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 NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

MICHAEL L. FOREMAN
Counsel of Record
PENN STATE LAW CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd.,
Suite 118
University Park, PA 16803
(814) 865-3832
mlf25@psu.edu

JAMIE GOLDEN SYPULSKI
LAW OFFICE OF
JAMIE GOLDEN SYPULSKI
150 North Michigan Ave.,
Suite 1000
Chicago, IL 60601
(312) 332-6202

Additional Counsel Listed On Inside Cover

Matthew C. Koski
NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION
2201 Broadway, Suite 310
Oakland, CA 94612
(415) 296-7629

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INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

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[1] Pursuant to Rule 37.3(a), counsel for both parties submitted letters to the Clerk granting blanket consent to the filing of *amicus curiae* briefs. Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

NELA has an abiding interest in the protection of the legal rights of working men and women. Service advisors employed at automobile dealerships do not fall within the Section 213(b)(10)(A) exemption of the Fair Labor Standards Act (FLSA). Accordingly, those advisors are entitled to the protections of the FLSA. NELA submits this brief to explain why the decision of the Ninth Circuit Court of Appeals should be affirmed.

SUMMARY OF THE ARGUMENT

Fair Labor Standards Act (FLSA), Section 213(b)(10)(A), only exempts from overtime pay "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements . . .." By a plain reading of that section service advisors are not exempt from overtime. The court of appeals accordingly held that the "the most natural reading" of the exemption excludes service advisors, and that holding should be affirmed.

Petitioner's contrary assertion that service advisors are salesmen that service cars is a decidedly forced reading of the Section 213(b)(10)(A). As the court of appeals determined, service advisors may be salesmen "of a sort," but they are not "servicing" automobiles. As Petitioner itself admits, service

advisors are not actually servicing cars: they are *selling servicing*.

The exclusion of service advisors from the exemption is further supported by the statutory interpretive rules of *expressio unius est exclusio alterius* and *reddendo singula singulis*, and on these additional grounds the Court can affirm the judgment of the court of appeals.

Finally, though its application is not necessary to affirm the judgment of the court of appeals, this Court's well-settled, consistently-applied rule of construing exemptions to the FLSA narrowly against the employer, in order to achieve the remedial, humanitarian purposes for which the FLSA was enacted, also supports affirming the judgment of the court of appeals.

ARGUMENT

I. THE "MOST NATURAL READING" OF THE SECTION 213(b)(10)(A) EXEMPTION EXCLUDES SERVICE ADVISORS

Statutory construction begins, and absent a clearly expressed legislative intent to the contrary, ends, with the plain language of the statute. *Bread Political Action Comm. v. FEC*, 455 U.S. 577, 580 (1982). A term otherwise undefined in a statute is given its ordinary meaning. *Taniguchi v. Kan Pac.*

Saipan, Ltd., 566 U.S. 560, ____, 132 S. Ct. 1997, 2002 (2012).

The Section 213(b) exemption at issue here exempts from overtime pay "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements . . .." 29 U.S.C. § 213(b)(10)(A). To be exempt, under any plain reading of the three positions in that Section, one must be engaged primarily in one of two duties: selling automobiles, trucks, or farm implements; or servicing automobiles, trucks, or farm implements.

Service advisors are not selling cars. Assuming for the moment then that a service advisor is a salesman,[2] Petitioner must acknowledge that a service advisor is not "servicing" a car like the partsman or mechanic. When the partsman and mechanic complete their work on a car with faulty brakes, the car is repaired. When the service advisor's work is done, diagnosing that brake work is

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[2] While the duties of service advisors include sales of service, making them salesman "of a sort," *Navarro v. Encino Motorcars, LLC,* 845 F.3d 925, 931 (9th Cir. 2017), that job has additional duties that are not sales duties. *Id.* at 927. Further, some duties of the service advisor that might be considered sales of service implicate warranty work, and thus may not result in a "sale" to the customer. Therefore, the position of service advisor and that of car salesman are not coextensive.

needed, the car still does not stop. Petitioner concedes that service advisors are not *really* servicing automobiles, but rather "selling services." Pet.'s Br. at 29. Such an activity, says Petitioner, is part of the "service process." *Id.* at 28.

