No. 16-1362

In the Supreme Court of the United States

ENCINO MOTORCARS, LLC,
Petitioner,
v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, AND REUBEN CASTRO,
Respondents.

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

BRIEF OF U.S. SENATORS PATTY MURRAY, SHERROD BROWN, AND JACK REED AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

VINCENT LEVY
DANIEL M. SULLIVAN*
GREGORY DUBINSKY
MATTHEW V.H. NOLLER
HOLWELL SHUSTER & GOLDBERG LLP
750 Seventh Avenue
New York, NY 10019
(646) 837-5132
dsullivan@hsgllp.com

Counsel for Amici Curiae
**Counsel of Record*

December 15, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*

Amici are United States Senators Patty Murray (Washington), Sherrod Brown (Ohio), and Jack Reed (Rhode Island).[1] They have a strong interest in ensuring the Fair Labor Standards Act (FLSA) is interpreted correctly. Senator Murray is the ranking member of the Senate Committee on Health, Education, Labor, and Pensions (HELP), which has jurisdiction over the FLSA. Senators Brown, Reed, and Murray, along with other Members of Congress, submitted a comment on the Department of Labor's 2008 proposed rule regarding Section 13(b)(10)(A) of the FLSA. *See* Letter from Members of Congress to Richard M. Brennan at 7 (Sept. 26, 2008), https://goo.gl/NhqhMx.

Amici are intimately familiar with Congress's intent in creating the FLSA's workplace protections and crafting narrow exemptions from those protections. They submit this brief to explain how Petitioner's arguments are inconsistent with the FLSA's text and congressional intent.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When Congress enacted the FLSA in 1938, it "set up a comprehensive legislative scheme," *United States* v. *Darby*, 312 U.S. 100, 109 (1941), to protect American workers in "bold and sweeping terms," *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 516–17 (1950). Congress's "basic objectives" were to "prohibit 'labor con-

---

[1] Counsel for Petitioner and Respondents have filed blanket consents to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

ditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers'" through "substantive wage, hour, and overtime standards." *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11 (2011) (quoting 29 U.S.C. § 202(a)).

The FLSA requires covered employers to pay one and one-half times an employee's regular rate of pay for each hour the employee works beyond forty per workweek. 29 U.S.C. § 207(a)(1). Section 13(b)(10)(A) of the statute, however, exempts automobile dealerships from the overtime provision as to three limited occupations: "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A).

Because "[b]readth of coverage was vital to" the FLSA's "mission," exemptions from its requirements are "narrow and specific." *Powell*, 339 U.S. at 516. The exemption at issue here is no different. Yet Petitioner proposes a fourth exempt occupation: service advisors. Petitioner's interpretation does violence to Section 13(b)(10)(A)'s text, distorts its history, and invites the Court to override Congress's policy judgments and clear intent.

First, the text. To fall under Section 13(b)(10)(A)'s exemption, a "salesman, partsman, or mechanic" must either "sel[l]" automobiles or "servic[e]" them. No other option is available. And service advisors neither sell nor service automobiles. Instead, as Petitioner admits, at most they sell servicing performed by others. *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2121 (2016); Pet. Br. 1, 29. Section 13(b)(10)(A) does not cover the selling of automobile servicing, so this should be the end of the matter.

Petitioner nonetheless contends that the statutory exemption *should* cover service advisors because, Petitioner asserts, they are salesmen who are "integral to the process of servicing vehicles" performed by others. Pet. Br. 23. According to Petitioner, "it makes no sense to hold that service advisors are non-exempt." *Id.* at 29. But it was for Congress to decide whether such an exemption was warranted, not Petitioner or the courts. Congress made that decision when it enacted the exemption, the plain terms of which do not cover service advisors. The Court should respect Congress's policy choice.

