their decision also better met the purpose of the Act’s exemption, given Reps’ significant compensation, and that it made no sense to exclude PSRs based on a technicality specific to their industry.¹⁴⁹ The conservative majority even acknowledged a pragmatic view, explaining that “it would be challenging, to say the least, for pharmaceutical companies to compensate detailers for overtime going forward without significantly changing the nature of that position.”¹⁵⁰

3. The Liberal Justices’ Dissent

The dissent agreed that the Department’s interpretation of its regulations, advanced by the Solicitor General during oral argument, should not be given favorable weight.¹⁵¹ When the dissenters interpreted the provisions, though, they found the Reps’ primary duty was not “making sales,” so Reps should receive overtime pay.¹⁵² The detailer may convince a doctor to prescribe a drug for certain types of patients, but in the end, the pharmacist is the one who sells the drug.¹⁵³

The dissent looked at the specific language of the statute and noted that the Reps do not “sell,” “exchange,” or even “dispose” of the product to doctors.¹⁵⁴ Instead detailers inform doctors about the drugs and explain their uses and limitations.¹⁵⁵ At most, the doctor may give the Rep a non-binding commitment to prescribe the drugs where appropriate, and the patient then may take the doctor’s prescription and use it to buy that drug.¹⁵⁶ The dissent highlighted two relevant pieces of data about this process: (1) thirty percent of patients over a two-year period had not filled a prescription they received from a doctor,¹⁵⁷ and (2) seventy-five percent of prescriptions that are filled are done

147. *Id.* at 2172.

148. *Christopher*, 132 S. Ct. at 2172–73.

149. *Id.* at 2172 n.23.

150. *Id.* at 2173.

151. *Id.* at 2175 (Breyer, J., dissenting).

152. *Id.* at 2175–76 (Breyer, J., dissenting).

153. *Christopher*, 132 S. Ct. at 2176.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* (citing *The Public on Prescription Drugs and Pharmaceutical Companies*, HARVARD SCH. OF PUB. HEALTH ET AL. 3 (2008), <http://www.kff.org/kaiserpolls/upload/7748.pdf>).

with generic drugs, not brand-name drugs.¹⁵⁸ In other words, even when a Rep is successful at the doctor's office, that performance does not come close to guaranteeing a sale of the promoted drug. A commitment to *advise* a client to buy a product is not the same as a commitment to *sell* a product.¹⁵⁹

Given this view of the process, the dissent found no difficulty in describing the Reps' work as promotional work, not sales. The dissent mentioned three sources supporting this view: (1) the PhRMA Code, (2) a 1940 Department of Labor report, and (3) a Wage and Hour Division report from 1949.¹⁶⁰ The Code emphasized that Reps deliver information to doctors, who remain totally free to rely solely on their medical judgment to meet patients' needs.¹⁶¹ Thus, the industry itself recognized that a Rep's primary duty could not be to make nonbinding commitments, since these commitments would be irrelevant when it came time to prescribe treatment for a patient.¹⁶² If Drug D was the best option, the dissent said, that is what the doctor would prescribe regardless of any commitments made.¹⁶³ The 1940 report noted: (1) Detailers "'pav[e] the way' for sales by others," (2) "'[t]hey do not make actual sales,'" and (3) "'they 'are admittedly not outside salesmen.'"¹⁶⁴ The 1949 report clarified the distinction between promotion and sales and suggested the question in close cases was whether the salesman is "actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling."¹⁶⁵ Reps can neither consummate their own sales nor receive a commitment to buy from doctors. The dissent found these points more compelling than the majority's argument for an industry-specific exception, concluding that

[g]iven the fact that the doctor buys nothing, the fact that the detailer sells nothing to the doctor, and the fact that any "nonbinding commitment" by the doctor must, of ethical necessity, be of secondary importance, there is nothing

158. *Christopher*, 132 S. Ct. at 2176 (citing U.S. DEPT. OF HEALTH AND HUMAN SERVS., OFFICE OF SCIENCE & DATA POLICY, EXPANDING THE USE OF GENERIC DRUGS 2 (2010)).

159. *Christopher*, 132 S. Ct. at 2177.

160. *Id.* at 2177–78.

