No. 10-15257

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL SHANE CHRISTOPHER and
FRANK BUCHANAN,

Plaintiffs-Appellants,

v.

SMITHKLINE BEECHAM CORPORATION,
D/B/A GLAXOSMITHKLINE,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Arizona

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiffs-Appellants' Petition for Panel Rehearing and Rehearing *En Banc* on the issue whether pharmaceutical sales representatives ("Reps") are exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA" or "Act") under the "outside sales" exemption, 29 U.S.C. 213(a)(1). The court's decision is incorrect and warrants rehearing by the panel in the first instance because the panel

did not accord proper deference to the Secretary's interpretation of her own regulations, thereby expanding the outside sales exemption without any basis in law or fact. *See* Fed. R. App. P. 40(a)(2).

The decision also merits *en banc* review under Federal Rules of Appellate Procedure 35(a)(2) and 35(b)(1)(B), and Ninth Circuit Rule 35-1, because it presents "a question of exceptional importance" -- it conflicts directly with a decision of the Second Circuit, *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 79 U.S.L.W. 3246 (U.S. Feb. 28, 2011) (No. 10-460) (a nationwide class action). In *Novartis*, the Second Circuit accorded controlling *Auer* deference to the Secretary's interpretation of her own regulations (an interpretation that the court determined was consistent with those regulations) as set forth in her amicus brief. *See* 611 F.3d at 149, 153 (citing *Auer v. Robbins,* 519 U.S. 452, 461 (1997)). It thus adopted the Secretary's view that Reps do not actually "make sales" but, rather, engage in the "promotion" of drugs, which is not exempt outside sales work. The panel opinion further conflicts with several decisions of the Supreme Court and this Court instructing courts to defer to an agency's interpretation of its own regulation unless "that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Chase Bank USA, N.A. v. McCoy,* 131 S. Ct. 871 (2011) (quoting

Auer, 519 U.S. at 461); *see Bassiri v. Xerox Corp.*, 463 F.3d 927, 930-31 (9th Cir. 2006).

Finally, the panel opinion substantially affects a rule of national application in which there is an overriding need for national uniformity; many of the pharmaceutical companies that employ Reps, including both GlaxoSmithKline and Novartis, operate nationwide and employ thousands of Reps across the country who are now subject to two conflicting rules regarding their entitlement to overtime pay.[1]

INTEREST OF THE SECRETARY

The Secretary administers and enforces the FLSA and has a strong interest in ensuring that it is interpreted correctly in order to ensure that all employees receive the wages to which they are entitled. *See* 29 U.S.C. 204(a) and (b); 211(a); 216(c); 217. She also is charged by Congress with "defining and delimiting" certain exemptions from overtime, including the "outside sales" exemption. *See* 29 U.S.C. 213(a)(1). Thus, in the context of this case, the Secretary has a particular interest in the correct interpretation of the term "outside salesman" in section 13(a)(1), which she has defined by regulation at 29 C.F.R. 541.500-504. The Secretary also is

[1] This same issue is pending in the Seventh Circuit, in *Schaefer-LaRose v. Eli Lilly and Co.*, No. 10-3855, and in the Fifth Circuit, in *Harris v. Auxilium Pharmaceuticals, Inc.*, No. 11-20027.

interested in the proper application of *Auer* and other Supreme Court authority requiring courts to accord "controlling deference" to her interpretation of her regulations unless they are plainly erroneous or inconsistent with those regulations.

ARGUMENT

THE PANEL ERRED BY REFUSING TO DEFER TO THE SECRETARY'S INTERPRETATION OF HER OWN REGULATIONS THAT DEFINE THE OUTSIDE SALES EXEMPTION

1. Pursuant to Congress's expressly delegated rulemaking authority, the Secretary issued regulations after notice and comment that "define[] and delimit[]" the FLSA's overtime exemptions, including the exemption for an outside salesman. 29 U.S.C. 213(a)(1); *see* 69 Fed. 22,122 (Apr. 23, 2004). The Department of Labor's ("Department") regulations define the statutory phrase "outside salesman" as including "any employee . . . [w]hose 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). "Primary duty" means "the principal, main, major, or most important duty that the employee performs," 29 C.F.R. 541.700(a), and section 3(k) of the FLSA defines "[s]ale" as including "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. 203(k); *see* 29 C.F.R. 541.501. The

Department's regulations further explain that "[s]ales 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," and that "'services' extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order." 29 C.F.R. 541.501(b) and (d).

