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IN THE SUPREME COURT OF THE UNITED STATES

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ENCINO MOTORCARS, LLC,)
 Petitioner,)
 v.) No. 16-1362
 HECTOR NAVARRO, ET AL.,)
 Respondents.)

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Washington, D.C.

Wednesday, January 17, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

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

JAMES A. FELDMAN, Philadelphia, Pennsylvania; on behalf of the Respondents

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 16-1362,
5 Encino Motorcars versus Navarro.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

9 MR. CLEMENT: Mr. Chief Justice, and
10 may it please the Court:

11 Service advisors are salespeople
12 primarily engaged in servicing automobiles.
13 Service advisors are plainly salespeople, and
14 what they sell and what they are primarily
15 engaged in is the servicing of automobiles.

16 Thus, Respondents and the nation's
17 100,000 service advisors come within the
18 literal disjunctive text of the FLSA exemption
19 for any salesman, partsman, or mechanic
20 primarily engaged in selling or servicing
21 automobiles, trucks, or farm implements.

22 That is --

23 JUSTICE GINSBURG: Is -- is there any
24 other category that -- the statute lists three
25 categories: Salesmen, partsmen, and mechanics.

1 And you say the service advisor is --
2 should fit under salesmen. Is there any other
3 person that's not specifically enumerated
4 that's subsumed under one of these categories?

5 MR. CLEMENT: There -- there is,
6 Justice Ginsburg, if what you mean is sort of
7 an occupation that was well understood at the
8 time that Congress passed this exemption in
9 1966. The example would be automobile body
10 repairmen. It was treated as a separate
11 category, for example, in the Occupational
12 Outlook Handbook that my friends on the other
13 side like so much, but yet the -- the Labor
14 Department has consistently treated repairmen
15 in the body shop as covered by the exemption,
16 just like mechanics in the service shop.

17 So I think that goes a long way to
18 showing that it's not like Congress was
19 consulting this handbook at all or had this
20 conception that it was going with a
21 three-to-three correspondence with existing
22 occupations and what it was trying to capture
23 in the statute.

24 JUSTICE KAGAN: Mr. Clement --

25 JUSTICE SOTOMAYOR: How about --

1 JUSTICE KAGAN: -- you said the
2 literal meaning. And you have some good
3 arguments, but I have to tell you I don't think
4 that that's the best one of them.

5 Just if you think of what servicing
6 means -- this is one dictionary, but basically
7 all dictionaries say the same thing -- it means
8 to perform services of maintenance, supply,
9 repair, installation as to service a car.

10 So it actually means to do the work,
11 to do the repair, to do the maintenance -- I
12 think would be the most ordinary understanding
13 of what servicing means.

14 So it does seem as though, for all the
15 arguments that you do have, that one cuts
16 against you, that, you know, just the ordinary
17 meaning of what it means to be engaged in
18 servicing automobiles is to be repairing,
19 maintaining, fixing cars.

20 MR. CLEMENT: Well, Your Honor, I
21 mean, I'd love to talk to you about some of the
22 other arguments you seem to like better, but
23 let me try to push back a little bit on this
24 one, which is I'm the -- the first to admit
25 that servicing in some statutes can have a

1 relatively narrow compass and includes only,
2 you know, essentially turning the wrenches
3 yourself.

4 But in other contexts, it can have a
5 broader meaning, supplying the service,
6 providing the service. And here we know that
7 Congress used the term in that latter, broader
8 sense, because of the inclusion of partsmen,
9 because partsmen are not engaged in getting
10 under the hood and turning the wrenches.

11 The best place to look at what a
12 partsman does is the Labor Department
13 regulation that's been on the books since 1970.
14 It specifically talks about what a partsman is
15 primarily engaged in, and that is the
16 requisitioning, stocking, and dispensing of
17 parts.

18 JUSTICE KAGAN: So I -- that is one of
19 the better arguments, I think, is what -- what
20 "partsman" is doing in this, but I think I'm
21 still suggesting, before we get on to that,
22 that if you took partsman out of this statute,
23 I don't really think that you'd have a leg to
24 stand on here, that we would just naturally
25 mean, well, servicing automobiles is like

1 fixing them.

