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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL SHANE CHRISTOPHER, ET AL., :

Petitioners : No. 11-204

v. :

SMITHKLINE BEECHAM CORPORATION, :

DBA GLAXOSMITHKLINE :

- - - - - x

Washington, D.C.

Monday, April 16, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of Petitioners.

MALCOLM L. STEWART, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioners.

PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 11-204, Christopher v. SmithKline Beecham.

Mr. Goldstein.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE PETITIONERS

MR. GOLDSTEIN: Mr. Chief Justice, and may it please the Court:

In the Fair Labor Standards Act, Congress directed the Secretary of Labor to quote/unquote "define and delimit" the statute's outside salesmen exemption. By regulation, the Secretary provided that an outside salesman is one who makes sales rather than promoting sales by others. In further guidance, the Secretary elaborated that nonexempt promotion includes either, one, a conversation where there can be no commitment or, two, one where there would be no exchange with the employer.

Now, everyone agrees that a pharmaceutical detailer engages in promotion. They tout drugs to doctors. Everyone agrees that there can't be a commitment to issue a prescription. Everyone agrees that a prescription is not an exchange with a

1 pharmaceutical company. But nonetheless, the Respondent
2 argues that pharmaceutical detailers sell drugs directly
3 to doctors as a matter of law. They say that follows
4 from the fact that the Secretary's regulation
5 incorporates the definition of "sale" in the FLSA, which
6 is in the blue brief in the appendix at page 1.

7 That definition, which is section 203(k),
8 provides -- it's the second provision on the page --
9 "'sale' or 'sell' includes any sale, exchange, contract
10 to sell, consignment for sale, shipment for sale, or
11 other disposition." And what you will not find in that
12 language is anything that contradicts the two points the
13 Secretary has made, which is that there has to be a
14 commitment or that at the very least, there has to be an
15 exchange with the employer.

16 JUSTICE ALITO: Well, is that consistent
17 with the government's argument? They argue, quote, "an
18 employee does not make a sale for purposes of the
19 outside salesmen exemption unless he actually transfers
20 title to the property at issue." The statute refers to
21 a consignment for sale. When that occurs, does -- does
22 the consignor actually transfer title to the property at
23 issue?

24 MR. GOLDSTEIN: It is an arrangement for
25 transfer of title, and that's why it's critical. But it

1 says a consignment for sale, the sale being the transfer
2 of title. But in all events, this case is not a fight
3 about transferring title or some lesser form of
4 exchange, because there's no exchange between the doctor
5 and the --

6 JUSTICE ALITO: I understand that, but I
7 would appreciate an answer --

8 MR. GOLDSTEIN: Yes.

9 JUSTICE ALITO: -- to my question.

10 MR. GOLDSTEIN: Yes.

11 JUSTICE ALITO: Is the government's position
12 consistent with the reference to consignment for sale?
13 When a consignment for sale occurs, is there a transfer
14 of title?

15 MR. GOLDSTEIN: There is an agreement for a
16 transfer of title, and I believe there --

17 JUSTICE ALITO: Is there a -- a transfer of
18 title?

19 MR. GOLDSTEIN: I apologize. There is not a
20 transfer of title, but there is an agreement for
21 transfer of title. They -- just to be clear, the
22 government says the definition of "sale" includes a
23 transfer of title. And so all I'm pointing out, if I
24 could just go back to the definition -- I apologize for
25 not answering --

1 JUSTICE ALITO: No, no, I understand. I
2 understand your position to be different from theirs.
3 But I --

4 MR. GOLDSTEIN: Oh, no --

5 JUSTICE ALITO: Perhaps I should ask them
6 about -- about their position.

7 MR. GOLDSTEIN: Sure. Well, I apologize if
8 I've created some kind of --

9 JUSTICE SCALIA: Excuse me. I -- I don't
10 agree that there's an agreement for transfer of title.
11 Where there's a consignment, you give the property to
12 somebody, and he says I will sell it to somebody if
13 somebody will buy it.

14 MR. GOLDSTEIN: Yes.

15 JUSTICE SCALIA: There is no agreement to
16 transfer title.

17 MR. GOLDSTEIN: There is --

18 JUSTICE SCALIA: It's purely a future
19 contingency. If someone will buy it, I will sell
20 them -- sell it to that person on your account.

21 MR. GOLDSTEIN: Yes. I believe -- I will
22 allow you -- I apologize saying "I will allow you."
23 The --

24 (Laughter.)

25 MR. GOLDSTEIN: You can do, I know, whatever

1 you want.

2 The government can explain it --

3 JUSTICE ALITO: No -- but anyway, go ahead.

4 MR. GOLDSTEIN: Yes. All right. It is --
5 the statute refers to a consignment for sale. I believe
6 they're defining a sale in that phrase. But in all
7 events, the debate over whether it includes or is
8 limited to a transfer of title is not at issue in this
9 case, because what the -- because all the statute
10 requires is that there at the very least be some
11 exchange of some part. There's going to be an -- a
12 binding agreement, a commitment, and that commitment
13 will involve an exchange with the employer. What
14 happens in pharmaceutical detailing is that there can't
15 be any commitment to issue a prescription at all --

16 JUSTICE GINSBURG: Because -- because the
17 limitation on sale is they can't sell -- by Federal law,
18 they can't sell. And you're -- you are debating about
19 exchange, sale. What strikes one about this case is
20 that these are workers -- they work autonomously. They
21 don't clock in and out. They work outside the
22 workplace. After they're trained, they have minimal
23 supervision.

24 Is there any other category of exempt
25 workers that have that kind of autonomy and yet come

1 under the wage and hours --

2 MR. GOLDSTEIN: I'm sorry. So your premise
3 is that they are exempt to begin with? There -- I can
4 tell you that there are a large number of employees who
5 do work outside the workplace and are substantially more
6 autonomous than are pharmaceutical detailers, who have
7 to operate from very strict scripts. There are -- it's
8 literally --

9 JUSTICE GINSBURG: For example, what are
10 the -- that's what I wanted to know. What are the
11 categories of people that seem to be autonomous, not the
12 type that clocks in and out?

13 MR. GOLDSTEIN: Sure. Well, you can have
14 emergency service workers that are working outside.
15 There are lots of people -- so, for example, you may
16 well --

17 JUSTICE SCALIA: I don't -- I don't
18 understand what that is.

19 MR. GOLDSTEIN: I apologize.

20 JUSTICE SCALIA: What's an emergency service
21 worker?

22 MR. GOLDSTEIN: A police officer or a
23 fireman, an ambulance driver. They are constantly
24 outside the office. You can also have lots of different
25 kinds of promotion --

1 JUSTICE SCALIA: Excuse me. They're not on
2 duty all the time. Aren't -- don't they have hours of
3 duty? My goodness. Some of them make enormous overtime
4 wages because they've put in hours beyond their regular
5 hours of duty --

6 MR. GOLDSTEIN: Well, that -- my --

7 JUSTICE SCALIA: These people have no hours
8 of duty.

9 MR. GOLDSTEIN: That is not quite right,
10 Justice Scalia. They are expected -- the joint appendix
11 explains -- to be in the doctors' offices between 8:30
12 and 5:00 p.m. They work additional time. The fact
13 that --

14 CHIEF JUSTICE ROBERTS: Doesn't that just --
15 I mean, that's when the doctors are there.

16 MR. GOLDSTEIN: That's -- but that is when
17 they are supposed to be in the doctors' offices. That's
18 dictated by the company.

19 JUSTICE GINSBURG: What about -- what about
20 the extras? I mean, we're told that part of this job is
21 to have a good relationship with the doctors. It
22 includes dinners. It may be conventions.
23 Entertainment, maybe golf. If -- if you're right, would
24 the time on the golf course get time and a half?

25 MR. GOLDSTEIN: Well, a couple things about

1 that, Justice Ginsburg.

2 (Laughter.)

3 MR. GOLDSTEIN: There actually are very
4 strict restrictions. That kind of activity is under the
5 PhRMA Code, which is trying to interpret Federal law, is
6 actually very heavily restricted. But whatever it is
7 that the employee is doing to further the employment
8 relationship is going to be hours on duty. It is really
9 important I think that while it is true that a
10 pharmaceutical detailer has many of the characteristics
11 of an outside salesman, the one they don't have is
12 selling.