Although Petitioner expresses astonishment that an individual selling car servicing to customers is neither selling cars nor servicing them, *Id.* at 29, the plain meaning of those terms—selling and servicing—admits to no other plausible interpretation. Petitioner in effect wants to combine those two words to create a new category of duty, and a new exempt employee.

However, as Petitioner affirms, Pet.'s Br. at 3, 27-28, the duties covered by the Section 213(b)(10)(A) exemption are separated by the disjunctive "or," and not, as Petitioner's interpretation demands, a combination of those terms that would read "selling servicing."

For this same reason, a service advisor is *not* "functionally similar" to partsman or mechanic. *Contra Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1097 (5th Cir. 1973). It is black letter law in FLSA jurisprudence that exemptions are applied *vel non* by examination of the actual duties of a position, and not the position's title. *See e.g., Mitchell v. Lublin*, 358 U.S. 207, 213 (1959) ("Congress deemed the activities of the individual employees, not those of the employer, the controlling factor in determining

the proper application of the Act"). But comparing the tasks of the service advisor and those of the partsman or mechanic does not yield the same set of duties. The combined work of the partsman and mechanic allows a customer to drive away from the dealership in a functioning car. While some duties of the service advisor—such as evaluating a vehicle's problems—may be preparatory to that result, they do not constitute actual repair work. The service advisor is thus not "functionally similar" to the partsman or mechanic.

Petitioner claims, with some persistence, that the court of appeals determined that a service advisor falls within the "literal" terms of the exemption. Pet.'s Brief at 2, 18, 19, 20, 22, 24, 35, 37, 38, 43, 44, 46, 48, 50. That contention, however, over-eggs the pudding. In fact, the closest the court came to such a conclusion was the following statement: "We agree with Defendant that, under an *expansive interpretation* of the *literal category* of a 'salesman . . . primarily engaged in . . . servicing automobiles,' the statute *could* be construed as exempting service advisors." 845 F.3d at 936 (emphasis added).

With said qualifications the court of appeals was as much saying that, even given Petitioner's preferred construction of "servicing automobiles," service advisors would not be exempt, because that interpretation does not give the words of the

exemption their ordinary and natural meaning. *Id.* "That a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense." *Taniguchi,* 566 U.S. at ___; 132 S. Ct. at 2003 (emphasis in original) *citing Mallard v. U.S. D. Ct. for S.D. of Iowa,* 490 U.S. 296, 301 (1989) (utilizing the word's "most common meaning" and "ordinary and natural signification").

The court of appeals here determined that excluding service advisors from the reach of the Section 213(b)(10)(A) exemption is "the most natural reading of the statute." *Navarro,* 845 F.3d at 934. That is, reading the plain language of the statute and giving undefined terms their common meaning, Congress did not intend to include service advisors in the exemption.

II. THIS COURT CAN AFFIRM THE COURT OF APPEALS, WITHOUT APPLICATION OF THE "NARROW CONSTRUCTION" RULE, BY APPLYING OTHER CANONS OF CONSTRUCTION THAT PLAINLY EXCLUDE THE "SERVICE ADVISOR" FROM THE SECTION 213(b)(10)(A) EXEMPTION

Petitioner argues that the unambiguous language of Section 213(b)(10)(A) exempts service advisors from the overtime requirements of Section

7. Pet.'s Brief at 25–26. While *amicus* agrees that the language of the exemption is not ambiguous, Petitioner is wrong that the plain language of Section 213(b)(10)(A) includes service advisors.

To reach that conclusion, Petitioner engages in some linguistic sleight-of-hand. Petitioner admits that service advisors "are engaged in the selling of the servicing of automobiles." Pet.'s Brief at 29. Petitioner contends that service advisors are part of the "service process," *Id.* at 28, "dedicated to" the servicing side of the business, *Id.* at 26, and that they are "integral to the servicing process . . .." *Id.* at 42. Ergo, says Petitioner, service advisors are primarily engaged in servicing automobiles. *Id.* at 26.

Even if Petitioner's statements are true, that service advisors sell services, that they are dedicated to the servicing side of the dealership, and that they are integral to the process of servicing cars, service advisors are still not servicing vehicles, but only, as Petitioner admits, *selling servicing*.

Under traditional methods of statutory construction, it is clear that service advisors are not within the ambit of the Section 213(b)(10)(A) exemption.