2 And what -- and the service providers,
3 they have something to do with servicing, to be
4 sure, but they're not doing the servicing.
5 What they're doing is selling service products.

6 MR. CLEMENT: Well, Your Honor, I
7 think if "partsman" were not in the statute, I
8 would have a weaker argument. I think I still
9 might have a leg to stand on, especially if
10 there were four decades of industry reliance on
11 a position.

12 But I do think that the partsman can't
13 be ignored and I do think it's actually a
14 mistake to sort of look at servicing in
15 isolation from the inclusion of partsmen in the
16 statute because --

17 JUSTICE GINSBURG: But if we look --
18 if we look, Mr. Clement, at how partsmen got in
19 there, I mean, there is the legislative history
20 that Senator Bayh said the partsmen are woken
21 up at 4 in the morning because some piece of
22 farm equipment needs to be repaired. And then
23 there was somebody else who backed that up. So
24 those senators at least thought of the partsman
25 as somebody who would work irregular hours.

1 Now, they may not have -- they may
2 have been talking about a specific category of
3 partsmen, the ones -- ones who attend to farm
4 equipment, but they use -- the statute uses the
5 general title.

6 MR. CLEMENT: Well, it does more than
7 use the general title, Justice Ginsburg. It
8 also -- I think there's no argument that the
9 statute only covers farm implement partsmen.

10 Based on its disjunctive structure, it
11 certainly covers, I think, automobile partsmen
12 and partsmen at a truck dealership. And I
13 think equally importantly, it covers it without
14 regard to whether they work outside or have
15 unusual hours.

16 And so I think what you have here is a
17 classic example of where Congress was impelled
18 to include partsmen in the statute based on
19 some very specific concerns of specific
20 senators about farm dealer partsmen, but then
21 they expanded the statute quite a bit more
22 substantially to cover all of the partsmen.

23 One other just footnote on that piece
24 of the legislative action, I think it's
25 actually interesting that when Congress first

1 proposed adding partsmen, they proposed adding
2 partsmen who were selling or servicing farm
3 implements.

4 And so I think what that shows is that
5 Congress may have actually had with selling or
6 servicing not necessarily two siloed,
7 disjunctive terms but sort of the broader
8 process of selling or servicing, because I
9 don't think partsmen ever sold the farm
10 implements themselves.

11 JUSTICE KAGAN: One of the amicus
12 briefs talks about what partsmen did
13 historically and makes the case that what
14 partsmen did when this statute was passed is a
15 little bit different from what -- or a lot
16 different from what a partsman does now, in the
17 sense that when this statute was passed, there
18 were not readily available, ready-made,
19 off-the-shelf parts. And what partsmen really
20 did was kind of get under the hood and try to
21 strip engines and play with the parts and
22 adjust parts. And, you know, it was very much
23 more part of the repair process than somebody
24 who was taking things off the shelf.

25 MR. CLEMENT: Justice Kagan, I know

1 there's an amicus brief that says that. I
2 think -- you know, we're here to ask you to
3 mostly look at the plain text of the statute,
4 but if you're interested in looking at
5 something, I do think that occupational
6 handbook from 1966 has a couple of pages about
7 what partsmen did back then, and I don't think
8 it really maps up with what the -- the amicus
9 brief says, which is to say, even back in 1966,
10 sure, there might be an occasion on which they
11 had to fix some part or got under the hood, but
12 in the main, what they did then is exactly what
13 the Labor Department identified, which is
14 they're behind the counter, they're making sure
15 that when you do a repair and you need a new
16 spark plug or a new fan belt, that they
17 actually have it in stock.

18 And that is, I think, classically what
19 a partsman does. I don't think that it really
20 puts them really in the same place as the
21 mechanics. I mean, it's interesting, if you
22 want to look at those photos at the back of the
23 red brief that come from that occupational
24 handbook, I think it's telling that the service
25 advisor and the mechanic are the two photos

1 where the hood's up. The -- the counterman,
2 partsman, he's behind the counter, which, you
3 know, I don't mean to say that's where he or
4 she belongs, but that is where they typically
5 are, and it's pretty far removed from the
6 action, which is why I think the partsmen
7 really are the clue to interpreting this
8 statute to have this broader compass of
9 services.

