No. 11-20151

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAN HARRIS,

Plaintiff-Appellee,

v.

AUXILIUM PHARMACEUTICALS, INCORPORATED,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE

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Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as amicus curiae in support of Jan Harris. The district court correctly concluded that Harris, a Medical Sales Consultant ("MSC")[1] employed by Auxilium Pharmaceuticals, Inc. ("Auxilium") was not exempt from the overtime requirements of the Fair Labor

[1] The Secretary uses "MSC" throughout this brief to refer to Harris and employees like her at Auxilium. In previous briefs, the Secretary has used the terms "pharmaceutical sales representatives" or "Reps," consistent with how functionally analogous employees were characterized by the employers in those cases. MSC, pharmaceutical sales representative, and Rep should be considered interchangeable terms.

Standards Act ("FLSA" or "Act") under either the outside sales exemption or the administrative exemption. *See* 29 U.S.C. 213(a)(1).

INTEREST OF THE SECRETARY

The Secretary administers and enforces the FLSA, *see* 29 U.S.C. 204(a) and (b), 211(a), 216(c), 217. Pursuant to express congressional authorization, *see* 29 U.S.C. 213(a)(1), the Secretary has promulgated regulations interpreting the two exemptions from the overtime provisions of the Act that are at issue in this case—the outside sales exemption and the administrative exemption. *See* 29 C.F.R. 541.500-04, 29 C.F.R. 200-04. The Department of Labor ("Department") has compelling reasons to participate as amicus curiae in this case, because it has a substantial interest in the correct interpretation of the FLSA and its regulations to ensure that all employees receive the wages to which they are entitled.

STATEMENT OF ISSUES

1. Whether the district court correctly concluded that Harris was not an exempt outside salesperson, given that she did not make sales as required by the Department's regulations.

2. Whether the district court correctly concluded that Harris was not an exempt administrative employee, given that, in promoting drugs under tightly circumscribed conditions dictated by her employer, she did not exercise discretion and independent

judgment with respect to matters of significance as required by the Department's regulations.

STATEMENT OF FACTS AND DECISIONS BELOW

1. Harris, the plaintiff in this case, worked for Auxilium as an MSC, promoting Auxilium's drug Testim 1% ("Testim") to physicians and pharmacies. *See Harris v. Auxilium Pharm., Inc.*, 664 F. Supp. 2d 711, 716 (S.D. Tex. 2009), *vacated in part on reconsideration by* 2010 WL 3817150 (S.D. Tex. Sept. 28, 2010). She was responsible for visiting physicians' offices and communicating with them about the features and benefits of Testim in an effort to convince them to prescribe it to their patients, and she was responsible for visiting pharmacies to persuade them to stock Testim. *Id*. at 716, 718. Like all of Auxilium's MSCs, Harris could not "enter into binding contracts with the physicians or negotiate the purchase price for Testim." *Id*. at 716.[2] Nor was she authorized to distribute samples of Testim, as it is a controlled substance. *Id.* at 718.[3] Instead,

[2] Rather than selling its drug directly to physicians, Auxilium sells it to distributors, who in turn sell it to pharmacies, who then sell it to individual customers with prescriptions. *See* Rec. 1819. Therefore, it is undisputed that Auxilium's MSCs do not actually sell Testim and physicians do not actually buy it; rather, the physicians are limited to writing prescriptions authorizing patients to buy the drug from a licensed pharmacy.

[3] In order for a physician to obtain samples of Testim, she must sign a sample request form provided by an MSC. The MSC then submits the signed request to Auxilium for processing at corporate headquarters. *See Harris*, 664 F. Supp. 2d at 718.

her goal for these visits was to obtain an unwritten, non-binding commitment from physicians to prescribe Testim. *Id*. at 716.