The regulations explicitly distinguish promotional work from exempt outside sales work, clarifying that

> [p]romotion 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). In other words, "[p]romotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work." 29 C.F.R. 541.503(b).[2]

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[2] The Act's "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392

2. The panel's conclusion, citing *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006), that the Department's regulations simply "parrot" the statutory language of section 3(k), and are thus undeserving of *Auer* deference, is patently incorrect. *Christopher v. SmithKline Beecham Corp.*, -- F.3d --, 2011 WL 489708, at *9, *10 (Feb. 14, 2011). Most importantly, the panel ignored the regulation that explicitly distinguishes "sales" from promotion work. *See* 29 C.F.R. 541.503. Specifically, the panel disregarded the Secretary's express statement in 29 C.F.R. 541.503(a) that "[p]romotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work." It also ignored the examples of promotional work set forth in 29 C.F.R. 541.503(b) and (c), which illustrate the promotion/sales dichotomy. The panel further ignored other sections of the regulations that go beyond the plain terms of section 3(k) by including within the outside sales exemption "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)(ii), and "the transfer of title to tangible property," 29 C.F.R. 541.501(b).[3]

(1960); *see Cleveland v. City of Los Angeles*, 420 F.3d 981, 988 (9th Cir. 2005).

[3] As noted *supra*, in promulgating these regulations, the Secretary acted pursuant to specific congressional authorization to "define and delimit" the term "outside salesman." While the

As the Second Circuit in *Novartis* stated:

> We think it clear that the . . . 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, <u>do far more than merely parrot the language of the FLSA</u>. The Secretary's interpretations of her regulations are thus entitled to controlling deference unless those interpretations are plainly erroneous or inconsistent with the regulation.

611 F.3d at 153 (emphasis added; internal quotation marks and citations omitted). The Seventh Circuit undertook a similar "deference" analysis in a case challenging the Department's interpretation of Family and Medical Leave Act regulations. As that court concluded, "It is true that part of the implementing regulation . . . follows closely the language of the statute; however, the regulation goes beyond the mere recitation of the statutory language and speaks to the issue presented in this case." *Harrell v. U.S. Postal Serv.*, 445 F.3d 913, 925 (7th Cir. 2006). And the district court in *Jirak v. Abbott Laboratories, Inc.,* 716 F. Supp.2d 740 (N.D. Ill. 2010), addressing the same regulations under consideration here, stated as follows:

> The regulations at issue in this case do not merely "parrot" the FLSA. The Court acknowledges that both the

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Secretary refers to the statutory definition of "sale" at 29 U.S.C. 203(k), the regulations at 29 C.F.R. 541.500-504 specifically address who is an "outside salesman," not what is a "sale" per se. Thus, the Secretary does not merely reiterate section 3(k) but, rather, "define[s] and delimit[s]" the term "outside salesman." 29 U.S.C. 213(a)(1).

> regulations and the FLSA define "sale" or "sell" to include "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." *See* 29 C.F.R. § 541.501(b); 29 U.S.C. § 203(k). The regulations, however, go further and provide guidance directly applicable to the issue in this case: when the outside sales exemption applies. The regulations explain that "sales" under the exemption include the transfer of both tangible and intangible property, and that "outside sales work" includes both the sale of commodities and obtaining orders or contracts for services or the use of facilities. *See* 29 C.F.R. § 541.501. Further, the regulations provide guidance as to when "promotion work" falls under the outside sales exemption. . . . As such, the regulations do more than merely repeat or summarize the FLSA.

Id. at 746-47 (footnote and citation omitted).