A. Under The Interpretive Rule Of *Expressio Unius Est Exclusio Alterius*, The Section 213(b)(10)(A) Exemption Is Limited To Three Positions, Salesman, Partsman And Mechanic, And Two Duties, Selling Automobiles Or Servicing Automobiles, But Does Not Include Either "Service Advisor" Or The Duty Of "Selling Servicing"

The statutory construction rule *expressio unius est exclusio alterius* provides that the express mention of one thing of a type may excludes others of that type. *U.S. v. Vonn*, 535 U.S. 55, 64 (2002).

This Court has cautioned, however, that the expression-exclusion rule will not apply where indications are that passage of statutory language was likely not meant to signal exclusion of others of the type. *Id.* Similarly, the rule will not be applied to an enumerated series characterized as illustrative, rather than exclusive. *Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 80 (2002). It is further inapplicable if the enumerated series does not support, by a telling absence, an inference that the thing omitted was intentionally left out. *Id.* at 81.

> As we have held repeatedly, the canon expressio unius est exclusio alterius does not apply to every statutory listing or grouping; it has force only when the items expressed are

> members of an "associated group or series," justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.

Barnhart v. Peabody Coal Co., 537 U.S. 149**,** 168 (2003).

Section 213(b)(10)(A) identifies three positions within a car dealership: salesman, partsman, or mechanic. The Section identifies two functions or duties: selling or servicing automobiles. Both groups are "associated group[s] or series," such that the absence of another in the series, such as "service advisor," or "selling servicing," suggests that the omission was an intentional decision on the part of Congress. In this light, the fact that a service advisor is "integral" to the "service process," as Petitioner often notes, is reason to believe that Congress's choice in omitting the service advisor from the exemption was a deliberate choice.

Moreover, Congress's backtracking on the Act's total exclusion of dealership employees in 1961 lends additional credence to the view that its decision-making regarding the particulars of the 1966 amendment was deliberate. As the court of appeals noted in its first decision, the 1961 amendment exempted from the Act *all* employees of car, truck or farm implement dealerships. *Navarro v. Encino Motorcars, LLC,* 780 F.3d 1267, 1276 (9th Cir. 2015).

In the next few years, several bills regarding dealership employees were considered, including one that would have exempted only salesmen and mechanics. *Id.* Those failed. After a number of false starts in 1966, including three "final" versions, the present[3] incarnation of the exemption was passed.

Thus, from 1961 to 1966, all dealership employees, including service advisors, were exempt from the FLSA requirements. In those intervening years, numerous different bills were considered by Congress regarding dealership employees, until the passage of the final bill, which included as exempt *only* the salesman, partsman, and mechanic, and only if "primarily engaged in selling or servicing automobiles . . .".

The positions and duties identified in the Section 213(b)(10)(A) exemption were the result of much back and forth in Congress, which suggests that Congress was making definitive choices regarding the exempt status of various types of dealership employees; just the opposite of an indication that exclusions were not intentionally made. Furthermore, the language of the Section

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[3] Additional changes were made in 1974 not germane to this case. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, Apr. 8, 1974, 88 Stat. 55, 65.

makes clear that the positions and functions are exclusive, not illustrative.

As Justice Sotomayor noted at oral argument in *Encino Motorcars I*, the term "service advisor" was an established job position in 1966, one that appeared in the Dictionary of Occupations of that time. Transcript of Oral Argument at 21-22, *Encino Motorcars v. Navarro, et al.*, 579 U.S. ___ (2016) (No. 15-415). This Court presumes that Congress legislates with an understanding of current circumstances. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 343, 382 n.66 (1982). "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." *Id.*

Congress knew in 1966 that the service advisor position included duties discrete from those of salesman, partsman, or mechanic. Nevertheless, Congress did not include as exempt the position of service advisor, nor the task of selling servicing. Congress thus chose not to exempt service advisors from overtime.

The construction of the Section 213(b)(10)(A) exemption under the expression-exclusion rule reveals both that service advisors are not exempt, and that the duty that service advisors perform, namely selling servicing, is not a function subject to exempt status.

B. Under The Construction Canon Of *Reddendo Singula Singulis*, The Two Duties Of The Section 213(b)(10)(A) Exemption Are To Be Applied To Such Of The Three Exempt Positions As Are Related By Context and Applicability

Under the canon of *reddendo singular singulis*, a court can interpret a writing with a number of antecedents and a number of consequents by reference to the context and purpose of the writing as a whole. 2A N. Singer & J.D. Singer, Statutes and Statutory Construction § 47.26, at 438 (7th ed. 2007); *Sandberg v. McDonald*, 248 U.S. 185, 204 (1918).