When visiting physicians, Harris was required to bring "detail pieces" created by Auxilium, and her job evaluation was partly based on whether she met Auxilium's benchmark of discussing the detail piece within the first ten seconds of a meeting with a physician. *Harris*, 664 F. Supp. 2d at 716. If the physician asked a question for which a response was not contained in the detail pieces, Harris was required to direct the question to another division at Auxilium's headquarters. *Id*. Auxilium provided Harris with promotional materials to leave in the offices she visited, and she was prohibited from using any other materials to promote Testim. *Id*. She was expected to plan a speaker program once a month featuring a doctor from an approved list. *Id.*

Auxilium assigned Harris to a territory encompassing the doctors and pharmacies she was required to visit. *See Harris*, 664 F. Supp. 2d at 716-17. Harris was not permitted to promote Testim outside of that territory. *Id.* Within that territory, Auxilium provided Harris with a list of physicians to visit, and she was not permitted to contact doctors other than the ones on her list. *Id.* at 716. Auxilium advised her that she should begin her calls between 8:00 a.m. and 9:00 a.m., and end her

calls between 4:00 p.m. and 5:00 p.m. *Id.* at 717. Auxilium also instructed Harris on the number of physicians and pharmacies to visit in a given period, and she was evaluated on how well she met these goals. *Id.* In addition to her base salary, Harris received incentive compensation and awards based on the number of prescriptions for Testim issued in her assigned territory, as opposed to any compensation based directly on her individual promotional efforts. *Id*.

2. The district court issued a decision on September 28, 2009, concluding that Auxilium's MSCs were exempt from the FLSA's overtime provisions under both the outside sales exemption and the administrative exemption. *See Harris*, 664 F. Supp. 2d at 711. Shortly thereafter, the Secretary filed an amicus brief in a nearly identical case then pending before the Second Circuit. *See In Re Novartis Wage and Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011). The Secretary's brief outlined the Department's position that pharmaceutical sales representatives did not meet the requirements for either the outside sales exemption or the administrative exemption, and the Second Circuit concurred with that position. Harris sought reconsideration from the district court in light of the Secretary's amicus brief in *Novartis*. Upon reconsideration, the court adopted the reasoning of the Second Circuit and held that Auxilium's MSCs were neither

outside salesmen nor administrative employees under the FLSA. *See Harris*, 2010 WL 3817150, at *3. The district court stated that "the *Novartis* court sets forth a persuasive and reasoned analysis for its deference to the DOL's interpretation of its regulations." *Id.* Further, the district court concluded that the Department's regulations do not merely parrot the language of the FLSA, and its interpretations of those regulations are therefore entitled to controlling deference unless plainly erroneous or inconsistent with the regulations. *Id*. The court concluded "that no such error or inconsistency exists." *Id*.

SUMMARY OF ARGUMENT

1. Exemptions from the FLSA's overtime protections are narrowly construed and apply only where an employee falls plainly and unmistakably within an exemption's boundaries. The Department has issued regulations defining and delimiting the Act's outside sales and administrative exemptions pursuant to an express congressional delegation, and those regulations must be accorded controlling *Chevron* deference if reasonable. To the extent the regulations are ambiguous, the Department's interpretation of those regulations—as expressed in opinion letters, the Preamble to the regulations, and this amicus brief—is entitled to controlling *Auer* deference, as the Second Circuit recently concluded in *Novartis*, a case nearly identical to this one.

2. Because Harris did promotional work and did not actually make sales, she does not qualify as an exempt outside salesperson. It is undisputed that Harris did not sell, or take orders for, Auxilium's drug Testim; instead, her primary duty was to increase demand for Testim by attempting to persuade certain physicians to prescribe it to their patients. As such, Harris's job consisted entirely of promotional work designed to stimulate sales made by others—the very type of activity that the Department's regulations state is not exempt outside sales work. *See* 29 C.F.R. 541.503.

Auxilium's characterization of its MSCs as salespeople, Harris's training in sales techniques, and the fact that Harris received some of her compensation as a bonus based on prescriptions issued in her territory cannot substitute for the relevant fact that Harris never actually made sales. Repeatedly over the past three-quarters of a century, the Department has considered types of employees who, like Harris, exhibit some indicia of sales work, and has consistently determined that they do not fall within the outside sales exemption of the FLSA.

3. Harris was not an administrative employee as defined by the Department's regulations because she did not exercise discretion and independent judgment concerning matters of significance. She had no real responsibility over management policies or operating practices; she did not provide expert

advice to, or negotiate on behalf of, management; she did not have the authority to commit Auxilium in significant financial matters; she did not have authority to deviate from pre-approved policies; and she was not involved in managerial planning or decision-making. *See* 29 C.F.R. 541.202(b). Thus, Harris did not affect in any substantial way the business operations of Auxilium, as is required by the regulations in order to be deemed to have exercised discretion and independent judgment as to matters of significance.