If the text of Section 13(b)(10)(A) left any doubt whether service advisors are exempt, statutory and legislative history eliminate it. Section 13(b)(10)(A) replaced an earlier exemption that covered *all* employees of automobile dealerships. As Congress considered which automobile dealership employees should be exempted from overtime protections, legislators discussed the responsibilities of salesmen, mechanics, and partsmen, and understood them to be different than those of service advisors. Indeed, a contemporaneous version of the Department of Labor's Occupational Outlook Handbook, a dictionary that defines occupations in particular industries, distinguished the job of service advisor from the jobs of salesman, mechanic, and partsman. With this background understanding, Congress deliberately drafted Section 13(b)(10)(A) to cover salesmen, mechanics, and partsmen, but not service advisors.

Congress had good reasons to do so. It exempted salesmen, mechanics, and partsmen because they regularly worked off-site during irregular hours, making it hard for employers to calculate their overtime obligations. Service advisors, in contrast, worked regular hours on dealership grounds, so they did not present

the same concern. Petitioner's alternative explanations for the exemption lack support in the legislative history and are inconsistent with the FLSA's other provisions.

The narrowing of the exemption in Section 13(b)(10)(A) is consistent with the FLSA's evolution in general. Over the years, Congress has expanded the FLSA's protections while limiting its exemptions. It is this repeated and consistent statutory history that justifies the Court's practice of interpreting FLSA exemptions narrowly. The Court should not disregard the lines Congress has drawn by interpreting Section 13(b)(10)(A) more broadly than its text requires. The Court should defer to Congress's design and affirm the decision of the Court of Appeals.

ARGUMENT

The Court construes a statute's provisions "in their context and with a view to their place in the overall statutory scheme." *Utility Air Regulation Grp.* v. *EPA*, 134 S. Ct. 2427, 2441 (2014) (internal quotation marks omitted). The Court should also analyze relevant statutory and legislative history. *See Warger* v. *Shauers*, 135 S. Ct. 521, 527 (2014); *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 695 (2011).

Here, all indicia of congressional intent lead to the same conclusion: Service advisors are not exempt from the FLSA's overtime protections.

I. Section 13(b)(10)(A), By Its Terms, Does Not Cover Service Advisors.

1. Section 13(b)(10)(A) exempts from the FLSA's overtime protections "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). The parties spend considerable time debating whether this text should

be read to pair "salesman" only with "selling," or with both "selling" and "servicing."[2] As Respondents and the Court of Appeals explain, the first reading is the most natural and best honors ordinary usage. *See* Resp. Br. 31–39; Pet. App. 16–19.

But even if the statute covers both salesmen who sell and salesmen who service (which, as Respondents explain, is a contradiction in terms), service advisors are still not covered for a simple reason: Section 13(b)(10)(A) only exempts salesmen who are "primarily engaged in selling or servicing *automobiles*," and service advisors are not "engaged in" either activity. To "engage in" an activity is to personally participate in it. Resp. Br. 24 (citing dictionary definitions). This Court regularly uses the phrase "engaged in" to mean personally taking part in certain conduct.[3] Applying that ordinary understanding, what service advisors are "engaged in" is, at most, selling services, not selling or servicing automobiles.

Petitioner concedes, as it must, that service advisors do not sell automobiles. Pet. Br. 37–38. It also tac-

---

[2] Respondents also point out that service advisors may not even qualify as "salesmen." Resp. Br. 14–16.

[3] For examples in just the last ten years, see *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (the Court is "engaged in the business of interpreting statutes"); *Millbrook* v. *United States*, 569 U.S. 50, 56 (2013) (law enforcement officers are "engaged in investigative or law enforcement activity" (internal quotation marks omitted)); *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 244 (2012) (SEC is "not engaged in impermissible censorship"); *Giles* v. *California*, 554 U.S. 353, 359 (2008) ("defendant engaged in conduct designed to prevent [a] witness from testifying" (emphasis omitted)); *United States* v. *Williams*, 553 U.S. 285, 293 (2008) ("children engaged in sexually explicit conduct").

itly concedes that service advisors do not service automobiles in the ordinary sense of "maintaining" or "repairing" them. Pet. App. 11–12; Resp. Br. 20. Indeed, Petitioner admits that service advisors "are engaged in the selling of the servicing" done by partsmen and mechanics. Pet. Br. 29. That admission is fatal because Section 13(b)(10)(A) does not cover salesmen who, if they sell anything, sell *services* for automobiles, but rather salesmen who sell *automobiles* themselves.