> [The penalty provisions of the Seaman's Act of 1915] may be distributively applied and such application has many examples in legislation. It is justified by the rule of reddendo singula singulis. By it words and provisions are referred to their appropriate objects, resolving confusion and accomplishing the intent of the law against, it may be, a strict grammatical construction.

Sandberg, 248 U.S. at 204. *See also Go-Video, Inc. v. Akai Electric Co.,* 885 F.2d 1406 (1989) (under *reddendo singular singulis* maxim, a court interprets statutory passage in which antecedents and

consequents are ambiguous by reference to context and to purpose of entire act).

Petitioner claims that it is a fundamental grammatical rule that where a series of nouns face a series of gerunds as objects, each noun will link to each gerund. Pet.'s Brief at 26-27. That is, "as long as that noun-gerund combination has a sensible meaning." *Id.*

To make the exemption work for Petitioner, in order for service advisors to be exempt, they must be "salesmen . . . servicing automobiles." But that noun-gerund combination does *not* have a sensible meaning. Partsmen and mechanics do not sell cars, and salesmen do not service them. Those combinations are equally nonsensical: they are, in the words of the first decision of the court of appeals, the "meowing dog" and "barking cat" of the automobile dealership. *Navarro,* 780 F.3d at 1275.

What does make sense is to read Section 213(b)(10)(A) distributively, such that a given noun takes the appropriate object: salesmen selling automobiles; partsmen and mechanics servicing them.

III. ALTHOUGH THE COURT OF APPEALS DID NOT RELY ON IT, THIS COURT'S 70–YEAR–OLD PRECEDENT, THAT FLSA EXEMPTIONS ARE CONSTRUED NARROWLY AGAINST THE EMPLOYER, IS A VALID CANON OF STATUTORY CONSTRUCTION WITH APPROPRIATE APPLICATION TO THIS CASE, AND UNDER THAT NARROW CONSTRUCTION SERVICE ADVISORS ARE NOT EXEMPT

The court of appeals held that the Section 213(b)(10)(A) exemption applies only to those positions whose primary duties include actually selling cars or actually servicing cars. 845 F.3d at 933-34. Since service advisors do not perform those duties, they are not exempt from overtime. *Id.*

The court arrived at its holding with recourse to the statutory text alone. As the court noted, "our interpretive task could end here, with the words of the statue as commonly understood in 1966." *Id.* at 933. But in order to confirm its textual conclusion, the court analyzed the exemption under principles of statutory construction. *Id.* That analysis reinforced the court's textual interpretation: service advisors are not exempt. *Id.* at 934.

Only then, and only to address the implausibility of defendant's argument, did the court turn to the rule of narrow construction of exemptions to remedial statutes. *Id.* at 935. Said the court, "we

note that we would reach the same ultimate holding —that the exemption does not encompass service advisors—even if the rule of narrow construction did not apply." *Id.* at 935 n.14.

Under this Court's long-standing and well-settled canon of narrow construction of exemptions to remedial statutes like the FLSA, the court properly rejected Petitioner's expansive interpretation of the exemption. *Id.* at 935.

A. The FLSA Is A Remedial Statute Enacted To Eliminate Conditions Detrimental To The Well-Being Of Workers

After decades of academic research in the early 20th Century,[4] Congress concluded in 1938 that labor conditions detrimental to the minimum necessary standard for the health and well-being of workers were pervasive. 29 U.S.C. § 202(a). To eliminate those conditions, Congress passed the Fair Labor Standards Act. 29 U.S.C. § 202(b).

> The Congress hereby finds that the existence, in industries engaged in commerce or in the

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[4] *See* William G. Whittaker, Congressional Research Service Report for Congress, *The Fair Labor Standards Act: Minimum Wage in the 108th Congress* (2005), Summary.

> production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

29 U.S.C. § 202(a); *Citicorp Industrial Credit, Inc., v. Brock*, 483 U.S. 27, 36 n.8 (1987). This "minimum standard of living" at the heart of congressional concern was emphasized by the Supreme Court six years after the passage of the Act:

> [T]hese provisions, like the other portions of the Fair Labor Standards Act, are *remedial* and *humanitarian* in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.

Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590, 597 (1944) (emphasis added).[5]

Moreover, improving the plight of workers was not Congress' only concern. 29 U.S.C. § 202(a); *Citicorp Indust.,* 483 U.S. at 36-37. Congress also recognized that goods produced under substandard labor conditions result in unfair competition, and drive down wages and working conditions. *Id.,* at 36 n.8. Aside from their effect, such practices are themselves pernicious and "injurious to the commerce." *U.S. v. Darby*, 312 U.S. 100, 115 (1941).

Petitioner's *amici* claim that the broad-construction maxim of remedial statutes is flawed because it is based, so they say, on the notion that "Congress intends statutes to extend as far as possible in service of a single objective," and "at all costs." Brief for the Chamber of Commerce of the United States of America, et al. as *Amici Curiae* at at 7.

That is a non-sequitur, because construing an exemption narrowly, or requiring that an employer's assertion of an exemption be "plainly and

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[5] Since 1944, numerous courts have referenced the remedial and humanitarian nature of the Act. *See e.g.*, *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Goldberg v. Wade Lahar Const. Co.*, 290 F.2d 408, 415 (8th Cir. 1961).

unmistakably" within the exemption's terms, are not conditions that extend the Act "as far as possible." Petitioner's proffered construction of Section 213(b)(10)(A) is a case in point.

Petitioner acknowledges that service advisors sell services. Pet.'s Brief at 26. By some questionable footwork, Petitioner arrives at the conclusion that service advisors are somehow also "servicing automobiles." *Id.* But selling servicing is not the same as servicing, and "selling servicing" is not a job function identified in the exemption; nor is the service advisor, a position extant in 1966, among the exemption's enumerated jobs.

In this case, then, the canon's application is not so much a narrow reading as it is a refusal to read the exemption unjustifiably broadly. In no event is it an interpretation that "extends as far as possible."

B. This Court Has Regularly And Consistently Construed The Act's Section 213 Exemptions Against The Employer

This Court's earliest cases holding that the FLSA must be "broadly" or "liberally" interpreted, and the corollary, that exemptions to the Act be narrowly construed, were prefigured by Justice Frankfurter. *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944).

In *Addison*, citrus fruit cannery employees obtained a judgment on an FLSA claim for unpaid wages. *Id.* at 608. The court of appeals overturned the district court, and the case turned on the definition of "area of production," as that term was used in the Section 213 agricultural exemption of that time. *Id.* at 608-09. The Court reversed the court of appeals and remanded to the district court. Justice Frankfurter wrote:

> The *details with which the exemptions in this Act have been made preclude their enlargement by implication*. While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid "that *retrospective expansion of meaning* which properly deserves the stigma of judicial legislation." *Kirschbaum Co.* v. *Walling,* 316 U.S. 517, 522 (1942). To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation.

Id. at 618 (emphasis added).

There followed a series of decisions by the Court that made the point more bluntly. *See A.H. Phillips,* 324 U.S. at 493 (1945) (because the FLSA is a humanitarian and remedial law, any exemption

narrowly construed; any attempt to "extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process"); *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 517 (1950) (exemptions were "narrow and specific."); *Mitchell v. Kentucky Fin. Co.,* 359 U.S. 290, 295–96 (1959) (It is "well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed."); *Arnold v. Ben Kanowsky, Inc.,* 361 U.S. 388, 394 (1960) (Section 213 exemptions "narrowly construed" against employer); *Moreau v. Klevenhagen,* 508 U.S. 22, 33 (1993) ("well-established rule" that exemptions are narrowly construed).

Most recently, the Court has raised the "narrowly construed" rule twice. *See Christopher v. SmithKline Beecham Corp.,* 132 S. Ct. 2156, 2172 n. 21 (2012) (Court has stated that FLSA exemptions must be narrowly construed against employer and their application limited to those instances "plainly and unmistakably within their terms and spirit"); *Sandifer v. U.S. Steel Corp.,* 134 S. Ct. 870, 879 n.7 (2014) (exemptions to the Act are construed narrowly against employer asserting them). In both instances the Court provided the same rationale as to why the rule was not applicable: the "narrowly construed" rule applies to exemptions, and the issues in *Christopher* and *Sandifer* went beyond Section 213. 132 S. Ct. at 2172 n. 21; 134 S. Ct. at 879 n.7.