Moreover, Harris's work as an MSC was tightly circumscribed and scripted by her employer. She was provided with a specific territory and specific lists of physicians and pharmacies within that territory, and was prohibited from contacting anyone not on those lists. When making her visits, Harris was not permitted to use anything besides pre-approved materials to promote Testim, and if a physician asked a question for which an answer did not appear on a detail piece, Harris was required to refer the physician to Auxilium headquarters. Harris had discretion only over minor matters such as deciding what time of day to visit which physician, and how she would deliver Auxilium's pre-approved message to a particular physician. These constraints on Harris prevented her from exercising discretion and independent judgment with respect to matters of significance.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY CONCLUDED THAT HARRIS WAS NOT EXEMPT AS AN OUTSIDE SALESPERSON BECAUSE SHE PROMOTED AUXILIUM'S PRODUCT AS OPPOSED TO SELLING IT

1. Exemptions from the FLSA are "narrowly construed against the employer[]" and they apply only when an employee falls "plainly and unmistakably" within their boundaries. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). The burden is on the employer to prove that an employee is exempt from the overtime provisions of the FLSA. *See Vela v. City of Houston*, 276 F.3d 659, 666 (5th Cir. 2001).

Pursuant to an express delegation from Congress, *see* 29 U.S.C. 213(a)(1), the Secretary has "defined and delimited" the exemptions from the Act's overtime provisions for "outside salesmen" and "administrative" employees, after full notice and comment. *See* 69 Fed. Reg. 22,122 (Apr. 23, 2004). When Congress expressly delegates authority to an agency to flesh out a statute, as it has here, the agency's regulations are entitled to controlling deference "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984); *see Gonzales v. Oregon*, 546 U.S. 243, 255-256 (2006) (*Chevron* deference is warranted "when it appears that Congress delegated authority to the agency generally to make rules

carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.") (internal quotation marks omitted); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165-68 (2007); *Belt v. EmCare, Inc*., 444 F.3d 403, 407-08 (5th Cir. 2006).

To the extent that the plain language of the Department's regulations is deemed ambiguous, controlling deference must be given to the Department's interpretation of its own regulations, unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (granting controlling deference to the Department's position as expressed in an amicus brief); *see Chase Bank N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008) ("Just as we defer to an agency's reasonable interpretations of the statute when it issues regulations in the first instance, the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force.") (citations omitted); *Long Island Care at Home*, 551 U.S. at 171-74; *Novartis*, 611 F.3d at 155 (granting controlling deference to the Secretary's amicus brief and holding that pharmaceutical sales representatives do not meet the outside sales or administrative exemption); *EmCare*, 444 F.3d at 407-08 (giving controlling weight to the Secretary's

interpretation—as expressed in an opinion letter, an enforcement manual, and an amicus brief—of an ambiguous regulation).

The Supreme Court recently reaffirmed that deference is due "to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is plainly erroneous or inconsistent with the regulation[s] or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2261 (2011) (internal quotation marks omitted).

These principles of deference apply equally to the outside sales and administrative exemptions. Whether *Chevron* deference (to the regulations) or *Auer* deference (to the interpretation of the regulations) applies, the level of deference is the same: controlling deference.

2. The Department's regulations define the statutory term "outside salesman" as including "any employee . . . whose primary duty is . . . making sales within the meaning of section 3(k) of the Act, or . . . obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." 29 C.F.R. 541.500(a)(1)(i)-(ii).[4] They further specify that "[s]ales

[4] Section 3(k) of the FLSA defines a sale to "include[] any sale, exchange, contract to sell, consignment for sale, shipment for

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." 29 C.F.R. 541.501(b). The regulations define "primary duty" as "the principal, main, major, or most important duty that the employee performs." 29 C.F.R. 541.700.

The regulations explicitly distinguish between exempt outside sales work and nonexempt "promotion work":

> Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

29 C.F.R. 541.503(a). The regulation emphasizes that "[p]romotion activities directed towards consummation of the employee's own sales are exempt. Promotional activities

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sale, or other disposition." 29 U.S.C. 203(k). "Other disposition" should not be read in a vacuum, completely divorced from the terms preceding it. Further, as the Second Circuit recognized in *Novartis*, "although the phrase 'other disposition' is a catch-all 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.' Such an . . . interpretation is consistent with the interpretive canon that exemptions to remedial statutes such as the FLSA are to be read narrowly, and is *neither erroneous nor unreasonable*." 611 F.3d at 153 (emphasis added) (citations omitted). The phrase "in some sense make a sale," 69 Fed. Reg. at 22,162, does not encompass the mere promotion of a product.

designed to stimulate sales that will be made by someone else are not exempt outside sales work." 29 C.F.R. 541.503(b).