The same analysis should apply here. As noted *supra*, the regulations set forth a primary duty test and describe the distinction between "sales" and "promotion," and specifically state that "[p]romotional 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). They also stress that where an employee "does not consummate the sale [or] direct efforts toward the consummation of [his own] sale, the work is not exempt outside sales work." 29 C.F.R. 541.503(c). Thus, rather than merely parroting the language of the FLSA, the regulations at issue represent the considered judgment of the Secretary that promotional work which does not involve any actual sales does not qualify for the outside sales exemption. As such, any reasonable interpretation of those regulations, i.e., any interpretation that is not plainly erroneous or inconsistent

with the regulations, is entitled to controlling *Auer* deference regardless of the form that the interpretation takes. *See Chase Bank USA,* 131 S. Ct. at 880 ("We defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'") (quoting *Auer*, 519 U.S. at 461); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council,* 129 S. Ct. 2458, 2469-70 (2009) (when an agency's regulations construing a statute are ambiguous, courts should turn to the agency's subsequent interpretation of those regulations, which must be deemed to be "correct" unless "plainly erroneous or inconsistent with the regulation[s]") (internal quotation marks omitted); *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan,* 129 S. Ct. 865, 872 (2009) ("[B]eing neither plainly erroneous [n]or inconsistent with the regulation, the Treasury Department's interpretation of its regulation is controlling") (internal quotation marks omitted); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008) (same); *Bassiri*, 463 F.3d at 930-31 ("[W]here an agency interprets its own regulation, even if through an informal process, its interpretation of an ambiguous regulation is controlling under *Auer* unless plainly erroneous or inconsistent with the regulation.") (internal quotation marks omitted). Therefore, the panel clearly erred by concluding that *Auer* was inapplicable in the first instance and

that controlling deference should not be accorded to the Secretary's interpretation of her own regulations.[4]

3. The panel also erred in concluding that, even if *Auer* were applicable, the Secretary's interpretation is "both plainly erroneous and inconsistent with her own regulations and practices . . . ." 2011 WL 489708, at *10. The Reps, who merely promote drugs to physicians, do not make a sale in accordance with the regulations, which specifically distinguish promotional work from sales work. *See* 29 C.F.R. 541.503(a). The actual sale of the drug, which involves a tangible exchange, takes place later in the process and includes neither the Rep nor the physician. Thus, the Reps, consistent with the regulations the Secretary was authorized by Congress to promulgate, do not come within the "outside salesman" exemption.

The Second Circuit recognized in *Novartis* that this interpretation by the Secretary of the outside sales exemption "is neither erroneous nor unreasonable," and courts are

[4] In her initial amicus brief, the Secretary argued for controlling *Auer* deference in the alternative. She first argued for controlling *Chevron* deference, stating that the regulations themselves answer the question presented. *See Jirak*, 716 F. Supp.2d at 746 ("The regulations dictate that if an employee does not make any sales and does not obtain any orders or contracts, then the outside sales exemption does not apply.") (citation omitted). The Secretary, however, focuses her arguments here on *Auer* deference, in light of the panel decision and the fact that under either analysis the level of deference would be the same.

therefore required to accord it "controlling" deference. 611 F.3d 149, 153. Nor does the Department's use of the phrase "in some sense make [a] sale[]" in its 2004 preamble, 69 Fed. Reg. 22,162 (Apr. 23, 2004), somehow, as suggested by the panel, render the Department's position plainly erroneous or inconsistent with the regulations. 2011 WL 489708, at *11, *12. As the Second Circuit explained:

> The basic premise of the regulations explaining who may properly be considered an exempt "outside salesman" -- a term for which the FLSA explicitly relies on the Secretary to promulgate defining and delimiting regulations -- is that an employee is not an outside salesman unless he does "in some sense make the sales," 2004 Final Rule at 22162 . . . . [T]he regulations quoted above make it clear that a person who merely promotes a product that will be sold by another person does not, in any sense intended by the regulations, make the sale. The position taken by the Secretary on this appeal is that when an employee promotes to a physician a pharmaceutical that may thereafter be purchased by a patient from a pharmacy if the physician -- who cannot lawfully give a binding commitment to do so -- prescribes it, the employee does not in any sense make the sale. Thus, the interpretation of the regulations given by the Secretary in her position as amicus on this appeal is entirely consistent with the regulations.

Novartis, 611 F.3d at 153 (emphases added). The court went on to sum up its reasoning:

> [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.