10 JUSTICE KAGAN: So can I try a
11 hypothetical on you? And the hypothetical
12 statute is designed to match this one in
13 structure and -- and -- and to present the same
14 question. So here's the language: Any
15 salesman, designer, or seamstress primarily
16 engaged in selling or making dresses. All
17 right?

18 So there we -- we know the seamstress
19 is involved in making dresses. We know the
20 salesman is involved in selling dresses. The
21 designer is the partsman. And you could say,
22 look, the designer, they're not actually
23 sitting there with the needle, but they're
24 still sort of making the dresses. That's the
25 partsman.

1 And then the question is, would you
2 really say that the salesman is making the
3 dresses, too?

4 MR. CLEMENT: I'm not sure I would,
5 Your Honor, but I think there are reasons for
6 that, which is I think making dresses is a
7 narrower term, frankly, than servicing. I
8 think servicing is a broader term.

9 I also think that designers are,
10 frankly, more integral to the making of the
11 dresses than the partsman is to any kind of
12 narrow concession of services --

13 JUSTICE BREYER: That is exactly why
14 I've -- I was interested. You said you're
15 primarily relying on literally.

16 Well, I think in 10 minutes the two of
17 us could think of hundreds of examples maybe,
18 or at least 50, where just, look, any
19 seamstress or customer who makes or wears
20 dresses.

21 Hey, they don't mean the seamstress
22 who wears dresses. They mean the customer who
23 wears dresses and the seamstress makes the
24 dresses. Any professor or student who teaches
25 or learns at this university, they don't mean

1 the professor who learns at the university.
2 They mean the professor who teaches and the
3 student who learns.

4 Any salesman who -- what's the word,
5 you know, sells or -- sells cars or -- we --
6 you see the -- but I think there's so many
7 examples like that, that that seems to be the
8 natural meaning. You have two words over here
9 that are verbs, two words over here that are
10 nouns. The first seems to go with the first,
11 the second with the second.

12 And if I just gave you this and you
13 knew nothing else about it and you were just
14 looking at the literal words, I would have
15 thought on a bet you would have said that's the
16 interpretation.

17 MR. CLEMENT: Well, Justice Breyer,
18 there's a couple of things. Most of the
19 examples that you are suggesting, I think, have
20 a two-to-two correspondence --

21 JUSTICE BREYER: Yeah.

22 MR. CLEMENT: -- not a three-to-two
23 correspondence. And I do think that makes a
24 big difference in the real world.

25 The second thing is I do think, I

1 mean, I'm not here to tell you that there
2 aren't disjunctive series followed by
3 disjunctive series where you do have matching.

4 JUSTICE BREYER: Yeah.

5 MR. CLEMENT: Now, I think often that
6 is because the matching really excludes the
7 other cases or produces a null set. I think it
8 also depends a little bit on sort of what's
9 going on.

10 With your professor and student
11 hypothetical, if you do, you know, if that was
12 all tethered to a requirement as to who gets
13 issued a library card, if you had a professor
14 who was sort of visiting that semester and only
15 learning and not teaching, would they really
16 deny him a library card?

17 JUSTICE BREYER: No, no. Okay.

18 JUSTICE KAGAN: But, Mr. Clement --

19 JUSTICE BREYER: But then you go to
20 her second point, which the second point was
21 what about the purposes as Congress reveals
22 them?

23 JUSTICE KAGAN: Could we --

24 JUSTICE BREYER: You can see in the --
25 sorry?

1 JUSTICE KAGAN: Could I ask your
2 indulgence --

3 JUSTICE BREYER: Yeah.

4 JUSTICE KAGAN: -- just before you
5 talk about purposes?

6 Just, you know, my -- what my
7 hypothetical was designed to do, and I came up
8 with a bunch of them and I'll spare you --

9 (Laughter.)