13 And that is the line that Congress drew.
14 It --

15 JUSTICE GINSBURG: You were -- you were
16 giving examples, and we just stopped at --

17 MR. GOLDSTEIN: Sure.

18 JUSTICE GINSBURG: -- emergency service
19 worker. But you said there are many examples --

20 MR. GOLDSTEIN: Sure.

21 JUSTICE GINSBURG: -- of people who are
22 highly autonomous and still come under the hours
23 regulation.

24 MR. GOLDSTEIN: Sure. Another example would
25 be insurance adjusters. There are people who are

1 outside cleaning people that are not -- that don't have
2 any --

3 JUSTICE KENNEDY: And these are all -- these
4 are all within the Fair Labor Standards Act?

5 MR. GOLDSTEIN: Yes. Yes, Justice Kennedy,
6 they absolutely are.

7 JUSTICE KENNEDY: Are there any occupations
8 or pursuits that are not covered by the Fair Labor
9 Standards Act because -- on the rationale that they are
10 out, that they're unsupervised, and so forth. In other
11 words, if you were in the case of the Respondent, would
12 you -- would you have any close analogies to areas that
13 are not -- that are exempt; in other words, that they
14 wouldn't be salesmen, but there'd be some other
15 classifications to fit them?

16 MR. GOLDSTEIN: I would, but they would all
17 be one of two things. They would either fall within the
18 administrative exemption, which is, Justice Ginsburg,
19 what is Congress was talking about when it talked about
20 people who have a lot of autonomy, and which is not true
21 of detailers -- or some other exemption. So, to give an
22 example, certain outside buyers are exempt under the
23 Fair Labor Standards Act. A good -- that's a good
24 example, because if you're an outside buyer of poultry,
25 then you are exempt, but if you're an outside buyer of

1 meat, you aren't.

2 It is one of a lot of different places --
3 there are 50-some exemptions from the Fair Labor
4 Standards Act. And Congress drew incredibly fine lines.

5 JUSTICE SCALIA: Congress can draw -- draw
6 even silly lines.

7 MR. GOLDSTEIN: Yes.

8 JUSTICE SCALIA: If Congress draws it, it's
9 a line. But the line you're suggesting here -- both
10 your brief and the government's, as I recall, say, my
11 goodness, if we find for the Respondent here, there'll
12 be so much uncertainty in the future. I'm not sure
13 there isn't a lot of uncertainty if we -- if we find in
14 your direction.

15 Now, let me give you an example. One of my
16 law clerks -- my law clerks supplement my sparse life
17 experience.

18 (Laughter.)

19 JUSTICE SCALIA: One of my law clerks is
20 familiar with the -- the framing business. Okay? Now,
21 salesmen of frames do not sell the frames at the time
22 that they visit the -- the framing company or the
23 framing store. They get a commitment that in the
24 future, that person will order from the framing company.
25 Now, is that a sale?

1 MR. GOLDSTEIN: That is a sale, but the
2 difference here is that there's neither a commitment --
3 remember, the commitment is illegal as a matter of law.

4 JUSTICE SCALIA: Well, but there is a
5 commitment. There is a commitment to -- what they are
6 trying to get is a commitment to consider this drug if
7 it's appropriate for prescription to patients in the
8 future. That's a commitment.

9 MR. GOLDSTEIN: Justice Scalia, if that is
10 the commitment, then all of promotion I think is going
11 to be a sale, because every promoter who walks up to you
12 on the street saying, will you try my product, will you
13 go into the store, is trying to get you to say, I'll go
14 in. And that is much more of a direct commitment than
15 you saying, I will consider it in an appropriate
16 circumstance.

17 The commitment by a doctor is precatory at
18 most. They do not make any commitment in any instance
19 that can be binding in any way that they will prescribe
20 a drug for anyone.

21 And remember, there is the second -- the
22 second distinction. So that's one. But the second is
23 that, remember, there is a purchase in your hypothetical
24 of framing, a purchase from the framing store. But the
25 second part of the Secretary's guidance is that when the

1 doctor decides to issue a prescription they are not
2 exchanging anything with the drug company. There --
3 nothing is acquired from the drug company. That is a
4 very significant difference.

5 JUSTICE SCALIA: It's a peculiar line of
6 commerce. And -- and you are saying that what
7 constitutes a sale of a salesman cannot take account of
8 the fact that this is a weird line of commerce, where
9 you are selling to people who cannot make a commitment.

10 MR. GOLDSTEIN: Well, there are two things.
11 The first is the commitment, and they are not selling
12 anything to the doctor. Remember, just to frame this
13 industry, the pharmaceutical company sells its products;
14 it sells them to pharmaceutical wholesalers, which sell
15 them to pharmacies -- pardon me -- which sell them to
16 customers, which have a relationship with a doctor, who
17 may or may not have met with a detailer.

18 There is a sale here in this industry, but
19 it is to a pharmaceutical detailer, and that is a very
20 significant difference. The critical point as well for
21 purposes of --

22 JUSTICE KAGAN: Mr. Goldstein, doesn't --

23 JUSTICE GINSBURG: May I ask you -- may I
24 ask you to follow up on other -- other categories of
25 employee? You gave me cleaning workers, emergency

1 service workers. Are any of those categories people who
2 get paid commissions?

3 MR. GOLDSTEIN: Ah, those are not, but the
4 example that I gave to Justice Kennedy would be, which
5 is that there are outside buyers who do receive
6 commissions. And remember, of course, that there are
7 outside salesmen who do not receive commissions but are
8 nonetheless exempt. Congress didn't write an exemption
9 about commissions; it wrote them about whether it's an
10 outside person who engages in sales.

11 And the other point I was trying to make is
12 that -- and Justice Scalia echoed it to some extent --
13 and that is that the FLSA draws very fine lines. If you
14 work for a movie theater you are exempt, but not a
15 playhouse. If you work for a small newspaper but not a
16 small magazine, you are exempt. If you care for the
17 elderly but not the young, you are exempt.

18 And what Congress said is that there has to
19 be -- you are an outside salesman. And that, it is true
20 that this is a peculiar industry, but the peculiarity of
21 it is that you don't make sales.

22 If I could reserve the remainder of my time.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Stewart.

25 ORAL ARGUMENT OF MALCOLM L. STEWART,

1 FOR UNITED STATES, AS AMICUS CURIAE,
2 SUPPORTING THE PETITIONERS

3 MR. STEWART: Mr. Chief Justice, and may it
4 please the Court:

5 It's common ground in this case that in
6 order to be an outside salesman an employee must make
7 sales, and in theory there are two different ways in
8 which Respondent could have attempted to establish that
9 the PSRs in this case fit that criteria.

10 JUSTICE SOTOMAYOR: Could you answer
11 Justice Alito's question? Your brief to the Second
12 Circuit and the Ninth Circuit suggested that a sale is
13 a -- is a transaction, a transfer of some sort, or at
14 least a promise to purchase. But your brief here holds
15 IT a much more rigid test, that there has to be a
16 transfer of title. And he pointed to the language of
17 3(x) -- 3(k), that says "consignment for sale," which
18 doesn't have a transfer of the title. So what is the
19 government's position?

20 MR. STEWART: Well, the DOL regulations have
21 since 19 -- I believe it's since 1949, have said to make
22 a sale within the meaning of 203(k), the term make --
23 "sale" within the meaning of 3(k) includes a transfer of
24 title. And in theory the verb "includes" could leave
25 open the possibility that other things could be included

1 as well. We've never encountered a situation in which
2 DOL has found a sale of goods without a transfer of
3 title, but in direct answer to your question,
4 Justice Alito, about --

5 JUSTICE SCALIA: Well, excuse me.
6 Consignment salesmen are -- are not exempt?

7 MR. STEWART: It would be -- with specific
8 respect to consignments for sale, it would have been
9 more precise to say that there has to be a transfer of
10 possession in contemplation of a transfer of title.

11 JUSTICE ALITO: And what about salesmen
12 who -- whose objective is to obtain a rental? The lower
13 courts have said that they qualify. Does the government
14 disagree with that?

15 MR. STEWART: DOL believes that they
16 qualify, but not as sales of goods. And if the -- the
17 Court could look at the appendix to the blue brief on
18 page 4. This is the pertinent regulation that refers to
19 making sales or obtaining orders.

20 And it says: "Section 541.500 requires that
21 the employee be engaged in making sales within the
22 meaning of section 3(k) of the Act or obtaining orders
23 or contracts for services or for the use of facilities,"
24 and DOL's view is that a rental agreement would be a
25 contract for services or for the use of facilities.

1 And the way --

2 JUSTICE SCALIA: Excuse me. How can they
3 put in number 2? I -- I thought that 3(k) is 3(k).
4 Can -- can they supplement 3(k)?

5 MR. STEWART: They have supplemented 3(k)
6 and they did that --

7 JUSTICE SCALIA: What's the authority to do
8 that?

9 MR. STEWART: The -- this is discussed in
10 the Stein report which was issued in 1940; and what had
11 happened was that the question had arisen -- and the
12 Stein report lays this out in a fair amount of detail --
13 the question had arisen whether individuals who
14 negotiate for contracts to buy time on the radio or sell
15 time -- sell advertising space in newspapers or sell --
16 negotiate contracts for a carriage of freight by rail or
17 truck; the question arose whether they were outside
18 salesmen within the meaning of the statute.