Id. at 154 (emphasis added).[5]

Similarly, the panel's reliance on the "other disposition" language of section 3(k) does not render the Secretary's interpretation plainly erroneous. As the Second Circuit stated in *Novartis*, "[a]lthough 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 (citations omitted). The phrase "in some sense a sale," by its very terms, does not connote a transaction outside the

[5] The panel stated that the Reps' promotion activities "are but preliminary steps toward the end goal of causing a particular doctor to commit to prescribing *more* of the particular drugs in the [Reps'] drug bag." 2011 WL 489708, at *14. The Second Circuit in *Novartis* addresses this point, stating that "[t]he physician is of course an essential step in the path that leads to the ultimate sale of a Novartis product to an end user; a patient cannot purchase the product from a pharmacy without a prescription, and it is the physician who must be persuaded that a particular Novartis drug may appropriately be prescribed for a particular patient. But it is reasonable to view what occurs between the physicians and the Reps as less than a 'sale.'" 611 F.3d at 154.

confines of a "sale," such as the promotion of a product that is not incidental to one's own sale.[6]

The panel was also incorrect in asserting that "the Secretary has used her appearance as amicus to draft a new interpretation of the FLSA's language," and that deferring to the Secretary's views "would sanction bypassing of the Administrative Procedure[] Act and notice and comment rulemaking." 2011 WL 489708, at *10. Rather, the Secretary's interpretation, as recognized by the Second Circuit, is entirely consistent with the regulations, which were promulgated in 2004 after notice and comment.

4. The panel further erred by choosing to substitute its own broad interpretation of the outside sales exemption for the Department's appropriately narrow one by relying on "industry practice and prevailing customs," and a generic definition of "pharmaceutical detailers." 2011 WL 489708, at *12, *15 (*citing* U.S. DEP'T OF LABOR, DICTIONARY OF OCCUPATIONAL TITLES (4th ed., rev. 1991)) ("DOT"). The Supreme Court has expressly held that industry custom and practice does not circumscribe employees'

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[6] The panel's observation that the Reps may be similar to the "classic salesman" in *Jewel Tea Co. v. Williams*, 118 F.2d 202 (10th Cir. 1941), *see* 2011 WL 489708, at *13, is unpersuasive. The *Jewel Tea* employees sold a variety of merchandise to their customers; unlike the Reps here, they actually consummated transactions. *See* 118 F.2d at 208. The Reps do not sell goods or transfer property, do not consummate any transactions, and do not receive any consideration from their "customers."

rights under the FLSA. *See Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 741 (1981). As the Court stated in *Barrentine*:

> 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)).

Moreover, 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. Additionally, the DOT definition relied upon by the panel (section 262.157-010), *see* 2011 WL 489708, at *15, is clearly inapplicable on its face. Not only does that definition include more duties than are performed by the Reps in the present case (e.g., dealing with hospitals and retail and wholesale drug establishments) but, by specifying "[m]ay sell <u>and take orders</u> for pharmaceutical supply items from persons contacted (emphasis added)," it necessarily describes an activity that the Reps do not, and cannot, perform in regard to the drugs they are promoting. In any event, it is significant that the DOT itself contains a disclaimer ("Special Notice"),

which states that "the occupational information in this edition cannot be regarded as determining standards for any aspect of the employer-employee relationship. Data contained in this publication should not be considered a judicial or legislative standard for wages, hours, or other contractual or bargaining elements." DOT at xiii (attached as Addendum; *available at* http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTSPEC.HTM). Indeed, cases recognize the limited applicability of the DOT. *See Wheeler v. Apfel*, 224 F.3d 891, 897 (8th Cir. 2000) ("DOT definitions are simply generic job descriptions that offer the approximate maximum requirements for each position, rather than their range. The DOT itself cautions that its descriptions may not coincide in every respect with the content of jobs as performed in particular establishments or at certain localities.") (internal quotation marks and citations omitted); *Barker v. Shalala*, 40 F.3d 789, 795 (6th Cir. 1994) ("[I]t would be manifestly inappropriate to make the *Dictionary of Occupational Titles* the sole source of evidence concerning gainful employment."); *Albers v. Mellegard, Inc.*, No. 06-4242-KES, 2008 WL 7122683, at *15 n.4 (D.S.D. Oct. 27, 2008) ("Neither the [DOT] nor the regulation cross-reference each other, and there is no indication that the [DOT] definition is intended to control the meaning of . . . the [exemption] regulation."); *but see Viart v. Bull Motors, Inc.*, 149 F.