Petitioner argues, nevertheless, that the exemption covers service advisors because selling servicing of automobiles is equivalent to "servicing" them. According to Petitioner, "engaged in . . . servicing automobiles" should be read to mean "engaged in 'sales activities' that 'are integral to the process of servicing vehicles.'" Pet. Br. 13, 26; *see also* Pet. Br. 42 (claiming service advisors are integral to "the servicing process"). This argument rewrites Section 13(b)(10)(A)'s text, which does not include Petitioner's proposed definition of servicing to encompass selling.

The structure of the exemption confirms that Petitioner's interpretation is wrong. "Selling" and "servicing" are, by virtue of being separated by the word "or," distinct categories. *See Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) ("or" is "almost always disjunctive, that is, the words it connects are to be given separate meanings" (internal quotation marks omitted)). And what salesmen, partsmen, and mechanics "sell" or "service" is "automobiles." Petitioner wants the statute to cover those who, they claim, sell servicing of automobiles, Pet. Br. 29, but the text cannot bear that meaning. "Sell" and "service" refer to "automobiles," not to each other.

Petitioner's approach suffers from another interpretive vice: it reads a dozen words out of the statute. After all, every employee who is "employed by a non-manufacturing establishment primarily engaged in the business of selling" automobiles, 29 U.S.C. § 213(b)(10)(A), is on some level engaged in the "process" of selling or servicing automobiles. Why else would the car dealership have employed the individual in the first place? Petitioner's approach thus empties of all meaning the statute's prescription that, although they may work for car dealerships, "salesm[e]n, partsm[e]n, [and] mechanics" are exempt only if they are "primarily engaged in selling or servicing automobiles."

2. Petitioner asserts that it "makes no sense" to exclude service advisors from Section 13(b)(10)(A). *E.g.*, Pet. Br. 29, 34. But when Congress adopted that exemption, it concluded otherwise. Petitioner proffers no justification for departing from Congress's judgment.

Petitioner's primary argument is that a service advisor is "in some sense a hybrid" of a salesman and a mechanic. Pet. Br. 34. But a hybrid of A and B is neither A nor B; a hypothetical statute that covered "labradors or poodles" would not apply to labradoodles. And Petitioner's argument does not address the requirement that these supposed hybrids, which are neither salesmen, partsmen, nor mechanics, must still sell or service automobiles.

Petitioner calls it "nonsensical to suggest that an individual primarily engaged in selling the servicing of automobiles is engaged in *neither* selling *nor* servicing automobiles." Pet. Br. 29. That is not nonsensical; it is accurate. Selling servicing is a different activity from either selling automobiles or servicing automo-

biles. For much the same reason, petitioner's assertion that service advisors "are not engaged in selling or servicing anything other than automobiles," *id.*, is incorrect. Service advisors do not sell automobiles, and they do not service anything at all.[4]

At bottom, what Petitioner is really saying is that service advisors perform tasks that are similar to what salesmen and mechanics do, which should be close enough. But Congress chose its words carefully to enact a narrow carve-out from the FLSA's broad protections, which does not leave room for Petitioner's impressionistic method of statutory interpretation. *See also infra* 16–17.

Petitioner also raises concerns that Congress's choice not to exempt service advisors will cause "division" among dealerships' employees and will "not advance the core policy goals of the FLSA." Pet. Br. 33–34. These arguments are wrong on the merits, but the bigger problem is that Petitioner is directing them to the wrong institution. When interpreting a statute, the Court's "appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress

---

[4] Petitioner claims this approach renders Section 13(b)(10)(A)'s reference to partsmen superfluous because (Petitioner says) partsmen also do not service automobiles. Pet. Br. 40–41. The Ninth Circuit explained that this is not true, Pet. App. 13–15, but even if it were true, it would not matter. A "partsman" is exempt only to the extent that he is "primarily engaged in . . . servicing automobiles." 29 U.S.C. § 213(b)(10)(A). Some partsmen may service automobiles and be exempt, while others may not. That does not render the statute's inclusion of partsmen superfluous. *See Buehlman* v. *Ide Pontiac, Inc.*, No. 6:15-cv-6745(MAT), 2016 WL 6581757, at *3–4 (W.D.N.Y. Nov. 7, 2016) (holding that partsmen who do not service automobiles are not exempt and rejecting argument that this renders the partsman exemption superfluous).

is to be put aside." *TVA* v. *Hill*, 437 U.S. 153, 194 (1978).