19 And the Stein report explained that the Wage
20 and Hour Division had taken the position that they were
21 not because it interpreted "sales" -- it appears to have
22 interpreted "sales" to refer only to sales of goods, and
23 people who were engaged in those sorts of businesses
24 were not selling goods. But the Stein report said:
25 However, these people are commonly regarded as salesmen;

1 the contracts they negotiate are treated as sales.

2 JUSTICE SCALIA: Well, that's wonderful.

3 Then if you can go beyond 3(k), I guess really the
4 question before us is whether it's arbitrary or
5 capricious for the agency not to extend their --
6 their -- their power to supplement 3(k) to this
7 situation, which these people look like salesmen to me.

8 And so if they can do number 2 there, I
9 don't know why -- why the agency couldn't say, oh, and
10 by the way detailers are also included.

11 MR. STEWART: Well --

12 JUSTICE SCALIA: And the issue would be
13 whether it's unreasonable for them not to say that.

14 MR. STEWART: The agency has taken the
15 position that, even though it has construed 3(k) to
16 refer only to sales of goods, that sales of services or
17 contracts for the use of facilities can be covered.

18 However, there is a big difference between the
19 interaction between a detailer and a physician and the
20 interaction between the -- the person who sells time on
21 the radio. The person --

22 JUSTICE SCALIA: Sure there is; sure there
23 is. But once you -- once you concede that it doesn't
24 have to be within 3(k) and that it's within the power of
25 the agency to grant the exemption anyway, then we -- we

1 really have a different -- a different argument before
2 us here.

3 MR. STEWART: Well, the -- the theory on
4 which the Stein report proceeded was that, even though
5 sales of time on the radio were not sales of goods, they
6 were still customarily regarded as sales and they had
7 the essential attributes of sales, namely an exchange of
8 something valuable that the seller possessed in return
9 for consideration from the buyer. And you don't have
10 any of that when the detailer deals with the -- the --

11 JUSTICE KAGAN: Mr. Stewart, there is this
12 other regulation which is I guess in the coverage
13 section, 779.241, which says that if an employee
14 performs any work that in a practical sense is an
15 essential part of consummating the sale of the goods, he
16 will be considered to be selling the goods. So I guess
17 this question is a two-part question. Do you agree that
18 that regulation does cover the -- these detailers? And
19 the second part is, if you do, you know, how does it
20 work that we should understand sale one way for purposes
21 of coverage and another way for purposes of exemption?

22 MR. STEWART: Well, the first thing I would
23 say is that we wouldn't agree that this would cover
24 detailers. That is, if the relevant sales are, as we
25 believe, GSK's sales to -- the transfer of drugs to

1 wholesalers and pharmacies in return for consideration,
2 the detailers don't play an essential role in the
3 consummation of those sales. They don't participate in
4 those sales. It's true that their mission is to engage
5 in activities which set in motion a chain of events that
6 will make those sales more likely to occur, but we
7 wouldn't regard them as --

8 JUSTICE KAGAN: But that seems a little bit
9 blind to the way the industry actually works. The way
10 this industry actually works is the real work is done by
11 the detailer getting the doctor to say, yeah, I'm going
12 to start prescribing this where it's medically
13 appropriate. The actual sales from the company to the
14 pharmacy just follows from however successful the
15 detailer is.

16 MR. STEWART: But I think much the same
17 thing could have been said about all the promotional
18 workers that DOL has done with -- has dealt with in the
19 past. That is, the premise, the justification for a
20 company to hire a promotional worker, is that the
21 promotional activities will increase the overall sales
22 of the company, will either directly or indirectly set
23 in motion a chain of events that leads people to buy the
24 product. But DOL has historically regarded those
25 activities as distinct from selling the product.

1 JUSTICE ALITO: Well, do those employees
2 work on commissions?

3 MR. STEWART: Some employees may work on
4 commission. Some --

5 JUSTICE ALITO: Promotional workers do work
6 on commissions?

7 MR. STEWART: It's -- I don't think there is
8 necessarily a uniform rule one way or the other. The
9 Stein report did say in 1940 that, although it was
10 characteristic for outside salesmen to receive
11 commissions, that was not the test, that that was a
12 quirk of compensation. The other thing I would say --

13 JUSTICE SCALIA: Didn't we have detailers in
14 1940? Gee, that's a long time ago. Did we have
15 detailers in 1940? That's almost a century ago.

16 MR. STEWART: There were detailers in that
17 era, and --

18 JUSTICE BREYER: That's my point, actually.
19 That's where I'm sort of bothered, just exactly what
20 Justice Scalia said, that if you look through what I've
21 seen so far by the materials, they're pretty evenly
22 balanced, and there are tens of thousands of people who
23 work in this industry, and there's a history of 75 years
24 of nobody said anything.

25 So you would think -- and it isn't the only

1 problem that has just been recognized in other
2 industries, too. If the agency is going to reverse, not
3 reverse, but suddenly do something it hasn't done for
4 75 years, the right way to do it is to have notice and
5 comment, hearings, allow people to present their point
6 of view, and then make some rules or determine what
7 should happen. Perhaps they'd say for the future let's
8 do this, but not let's give people a windfall for the
9 past. Perhaps they'd say some and not others. Okay?

10 That's my instinctive reaction, not
11 necessarily legal, but informed by administrative law.
12 But why shouldn't I try to get there?

13 MR. STEWART: I guess I'd say two things,
14 one general and one specific to detailers. The general
15 thing is that DOL has consistently drawn a distinction
16 between promotional work --

17 JUSTICE BREYER: No, I've read those.

18 MR. STEWART: Okay.

19 JUSTICE BREYER: I've read those, and I find
20 them beautifully ambiguous.

21 (Laughter.)

22 JUSTICE BREYER: I'll go back and read
23 them again, and if they're absolutely clear, you win,
24 fine, that's the end of it.

25 JUSTICE KENNEDY: And it's gone on for

1 70 years, and you're -- instead of doing a regulation,
2 amended regulation, as Justice Breyer indicates, you're
3 filing amicus briefs quietly in different -- different
4 courts. It seems to me that's not nearly as fair or
5 straightforward or as candid as -- as an agency ought to
6 be.

7 MR. STEWART: Well, with respect to where
8 the industry expectation arose, we have only one data
9 point or at least only one data point that has been
10 identified in the briefs. That is the National
11 Federation of Independent Small Business Legal Center
12 has filed an amicus brief on Respondent's side, and then
13 -- they identify one DOL opinion letter, of which we
14 were previously unaware, that dates from 1945. And in
15 the opinion letter. The employer of the detailer asked
16 for an opinion to the effect that its detailers were
17 covered by the administrative exemption. That employer
18 didn't request a ruling that these were outside
19 salesmen. And DOL --

20 JUSTICE BREYER: You're right about that,
21 and so they're at fault, too. But on the other hand,
22 their employees might have been satisfied, and this is
23 done to protect the employees.

24 So I'm asking, not saying, but what is the
25 process here? How do you know -- at what level was this

1 agency decision made to suddenly go ahead with this?
2 Who made it? What was the input? How do you know
3 they're on your side? You do know; you're right. But I
4 mean, what's the process internally?

5 MR. STEWART: Internally, the -- the
6 Solicitor's Office at the Department of Labor would
7 consult with the Wage and Hour Division. The
8 Solicitor's name went on the briefs both that were filed
9 in the Ninth Circuit and the brief -- I mean, the Ninth
10 Circuit and also the Novartis brief in the Second
11 Circuit. And the Solicitor's name is on the
12 government's brief in this Court. The Solicitor is the
13 third-highest-ranking individual within the Department
14 of Labor.

15 CHIEF JUSTICE ROBERTS: Do you -- I'm sorry
16 to interrupt your answer, but does your office review
17 the amicus filings in the courts of appeals by the
18 agencies?

19 MR. STEWART: There was SG authorization for
20 the amicus brief to be filed.

21 CHIEF JUSTICE ROBERTS: Is that the normal
22 procedure?

23 MR. STEWART: Yes.

24 JUSTICE SCALIA: But this is part of a
25 regular program that the agency has now instituted, to

1 run around the country and file amicus briefs; is that
2 it?

3 MR. STEWART: To clarify -- well, to clarify
4 the agency's view of what the proper understanding of
5 the law is. And in terms of --

6 JUSTICE SCALIA: Yes, right, to get --
7 instead of doing rulemaking, instead of doing
8 adjudication, we're going to file amicus briefs, and the
9 court will accept our view in that amicus brief and,
10 hey, presto, we have made law.