10 MR. CLEMENT: Thank you.

11 JUSTICE KAGAN: -- is to have a
12 three-to-two correspondence. Your answer back
13 to Justice Breyer was right away: Well, your
14 hypotheticals have a two-to-two correspondence
15 and that's different.

16 My hypothetical had a three-to-two
17 correspondence and you had to do a little bit
18 of stretching to get one of the -- the middle
19 term in.

20 But the question is does that force
21 you to stress -- to stretch so much that you
22 get the first term in, when the first term
23 pretty naturally pairs with the other, with the
24 -- with the selling word, and that's what
25 you're asking us to do.

1 And I think to put the point more
2 generally, the fact that you have to do a
3 little bit of stretching to get partsmen in
4 does not compel you to do a lot of stretching
5 to get salesmen in.

6 MR. CLEMENT: But, Justice Kagan, and
7 I -- I want to try to get back to the purpose
8 of questions, but I do think that the degree of
9 stretching you have to do to get partsmen in is
10 not a significant difference between how much
11 stretching you have to do to get the service
12 advisors in.

13 And I think that's really the key. I
14 mean, maybe in your hypothetical, which you
15 designed a lot of them and you probably gave me
16 one of the best ones, and I think that's
17 because --

18 JUSTICE KAGAN: Now you're daring me.
19 (Laughter.)

20 MR. CLEMENT: Well, no, no, but -- but
21 -- but I take it that because you really
22 thought there was a big gap between the
23 designers and the salespeople in terms of the
24 stretching. And I just don't think that's the
25 case with the partsmen. And I really do think

1 -- I mean, the partsmen, I mean, God love the
2 partsmen, but they're pretty far removed from
3 the action of turning the wrenches.

4 I actually think that if you did an
5 empirical test as to who got under the hood
6 more often, the service advisors would win.

7 JUSTICE GORSUCH: Mr. Clement --

8 JUSTICE GINSBURG: Well, why can't you
9 say that this, the partsmen, they're exempt
10 because Congress put them there specifically
11 and you don't have to match them with anything.
12 Congress may have been overbroad because they
13 started with the farm equipment people.

14 So, if we just look at the two others,
15 why should we stretch service advisor to come
16 within the mechanic who's actually servicing
17 when we know that the service advisor doesn't
18 even possess the skills to be engaged in
19 servicing?

20 MR. CLEMENT: So, Justice Ginsburg, I
21 don't -- I don't think the service advisor is
22 differently situated from the partsman in terms
23 of having the skills to go under the hood and
24 turn the wrenches himself or herself.

25 I think, as to the answer to your

1 question about why don't we just say, hey, the
2 partsmen are in because the partsmen are in,
3 because the structure of the statute doesn't
4 let you say just the partsmen are in. The
5 partsmen are in because they are primarily
6 engaged in selling or servicing automobiles.

7 Now, I take it that the partsmen don't
8 sell the automobiles, so they must be in either
9 because selling or servicing is just sort of a
10 catch-all that gets everything that the
11 dealership basically does, or it's because we
12 have a broad enough conception of servicing to
13 include the partsmen.

14 Now, the way that I understand this
15 Court to interpret statutes is, once you
16 interpret a statutory term to have a certain
17 breadth, I mean, that's what it has, even in
18 like Clark v. Martinez, even when you have to
19 stretch the language of the Constitution to
20 avoid a -- of a statute to avoid a
21 constitutional problem --

22 JUSTICE KENNEDY: Do you have an
23 example of a partsman that is not engaged in
24 servicing automobiles, say a partsman in
25 another office and he -- downtown from the

1 dealership, and he just picks up the phone and
2 orders parts or something?

3 MR. CLEMENT: Sure. I mean, first of
4 all, you could have a partsman who's not
5 employed by an automobile dealership at all,
6 that they're just an independent partsman or
7 they work at AutoZone or something like that.
8 I don't think they're covered by the terms of
9 the statute.

10 So I do think you have to interpret
11 the statute. So you tether partsman to a term
12 like servicing. And then, once you interpret
13 it to have a certain breadth, I don't think it
14 can shrink back down so it can be wide as to
15 partsmen but narrow as to service advisors.