Under the plain language of the Department's regulations, Harris fails to meet the requirements for the outside sales exemption. She never sold Testim or obtained orders for Testim; she was unable to transfer any quantity of Testim to the doctors and pharmacies she visited. Her goal in every visit to a doctor was, at most, to obtain a non-binding, unwritten commitment to prescribe Testim when appropriate for a patient's care. Harris promoted the drug in a manner designed to stimulate sales that would be made by others; she therefore cannot qualify as exempt under the outside sales exemption.

3. To the extent that there is any ambiguity in the Department's regulations, the Department's Preamble to the 2004 final rule ("Preamble") and Wage and Hour ("WH") opinion letters provide guidance.[5] The Preamble emphasizes that the Department

[5] In holding that Reps were exempt as outside salespersons, the Ninth Circuit, in *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011), *reh'g denied*, May 17, 2011, concluded that controlling *Auer* deference was not applicable to the Secretary's interpretation of her outside sales regulations because those regulations merely parroted the statutory language of section 3(k). *Id.* at 393-95. As the Second Circuit stated, however, "[w]e think it clear that the [outside sales] regulations, defining the term 'sale' as involving a transfer of title, and defining and delimiting the term 'outside salesman' in connection with an employee's efforts to promote the employer's products, do far more than merely parrot the language of the FLSA. The Secretary's interpretations of her regulations are thus entitled to controlling deference unless those

"does not intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services," and that "employees have a primary duty of making sales [only] if they obtain a commitment to buy from the customer and are credited with the sale." 69 Fed. Reg. at 22,162 (internal quotation marks omitted).

The Preamble expressly instructs that the exemption does not extend to employees engaged in "paving the way" for others to make sales. 69 Fed. Reg. at 22,162. "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." *Id.* at 22,162-22,163 (internal quotation marks omitted); *see* WH Opinion Letter FLSA 2006-16, 2006 WL 1698305 (May 22, 2006) (rejecting application of the outside sales exemption to employees of a for-profit professional fundraising

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interpretations are plainly erroneous or inconsistent with the regulation. . . . We find no such inconsistency and see no such error." *Novartis*, 611 F.3d at 153 (internal quotation marks and citations omitted).

business who solicited promises of charitable donations); WH Opinion Letter, 1994 WL 1004855 (Aug. 19, 1994) (concluding that soliciting organ and tissue donors by "selling the concept" of being a donor does not constitute sales under the regulations). Here, because Harris does not consummate her own sales, she clearly falls on the nonexempt promotion side of the line drawn by the Secretary pursuant to express congressional authorization and after notice and comment.

The argument that Auxilium seeks to make—that its employees are functionally equivalent to outside sales persons, even though they do not actually sell a product—is an argument that the Department has been presented with, considered, and declined to adopt multiple times since the original regulations were issued in 1938. In 1940, the presiding officer of the Department's public hearings on proposed revisions of the outside sales exemption wrote:

> A further group of persons for whom exemptions has been asked and who are admittedly not outside salesmen, in that they do not make actual sales, are sales promotion men. . . . Frequently the sales promotion man deals with retailers who are not customers of his own employer but of his employer's customer, the jobber. . . . It should be noted that frequently the promotion man is primarily interested in sales *by* the retailer, not *to* the retailer. Thus, inasmuch as the promotion man's earnings are normally not directly related to his working time, as is customarily the case with outside salesmen, it is doubtful that the nature of his work requires or justifies an exemption from the provisions of the act.

WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS, U.S. DEP'T OF LABOR, REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER ON PROPOSED REVISIONS OF REGULATIONS, PART 541, "Stein Report", Section IX (October 10, 1940).

"Promotion men and others engaged in 'indirect sales'" were again proposed for inclusion in the outside sales exemption in conjunction with the 1949 hearings on the regulations, and the Department again declined to include this category of employee within the exemption. *See* WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS, U.S. DEP'T OF LABOR, REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER ON PROPOSED REVISIONS OF REGULATIONS, PART 541, "Weiss Report", Section 541.5 (June 30, 1949). The example given there was of a "manufacturer's representative" who visits stores, discusses the store's needs with the manager, and fills out and leaves an order form with the manager to be submitted, should the store so choose, to the store's warehouse. The Department concluded that "[s]ince the manufacturer's representative in this instance does not consummate the sale nor direct his efforts toward the consummation of a sale . . . this work must be counted as nonexempt." *Id*.