11 MR. STEWART: Well, maybe yes, maybe no --

12 JUSTICE SCALIA: That's extraordinary.

13 MR. STEWART: Well, in comparison to the
14 alternative step of filing enforcement actions, it's
15 both --

16 JUSTICE BREYER: Well, did the Secretary of
17 Labor herself or himself, depending on when it was,
18 consider this matter?

19 MR. STEWART: I don't know whether the
20 Secretary --

21 JUSTICE BREYER: No, we don't. All right.
22 So -- so the alternative is not enforcement actions,
23 necessarily. The alternative is for the agency to focus
24 on the question and decide what it actually wants to do.

25 MR. STEWART: And the agency has regarded

1 the application of its promotion sales regulations to
2 the facts of this case as clear. That is, if you asked
3 GSK's highest level management why does it make sense to
4 employ detailers, they wouldn't say because they get
5 these commitments from physicians which are of value to
6 the company. The commitments or the quasi-commitments
7 from physicians in and of themselves are of no value.

8 JUSTICE SCALIA: There are 90,000 of these
9 people, and you have not -- the agency has not brought
10 any action for these, lo, these many years. 90,000 of
11 them. And all of a sudden you say -- you come in and
12 say: Oh, you have been in violation of the law in the
13 past, and you're going to have to pay a lot of money for
14 all these people who you didn't give overtime to in the
15 past. I just think that's extraordinary.

16 MR. STEWART: Well, to the extent that there
17 was an industry expectation that was based on anything
18 DOL had said, it was based on, as far as we know, based
19 on the 1945 opinion letter, which said not --

20 CHIEF JUSTICE ROBERTS: Well, but you -- you
21 didn't even know about that.

22 MR. STEWART: Right.

23 CHIEF JUSTICE ROBERTS: And yet you expect
24 the industry to know all about it, and yet it escaped
25 your attention.

1 MR. STEWART: Again, our argument is not
2 that they should have known from the -- about the
3 opinion letter. Our argument is that the proper
4 application of the promotion sales regulation to the
5 facts of this case is pretty clear, and that if GSK's
6 top-level management was asked to defend the use of
7 detailers, they would say these people are important
8 because if they persuade physicians to write more
9 prescriptions and those are filled with GSK products,
10 then pharmacies will reorder the drug and our
11 wholesalers will reorder it from us.

12 JUSTICE SOTOMAYOR: Counsel, can I --

13 JUSTICE SCALIA: So you have been guilty of
14 malfeasance for 70 years, right? These 90,000 people
15 out there who have been in violation of the law and the
16 agency has done not a blessed thing?

17 MR. STEWART: To return to the 1945 opinion
18 letter, the opinion letter was based on the premise that
19 the employees exercised discretion and independent
20 judgment in the performance of their duties. That's
21 what -- what DOL said in concluding --

22 JUSTICE SOTOMAYOR: Counsel, I thought that
23 this whole system was set up on giving industries the
24 opportunity to ask the government for an opinion letter,
25 correct?

1 MR. STEWART: Right.

2 JUSTICE SOTOMAYOR: I saw in the briefing
3 hundreds of opinion letters by hundreds of different
4 industries. Outside of this 1945 letter, did anybody
5 else, any other pharmaceutical company, ever set out for
6 the government or seek an opinion letter that you're
7 aware of?

8 MR. STEWART: I'm aware of only one
9 instance. I think this is not a matter of public
10 record, but there was one request in, I believe,
11 December of 2007, for an opinion to the effect that the
12 detailers were covered by the outside salesman
13 exemption. DOL never responded one way or the other.

14 JUSTICE SCALIA: You don't suggest -- you're
15 not arguing for a rule that if-- if an individual does
16 not seek an opinion letter, he's guilty? Is that --

17 MR. STEWART: No, I'm not arguing for that
18 rule. The --

19 JUSTICE GINSBURG: Mr. Malcolm -- Mr.
20 Stewart, is it -- is it true that that option is no
21 longer available, that the Department of Labor no longer
22 gives opinion letters?

23 MR. STEWART: It does -- it has phased out
24 the opinion letter program and gives other forms of
25 administrative guidance. That is, DOL's rationale was

1 that the opinion letter program had not been cost
2 effective because often the bottom line -- may I --
3 often the bottom line answer to the question would turn
4 on factual nuances of a particular employer and wouldn't
5 provide much guidance to others. And so it's tried to
6 provide forms of guidance that are -- speak to the
7 industry or a class of employees as a whole.

8 CHIEF JUSTICE ROBERTS: Thank you, Mr.
9 Stewart.

10 Mr. Clement.

11 ORAL ARGUMENT OF PAUL D. CLEMENT

12 ON BEHALF OF THE RESPONDENT

13 MR. CLEMENT: Mr. Chief Justice, and may it
14 please the Court:

15 Petitioners are two pharmaceutical sales
16 representatives. They were hired for a sales job. They
17 were given sales training. They attend sales
18 conferences. They are assigned to sales territory, and
19 they are evaluated and compensated as sales people.

20 CHIEF JUSTICE ROBERTS: And they don't do
21 sales.

22 JUSTICE BREYER: That --

23 MR. CLEMENT: With respect --

24 CHIEF JUSTICE ROBERTS: Your long list sort
25 of stopped one step short. They don't make sales.

1 MR. CLEMENT: With respect,
2 Mr. Chief Justice, we disagree. We think they do make
3 sales in the way that is relevant in this industry, and
4 we do think they make sales in some sense, which is the
5 practical construction the agency has always put on the
6 sales requirement in the --

7 JUSTICE SOTOMAYOR: Can you give me what
8 your regulation is going to be?

9 MR. CLEMENT: What's that?

10 JUSTICE SOTOMAYOR: And would it exempt
11 everybody from coverage? Meaning, you seem to be saying
12 if in some sense they make sales, it seems that every
13 promotional person will be a salesman, that all
14 industries have to do is put one or two forms of sales
15 activities involved in the work of their worker, and
16 they are exempt. Give me your definition? As long as
17 it's in some sense, that covers everybody's exempt?

18 MR. CLEMENT: Yes, but Justice Sotomayor, if
19 I could, there's two important qualifications that avoid
20 the slippery slope concerns you're talking about. One
21 is it's, I think, common ground among everybody that
22 you -- to qualify for any exemption or certainly all of
23 these relevant exemptions here, it has to be your
24 primary duty. So you can't just slip in a little sales
25 activity for something and get that person qualified.

1 The other thing --

2 JUSTICE SOTOMAYOR: Well, it seems like the
3 sale here is not the primary duty. The sale here is to
4 schmooze the doctor and give him information. That's
5 what you said in one of your briefs, your company said
6 in one of its briefs in a product liability litigation.

7 MR. CLEMENT: With respect, Your Honor, the
8 commitment is very important in this industry. It is
9 the objective of the sales call. It's to get a
10 commitment to prescribe when medically necessary.

11 Now, it is true that there is prologue to
12 that, and there is efforts to promote before you get
13 that particular sale. But the regulations address that
14 particularly, and they say, as long as you --

15 JUSTICE SOTOMAYOR: Primary duty is one of
16 the limiting, and what was the second limiting
17 principle?

18 MR. CLEMENT: The second limiting principle
19 is actually what I'm talking about now, which is if you
20 look at 503, which are the regulations that draw the
21 distinction between promotion and between being outside
22 sales, they do not say that promotion is nonexempt
23 activity. What they say is it depends who does the
24 promotion. And as long as the outside salesperson does
25 the promotion in conjunction with his or her own sales

1 or solicitations, then that is exempt activity. And
2 what they were trying to --

3 JUSTICE GINSBURG: But it also says, it also
4 says promotional work incidental to sales made by
5 someone else.

6 MR. CLEMENT: Is not covered.

7 JUSTICE GINSBURG: -- is nonexempt.

8 MR. CLEMENT: You're right.

9 JUSTICE GINSBURG: And these, these sales --
10 I mean, eventually there is a sale to a hospital, to a
11 pharmacy, and that sale is not made by the detailer.

12 MR. CLEMENT: But, Justice Ginsburg, I think
13 it's important to recognize that the reason that 503
14 draws a distinction between promotional activity in
15 conjunction with the salesperson's own sales or
16 promotional activity with respect to somebody else's
17 sales is they are concerned about the consideration
18 where somebody else is going to follow up with the same
19 customer to close the deal.

20 And if you look at the regulatory
21 commentary, that's what they're concerned -- they don't
22 want to sort of have double counting, where somebody
23 promotes with a sales target and then somebody else
24 follows up to close the sale.