16 And so I do think then the service
17 advisors do come comfortably within the text of
18 the statute, and we haven't talked about the
19 fact that for four decades they've been treated
20 that way, which I think --

21 JUSTICE KENNEDY: Well, I wanted to
22 ask you, you mentioned in your argument that
23 there's been decades of reliance.

24 If we want to adopt that argument and
25 say, well, there's been reliance here, it's a

1 close question, we're not sure, it's ambiguous,
2 what case do I cite to show that reliance bears
3 on the interpretation of the statute?

4 MR. CLEMENT: I think you'd cite,
5 among other things, you could cite the
6 Christopher case, the Christopher against
7 SmithKline case, which is another FLSA case.
8 And this Court averted to the reliance interest
9 both in deciding not to apply our deference but
10 also in interpreting the statute.

11 And I think the principle isn't, you
12 know, well, if for four decades people have got
13 it wrong, we'll get it wrong.

14 I think the principle is, you know, as
15 -- as the -- as the Seventh Circuit said in the
16 Yi case, which Christopher cited, I mean, it's
17 -- it's no mean feat to conclude that an agency
18 has been in open, notorious violation of the
19 FLSA for four decades.

20 And I think the behavior of the
21 industry is some evidence of what those terms
22 meant.

23 JUSTICE GINSBURG: The agency, as I
24 understand it, the agency gave up after two
25 circuits rejected its position. So the agency

1 acquiesced in the Fourth and Fifth Circuit
2 position.

3 But last time around, I noticed your
4 argument about the massive retroactive
5 liability. And I said, well, what about this
6 provision that says someone who relies in good
7 faith on the agency position doesn't have
8 retroactive liability?

9 MR. CLEMENT: Well, it's -- I think
10 that the issue, I'm happy to discuss that,
11 that's the Portal-to-Portal-Act affirmative
12 defense, I think our reliance on that is even
13 more complicated now because it doesn't just
14 allow for no damages when you've relied on the
15 agency in the abstract. It specifically talks
16 about relying on agency regulations.

17 So at least since 2011 when you had
18 the last change in administrative position, I
19 don't think we'd be able to rely on the
20 Portal-to-Portal Act affirmative defense to say
21 we're not subject to liability.

22 The other thing my friends on the
23 other side say is that, well, you know, there's
24 this other exemption, 207(i), that will help at
25 least those that were paid on a majority basis

1 for a commission.

2 Now, there's a couple of things about
3 that. I mean, I think the most important one
4 is there -- there -- there -- I don't know the
5 exact number, but there are a sizable number of
6 people in the industry who are paid majority
7 salary, and so they'd have to be restructured.

8 But the other thing is it's a little
9 bit rich for my friends on the other side to
10 say: Don't worry about this because of 7(i).
11 I mean, when they filed this complaint, they
12 must have had some theory as to why we weren't
13 already covered by 7(i).

14 So I think that just shows that what
15 -- what the industry has relied on for four
16 decades is not some combination of the
17 Portal-to-Portal Act in 207(i). What the
18 agency -- what the industry's relied on is the
19 idea that in this context, you know, it is this
20 exemption that exempts all service advisors,
21 not just those that are paid primarily on a
22 commission.

23 JUSTICE KAGAN: When I think of these
24 three categories of workers, so service
25 providers, partsmen, mechanics, to coin a

1 couple of silly kind of words, a service
2 advisor is customer-facing. You know, it's --
3 the -- the primary -- the primary job is to
4 deal with customers, to sell them things, to
5 liaison with them, to make sure they're happy.

6 Mechanics and also partsmen are
7 car-facing. You know, their job is to do stuff
8 with the car. And, you know, in different
9 ways, the partsmen is more helping, but their
10 -- their focus is on the automobile, whereas
11 the service provider's focus is on the
12 customer.

13 That seems to me a pretty big divide,
14 suggesting that the service providers are
15 really, you know, salesmen, not servicers.