The Department considered the question yet again in issuing its 2004 regulations. Several large employer organizations urged the Department to "eliminate the emphasis upon an employee's 'own' sales" in the "promotion work" regulation. 69 Fed. Reg. at 22162. These employer organizations argued that

the "sales personnel" in many businesses are not evaluated based on individual sales. Rather, like Auxilium's MSCs, these employees are evaluated on their "sales efforts" rather than on their "sales numbers." *Id*. The U.S. Chamber of Commerce argued that "promotional activities, even when they do not culminate in an individual sale, are nonetheless an integral part of the sales process." *Id*. Once again, the Department declined to include such promotional activities unconnected to an individual sale as qualifying for the outside sales exemption. *Id.*

In sum, the scenario presented by the employee who has some indicia of sales work but does not consummate an individual sale is not unique to the pharmaceutical industry, and is something that the Department has considered repeatedly over the nearly 75 years it has administered the FLSA and has determined to be beyond the narrow scope of the outside sales exemption. As the Second Circuit summarized in the context of the pharmaceutical industry:

> [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, . . . 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.

Novartis, 611 F.3d at 154. The Second Circuit went on to note in *Novartis* that "[t]o the extent that the pharmaceutical industry wishes to have the concept of 'sales' expanded to include the promotional activities at issue here, it should direct its efforts to Congress, not the courts." *Id.* at 155.

4. Harris's work is analogous to that of employees found by this Court not to qualify for the outside sales exemption. *See Wirtz v. Keystone Readers Serv., Inc.*, 418 F.2d 249 (5th Cir. 1969). In *Wirtz*, "student salesmen" who went door-to-door soliciting subscribers and obtaining a nonbinding commitment to buy magazines were not outside salesmen. *Id.* at 260-61. The potential customers identified by the student salesmen were subsequently contacted by the student salesmen's supervisors, who actually made the sale. *Id.* at 252, 260. Like Harris, the students in *Wirtz* only laid the groundwork for sales by others, but did not themselves engage in actual sales as defined by the Department's regulations.

In contrast, Harris's work is patently distinct from that of the classic exempt outside salesmen described in *Jewel Tea Co. v. Williams*, 118 F.2d 202 (10th Cir. 1941). The *Jewel Tea* employees sold a variety of merchandise to their customers, with their days comprised of a series of consummated transactions in which cash was exchanged for goods, and they were paid strictly by commissions based on the total amount of goods that they

themselves sold. *Id*. at 207-08. Harris, on the other hand, engaged in a daily routine of promotional meetings with physicians, but never consummated any transactions in which money was exchanged or a binding commitment given, and she was paid a base salary with bonuses based on prescriptions of Testim issued within her territory, not a straight commission derived from a percentage of her own sales.

5. The fact that Auxilium has been treating its MSCs as exempt or characterizing their jobs as sales positions is irrelevant to a determination whether Harris is an exempt outside salesperson. The Supreme Court has expressly held that industry custom and practice do not define or circumscribe employees' rights under the FLSA. *See Barrentine v. Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 741 (1981). As the *Barrentine* Court stated:

> "The Fair Labor Standards Act was not designed to codify or perpetuate [industry] customs and contracts. . . . Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights."

Id. (quoting *Tenn. Coal, Iron & R. Co. v. Muscoda Local 123*, 321 U.S. 590, 602-03 (1944)).

Furthermore, the Department's regulations clearly state that job titles may not be used to establish exempt status; rather, each employee's actual job duties must be evaluated. *See* 29 C.F.R. 541.2. Auxilium's attempt to rely on a generic job description in the *Dictionary of Occupational Titles* ("Dictionary") published by the Department in 1991 is therefore also misplaced. On its face, the Dictionary's definition of "pharmaceutical detailer" is not a reliable guide to the duties of the MSCs at issue in this case, as it includes "sell[ing] and tak[ing] orders for pharmaceutical supply items" to and from doctors, hospitals, pharmacies, and wholesalers." U.S. DEP'T OF LABOR, DICTIONARY OF OCCUPATIONAL TITLES § 262.157-010 (4th ed., rev. 1991); there is no dispute that Auxilium's MSCs cannot take orders for Testim. In addition, the Dictionary contains an explicit disclaimer that its "occupational information . . . cannot be regarded as determining standards for any aspect of the employer-employee relationship" and "should not be considered a judicial or legislative standard for wages [or] hours." *Id.* at xiii; *see Wheeler v. Apfel*, 224 F.3d 891, 897 (8th Cir. 2000); *Barker v. Shalala*, 40 F.3d 789, 795 (6th Cir. 1994).