161. *Id.* at 2177 (citing PHRMA, *Code on Interactions with Healthcare Professionals* 2 (2008), available at http://www.phrma.org/sites/default/files/108/phrma_marketing_code_2008pdf).

162. *Christopher*, 132 S. Ct. at 2177.

163. *Id.*

164. *Id.* at 2178 (quoting U.S. DEP'T OF LABOR, WAGE AND HOUR DIV., REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER AT HEARINGS PRELIMINARY TO REDEFINITION 46 (1940)).

165. *Christopher*, 132 S. Ct. at 2178 (quoting U.S. DEP'T OF LABOR, WAGE AND HOUR DIV., REPORT AND RECOMMENDATIONS ON PROPOSED REVISIONS OF REGULATIONS, PART 541, at 83 (1949)).

about the detailer's visit with the doctor that makes the visit (or what occurs during the visit) "tantamount . . . to a paradigmatic sale."¹⁶⁶

The weakest part of the dissent is the final paragraph, which addresses the majority's claim that treating Reps as outside salesmen fits with the purpose of the Act's exemptions. Here, the dissenters muster only a brief positivist argument (although they likely would not identify it as such) that detailers simply do not fall within the regulation's definitions.¹⁶⁷ The dissent avoids trying to support the premise that the exemption should help well-paid Reps get paid even better.

II. ANALYSIS

A. *The Agency's Interpretation Was Not Entitled to Deference*

The statutory definition of "sale"—any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition—is ambiguous when applied to the pharmaceutical sales setting.¹⁶⁸ It does not plainly identify whether a Rep's attempt to sell doctors on prescribing certain drugs—an activity that includes the disposition of product information and samples potentially in exchange for a non-binding commitment—constitutes a "sale." Because of this ambiguity, the court can look at the agency's interpretation for guidance.¹⁶⁹ Under its power to "define and delimit" the Act's terms, the Secretary attempted to further define "sale" through a published regulation,¹⁷⁰ and the agency's interpretation of that regulation would be entitled to deference so long as it was not "plainly erroneous or inconsistent with the regulation."¹⁷¹ The interpretation also needed to show the agency using its expertise, not simply repeating the statutory language.¹⁷²

At first glance, little distinguishes the definition provided in the second sentence of the regulation from the statute.¹⁷³ In fact, the Secretary's definition explains that "[s]ection 3(k) of the Act states."¹⁷⁴ Not only does that portion of the regulation mirror the statutory language, but it expressly notes that it is

166. *Christopher*, 132 S. Ct. at 2179 (citation omitted).

167. *See id.* at 2179–80.

168. *See supra* text accompanying notes 14–19.

169. *See supra* text accompanying notes 69–73.

170. 29 C.F.R. § 541.501(b) (2011).

171. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

172. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

173. *Compare* 29 C.F.R. § 541.501(b) ("Section 3(k) of the Act states that 'sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."), *with* 29 U.S.C. § 203(k) ("'Sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.").

174. 29 C.F.R. § 541.501(b) (emphasis added).

doing just that: repeating the statute's language.¹⁷⁵ It would not be difficult to argue that, like in *Gonzalez*, the regulation simply "parrots" the statute.¹⁷⁶ But it is an unnecessary argument. Reliance on *Auer* is sufficient, since an agency's interpretation of its regulation is not entitled to deference when it is inconsistent with the regulation.

Although the "transfer of title" language does differentiate the regulation from the statute, it does so in a way that contradicts the statute. As Justice Alito explained, a regulation that requires a transfer of title in order to recognize a sale cannot be consistent with a statute that explicitly states that consignments for sale are considered sales.¹⁷⁷ A consignment for sale involves no transfer of title from the consignee to the consignor; the title is transferred only to the eventual buyer. When considering this point in conjunction with the practical implications of granting deference in this instance,¹⁷⁸ the Court had no problem finding the DOL interpretation "plainly lack[ed] the hallmarks of thorough consideration" and declined to provide *Auer* deference.¹⁷⁹

B. PSRs Do Not Fall Plainly and Unmistakably Within the Exemption's Terms

The Ninth Circuit emphasized a "common-sense understanding" to find that PSRs make sales "in some sense."¹⁸⁰ The Supreme Court's majority used a similar approach, calling for a "functional" interpretation of the statute's terms.¹⁸¹ After all, both the employer and employee frequently refer to PSRs'

175. *Id.* As the Ninth Circuit noted, this definition, in effect, explains that "a 'sale' means a 'sale.'" *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 394 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012).