Supp.2d 1346, 1350 (S.D. Fla. 2001) (after relying on the Department's applicable regulation, granting *Skidmore* deference to the definition of "get ready mechanic" in the DOT).

5. Finally, the panel is incorrect in suggesting that "the Secretary's acquiescence in the sales practices of the drug industry for over seventy years" supports its conclusion that these employees are exempt as a matter of law. 2011 WL 489708, at *15. The panel proposed as a "'plausible hypothesis'" that the pharmaceutical industry has been "'left alone'" by the Department "because DOL believed that its practices were lawful." *Id.* (quoting *Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 510-11 (7th Cir. 2007)).[7] It further described the Department's position as an "about-face regulation, expressed only in ad hoc *amicus* filings," after "decades of DOL nonfeasance and the consistent message to employers that a salesman is someone who in some sense sells." *Id.* This argument must fail.

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 in the form of a regulation) may be relied on by a party in good faith as an affirmative defense to violations committed under the FLSA. *See*

[7] The statement in *Yi* relied upon by the panel is manifestly dictum.

29 U.S.C. 259; *see also* 29 C.F.R. 790.13-790.19. Significantly, the Department's regulations state 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) ("[B]y their plain terms, court decisions, agency litigation positions and self-initiated activities are not administrative rulings or interpretations.") (internal quotation marks omitted), *aff'd on other grounds*, 546 U.S. 21 (2005); *Keeley v. Loomis Fargo & Co.*, 183 F.3d 257, 270-71 (3d Cir. 1999). The panel did not point to any agency action indicating that Reps should be treated as exempt outside salespersons. *Cf. Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("Petitioner's attempt to infer from . . . silence the existence of a contrary policy fails because the intermediary letter did not purport to be a comprehensive review of all conditions that might be placed on reimbursement of educational costs."); *Harrington v. Chao*, 372 F.3d 52, 59-60 (1st Cir. 2004) (citing *Thomas Jefferson Univ.*, 512 U.S. at 512).

Moreover, there are practical considerations for not treating an agency's prior non-enforcement as acquiescence. As

the Supreme Court stated in *Heckler v. Chaney*, 470 U.S. 821 (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." *Id.* at 831-32.[8] Concluding that non-enforcement by an agency is equivalent to acquiescence would curtail the future ability of agencies to enforce the laws that Congress has specifically charged them with enforcing.

[8] *See* 29 C.F.R. 790.18(h) ("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."). The limited resources of the Wage and Hour Division and the impact on enforcement of the FLSA is evident in a recent report. *See* DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION (May 2010), *available at:* http://www.dol.gov/whd/resources/strategicEnforcement.pdf.

CONCLUSION

For the foregoing reasons, the Secretary supports panel rehearing and, should the panel deny rehearing, believes that rehearing *en banc* is warranted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH NINTH CIRCUIT RULES 29-2, 35-4, and 40-1

I certify that pursuant to Circuit Rules 29-2, 35-4, and 40-1, the attached amicus brief in support of petition for panel rehearing/petition for rehearing *en banc* is:

_x__ Monospaced, has 10.5 or fewer characters per inch and contains 4,198 words (petitions and answers must not exceed 4,200 words)

___ Or in compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

Dated: March 24, 2011

s/Sarah J. Starrett
SARAH J. STARRETT
Attorney

CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of March, 2011, the foregoing BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING *EN BANC* is being filed electronically and that notice of such filing will be issued to all counsel of record through the Court's electronic filing system.

s/Sarah J. Starrett
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ADDENDUM

Dictionary of Occupational Titles

Fourth Edition, Revised 1991

Volume I

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Lynn Martin, Secretary

Employment and Training Administration
Roberts T. Jones
Assistant Secretary of Labor

U.S. Employment Service
1991

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Comments or inquiries regarding definitions or data elements included in the revised fourth edition DOT are invited and should be addressed to:

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