If Petitioner believes Section 13(b)(10)(A) needs revision, "there's a constitutionally prescribed way to do it. It's called legislation." *Perry* v. *Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting). Congress, through and with the HELP Committee, is the appropriate body to assess Petitioner's policy concerns. The Court's task is to honor Congress's judgments by enforcing the text it enacted. *See Citicorp Indus. Credit, Inc.* v. *Brock*, 483 U.S. 27, 34 (1987) (refusing to expand FLSA exemptions based on policy); *Addison* v. *Holly Hill Fruit Prods.*, 322 U.S. 607, 618–20 (1944) (same). That text does not exempt service advisors.

II. Section 13(b)(10)(A)'s History Confirms That Congress Intentionally Drafted The Exemption Narrowly To Exclude Service Advisors.

1. Congress's omission of service advisors from Section 13(b)(10)(A) was no accident. Today's exemption is the result of a lengthy process in which Congress carefully narrowed a broader exemption for all automobile dealership employees. Congress considered the responsibilities of various dealership employees and—consistent with the contemporary public meaning of the occupational terms—understood that the job of service advisor was distinct from that of salesman, partsman, and mechanic. Congress then wrote an exemption that covered salesmen, partsmen, and mechanics, but not service advisors.

Section 13(b)(10)(A) began its life in the 1966 amendments to the FLSA. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601 § 209(b), 80 Stat. 830, 836 (codified at 29 U.S.C. § 213(b)(10) (1970)). Before 1966, the FLSA contained a blanket

exemption from its minimum-wage *and* overtime provisions for "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements." Fair Labor Standard Amendments of 1961, Pub. L. No. 87-30 § 9, 75 Stat. 65, 71 (codified at 29 U.S.C. § 213(a)(19) (1964)).

The 1966 amendment narrowed that exemption in two respects. First, it limited the exemption to the FLSA's overtime provisions. 29 U.S.C. § 213(b)(10) (1970). Second, it reduced the scope of the exemption from "any employee" to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft." *Id.*

Congress further tailored the exemption in 1974. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259 § 14, 88 Stat. 55, 65. It removed the exemption for trailer and aircraft partsmen and mechanics, creating a new exemption for just "salesm[e]n primarily engaged in selling trailers, boats, or aircraft." 29 U.S.C. § 213(b)(10)(B). It also enacted Section 13(b)(10)(A) in its current form.

Congress paid close attention to the nature of the occupations it exempted from the FLSA's overtime protections. Legislators discussed the distinct responsibilities of automobile salesmen, partsmen, and mechanics.[5] They were also aware of service advisors' responsibilities, which differed from those of salesmen,

---

[5] *See* 112 Cong. Rec. 20,502 (1966) (Sen. Bayh) ("The partsman classifies, shelves and dispenses parts used by mechanics"); *id.* at 20,503 (Sen. Hruska) ("[Y]ou can buy a new tractor from a salesman[.]"); *id.* at 20,504 (Sen. Yarborough) ("[T]he salesman . . . can go out and sell an Oldsmobile, a Pontiac, or a Buick all day long and all night."); *id.* (Sen. Bayh) (partsmen "come down

partsmen, and mechanics as legislators understood them.[6] These discussions show that Congress understood service advisors to be distinct from salesmen, partsmen, and mechanics—the "three occupations" covered by the exemption. 112 Cong. Rec. 20,502.

2. Congress's understanding that service advisors were distinct from salesmen, partsmen, and mechanics reflected the definitions of the relevant occupations in the 1966–1967 and 1974–1975 editions of the Department of Labor's Occupational Outlook Handbook (OOH).