176. Of course, the opposing side would argue that someone interpreting the regulation cannot simply gloss over its first sentence, which explains that "sales" include a "transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." 29 C.F.R. § 541.501(b). The two sentences cannot and should not be read separately, but instead as one unit. *See* YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2008) (setting forth as a cardinal rule of construction the requirement to read a statute as a harmonious whole). The "transfer" language is completely unique to this interpretation and should not be discarded; it provides a meaningful limitation on what can be considered a sale. In fact, the Second Circuit found it "clear" that the inclusion of the "transfer of title" section, as well as the portion defining and delimiting "outside salesman" in relation to promoting products, did "far more than merely parrot" the FLSA's language. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 153 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011).

177. *See supra* text accompanying notes 131–136.

178. *See supra* text accompanying notes 127–130.

179. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2169 (2012).

180. *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 395–97 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012).

181. *Christopher*, 132 S. Ct. at 2170.

activity as “sales.”¹⁸² The Reps’ job title alone shows some acknowledgment that their work could constitute sales; Glaxo was not being sued by pharmaceutical “promotions” representatives.¹⁸³ As the Ninth Circuit explained:

Plaintiffs suggest that despite being hired for their sales experience, being trained in sales methods, encouraging physicians to prescribe their products, and receiving commission-based compensation tied to sales, their job cannot “in some sense” be called selling. This view ignores the reality of the nature of the work of detailers, as it has been carried out for decades.¹⁸⁴

If Congress had wanted a strict definition of sales, the argument goes, it would not have included the rest of the terms in the statutory definition.¹⁸⁵ A strict reading would make those other terms superfluous, a result that should be avoided since courts are asked to “give effect, if possible, to every clause and word of a statute.”¹⁸⁶

However, using a strict construction hardly makes the verbiage superfluous. The Second Circuit suggested another canon of statutory interpretation, *eiusdem generis*, which provides a competing view.¹⁸⁷ Under this rule, “where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated.”¹⁸⁸ Thus, “other dispositions” should not be read as a broad catchall, but limited by the preceding terms, which all refer to a type of sale. This interpretive approach also better follows the call to narrowly construe the Act’s exemptions, another rule of statutory interpretation.¹⁸⁹ This approach is further validated by examining the common definition of the term “disposition.” Black’s Law Dictionary defines it as “the act of transferring something to another’s care or possession, esp. by deed or will; the relinquishing of property.”¹⁹⁰ Merriam-Webster’s provides a similar definition

182. *See, e.g.*, *Kuzinski v. Schering Corp.*, 604 F. Supp. 2d 385, 390–91 (D. Conn. 2009) (noting that the term “sales” permeates descriptions of PSR work by both drug companies and their employees and further finding the plaintiff himself admitted he considered his work “selling”).

183. Nevertheless, some writers prefer to describe PSR activities as “ethical promotion.” *See, e.g.*, Robert F. Wright & William J. Lundstrom, *Physicians’ Perceptions of Pharmaceutical Sales Representatives: A Model for Analysing the Customer Relationship*, 4 INT’L J. OF MED. MARKETING 29, 34 (2004). Further, the statute pays no attention to job titles. 29 C.F.R. § 541.2 (“A job title alone is insufficient to establish the exempt status of an employee.”).

184. *Christopher*, 635 F.3d at 396.

185. *See* KIM, *supra* note 176, at 12–13.

186. *Id.* (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

187. *See* KIM, *supra* note 176, at 10.

188. *Id.* (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588 (1980)).

189. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 153 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011).

190. BLACK’S LAW DICTIONARY 539 (9th ed. 2009).

for the term “dispose”: “to transfer or give away.”¹⁹¹ Even if a doctor’s non-binding commitment to prescribe drugs is a “meaningful exchange,”¹⁹² it is difficult to see how this exchange fits within those provided dictionary definitions.