25 JUSTICE KAGAN: Well, that might be one

1 thing that they are concerned about, but it may not be
2 the only thing. I mean, if you look at these
3 regulations, it seems as though what they are trying to
4 do is draw a distinction between people who actually
5 consummate transactions, transactional people, and
6 people who are pitchmen. And what the Department of
7 Labor here is saying is detailers are people who make
8 pitches; they are not people who consummate the
9 transactions.

10 MR. CLEMENT: Well, Justice Kagan, I really
11 think if you look at the regulations as a whole and the
12 commentary in the Stein Report and the Weiss Report,
13 they are not worried about sorting out the pitchmen
14 because they understand that a classic outside
15 salesperson is a pitchman who then tries to get a
16 commitment to buy or some other commitment from the
17 sales target.

18 So what they are trying to do is really
19 distinguishing not between pitchmen and sales people,
20 but between what they refer to as missionary men or
21 people who pave the way for somebody else to make the
22 sale. And I really think that's the focus of the 503
23 regulation. And so the government's argument really
24 boils down to the notion that there's nobody in this
25 industry that makes enough of a commitment with the

1 doctor for anybody to be involved in anything but
2 promotion with the doctor. And that seems --

3 JUSTICE KAGAN: Why isn't that possible? I
4 mean, your brief seems to suggest that in every industry
5 there needs to be some group of people who would be
6 classified as outside salesmen, and that's not
7 necessarily the case. There may be some industries, and
8 here it's a result of regulation, or it may be because
9 of other business practices, where there just isn't
10 anybody who's an outside salesman.

11 MR. CLEMENT: Justice Kagan, it's
12 theoretically possible, but it would be odd, especially
13 in an industry that employs 90,000 people, in order to
14 get a commitment to prescribe from the doctor. And I
15 think if you --

16 JUSTICE KENNEDY: What is -- what is this
17 commitment? Is the commitment in writing?

18 MR. CLEMENT: The commitment is generally
19 not in writing, Justice Kennedy.

20 JUSTICE KENNEDY: Would it be lawful to make
21 it -- put it in writing?

22 MR. CLEMENT: I don't know that anything
23 would turn on whether it was in writing or not because
24 what --

25 JUSTICE KENNEDY: Would it be lawful to put

1 it in writing?

2 MR. CLEMENT: I -- I think the answer is
3 yes. It's important for the commitment not to be
4 binding because of the nature of the doctor's role.
5 Nobody wants to go into a doctor's office, let alone
6 these sales people, and say: Look, whoever is the next
7 person who walks in the door, prescribe them the
8 product.

9 JUSTICE KENNEDY: That sounds to me it's not
10 a commitment, unless the doctor says: Well, I'll look
11 at this, this is interesting; I'll go home and read your
12 material, I'll think about it. Is that -- is that a --

13 MR. CLEMENT: That's not the kind of
14 commitment they are looking for, Justice Kennedy. They
15 are looking for a commitment that -- sometimes it's the
16 next patient that presents the condition for which the
17 medicine is medically appropriate, that they will
18 prescribe. And if you think just practically --

19 JUSTICE GINSBURG: But it's got to be non-
20 binding.

21 MR. CLEMENT: It has to be non-binding, I
22 agree. But I don't think that --

23 JUSTICE KENNEDY: And that's why it's not in
24 writing.

25 MR. CLEMENT: Well, but you can have a

1 non-binding commitment in writing. You can have a
2 binding commitment that's oral, as long as it's -- you
3 know, I don't want to get into the Statute of Frauds
4 here. But it seems to me that the binding nature is not
5 dispositive either. You can have a situation -- look,
6 if I agree as -- that I am going to buy something, I can
7 often return it. Sometimes there is a cooling-off
8 period, things like that.

9 JUSTICE KENNEDY: Well, let me ask you this,
10 and I'm not well versed in all -- in all of the
11 specifics, but my understanding is that the Federal
12 Government has expressed new concerns, has new
13 regulations, new rules about these outside sales.

14 Does that mean that the nature of the work
15 has changed in the last 5 or 10 years, so that the
16 70 years we are talking about is not relevant? Would
17 you comment on that?

18 MR. CLEMENT: I would love to,
19 Justice Kennedy. I think, to the contrary, I think that
20 -- I mean, the government actually ironically says that
21 the 2004 rulemaking, which was the last time there was
22 any rulemaking, didn't change anything substantively.
23 We think that is wrong. We actually think there was an
24 important substantive change to the 503(c) regulations
25 and others which addressed the following problem, which

1 is not that the basic role of the outside salesperson
2 has changed, but the technology has changed in such a
3 way that it would be silly to draw a distinction between
4 whether the salesperson actually takes the order and
5 writes it down or gets a form in triplicate, or rather
6 gets a commitment to buy from the sales target who then
7 actually enters the order on a computer on their own.

8 And that I think is the specific situation
9 that the agency was confronted with. And in 2004 they
10 said: We don't want things to turn on who enters the
11 order, whether it's the customer on their own computer
12 or the outside salesperson.

13 JUSTICE KAGAN: But, Mr. Clement, I thought
14 that in 2004 there were two proposals, really, and one
15 was the proposal that was changed and the other was the
16 proposal to get rid of this promotional stuff and to
17 allow people who promoted products to qualify as outside
18 salesmen, and the agency specifically rejected that
19 suggestion.

20 MR. CLEMENT: Absolutely, Justice Kagan, but
21 there has always been an effort to try to get all
22 promotional people treated as being exempt. But that is
23 different from what is being asked for here, which is
24 the last person who makes a visit to the person who
25 places the relevant order in the industry and gets the

1 commitment from that person. That, in contrast to
2 general promotion, often directed at the world at large,
3 has always been the hallmark of a sale in the
4 Department's own flexible approach. And I think that's
5 really important.

6 JUSTICE GINSBURG: But that seems to be
7 inconsistent with this, this opinion letter. The
8 request is put in by the pharmaceutical company and they
9 want an exemption under administrative employees. In
10 the Department of Labor's response allowing that
11 exemption, it says that these detailers, and they use
12 the word "detailers," medical detailers, are engaged in
13 a form of promotional or missionary work.

14 MR. CLEMENT: Well, Justice Ginsburg, I -- I
15 want to say two things about that. One is to say
16 obviously that may depend a little bit on how the
17 particular role was described. If you are reading from
18 the 1945 opinion letter, I mean, that may be somewhat
19 different. But I do think that what's important here is
20 that promotional activity itself is not problematic.
21 Promotional activity is exempt as long as its in
22 conjunction with the person's own sales or solicitations
23 is the word of the regulation. So I don't think that is
24 dispositive.

25 JUSTICE GINSBURG: I think the letter goes

1 on to say that these detailers are engaged in a form of
2 promotion not having for its object the making of
3 specific transactions.

4 MR. CLEMENT: Well, and again, Justice
5 Ginsburg, we would take issue with that and say, no,
6 there is an interest in getting a specific commitment.
7 It is commitment to prescribe. It may be somewhat -- it
8 is non-binding, and it may be somewhat forward-looking,
9 but I don't think that distinguishes this industry from
10 any industry. It's not --

11 JUSTICE GINSBURG: But as far as your
12 70 years, it's suspect for two reasons. One is we are
13 told that in the early years, at least, before there
14 were regulations restricting the sale of prescription
15 drugs, that these detailers did two things. They did
16 have their informational function, but they also did
17 direct sales to pharmaceutical companies, to hospitals.
18 So for at least 20 years of those 70 years these people
19 were engaged in what the department would call sales.
20 So that's suspect.

21 And then when we have the commitment, the
22 opinion letter that says: We have a category for these
23 people; they are engaged in instruction, in information;
24 they are not engaged in sales; but because they are so
25 independent, we rank them as administrative -- in the

1 particular case we rank them as administrative people.
2 So it's not as though there was a sudden about-face as
3 you suggest. We have a categorization as -- as
4 administrative employees, but not sales employees, and
5 we have a history of these detailers at one time
6 actually selling.

7 MR. CLEMENT: Well, Justice Ginsburg, let me
8 say -- I mean, certainly as the regulatory environment
9 has changed, the nature of how the sales are transacted
10 in this industry have changed, but I think the focus is
11 very much on the doctors appropriately because they're
12 the ones that placed the order. But I also want to be
13 responsive to the administrative exemption.

14 JUSTICE SCALIA: You wouldn't -- you
15 wouldn't mind being exempt as administrative, would you?

16 MR. CLEMENT: I wouldn't, Justice Scalia --

17 JUSTICE SCALIA: Yes.

18 MR. CLEMENT: -- but I do want to --

19 JUSTICE SCALIA: But they've changed their
20 -- their view.

21 MR. CLEMENT: They've changed their view on
22 that, too. And I certainly don't want this Court to
23 think that the industry somehow has the administrative
24 exemption as an ace up their sleeve or in their back
25 pocket. And it's really the same exact issue, because,

1 once again, the agency has changed their view. And once
2 again, their view is not based on anything that has to
3 do with label --

4 JUSTICE GINSBURG: Did you claim -- did you
5 claim exemption as administrative employee?

6 MR. CLEMENT: We did, Your Honor, in the
7 district court. It's not before this Court because we
8 got summary judgment in our favor on the outside sales
9 exemption.