Congress established the Occupational Outlook Service within the Bureau of Labor Statistics (BLS) in 1940, in response to a Presidential Advisory Committee's recommendation that BLS "make long-range studies of . . . occupational outlook." Harold Goldstein, *The Early History of the Occupational Outlook Handbook*, Monthly Labor Rev., May 1999, at 3, *available at* https://goo.gl/jdYrC6. BLS published the first OOH in 1949. U.S. Dep't of Labor, OOH, Bulletin No. 940 (1949 ed.). Since then, "every informed person in the field of vocational guidance has come to regard it as one of his indispensable tools." U.S. Dep't of Labor, OOH, Bulletin No. 998, at II (1951 ed.).

Courts, Congress, and federal agencies also rely on the OOH. Courts have recognized that the OOH is instructive in determining the common understanding

---

to the store to show [the mechanic] which part should be used"); *id.* (Sen. Yarborough) (mechanics "repair . . . cars and tractors").

[6] *Fair Labor Standards Amendments of 1971: Hearings Before the Subcomm. on Labor of the Comm. on Labor and Pub. Welfare*, 92d Cong. 780–81 (1971) (service advisors "wait[] on the customer," "tell you what that repair job is going to cost on your automobile before the job is actually performed," and "contact the customer before any further work is done on the automobile").

of occupational terms in the FLSA. *E.g.*, *Belt* v. *EmCare, Inc.*, 444 F.3d 403, 406, 416 (5th Cir. 2006); *Clark* v. *United Emergency Animal Clinic, Inc.*, 390 F.3d 1124, 1127 (9th Cir. 2004); *Johnson* v. *Wave Comm GR LLC*, 4 F. Supp. 3d 423, 439 (N.D.N.Y. 2014). Congress has cited the OOH as a "very important and widely used" source for up-to-date information about jobs in the United States. H.R. Rep. No. 81-1797, at 91 (1951); *see* 96 Cong. Rec. 1912 (1950) (citing the OOH); 119 Cong. Rec. 21,261 (1973) (same); 124 Cong. Rec. 21,060, 27,797 (1978) (same). And numerous agencies rely on the OOH in administrative decisions, including some contemporaneous with the 1966 and 1974 FLSA amendments. *E.g.*, *In re VSP-F-II, LLC*, 2017 WL 5654954, at *3 n.3 (DHS Admin. App. Office Oct. 31, 2017) (deeming the OOH an "authoritative source[] on the duties of the wide variety of occupations that [it] address[es]").[7]

In 1966 and 1974, the OOH gave separate definitions for automobile salesmen, partsmen (or "parts countermen"), mechanics, and service advisors. These common-sense definitions accord with Respondents' interpretation of Section 13(b)(10)(A). Automobile salesmen, according to the OOH, sell automobiles.

---

[7] *See In re Panganiban*, 13 I. & N. Dec. 581, 582–83 (B.I.A. 1970) (relying on the OOH); *In re Springfield Electrotype Serv., Inc.*, 166 N.L.R.B. 639, 642 n.16 (1967) (same); *In re Stamatiades*, 11 I. & N. Dec. 643, 644–45 (B.I.A. 1966) (same); *accord In re Womack*, Nos. 2013-LHC-01205 et al., 2014 WL 6482197, at *20 (Dep't of Labor Ben. Rev. Bd. June 30, 2014); *Higginbotham* v. *Army*, No. SF-0752-12-0769-I-1, 2012 WL 8203340 (MSPB Dec. 11, 2012); *In re D.S.*, No. 07-934, 2007 WL 2848801, at *3 (Empl. Comp. App. Bd. Aug. 17, 2007); [*Title Redacted by Agency*], Bd. Vet. App. 9318727, 1993 WL 13604663, at *9 (Jan. 1, 1993); IRS Chief Counsel Advisory 201349013, 2013 WL 6355756 (Dec. 6, 2013).