16 MR. CLEMENT: Well, Your Honor, a
17 couple of things.

18 First of all, you probably anticipate
19 that I'm going to take you back to the partsmen
20 again because I do think describing the
21 partsmen as just vehicle-facing really
22 mis-describes what they do. And I would ask
23 you, if you have the time, to look at that 1966
24 entrance on the auto partsman counterman,
25 because what it talks about is, you know, they

1 really -- sometimes they sell direct parts to
2 retail customers. So sometimes they too are
3 customer-facing.

4 And that's all part of what they are
5 primarily engaged in, which is not just facing
6 the car. It's really their responsibility is
7 the parts, whether it's the mechanic that wants
8 the parts for a particular repair or whether
9 it's some outside customer who wants to buy a
10 part because they're a do-it-yourselfer. Now
11 -- so I really think the partsmen are in the
12 middle in a way that does really give servicing
13 a broad compass.

14 The other thing I would say is I don't
15 think you can underestimate the degree to which
16 these three occupations, especially in light of
17 the way the industry has structured itself for
18 the last four decades, really do go together.
19 There are many dealerships, as I understand it,
20 who -- essentially, the commission is a pot
21 that is shared by the service advisors, the
22 partsmen, and by the mechanics that all work at
23 some dealerships. They all get paid on a
24 commission, and it all comes out of the same
25 pot, which, of course, gets to the common sense

1 of the matter, which is, if the service
2 advisors don't do their job, there's not much
3 of a job for the partsmen or the mechanics to
4 do. There's no -- there's no work to do if the
5 service advisors --

6 JUSTICE KAGAN: Is -- is everybody
7 who's in a service department -- does everybody
8 count as primarily engaged in servicing
9 automobiles who's in a service department, the
10 receptionist, the filers?

11 MR. CLEMENT: The answer is I'm not
12 sure. I think probably not. But I also don't
13 think it matters much because, of course, to be
14 exempt, you not only have to be primarily
15 engaged in servicing, you also have to be a
16 salesperson, a partsman, or a mechanic.

17 So if you take somebody like a car --
18 a car porter, you know, are they primarily
19 engaged in servicing? I think the definition
20 of partsman is probably broad enough to say
21 yes. You might disagree with me. But, either
22 way, they're not exempt.

23 JUSTICE KENNEDY: What about an
24 automobile upholsterer?

25 MR. CLEMENT: Again, I would say that

1 that's somebody who might be primarily engaged
2 in servicing, but they wouldn't be covered
3 because they're not a mechanic, they're not a
4 partsman, and they're not a salesperson.

5 JUSTICE KAGAN: How about if the
6 service advisor --

7 JUSTICE GORSUCH: What role do -- what
8 role do the -- the three objects at the end of
9 the sentence play in your interpretation? We
10 haven't discussed those yet.

11 MR. CLEMENT: Well, I hope they play
12 this role, Your Honor, which is I think it's
13 common ground among -- between the parties that
14 those are distributed to each other noun/gerund
15 combination. So nobody's here saying, well,
16 the first goes with the first when it comes to
17 the object, so the only people that are exempt
18 are the farm dealer mechanics.

19 And I think that just shows -- it may
20 be really odd -- anything is possible, of
21 course, but it would be really odd if the way
22 you read the statute is with -- the nouns
23 vis-à-vis the gerunds, you apply this reddendo
24 principle, but with respect to the gerunds
25 vis-à-vis the objects, you apply the normal

1 "or" means "or" principle.

2 I think the real way to apply this
3 statute -- and, honestly, I think what is the
4 only thing that really ought to be left of the
5 reddendo canon is the commonsense principle
6 that when you have these disjunctive series, if
7 they combine in a way that really is something
8 like the null set, you ignore it. You don't
9 lose a lot of sleep over it, and it's fine
10 because, you know, I'm not here to tell you
11 there are mechanics who are primarily engaged
12 in selling automobiles.

13 But since there aren't any, you don't
14 really have to lose any sleep over it and you
15 shouldn't construe the statute primarily based
16 on the fact that there's a null set with one
17 combination, especially when there's 100,000
18 flesh-and-blood examples of salesmen who are
19 primarily engaged in servicing.