Despite agreeing that *ejusdem generis* should guide its interpretation of the statute, the Court’s majority reached a different result, claiming the DOL’s suggested application of the canon was too narrow.¹⁹³ The majority argued that Congress intended to broadly define “sale,” so “other dispositions” should be treated similarly.¹⁹⁴ The opinion further explained that *ejusdem generis* should not be used to “obscure and defeat the intent and purpose of Congress.”¹⁹⁵ Two things are striking about this reasoning. First, the Court essentially states that “other dispositions” is self-defining; Congress purportedly included it in the definition of sales in order to create a broader definition, and thus, “other dispositions” should also be broadly defined. This argument seems circular. More troubling, the assertion that what the majority terms a “narrow” construction of “other disposition” would defeat Congress’s intent completely ignores the Court’s treatment of exemptions in remedial legislation—such treatment claims that narrow constructions of exemptions are required in these instances to effectuate the legislation’s purpose.¹⁹⁶ This contradiction is not a problem only for this specific case. The majority’s disregard of a narrow construction of the exemption calls into question the continued relevance of *Arnold* and the Court’s likely approach to future FLSA exemption challenges.¹⁹⁷ It creates the potential for more employer-friendly results. Whether one tends to side with employers or employees on these disputes is irrelevant; the problem is the Court seems to be overriding Congress’s intent, or at least the way it has defined Congress’s intent in the FLSA realm for the past half-century.

C. What About the Exemption’s Spirit?

Nevertheless, the dissent’s conclusion—that Reps are entitled to overtime pay—would also have created an unsatisfying result. Although it would have stayed faithful to the statutory language, it would have overlooked the FLSA’s

191. WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 568 (2d ed. 2003).

192. *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 396 (9th Cir. 2011), *aff’d*, 132 S. Ct. 2156 (2012).

193. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2171 (2012).

194. *Id.*

195. *Id.* (quoting *United States v. Alpers*, 338 U.S. 680, 682 (1950)).

196. *See supra* notes 60–61 and accompanying text.

197. *See* David S. Rosenthal & Jeffery Gilbreth, *High Court’s FLSA Ruling on Rx Reps: The Ray of Hope It Offers Others*, 323 FAIR LAB. STANDARDS HANDBOOK FOR STATES, LOC. GOV’T & SCH. NEWSL. 5 (Aug. 2012), available at <http://prod-admin1.tmg.atex.cniweb.net:8080/fileserver/file/1751/filename/fair2012-08.pdf>.

social purpose.¹⁹⁸ Finding PSRs not exempt would have created mixed results, at best, in terms of satisfying the Act's policy: protecting workers "unable to protect themselves from excessively low wages and excessively long hours" and spreading jobs to the jobless.¹⁹⁹

1. "Excessively Low Wages"

PSRs are already handsomely rewarded for their work through salaries that commonly reach six figures when bonuses are counted.²⁰⁰ The high-salary exemptions included in the Secretary's regulations demonstrate the intent not to overly reward employees who already receive significant compensation.²⁰¹ Of course, the regulations do exclude outside sales people from the salary requirements, so maybe the Secretary would not mind the resulting high pay for Reps. This distinction between exemptions may have created the potential for significant inconsistencies in the application, though. Some of the better-paid Reps would fall into the highly compensated exemption as long as the employer could show they met at least one portion of any of the other overtime exemptions.²⁰² Those employees would not receive overtime pay. Yet, their counterparts who fell below the \$100,000 mark would not receive that same exemption, enabling them to earn overtime pay that could allow them to out-earn their "highly compensated" coworkers.²⁰³

Besides, if the Act was meant to protect workers who could not protect themselves from low wages, allowing the law to benefit workers who make

198. *Nicholson v. World Bus. Network, Inc.*, 105 F.3d 1361, 1364 (11th Cir. 1997) ("To read the FLSA blindly, without appreciation for the social goals Congress sought, would also do violence to the FLSA's spirit.").

199. LINDER, *supra* note 18, at 48; *see also supra* notes 33–37, 41–45 and accompanying text.

200. *See supra* notes 7–8 and accompanying text. *But see* *Baum v. AstraZeneca LP*, 372 F. App'x 246, 247 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 332 (2010) (finding PSRs exempt from the FLSA's overtime provisions even in cases where the plaintiff worked up to 70 hours per week and made as little as \$63,000 in base salary).