10 But I really would think it would be a -- a
11 mistake for this Court to say --

12 JUSTICE GINSBURG: So that would -- then
13 that would be still open if you lose on the outside
14 sales?

15 MR. CLEMENT: It would, Justice Ginsburg.
16 But you're just deferring the same inquiry, because the
17 government's position once again is after 70 years of
18 having the industry proceed on the assumption that these
19 individuals were exempt, they now have changed their
20 mind. And, again, their view has everything to do with
21 FDA regulation --

22 JUSTICE KAGAN: Well, Mr. Clement --

23 MR. CLEMENT: -- and nothing to do --

24 JUSTICE KAGAN: I'm sorry.

25 MR. CLEMENT: -- and nothing to do with

1 labor policy, because what they say is that now because
2 of the government's own off-label prosecutions, these
3 outside salespeople have to stick to a script and -- in
4 order to avoid off-label liability. And because they
5 have to stick to the script, they are told they don't
6 exercise sufficient discretion to come within the
7 administrative exemption.

8 And the problem here is the Labor
9 Department, instead of looking at this and making a
10 rational judgment about labor policy and whether these
11 individuals who make \$93,000 on -- for the median should
12 rationally be the kind of workers that are protected by
13 the Fair Labor Standards Act, instead, they're looking
14 at things that have everything to do with FDA regulation
15 and nothing to do with labor policy.

16 JUSTICE KAGAN: You've suggested --

17 JUSTICE BREYER: The --

18 JUSTICE KAGAN: I'm sorry.

19 JUSTICE BREYER: Are they paid commissions?

20 If they're -- if the salesman or the promotion agent, as
21 the case may be, is successful in his territory in
22 getting doctors to prescribe the drug, does he receive
23 extra pay?

24 MR. CLEMENT: He receives incentive
25 compensation.

1 JUSTICE BREYER: What does that mean? Does
2 he -- I mean, an outside salesman -- in one document, it
3 says is a person who often obtains a commission on his
4 sales.

5 MR. CLEMENT: Right.

6 JUSTICE BREYER: And now what I'm trying to
7 figure out -- I might not have the right words to ask
8 the question -- are these people, people who in some
9 sense or other receive out -- commissions on their
10 sales?

11 MR. CLEMENT: And the answer is -- for the
12 Petitioners on this record, the answer is yes. They're
13 not the commissions that are a one-to-one
14 correspondence, but what they do is they receive
15 substantial incentive compensation, about 25 percent of
16 the total, and it's based on the sales of the product in
17 their sales territory. So, if the --

18 JUSTICE SOTOMAYOR: How is that different
19 from a bonus that an employee gets? How is it any
20 different than what most companies do in -- in giving a
21 bonus at the end of the year?

22 MR. CLEMENT: Certainly, based on the facts
23 in this record, it -- at the time of this case, it's
24 much more tied to the performance of the product in the
25 sales territory. And I don't think that's -- you know,

1 it's not based on the company's overall performance --

2 JUSTICE SOTOMAYOR: Mr. Clement, you give me
3 one definition of "outside salesmen," the one that you
4 prefer for us to apply here. The Department of Labor
5 gives another, and the one they're giving according to
6 them is a bright-line rule. It's easy to apply. You
7 have to do some sort of transfer of title. That's as --
8 their rule.

9 Tell me what the -- your argument is that --
10 why your rule has to win. Meaning, aren't we supposed
11 to give deference to the expertise of the agency,
12 especially when Congress lets them define --

13 MR. CLEMENT: Justice Sotomayor, two
14 responses to that. One is you can't defer to the Labor
15 Department's preferred construction, because it's flatly
16 inconsistent with the statute. This idea that you have
17 to have a transfer of title cannot be squared with 3(k);
18 it cannot be squared, at least as I understand it, with
19 some of the -- the own advice they've given, which is
20 all you need is a commitment to buy. That's what
21 they've told people since 1949.

22 There's an example in that Weiss report from
23 1949 involving a jobber where you have a situation where
24 somebody's treated as an outside salesperson even though
25 they never have title over the product. So they get the

1 commitment to buy from the sales target, and then a
2 jobber who works for a different employer is the one
3 that transfers title. That's at page 11 of the NFIB
4 brief, if you want to look at it. So --

5 JUSTICE KAGAN: Mr. Clement, I guess I'm not
6 sure I understand what you just said.

7 If -- forget the transfer of title business,
8 but if it's just -- we're requiring a transaction here.
9 And we're drawing a line between people who do
10 transactions and people who just advertise or make
11 pitches or whatever you want to do it. That's perfectly
12 consistent with the statute, isn't it? I mean, you can
13 argue about is it the only possible reading; you can
14 even argue about whether it's the best possible reading.
15 But it's surely a -- a possible reading.

16 MR. CLEMENT: It is a possible reading,
17 Justice Kagan. But it's not the one that the Labor
18 Department has advanced in their amicus brief. So you
19 can't defer to that. I mean, you can decide that it's
20 the best reading of the statute if you want, but --

21 JUSTICE KAGAN: I suppose that that's a
22 question. For them, I read their amicus briefs to sort
23 of suggest two things. Sometimes they just talk about
24 transactions, and sometimes they talk about transfer of
25 title.

1 MR. CLEMENT: Well, and with respect,
2 Justice Kagan, that's one of the many problems with
3 deferring to amicus briefs. Because when an agency
4 gives guidance in an interpretative rule or something,
5 there's one place, and they provide "the" answer. Now,
6 I don't know if the government wants you to defer to the
7 -- defer to the argument on page 12 or the argument on
8 page 20 or the argument on page 24.

9 JUSTICE KAGAN: Well, I think that they
10 would say that it doesn't make any difference, because
11 they've never really seen a person who makes
12 transactions without transferring title. So I think
13 that --

14 MR. CLEMENT: Well, with respect, they
15 have -- no -- with respect, they have seen that person.

16 JUSTICE SCALIA: Consignment, for one, which
17 is legitimate --

18 MR. CLEMENT: Well, consignment is in the
19 statute. But this jobber example is right out of the
20 Weiss report in 1949, and the outside salesperson in
21 that case never had title. The title comes from the
22 jobber who works for somebody else. So the salesperson
23 in that instance never had title, not even in the chain
24 of distribution. Yet they say that is a clear case
25 where the person is an outside salesperson and exempt.

1 JUSTICE GINSBURG: Did -- did the
2 pharmaceutical companies request -- ever in this period,
3 request a ruling, a rulemaking on the status of these
4 PSRs?

5 MR. CLEMENT: Well, I understand from the
6 government that there was a request in 2007 and that the
7 Labor --

8 JUSTICE GINSBURG: That was an opinion
9 letter, they said. I thought they said that was an
10 opinion letter.

11 MR. CLEMENT: It was a request for an
12 opinion letter. I'm sorry --

13 JUSTICE GINSBURG: Yes. I asked if there
14 was a request from the pharmaceutical companies for a
15 rulemaking on the proper classification in this case.

16 MR. CLEMENT: No, there wasn't, Justice
17 Ginsburg, but I think that actually cuts in our favor,
18 because in 2004, a lot of companies were coming in with
19 things where they thought it was unclear, where they
20 thought there was some doubt, and asking for
21 clarification. This was so well understood that the
22 outside sales exemption, or perhaps the administrative
23 exemption, covered the outside sales force of this
24 industry --

25 JUSTICE KENNEDY: What's the case that I

1 cite if this opinion is written the way you -- you
2 propose, and the -- this Court says, well, this has been
3 70 years, or maybe in 10 years if you take the new
4 regulations as setting a new regime, and the Department
5 has never made an objection, and therefore, it follows
6 that the Department's interpretation is implausible or
7 improper, and then I cite some case from our Court.

8 What -- how do I write this?

9 MR. CLEMENT: I would -- I would -- I would
10 ask you not to be bound by having to cite a case. I
11 would ask you to just use the following reasoning,
12 though, which I think is 100 percent -- and there's
13 plenty of cases you could cite as perhaps *cf.* Cites.

14 JUSTICE KENNEDY: Well, I'd like one.

15 (Laughter.)