6. Finally, any argument that the Department has acquiesced in treating employees like Harris as exempt outside salespersons is without merit. Congress has specifically

provided that only affirmative agency action (e.g., in the form of a written statement by the Administrator of the Wage and Hour Division or a Department regulation) may be relied on by a party as a "good faith" affirmative defense to violations committed under the FLSA. 29 U.S.C. 259; *see* 29 C.F.R. 790.13-.19. Indeed, the Department's regulations require that "before it can be determined that an agency actually has a practice or policy to refrain from acting, there must be evidence of its adoption by the agency through some affirmative action establishing it as the practice or policy of the agency." 29 C.F.R. 790.18(h) (footnote omitted); *see Alvarez v. IBP, Inc.*, 339 F.3d 894, 908 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005); *Keeley v. Loomis Fargo & Co.*, 183 F.3d 257, 270-71 (3d Cir. 1999). Here, there is no record evidence of any agency action or statement that MSCs should be treated as exempt salespeople.

Moreover, there are practical considerations for not treating an agency's non-enforcement as acquiescence. As the Supreme Court explained in *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985), "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. . . . The agency is far better

equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."[6]

II.

THE DISTRICT COURT CORRECTLY CONCLUDED THAT HARRIS WAS NOT AN EXEMPT ADMINISTRATIVE EMPLOYEE BECAUSE SHE PERFORMED DUTIES THAT WERE TIGHTLY CIRCUMSCRIBED BY AUXILIUM AND THUS DID NOT EXERCISE DISCRETION AND INDEPENDENT JUDGMENT CONCERNING MATTERS OF SIGNIFICANCE

1. Only those employees "whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance" can meet the requirements for the administrative exemption. 29 C.F.R. 541.200(a)(3).[7] Discretion and independent judgment "involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term 'matters of significance' refers to the level of importance or consequence of the work performed." 29 C.F.R. 541.202(a). The regulation provides an extensive—but not exhaustive—list of the factors to consider in analyzing an

[6] "A failure to inspect [on the part of the Wage and Hour Division] might be due to any one of a number of different reasons. It might, for instance, be due entirely to the fact that the inspectors' time was fully occupied in inspections of other industries in the area." 29 C.F.R. 790.18(h).

[7] Because Harris cannot satisfy the "discretion and independent judgment with respect to matters of significance" prong of the administrative exemption, this brief does not address whether her "primary duty [was] the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. 541.200(a)(2) and (3).

employee's exercise of discretion and independent judgment with respect to matters of significance. Those factors ask whether the employee

- has authority to formulate, affect, interpret, or implement management policies or operating practices;
- carries out major assignments in conducting the operations of the business;
- performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;
- has authority to commit the employer in matters that have significant financial impact;
- has authority to waive or deviate from established policies and procedures without prior approval;
- has authority to negotiate and bind the company on significant matters;
- provides consultation or expert advice to management;
- is involved in planning long- or short-term business objectives;
- investigates and resolves matters of significance on behalf of management;
- represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. 541.202(b).[8] Federal courts generally find employees who meet at least two or three of these indicators to be exercising discretion and independent judgment with respect to matters of significance, although a case-by-case analysis is required. *See* 69 Fed. Reg. at 22,143 (listing cases).

The use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other

[8] In the interest of readability, the Secretary has rendered the regulatory criteria into bullet points.

sources does not meet the standard. *See* 29 C.F.R. 541.202(e); *see also* 541.203(g)-(i) (clarifying through examples of exempt and non-exempt administrative employees that reliance on techniques and skills developed through specialized training and use of manuals is insufficient for application of the exemption). The fact that an employer might suffer financial losses if the employee fails to perform a job properly likewise fails to transform an employee's daily work into matters of significance as understood by the regulations. *See* 29 C.F.R. 541.202(f).