201. *See supra* notes 43–45 and accompanying text.

202. *See* 29 C.F.R. § 541.601(a).

203. Further highlighting the ridiculousness of this inconsistency is the fact that once a non-exempt employee receives enough overtime pay within a fifty-two-week period to push the past year's compensation above \$100,000, then that employee could be classified with his highly compensated peers who are exempt from overtime. *See* 29 C.F.R. § 541.601(b)(2). That designation might be fleeting, though. If the employee, no longer earning overtime pay, dips back below \$100,000 for the previous fifty-two-week period, that person no longer would fit through the highly compensated loophole, which makes the employee non-exempt and eligible for overtime pay again. *See id.*

nearly twice as much as the average American household seems counter to the Act's purpose.²⁰⁴ Reps do not need overtime pay to help protect them.

2. "Excessively Long Hours" and Job-Spreadings

Low wages are not a concern, but PSRs do contend with long hours. The white-collar exemptions are partially based on the belief that these employees' duties are difficult to spread, so forcing employers to pay overtime would not help create jobs.²⁰⁵ Although a drug-maker could always shrink a Rep's sales territory and hire more employees to cover parts of the Rep's former area, territory size is not what leads Reps to work overtime. They work those hours because their job requires them to attend dinners where they can more successfully engage with doctors outside the hospital or office setting.²⁰⁶ Shrinking a Rep's territory would have no effect on the necessity of them attending these events. Still, if a Rep's time at these evening events is counterbalanced by fewer work hours during the day, there might be a need for more Reps to handle the missed daytime assignments. Under this view, making Reps eligible for overtime might make some sense for the purpose of spreading employment.

From a practical standpoint, though, any talk about potential job spreading in the industry must face the reality that drugmakers are more likely these days to find other methods to promote their drugs.²⁰⁷ The irony in the application of this "remedial" legislation is that, rather than benefitting the workers, finding PSRs deserve overtime pay actually would have further destabilized their already tenuous position. It would threaten additional job losses and other worker-unfriendly industry changes.²⁰⁸ Further, ex-employees, as opposed to current workers, have little to lose from suing their former employer.²⁰⁹ Thus, the contraction of the market potentially would create a cyclical effect of continued industry downsizing. Companies, focused on the bottom line, lay off PSRs, who then sue the company for unpaid overtime. The company, forced to pay tens or even hundreds of millions in unpaid overtime claims, then seeks ways to improve the bottom line, which likely involves eliminating more sales representatives. In the end, a statute aimed at helping employees actually helps

204. The median annual household income in the United States was \$49,445 in 2011. *Income, Poverty and Health Insurance Coverage in the United States: 2010*, U.S. CENSUS BUREAU, (Sept. 13, 2011), http://www.census.gov/newsroom/releases/archives/income_wealth/cb11-157.html.

205. See *supra* note 46; see also *Defining and Delimiting the Exemptions*, 69 Fed. Reg. at 22,124.

206. See *supra* note 96 and accompanying text.

207. See *supra* notes 10–12 and accompanying text.

208. See *infra* Part III.C.

209. See *supra* note 13.

former employees while putting current employees at risk.²¹⁰ That result totally contradicts the Act's spirit.

III. NON-JUDICIAL SOLUTIONS

The Court's decision in *Christopher* provides much-needed clarity for the pharmaceutical industry, as well as serving as strong guidance for similarly regulated industries, such as the medical device field. However, the majority opinion creates new questions for the future, such as the proper construction of other FLSA exemptions. What other definitions could be considered general ones in order to avoid *Arnold's* call for narrow construction? In addition, the result hardly weds the terms and spirit of the outside sales exemption in this context. The ideal solution here likely resided outside the judicial branch.