16 MR. CLEMENT: Sure. Let's start -- let's
17 start with Fox and just the basic notion that in
18 administrative law, if you're going to change your
19 position, you have to acknowledge that you're making a
20 change. I think at a minimum here, if they're going to
21 impose this kind of massive retroactive liability on
22 this industry --

23 JUSTICE KAGAN: But, Mr. Clement, this isn't
24 a change. You've referred to it as a change in a lot of
25 ways -- in a lot of times, but what we have here is an

1 agency that, for some number of years, thought that this
2 was not the most urgent problem on their plate. Indeed,
3 one would think this is a pretty peculiar Department of
4 Labor if they thought that this was the most urgent
5 problem on their plate. So they didn't enforce it.

6 But now the question has come up, and they
7 say we'll look to our regulations. This falls on one
8 side of the regulation. Now, you've been given a gift
9 for all these years is one way of looking at it, because
10 -- because you were not their most urgent problem, and
11 so they didn't enforce their own regulations against
12 you.

13 MR. CLEMENT: Justice Kagan, here's the
14 thing. We can quibble about whether or not there is a
15 change in their position or whether they just didn't
16 have a position before, but I think the important thing
17 is they've imposed, by taking this position in an amicus
18 brief and asking for deference to it, massive liability
19 on this industry. The PhRMA brief estimates it's
20 billions of dollars.

21 Now, I --

22 JUSTICE GINSBURG: Why would you -- why must
23 you look to an amicus brief? Why not just look to the
24 regulations that define -- the regulations that define
25 "sale" and that define "promotion." The 541.503 says

1 promotion work incidental to a sale made by somebody
2 else is not exempt.

3 Why do we get into the amicus brief when we
4 have in these 541 regulations a definition of sales on
5 the one hand, promotion on the other, and then this
6 statement that promotion work incidental to sale made by
7 somebody else is not exempt?

8 Why doesn't -- why isn't that the answer to
9 this case?

10 MR. CLEMENT: Here's the answer as to why
11 that's not the answer, and then let me circle back and
12 say why, if you are going to err on one side or the
13 other, you shouldn't err on the side of imposing massive
14 retroactive liability. The reason that that is not a
15 simple matter of deferring to that is because that same
16 regulation earlier says that promotional work is exempt
17 if it is in conjunction with the individual's own sales
18 or solicitations. Now, I happen to think it's pretty
19 clear that these -- by getting this commitment, which is
20 the functional equivalent of a commitment to buy, which
21 is what the regulations and regulatory interpretations
22 have always said is a sale in some sense, I think these
23 are sales. Certainly --

24 JUSTICE GINSBURG: Does the pharmaceutical
25 company have a sales force? I mean, who sells to the

1 wholesalers, the pharmacies, and the hospitals?

2 MR. CLEMENT: It's not this kind of outside
3 sales force. It's a much less sales-oriented
4 transaction. The PhRMA amicus brief, for example, gives
5 the example of a company that has 2,000 outside sales
6 reps and 10 people that handle the movement of transfer
7 of product to the wholesalers and the distributors.

8 If you look at district court's opinion at
9 the page 42a of the petition appendix, the district
10 court addresses this issue and I think gets it exactly
11 right, which is the reason there is not a sales effort
12 focused on the wholesalers and distributors is because
13 their job is to have on stock the kind of medicines that
14 physicians are prescribing.

15 JUSTICE GINSBURG: But there are -- there
16 are people who sell to them. There may be only a few,
17 but --

18 MR. CLEMENT: There is a handful of people,
19 Justice Ginsburg, but that's -- I mean, there is nothing
20 anomalous about that. Most industries have some sales
21 force that operates on the wholesale --

22 JUSTICE GINSBURG: Are they exempt, too?

23 MR. CLEMENT: What's that?

24 JUSTICE GINSBURG: The -- the actual sellers
25 from the -- the people on the staff of the

1 pharmaceutical company who sell to the wholesalers,
2 pharmacies, and hospitals, are they exempt?

3 MR. CLEMENT: I don't believe so, Your
4 Honor, at least not under the outside sales exemption,
5 in part because they are not outside, in part because
6 they are not really engaged in a sales effort. It does
7 them no good -- if they can convince some wholesaler or
8 distributor that the GSK product is far superior to a
9 competitor's product and it doesn't make any difference
10 at all because as a result of that -- they need to have
11 product that actual doctors are writing prescriptions
12 for. That's what drives sales in this industry.

13 There is nothing anomalous about that. If
14 you think about any industry, sales activity is always
15 directed at the people who place orders. In this
16 industry, because of the learned intermediary doctrine,
17 the person who places the order is the doctor, not the
18 ultimate end user.

19 CHIEF JUSTICE ROBERTS: Is there -- let's
20 say the doctor hears the spiel and the doctor says:
21 Okay, yours is the first thing I will think of, you
22 know, when I have a patient with this and this. I mean,
23 is that a sale?

24 MR. CLEMENT: We think it is, Your Honor,
25 but if you have any doubt about that, certainly at the

1 point that the doctor then, when he sees the next
2 patient, writes the prescription, I think at that point
3 I think there's a sale; because again, what the
4 regulations and regulatory history looks for is a -- is
5 a commitment to buy. That's the relevant commitment to
6 buy. That's the order in this industry --

7 CHIEF JUSTICE ROBERTS: So what if the
8 doctor, as I suspect a lot of doctors do, they listen to
9 this guy, and they say: Okay, I'll think of -- you
10 know, when it comes up, I'll think of your product. And
11 the next guy comes in from the other company and he
12 says: Okay, when it comes up I'll think of your
13 product. Are those two sales or no sale?

14 MR. CLEMENT: I think they are probably two
15 sales, Your Honor. But you know, it's the same thing --
16 imagine somebody who's, you know, just sitting in their
17 house and they get an encyclopedia salesperson. And
18 they say, you know, I'll -- maybe I'll buy that. That
19 looks good, I'll buy it. And they say, but you know,
20 maybe the State law has a law that says you have got to
21 wait 24 hours before you put the order in, in the
22 computer.

23 CHIEF JUSTICE ROBERTS: But that's a firmer
24 commitment when they say: I will buy it. The physician
25 is just saying: I will think of your product when it --

1 when the need comes up.

2 MR. CLEMENT: But -- well, if -- I mean,
3 what I was suggesting is maybe you are talking about a
4 State that has a 24-hour waiting rule or something like
5 that. So it's a commitment that, sure, I'm going to
6 enter the order in 24 hours. Well, maybe another
7 encyclopedia salesman comes in, in 12 hours and he gives
8 another commitment. One of the two people he is going
9 to put the order in, and one of the two people will
10 certainly have finally had a sale. I think again --

11 JUSTICE KAGAN: But don't you think that the
12 way this works -- I mean, the way we should all hope it
13 works is that the detailer comes in, the detailer
14 provides information, the doctor says, that's very
15 interesting, I want to think about it, I'm going to
16 think about it. Then the doctor reads some medical
17 journals; then maybe the doctor goes to a convention and
18 talks to other doctors about the product.

19 I mean, that's what you would hope that a
20 doctor would do before a doctor decided, I'm going to
21 start prescribing this medicine. And the detail work is
22 a part of that, but so are many things before the doctor
23 actually decides to do something.

24 MR. CLEMENT: Sure, Justice Kagan. But you
25 don't want to look at this like it's an isolated,

1 one-time, you know, sort of interaction. I mean, one of
2 the things that -- that happens in this industry, like
3 other sales industry, is there are multiple trips. The
4 detailer goes there maybe the first time and lays the
5 ground work. Then maybe the doctor reads some other
6 information. Then maybe on the final visit, after all
7 that information is there, finally the detailer gets the
8 commitment to prescribe to appropriate patients.

9 I think one way to think about the absurdity
10 of making the difference turn on the prescription is to
11 compare this salesperson to another salesperson of
12 medical devices who goes in, but these are medical
13 supplies that the doctor uses in the doctor's office.
14 Now, they're both hired for their sales experience, they
15 both get sales training, they both have a sales
16 territory. They're sitting in the same doctor's waiting
17 room, waiting for the same doctor; they have samples in
18 their bags, and they both get a commitment from the
19 doctor.

20 Now, what sense does it make as a matter of
21 the FLSA and its labor policies to say one of those
22 people is exempt and the other one is not exempt,
23 because for perfectly sensible reasons, we say that one
24 of those products is a prescription where the doctor
25 writes the order and then with that order the end user,

1 the ultimate end user, can make the purchase at the
2 pharmacy, whereas the other one --

3 JUSTICE SCALIA: Mr. Clement, I wanted to
4 ask you about section 501 of the regulations, which --
5 which is on page 4 of the appendix in the blue brief,
6 and was mentioned in the -- in the government's
7 presentation. It says "requires that the employee be
8 engaged in, one, making sales within the meaning of
9 3(k); or, two, obtaining orders or contracts for
10 services or for the use of facilities." What
11 authorization is there for the agency to invent number
12 two?