Petitioner's *amici* suggest that this Court has abandoned the narrowly-construed rule, and indeed claim that, after 70 years, that canon of construction was really nothing more than dicta. Chamber of Commerce Brief at 16, 18-19.

But from the earliest days of the Act, and the earliest decisions of this Court about the Act, the narrowly-construed rule has only operated as to exemptions under Section 213. So the rationale provided by this Court for not applying the rule in *Christopher* and *Sandifer* is wholly consistent with the rule's treatment in *A.H. Phillips, Mitchell*, and *Arnold.*

As such, the statement of Petitioner's *amici* that the narrowly-construed canon never "represented an essential part of this Court's holding," Chamber of Commerce Brief at 19, is a fundamental mischaracterization of the manner in which this Court has applied the canon. "*We have held* [Section 213] exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold,* 361 U.S. at 394 (emphasis added).[6]

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[6] Nor do the Courts of Appeals treat the FLSA narrowly-construed rule as dicta. *See, e.g., Marzuq v. Cadete Enters.,* 807

F.3d 431, 438 (1st Cir. 2015) (citing cases) (remedial nature of FLSA requires that its exemptions be narrowly construed against those seeking to invoke them); *Chen v. Major League Baseball*, 6 F. Supp. 3d 449, 454 (2d Cir. 2014) (exemptions must be narrowly construed and limited to such establishments "plainly and unmistakably" within exemptions' terms); *Pignataro v. Port Auth.,* 593 F.3d 265, 268 (3d Cir. 2010) (FLSA exemptions narrowly construct against employer); *Calderon v. GEICO Gen. Ins. Co.,* 809 F.3d 111, 120-21 (4th Cir. 2015) (as remedial act, FLSA exemptions must be narrowly construed against employer, and employer must prove applicability of exemption by clear and convincing evidence); *McGavock v. City of Water Valley*, 452 F.3d 423, 424 (5th Cir. 2006) (FLSA construed liberally in favor of employees, and exemptions narrowly against employers seeking to assert them); *Lutz v. Huntington Bancshares, Inc.,* No. 14-3727, 2016 U.S. App. LEXIS 3860, at *9 (6th Cir. Mar. 2, 2016) (exemption narrowly construed against employer); *Johnson v. Hix Wrecker Serv.,* 651 F.3d 658, 660 (7th Cir. 2011) (as a remedial act, FLSA exemptions are narrowly construed against employers); *Fezard v. United Cerebral Palsy of Cent. Ark.,* 809 F.3d 1006, 1010 (8th Cir. 2016) (FLSA exemptions narrowly construed to further congressional goal of broad federal employment protection, and employer must prove that exemption applies by demonstrating that employee "fits plainly and unmistakably with the exemption's terms and spirit."); *Haro v. City of Los Angeles,* 745 F.3d 1249, 1256 (9th Cir. 2014) (FLSA liberally construed in favor of employee, exemptions narrowly construed against employers, and an employee will not be exempt except if found plainly and unmistakably within the terms and spirit of the exemption; *Ellis v. J.R.'s Country Stores, Inc.,* 779 F.3d 1184, 1188 (10th Cir. 2015) (citing cases) (FLSA exemptions must be construed narrowly against employer, who must prove that employee is exempt by "clear and affirmative" evidence); *Gregory v. First Title of Am., Inc.,* 555 F.3d 1300, 1307 (11th

C. Narrow Construction Of FLSA Exemptions Is Based On The Broad Interpretation Of Remedial Statutes, A Principle Long A Part Of This Court's Interpretive Canon, And Congress Legislates In The FLSA Realm With The Narrow Construction Rule As Backdrop

i. This Court Has A Long History Of Construing Remedial Statutes Liberally

Liberal interpretation of remedial statutes by this Court has a long history—long before the enactment of the FLSA. By 1851, this Court could already state, without citation, that the Judiciary Act of 1789 was "a remedial statute, and must be construed liberally to accomplish its object." *Parks v. Turner & Renshaw,* 53 U.S. 39, 46 (1851); *accord U.S. v. Padelford*, 76 U.S. 531, 537 (1869) (The Captured and Abandoned Property Act of March 12th, 1863, "held to be remedial in its nature, requiring such a liberal construction as will give