U.S. Dep't of Labor, OOH, Bulletin No. 1450, at 309–10 (1966–67 ed.) [hereinafter 1966 OOH]; U.S. Dep't of Labor, OOH, Bulletin No. 1785, at 220–21 (1974–75 ed.) [hereinafter 1974 OOH]. Partsmen identify, sell, and repair the parts needed for automobile repairs. 1966 OOH at 312–13; 1974 OOH at 219–20. Mechanics do "preventative maintenance, diagnose breakdowns, and make repairs." 1966 OOH at 477–78; 1974 OOH at 417–18. Service advisors figure out what services a customer needs, calculate their cost, send the order to the mechanic, and deal with customer complaints. 1966 OOH at 314–15; 1974 OOH at 222–23.

The OOH's definitions reveal that the public understood in 1966 and 1974 (as today) that "service advisor" is a different occupation than "salesman," "partsman," or "mechanic." Importantly, the definitions align with legislators' understanding of the four occupations' distinct responsibilities. *Supra* n.5; *see also Encino*, 136 S. Ct. at 2121–22 (similar definition). That shows that Congress intended the terms "salesman," "partsman," and "mechanic" in Section 13(b)(10)(A) to carry the common meanings reflected in the OOH, which do not encompass the separate—and separately defined—occupation of service advisor. And it confirms that if Congress had meant to exempt service advisors, Congress would have done so by naming them directly.

3. Section 13(b)(10)(A)'s purposes explain why Congress chose to exempt salesmen, partsmen, and mechanics, but not service advisors. When Congress enacted the blanket exemption for dealership employees in 1961, it did so based on its judgment that dealership employees work irregular hours, making overtime too hard to calculate. *See* 106 Cong. Rec. 15,195 (1960) (Rep. Dent) ("[I]f a man happens to be in a type of employment where his hours are uncontrollable, so

far as his earnings are concerned, he should not be put . . . under a maximum hours law."); *id.* at 16,693 (Sen. Keating) ("[T]he difficulty . . . has been that they work odd hours in order to get their work done.").

After 1961, Congress realized the blanket exemption was overbroad, and it sought to identify only those employees who actually worked irregular hours or worked off of dealership grounds. In committee, legislators considered facts about various occupations to decide which had the necessary "vicissitudes and . . . uncertainties" to justify the exemption. 112 Cong. Rec. 20,506 (Sen. Javits).

Legislators ultimately decided that automobile salesmen, mechanics, and partsmen qualified. Salesmen and mechanics "work . . . outside" and have "difficulty . . . keeping regular hours. *Id.* at 20,504 (Sen. Yarborough). Salesmen "go out at unusual hours," *id.* (Sen. Bayh), while mechanics "go[] out and answer[] calls in the rural areas," *id.* (Sen. Yarborough). Therefore, "[i]t is difficult to keep their time records." *Id.* at 20,505 (Sen. Clark). Similarly, partsmen worked "on an irregular schedule" for "longer hours or at other than regular times." *Id.* at 20,502 (Sen. Bayh). As with salesmen and mechanics, "it would not be easy to place partsmen on a time-clock basis and to compute overtime compensation in an equitable manner." *Id.*

Legislators contrasted automobile salesmen, partsmen, and mechanics with other employees who work inside during regular hours, such as "retail clerks," "secretaries," and "clerical workers." *Id.* at 20,504 (Sen. Yarborough). Those employees, legislators thought, should receive overtime pay. *Id.* And, in the ways that matter, service advisors are much more like those nonexempt employees than they are like automobile salesmen, partsmen, or mechanics. Service

advisors work regular hours and interact with customers at the dealership rather than traveling off-site. 1966 OOH at 314, 316; 1974 OOH at 222–24. It is simple for employers to calculate the overtime they owe service advisors, even when such employees are paid commissions. Law Profs. Br. 14–17. Exempting service advisors, therefore, would not advance Section 13(b)(10)(A)'s purposes, even though these employees (like other non-exempt clerical staff) further the dealership's commercial mission of selling and servicing automobiles.