A. *The Secretary Could Have Expanded the Definition of Sale*

Congress specifically chose the Secretary to fill any gaps related to the Act's exemptions,²¹¹ and the DOL is better positioned to fill those gaps than the Court.²¹² The Secretary could have given it another shot and more accurately defined what constitutes a "sale" or an "outside salesperson" in the pharmaceutical context.²¹³ At least one author has suggested massively changing the definition to create a special exclusion for PSRs.²¹⁴

The problem is that the Secretary's interpretation, as argued in the Department's amicus brief, was no better than the Second Circuit's outcome: Reps would get overtime. It is unclear why the Secretary would suddenly decide to support finding PSRs exempt. If the Department merely wanted to have the courts interpret the Act consistently with the express language, a revised definition could have been a workable option. However, that solution likely ignores the political and policy undercurrents of finding Reps eligible for overtime. Remember, the FLSA was passed at a time of high unemployment as a way to force companies to spread work and create more jobs.²¹⁵ Today, at a time when the nation's unemployment rate has remained above seven percent since December 2008, the administration might desire a return to a more forceful execution of the FLSA as an attempt to help get more people

210. *Id.*

211. 29 U.S.C. § 213(a)(1); *see also supra* notes 47–48 and accompanying text.

212. *See* Daniel Lovejoy, *The Ambiguous Basis for Chevron Deference: Multiple-Agency Statutes*, 88 VA. L. REV. 879, 888 (2002).

213. 29 U.S.C. § 213(a)(1).

214. Bryan D. Sullivan, *Reconciling the Terms and Spirit of the Law: Pharmaceutical Sales Representatives and the FLSA Outside-Sales Exemption*, 96 IOWA L. REV. 1429, 1447 (2011).

215. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577–78 (1942).

working.²¹⁶ Of course, this reasoning ignores the climate of the industry; pharmaceutical companies would be more likely to respond by cutting jobs than by adding them.²¹⁷

B. Congress Could Have Amended the Act

The *Novartis* court, likely not fully pleased with the end result of its analysis, explicitly mentioned the legislative option: “To the extent that the pharmaceuticals industry wishes to have the concept of ‘sales’ expanded . . . it should direct its efforts to Congress, not the courts.”²¹⁸ Congress has already amended the Act dozens of times; for instance, any increase in the national minimum wage requires amending the FLSA.²¹⁹ One such amendment, in 1990, added computer systems analysts, computer programmers, and software engineers as exempt employees.²²⁰ The benefit of this type of fix is that it would have completely avoided the problem of trying to classify PSRs within the current exemptions; a new one designed specifically for them could have been created.

C. Or the Pharmaceutical Industry Could Have Adapted

Even without judicial clarification, drugmakers could have responded by altering Reps’ job requirements and expectations to ensure they would not be eligible for overtime regardless of their designation.²²¹ These changes would have required an increased amount of oversight, possibly to an extent that

216. Labor Force Statistics from the Current Population Survey, U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, (Oct. 5, 2012), <http://data.bls.gov/timeseries/LNS14000000>.

217. See *supra* notes 4–12 and accompanying text.

218. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 155 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011); see also KIM, *supra* note 176, at 2 (“[T]he Court recognizes that legislative power resides in Congress, and that Congress can legislate away interpretations with which it disagrees.”).

219. See, e.g., Fair Minimum Wage Act of 2007, Pub. L. No. 110–28 § 8102, 121 Stat 112 (2007).

220. 29 U.S.C. § 213(a)(17).

221. This transformation has already begun as part of the overall restructuring of the industry. See, e.g., *The Evolution of Pharmaceutical Sales: New Models for a Changing Environment*, IMS HEALTH (February 2008), http://www.imshealth.com/deployedfiles/imshealth/Global/Content/Document/Sales%20and%20Marketing%20Effectiveness%20TL/Evolution_PharmaSales_new_models_changing_environment_PEE.pdf. Potential industry changes could include smaller territories to decrease employee travel time during the day and stricter oversight of employees’ time. See Mike Wokasch, *New Work Rules for Pharmaceutical Representatives*, PHARMA REFORM, (July 27, 2011), <http://www.pharmareform.com/2011/07/27/new-work-rules-for-pharmaceutical-sales-representatives>. This new oversight likely would involve “punching a clock” in order to account for time worked, as well as time spent for personal use, breaks, or lunch. *Id.* Some employers might go so far as to install GPS systems in employee’s cars in order to track them throughout the day. *Id.*

employees would consider it micromanaging.²²² Altered duties could also help employers make the case that even if Reps are not outside salesmen, they fit another FLSA exemption, such as the one for administrative employees. Numerous courts had shown a willingness to embrace that argument for PSRs.²²³ Further, thanks to the exemption for highly compensated workers, a minor tweak would be enough for some employees to be found exempt. The downside, of course, is that companies seek clarity, not continued litigation, which is what they would have faced even if they changed worker responsibilities enough to merit applying another exemption.