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Cir. 2009) (FLSA exemptions are narrowly construed, and to extend exemption to employee not plainly and unmistakably within its terms is abuse of interpretive process); *Cannon v. District of Columbia,* 717 F.3d 200, 204 (D.C. Cir. 2013) (employee entitled to overtime and minimum wage unless exempt, and exemptions are narrowly construed).

effect to the beneficent intention of Congress."); *see generally* Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 Harv. Envtl. L. Rev. 199, 229 (1996) (remedial purpose canon outgrowth of 'mischief rule' where statutes enacted to remedy defects in common law); 1 William Blackstone, *Commentaries on the Laws of England*, at *86 (1765) ("Statues also are either declaratory of the common law, or remedial of some defects therein.").

Since the enactment of the FLSA, this Court repeatedly has construed other remedial statutes broadly. *See e.g., Lilly v. Grand Trunk R. Co.*, 317 U.S. 481, 486 (1943) (Boiler Inspection Act, like the Safety Appliance Act, liberally construed to effectuate prime purpose, namely protection of employees and others); *Urie v. Thompson,* 337 U.S. 163, 180-82 (1949) (humanitarian and remedial nature of the Federal Employers' Liability Act precludes restrictions on type of employee covered, degree of negligence or sort of harm and requires "accepted standard of liberal construction to accomplish those objects"); *Dennis v. Higgins,* 498 U.S. 439, 443 (1991) ([42 U.S.C.] Section 1983, as a remedial statute, "liberally and beneficently construed").

Petitioner and its *amici* portray the liberal interpretation canon and its corollary in extreme

terms, but it is an interpretive tool like any other, and one with a long history of use in this Court.

ii. Congress Has Long Been Aware Of The Court's Narrow Construction Of FLSA Exemptions, And In All The Many Revisions Of The Act Since *A.H. Phillips* Never Rejected That Interpretation

Since this Court's decision in *Addison* in 1944, and certainly since the *A.H. Phillips* ruling the following year, Congress has been on notice that this Court construes the FLSA broadly to effectuate the law's remedial and humanitarian goal, and consequently that exemptions from the Act must be narrowly drawn.

Congress has amended the FLSA numerous times since 1944, including the two revisions in 1961 and 1966 germane to this case. But Congress has never amended the Act to foreclose either the broad interpretation of its provisions or the narrow construction of its exemptions. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

Given this Court's long-standing construction of the FLSA broadly as a remedial statute, and its consequent narrow drawing of exemptions from the

Act, and Congress's subsequent amendment of the Act without rejection of that interpretation, Congress has adopted that interpretation. *See U.S. v. Johnson,* 481 U.S. 681, 688 (1987) (Congress did not change Court's interpretation of Federal Tort Claims Act in the 40 years since initial decision, though it had "ready remedy" to resolve incorrect construction.).

This conclusion is all the more powerful because for decades before *Addison* and *A.H. Phillips*, and before the enactment of the FLSA, the Court construed remedial statutes liberally. *See supra*, Section III(C)(1). Indeed, because of that history, and because of the congressional findings and statement of policy that led to the FLSA's enactment, 29 U.S.C. § 202(a) & (b), one may conclude credibly that Congress had the liberal-construction canon in mind from the Act's inception.

D. If Section 213(b)(10)(A) Is Construed Consistent With The Remedial Law Canon, A Service Advisor Is Not Exempt From Overtime

The court of appeals found that the plain language of the Section 213(b)(10)(A) exemption excludes service advisors from its ambit. It goes without saying that a narrow reading of the exemption would not include service advisors.

But it is not so much a narrow drawing of the exemption that is called for, as it is refraining from a broad construction: Petitioner's interpretation seeks to include a job position not identified in the exemption performing a set of tasks not enumerated. Service advisors are *not* persons "plainly and unmistakably" within the terms of the Section 213(b)(10)(A) exemption.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

MICHAEL L. FOREMAN
Counsel of Record
PENN STATE LAW CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd.
Suite 118
University Park, PA 16803
(814) 865-3832
mlf25@psu.edu

JAMIE GOLDEN SYPULSKI
LAW OFFICE OF JAMIE GOLDEN SYPULSKI
150 North Michigan Ave.
Suite 1000
Chicago, IL 60601
(312) 332-6202

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