2. The Department has consistently reiterated that both the nature and the level of the employee's decisions as they relate to the employer's business operations determine whether the employee exercises discretion and independent judgment with respect to matters of significance. "In this regard, it is not significant that an employee makes decisions regarding when and where to do different tasks, as well as the manner in which to perform them." WH Opinion Letter FLSA 2006-45, 2006 WL 3930478 (Dec. 21, 2006) (copy editors do not exercise discretion as to matters of significance even though they "organize work priorities to meet production deadlines set by management . . . [and] make decisions on workflow within their areas and communicate these decisions to club copywriters") (citing *Clark*

v. J.M. Benson Co., 789 F.2d 282, 287 (4th Cir. 1986)) (internal quotation marks omitted).

Another Department opinion letter from 2006, citing authority from this Court, denied the application of the administrative exemption to a senior legal analyst who worked independently and used her judgment to prioritize work tasks, including deciding how her projects would be executed and how much time to devote to each assignment. *See* WH Opinion Letter FLSA 2006-27, 2006 WL 2792441 (July 24, 2006). The Department asserted that employees like the senior legal analyst who make "limited decisions[] within clearly 'prescribed parameters'" do not meet the standard required for the administrative exemption. *Id*. (quoting *Dalheim v. KDFW-TV*, 706 F. Supp. 493, 509 (N.D. Tex. 1998), *aff'd*, 918 F.2d 1220 (5th Cir. 1990)). The letter points out that the employee at issue did "not formulate or implement management policies, utilize authority to waive or deviate from established policies, provide expert advice, or plan business objectives in accordance with the dictates of § 541.202(b)." *Id.* The Department also noted that the inherent limitations on legal work performed by lay persons necessarily curtail any exercise of discretion. *Id*.

Like the non-exempt senior legal analyst, Harris worked largely without direct daily supervision and had some leeway—in deciding what time of day to visit the physicians to whom she

was assigned and how best to execute her presentations within Auxilium's tightly prescribed parameters. Harris, however, did not perform any duties comparable to those found in 29 C.F.R. 541.202(b). She did not formulate, affect, interpret, or implement management policies or operating practices; she did not perform work that affected business operations to a substantial degree; she did not have any authority to commit the employer in matters having significant financial impact; she did not have authority to waive or deviate from established policies without prior approval; she did not negotiate for management or resolve grievances; she did not plan any short- or long-term business objectives for the company. Indeed, Harris did not play any role in the business operations of Auxilium beyond promoting Testim. *Compare* WH Opinion Letter FLSA 2006-34, 2006 WL 3227789 (Sept. 21, 2006) (applying administrative exemption to community events supervisors because they had authority to negotiate and bind their employers on significant matters such as contracts with vendors); WH Opinion Letter FLSA 2006-46, 2006 WL 3930479 (Dec. 21, 2006) (location managers' primary duties, such as creating and enforcing rules for the production crew, committing the employer in financial matters, and negotiating site rentals, indicated that managers exercised discretion and independent judgment as to matters of significance).[9]

[9] The administratively exempt "medical detailists" discussed in a

3. This Court's decision in *Dalheim* is instructive. In *Dalheim*, this Court declined to extend the administrative exemption to directors and editors at a television news station in large part because they did not exercise discretion as to matters of consequence. *See* 918 F.2d at 1231-32. Directors decided which camera to use, which machine to run video and graphics on, and screened commercials to ensure they met the employer's standards. *Id.* at 1223. But as the district court pointed out, only "[a] technical skill and expertise is involved, not an exercise of discretion and independent judgment concerning matters of significance or policy." *Dalheim*, 706 F. Supp. at 509.[10] Editors monitored sources for story ideas that conformed with general station guidelines and assigned photographers and video editors to reporters. *See Dalheim*, 918

1945 WH letter referenced by Auxilium are manifestly distinct from Auxilium's MSCs: the detailists were "experts" in nutrition; they "train[ed] personnel"; and they were "consulted with respect to individual nutritional problems encountered by hospitals and physicians." Further, the detailists would "arrange for added deliveries of [the employer's] product to take care of emergencies" and "instruct the firm's salesmen in such technical matters as disease prevention, the chemical components of their product and nutritional research." Applicability of Exemption for Administrative Employees to Medical Detailists, [1943-48 Wages-Hours] Lab. L. Rep. (CCH) ¶ 33,093 (May 19, 1945).