13 MR. CLEMENT: Well, Justice Scalia, you
14 heard the government's explanation and, as you suggest,
15 if the government's explanation is right, then this
16 shouldn't be a matter of just trying to limit things to
17 3 -- to the 3(k) definition. I think, even though -- at
18 the 3(k) definition, though, if you look at that
19 definition, it has every hallmark of being broad and
20 functional and flexible.

21 I would want to make one very important
22 point, though, about the ultimate question here, because
23 ultimately the decision whether to go one way or another
24 on this issue has remarkable significance for
25 retroactive imposition of liability.

1 We all know that retroactive rulemaking is
2 disfavored. Well, think about the consequences here.
3 You have massive liability, between 4 and 6 years of
4 effective time and a half, because of the way that the
5 statute works. It has time and a half plus liquidated
6 damages. You are talking about people who are very well
7 paid, close to six figures. So unlike the classic
8 worker who you might think is covered by the FLSA, who
9 is a relatively low hourly worker, the amounts of
10 damages here are quite significant.

11 Of course, the effort to try to reconstruct
12 these people's hours, given that they were told they
13 were exempt and they were outside the office, trying to
14 reconstruct how many overtime hours they actually worked
15 is going to be a crapshoot at best. So if you think
16 about all of that, and then you think about, as
17 Justice Breyer indicated, the other option, which is
18 to --

19 JUSTICE BREYER: Let's pursue this for a
20 second.

21 MR. CLEMENT: Sure.

22 JUSTICE BREYER: Because I would like to go
23 back to Justice Kennedy's question, and this is only me
24 speaking. I don't know how anybody else feels. If this
25 had come up in 1941, you wouldn't have had a chance. I

1 would have said look at the statute; it says the
2 Secretary defines it. You say, well, can you define it
3 in a brief? Yes, you have to be careful in briefs, but
4 yes; and that's the end of the case. It's not a
5 question for judges, it's a question for administrators.

6 But now it's difficult for me because of the
7 passage of 75 years. And we can blame it in part on the
8 industry or in part on the Secretary. There is blame to
9 go around. So the question is, what do I do as a judge?

10 And partly my instinct is get somebody to
11 decide this other than a lawyer in the Department of
12 Labor, because this is a hard question. And that's
13 where we come to Justice Kennedy's question, which is he
14 says all right, fine, let's write that and -- and what
15 case do we cite?

16 And I don't agree with you, overturn Auer.
17 I think amicus briefs are often helpful, but use them
18 with care. And then I have the statute here, which
19 talks about the Secretary doing the definition of
20 "outside salesman," and I have lots of rules and
21 regulations and reports, which are fairly ambiguous in
22 my opinion. So you tell me what to say.

23 MR. CLEMENT: I -- may I answer?

24 CHIEF JUSTICE ROBERTS: Certainly.

25 MR. CLEMENT: I would start by citing -- I

1 know it's not always in fashion to cite lower court
2 opinions, but I would start by citing Judge Posner's
3 opinion in Yi, because the Seventh Circuit there, a, a
4 very distinguished panel, Judge Posner, Judge Wood, and
5 one other judge, the three of them considered this
6 question -- Judge Sykes, I'm sorry; it slipped my mind,
7 a very distinguished judge.

8 (Laughter.)

9 MR. CLEMENT: The -- it -- the point being
10 that he said along these lines that the 70 years of
11 history makes a significant difference. And here's the
12 thing. Just like you expect an agency to confront a
13 change of position, you would at least expect an agency
14 to confront the retroactive consequences and in that
15 sense address them and make sense of it. And I would
16 just simply say this, which is if you had a rulemaking
17 you could bring in all of the affected parties,
18 including the current sales representatives, who are not
19 the ones bringing these lawsuits, whose jobs are going
20 to be changed, and you could make a comprehensive view,
21 as opposed to just getting one side of an ongoing
22 litigation and then making a decision about an amicus
23 brief.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Goldstein, 3 minutes.

2 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

3 ON BEHALF OF THE PETITIONERS

4 MR. GOLDSTEIN: Thank you,
5 Mr. Chief Justice.

6 Three quick points. First, if you read the
7 transcript, you will see that my friend says that the
8 nature of this job has changed. And that is an
9 essential part of understanding this case. And there is
10 an entire amicus brief in addition to our submission on
11 behalf of pharmaceutical representatives, which explains
12 how very much the requirements of pharmaceutical
13 detailers and the restrictions on them have changed
14 dramatically over the last couple of decades in
15 particular. And that's why the continued references to
16 70 years are wrong.

17 The other important part about the FLSA in
18 particular is that there is a statute on this issue, and
19 it says that an employer can request guidance from the
20 agency; and if it doesn't do that, it is not -- it has
21 no defense. Its job is to ask for guidance. And there
22 are 50 different exemptions from the FLSA that cover
23 hundreds of different categories of employees. And if
24 the rule you are going to announce -- because Mr.
25 Clement's view is you shouldn't be bound by any

1 precedent, if the rule you are going to now announce is
2 that there has to be rulemaking with respect to all of
3 those, it's going to be an administrative nightmare.

4 Two quick further points. The Department of
5 Labor's position is that there has to be an actual
6 commitment, not a precatory commitment. And Mr. Clement
7 says, well, that's contrary to the definition of "sale"
8 in 3(k). Please read the definition again, and if you
9 find something in there, something that is not a
10 commitment -- it can be an exchange; it can be a
11 commitment that is even a consignment; it can be a
12 traditional sale. Every one of those things is
13 commitment. It is impossible to find in the definition
14 of commitment a rule that says -- excuse me, in the
15 definition of sale --

16 JUSTICE ALITO: Where do they say that
17 that's their test? Where does the Department of Labor
18 say that's their test, it has to be a commitment. I
19 thought what they said in their brief was there has to
20 be a transfer of title.

21 MR. GOLDSTEIN: There are two different
22 parts to it. One is that they -- as explained by Mr.
23 Stewart, their view of transfer of title, but the Weiss
24 Report says repeatedly that there has to be a commitment
25 to buy. That is --

1 JUSTICE SCALIA: Well, which is it? I mean,
2 you say, yes, yes, it's both.

3 MR. GOLDSTEIN: You have to agree --

4 JUSTICE SCALIA: Pick one.

5 MR. GOLDSTEIN: You have to --

6 JUSTICE SCALIA: Is it the transfer of title
7 or a commitment?

8 MR. GOLDSTEIN: It is the agreement to
9 transfer title. There are two parts to it --

10 JUSTICE SCALIA: Ah. Okay.

11 MR. GOLDSTEIN: But there has to be the
12 agreement, a firm agreement. It's repeated in the 2004
13 preamble to the regulations as well.

14 Now, the last critical point I want to make
15 is that Mr. Clement says there are commissions on sales
16 in the sales territory. And what he is not talking
17 about is any commitment by a physician. When you look
18 at the transcript and he talks about sales in the sales
19 territory, he is talking about the sales by the
20 pharmacy. That's where the sale occurs in this
21 industry. It's to the wholesaler and to the pharmacy
22 and to the customer.

23 He is not talking about a sale in the sense
24 of getting a commitment to have --

25 JUSTICE KENNEDY: But the district court

1 here made a finding -- this is at 42(a) of -- of the --
2 the appendix for the Petitioners: "Sales volume was
3 directly and exclusively driven by the number of
4 prescriptions written by physicians, and plaintiffs' job
5 was to encourage such prescriptions."

6 MR. GOLDSTEIN: That -- Mr. Justice Kennedy,
7 I don't believe that you can fairly describe that as a
8 finding of fact. That is the judge -- his view of the
9 summary judgment record. It is --

10 JUSTICE SCALIA: It's a finding of logic,
11 for Pete's sake. These are prescriptions. You can only
12 get a prescription from a doctor. Obviously, the number
13 of prescriptions -- drugs sold depends upon the number
14 of prescriptions given by doctors.

15 MR. GOLDSTEIN: Two -- two things about
16 that. First is that a detailer doesn't get a commitment
17 to a prescription. And then in addition, it's clear
18 that there are numerous influences on what a doctor
19 does. There's all the advertising --

20 JUSTICE SCALIA: That's a different point.

21 MR. GOLDSTEIN: It is an important point.
22 It is a different point.

23 JUSTICE SCALIA: It's not the point you were
24 making.

25 MR. GOLDSTEIN: Justice Scalia, the point

1 that I will make at bottom is that you have to have a
2 firm commitment. That's what the Department says. And
3 there's nothing in the definition in 3(k) that
4 contradicts that.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel,
6 counsel.

7 The case is submitted.

8 (Whereupon, at 11:06 a.m., the case in the
9 above-entitled matter was submitted.)

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