An hourly employee who works sixty hours in a week, which is not uncommon in this field, would have earned as much in overtime pay as in regular weekly salary. Reps would have been unlikely to cash in, though. Besides altering Reps' work hours so that they do not receive overtime pay, drugmakers also likely would have restructured how they compensate Reps.²²⁴ Companies might have cut base salaries or reduced, if not totally eliminated, incentive-based compensation. Companies opting for the latter would no longer have rewarded Reps for the quality of their work, but instead by the quantity of hours they put into it. That change would have been a tough sell for both employers and employees. Employers would have been reluctant to make the change because the first one to do it likely would suffer a significant loss of talent. After all, the most successful sellers are the ones who benefit the most from incentive-based bonuses, and they might decide to join a competitor that retained its incentive-based compensation structure. Ironically, employees would take the biggest hit. Besides uncertainty about their pay moving forward, Reps also might find themselves on the corporate chopping block. Layoffs may have been a common answer for companies seeking to prevent a further hit to the bottom line.²²⁵ Although the industry had a number of potential responses, few of these potential changes would have been favorable for employees.

222. Wokasch, *supra* note 221.

223. *See, e.g.*, Baum v. AstraZeneca LP, 372 F. App'x 246, 248–50 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 332 (2010) (finding no need to address whether the plaintiff fell under the outside salesperson exemption since the court had determined the administrative exemption was applicable); Smith v. Johnson & Johnson, 593 F.3d 280, 285 (3d Cir. 2010) (affirming the trial court's decision that although the outside sales exemption did not apply, the administrative exemption did). *But see In re Novartis*, 611 F.3d at 157 (finding the representatives did not exhibit the necessary discretion and independent judgment to meet the administrative exemption); Kuzinski v. Schering Corp., 801 F. Supp. 2d 20, 22, 30 (D. Conn. 2011) (where defendant followed an unsuccessful motion for summary judgment based on the outside sales exemption with a similarly unsuccessful motion based on the administrative exemption).

224. Scott, *supra* note 8.

225. *Vanishing*, *supra* note 4.

CONCLUSION

Federal law prohibits direct sales of prescription drugs to the users. Thus, pharmaceutical sales representatives must settle for promoting the product to physicians, who can prescribe it to patients, who may or may not purchase that brand-name drug. This activity should not meet the definition of “making sales” that the FLSA requires for an employee to be exempt from receiving overtime pay, particularly if the Court had followed *Arnold’s* call for narrowly construing FLSA exemptions. When the Court examined the statute’s text, it should have found that PSRs are entitled to overtime compensation. That result, though true to the terms of the FLSA’s outside sales exemption under the usually applied narrow construction, would have run counter to the purpose behind the overtime pay law and its exceptions. In addition, while some employees—and mostly former employees—would have gained a windfall from receiving back pay for unpaid overtime, that decision really would have been a long-term loss for PSRs. If the Court had found Reps were entitled to overtime, the Reps likely would have faced continued downsizing, altered job requirements, and reduced guaranteed compensation. This issue presented numerous alternative responses, with the best option being Congress revisiting the FLSA to add an exemption exclusively for Reps. However, rather than waiting for others to respond to the problem, the Court issued a pragmatic decision that provides a reasonable result, even if the reasoning is not the soundest. The most disturbing part for workers is the majority’s cold shoulder for *Arnold*, potentially signifying a new approach to FLSA disputes that will be much more favorable for employers.

ROBERT J. HURTT, JR.*

* I would like to thank everyone who helped contribute to the publication of this Note, particularly Professor Matt Bodie for his guidance and suggestions. Thanks also to Danielle and Vivienne Hurtt for all of their love and support throughout the writing (and rewriting) process. And a final thanks to the Supreme Court for granting cert in *Christopher*; although that decision led to significant revision of this Note, the final product is better for it.