[10] This Court specifically found "that the district court properly applied the applicable statute and regulations," and that the record supported the district court's conclusion that the employees involved were not administratively exempt. *Dalheim*, 918 F.2d at 1223.

F.2d at 1223. However, while editors did "make some decisions that involve the use of judgment, . . . these decisions are within prescribed parameters; anything outside their narrowly circumscribed range of responsibility must be approved by station management. They do not exercise discretion and independent judgment in their work, especially not as to matters of significance." *Dalheim*, 706 F. Supp. at 509. Like the employees this Court found to be non-exempt in *Dalheim*, Harris exercised a certain degree of skill and expertise in approaching physicians with Auxilium's promotional materials, but was prohibited from making any decisions outside of tightly prescribed parameters.

The non-exempt employees in *Dalheim* contrast with the employees found to be exempt administrative employees by this Court in *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578 (5th Cir. 2006). There, although the insurance company adjusters consulted manuals and guidelines, they advised management, negotiated on the company's behalf, and were authorized to enter into agreements that were financially binding on their employer. *Cheatham*, 465 F.3d at 585-86. Harris, on the other hand, was required to refer physicians to Auxilium headquarters if a detail piece did not contain the answer to a physician's question. She did not advise management or represent Auxilium

in any business matters, and she never negotiated a sale or contract for Auxilium's product.

4. This Court has not addressed whether pharmaceutical employees like Harris qualify as exempt administrative employees. While the Second and Third Circuits have reached opposite conclusions on this issue, the decisions are not in conflict. In *Novartis*, the Second Circuit deferred to the Secretary's interpretation that "the regulations require a showing of a greater degree of discretion, and more authority to use independent judgment, than Novartis allow[ed] the Reps." 611 F.3d at 156. The Second Circuit found no evidence "that the Reps have any authority to formulate, affect, interpret, or implement Novartis's management policies or its operating practices, or that they are involved in planning Novartis's long-term or short-term business objectives, or that they carry out major assignments in conducting the operations of Novartis's business, or that they have any authority to commit Novartis in matters that have significant financial impact." *Id.* Further, the court noted that the Reps play no role in planning marketing strategy or in formulating "core messages" to be delivered to physicians, are required to visit a given physician a certain number of times as established by the employer, are required to promote a given drug a certain number of times per trimester, are required to hold a certain number of promotional events, and

are not allowed to deviate from "core messages" and preapproved scripts (including when answering questions). *Id.* at 157.

The two Third Circuit cases on which Auxilium relies, *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010), and *Baum v. AstraZeneca*, 372 Fed. App'x 246 (3d Cir.), *cert. denied*, 131 S. Ct. 332 (2010), do not support a conclusion that the administrative exemption applies in the present case. In *Smith*, the Third Circuit upheld a lower court ruling that the Rep in that case had sufficient discretion and independent judgment to qualify as an exempt administrative employee. But the Third Circuit was careful to indicate the narrow nature of its holding, relying heavily on the Rep's own deposition testimony to reach its conclusion. Specifically, in regard to discretion and independent judgment concerning matters of significance, the Third Circuit relied on the fact that the Rep "described herself as the manager of her own business who could run her own territory as she saw fit." *Smith*, 593 F.3d at 285. As the Third Circuit stated, "Our opinion . . . focuses on Smith and the specific facts developed in discovery in this case. Consequently, we recognize that based on different facts, courts, including this Court, considering similar issues involving sales representatives for other pharmaceutical companies, or perhaps even for [Johnson & Johnson], might reach a different result than that we reach here." *Id.* at 283 n.1.

The Third Circuit in *Baum* decided a state law claim—not an FLSA claim—and thus has limited relevance to the case at hand. Significantly, the Third Circuit designated the unpublished decision in *Baum* as "not precedential." *See* 3d Cir. Internal Operating Procedures at 5.3, 5.7. These decisions are therefore not in conflict with the decision in *Novartis*.

CONCLUSION

For the reasons stated above, this Court should affirm the district court's decision and hold that Harris is neither an exempt outside salesperson nor an exempt administrative employee.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

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Dated: July 18, 2011

/s/Summer C. Smith
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief for the Secretary of Labor As Amicus Curiae in Support of Plaintiff-Appellee was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit today, July 18, 2011, using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service is to be accomplished by the appellate CM/ECF system upon the following attorneys of record:

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