4. Denying the plain import of Section 13(b)(10)(A)'s history, Petitioner hypothesizes several alternative purposes for the exemption. Besides being ahistorical, those hypotheses misunderstand the FLSA's design. For example, Petitioner argues that service advisors should be exempt because they are paid commissions. Pet. Br. 32–33. But Congress did not think the mere fact that some automobile salesmen, partsmen, and mechanics receive commissions was enough to justify the exemption. To the extent legislators referred to those employees' commissions, it was only to explain that commission pay caused them to work irregular hours. *See* 112 Cong. Rec. 11,289 (Rep. Andrews) ("It is impossible to successfully work these employees on a schedule basis because their ability to earn commissions depends on their availability when sales can be made or repairs are needed."). That is not true of service advisors.

And, in fact, the FLSA does not exempt all employees who earn commissions. Law Profs. Br. 12–14. It exempts such employees only if they earn 1.5 times the minimum wage and earn more than half of their compensation from commissions. 29 U.S.C. § 207(i). To exempt all service advisors based on their commissions, even if they do not satisfy Section 207(i), would

upset Congress's decision to exempt only some commissioned employees.

Petitioner also argues that service advisors should be exempt because they are paid well, Pet. Br. 34, but nothing in Section 13(b)(10)(A) turns on an employee's compensation, Law Profs. Br. 8–10. If Congress had wanted to restrict overtime protections to only those dealership employees who earn less than a certain amount, Congress would have—and easily could have—done so explicitly when it narrowed the exemption in 1966. Congress simply chose not to do so.

5. The process by which Congress enacted Section 13(b)(10)(A)—progressively narrowing a broader exemption to cover only a small number of carefully selected occupations—tracks its general approach to the FLSA. Congress passed the FLSA to create broad wage and hour protections for American workers. *Powell*, 339 U.S. at 516; *Darby*, 312 U.S. at 109. Since then, it has continually expanded the FLSA's protections. The 1966 amendments, for example, extended the FLSA's coverage to "over eight million additional employees." Robert N. Willis, *The Evolution of the Fair Labor Standards Act*, 26 U. Miami L. Rev. 607, 625 (1972). Subsequent amendments broadened its scope even further. *E.g.*, Fair Labor Standards Amendments of 1974 §§ 4, 6–8, 88 Stat. at 56–62.

At the same time, Congress has carefully tailored the FLSA's exemptions to cover only "narrow and specific" categories of employees. *Powell*, 339 U.S. at 517. All employees are protected unless they are "expressly exempted." *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 710 (1945). It is this fact, as well as the remedial purpose of the statute, that justifies the Court's longstanding practice of interpreting FLSA exemp-

tions no more broadly than their text requires. Contrary to Petitioner's contention, this practice reflects the Court's duty to interpret exemptions "fairly and correctly," Pet. Br. 50, and pays "due regard" to the FLSA exemptions' text and history by reading the exemptions as the narrow carve-outs Congress intended them to be, *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945). As the Court has explained, the "detail" and "particularity" of FLSA exemptions "preclude their enlargement by implication." *Addison*, 322 U.S. at 617; *Citicorp. Indus. Credit*, 483 U.S. at 35 (quoting *Addison*).

* * * *

The FLSA's text and history reveal that the "statutory plan," *Dep't of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 340 (1994), is to protect workers unless they are clearly exempted. Petitioner would disrupt that plan by expanding Section 13(b)(10)(A)'s plain text through tortured textual analysis and appeals to policy. This Court has rejected similar attempts in the past. *Citicorp. Indus. Credit*, 483 U.S. at 34–35; *Addison*, 322 U.S. at 618–20. It should do so again. To honor congressional intent and "the distinctive functions of the legislative and judicial processes," *Addison*, 322 U.S. at 618, the Court should follow Section 13(b)(10)(A)'s text and history where they lead, and hold that service advisors are not exempt from the FLSA's overtime protections.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

VINCENT LEVY
DANIEL M. SULLIVAN*
GREGORY DUBINSKY
MATTHEW V.H. NOLLER
HOLWELL SHUSTER &
GOLDBERG LLP
750 Seventh Avenue
New York, NY 10019
(646) 837-5132
dsullivan@hsgllp.com
**Counsel of Record*

December 15, 2017