20 JUSTICE GORSUCH: What about our
21 narrow construction canon?

22 MR. CLEMENT: Well, that's an
23 interesting question, Your Honor. I mean, you
24 know, the Ninth Circuit applied that, and I
25 suppose that, you know, the Ninth -- the canon

1 that the Ninth Circuit applied and the one it
2 derived from one of this Court -- Court's older
3 cases talks about being plainly and
4 unmistakably within the exemption.

5 Now, I'm a big enough believer in my
6 argument here that I think maybe we even meet
7 the plain and unmistakable test, but I also
8 think, as we've urged the Court, that it may be
9 time to put that canon to rest.

10 And I'm not suggesting that the FLSA
11 should be interpreted differently from any
12 other statute. It's a general principle of
13 statutory construction that exemptions are not
14 construed to swallow the rule.

15 I think that's a perfectly sensible
16 rule of construction. But I do think to sort
17 of amp that up to the degree that it is -- has
18 to be plain and unmistakable to come within the
19 exemption really is contrary to the way this
20 Court generally interprets statutes.

21 I don't think it makes a lot of sense,
22 especially if you remember that a lot of these
23 exemptions are being passed much later in
24 history than the 1938 enactment of the FLSA.

25 So even if you accept the proposition

1 that, in 1938, Congress had an unalloyed
2 interest in being remedial in the FLSA, I don't
3 know why that would inform your interpretation
4 of an exemption enacted in 1966 for the express
5 purpose of at least having some employees not
6 covered by the FLSA.

7 And I do think that this would be an
8 odd statute to have this plain and unmistakable
9 test when it's riddled with exemptions. So, if
10 there were ever one statute where you'd say,
11 okay, Congress, yeah, it had a very important
12 purpose, it was a worthy purpose, but it didn't
13 pursue it at all costs, it would be this
14 statute.

15 If you look at 213, which has the
16 various exemptions to both the minimum wage
17 laws and the overtime laws, as I count it up,
18 there are 31 exemptions to the -- to the -- to
19 the minimum wage and overtime laws just in 213,
20 and there are other exemptions in other places
21 in the statute. So what an odd statute to say
22 that the way we're going to interpret this is
23 only with a thumb on the scale in favor of the
24 coverage and against the exemptions.

25 If there are no further questions, I'd

1 reserve my time.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Feldman.

5 ORAL ARGUMENT OF JAMES A. FELDMAN
6 ON BEHALF OF THE RESPONDENTS

7 MR. FELDMAN: Mr. Chief Justice, and
8 may it please the Court:

9 The exemption in this case is for any
10 salesman, partsman, or mechanic primarily
11 engaged in selling or servicing automobiles.
12 The most obvious reason why or the clearest
13 reason why service advisors don't come within
14 that exemption is they don't service
15 automobiles.

16 In our brief, we cite five -- I think
17 the five most authoritative dictionaries of the
18 English language, and they define "service" --
19 "to service" as to maintain or repair. You
20 maintain -- you don't maintain or repair a car,
21 in the way people would ordinarily speak, with
22 a pad or a clipboard and a pencil or a
23 telephone, which are the primary tools that
24 service advisors use.

25 You do it back in the back of the shop

1 when you're actually working on the car.
2 Service advisors don't do that and, therefore,
3 they -- they don't service cars. They don't
4 repair or maintain them.

5 CHIEF JUSTICE ROBERTS: Well, I guess
6 sometimes, though, I mean, they do look under
7 the hood sometimes, right? You bring the car
8 up, you know, it's making this noise, they go
9 out and at least listen to the noise, and
10 sometimes they can say right away: Oh, that's
11 probably this. And then they send something
12 down, and whether the customer is still there
13 or comes back later, all that they do in the --
14 the mechanics or the partsmen, send it up and
15 then plug it in and it's right.

16 So, I mean, in certain situations, the
17 advisor would play the primary role in fixing
18 the problem, not when it's more complex, maybe
19 not typically, but certainly in what I suppose
20 would be many occasions.

21 MR. FELDMAN: I -- I don't think so.
22 I mean, actually, I think what the advisor does
23 is make a guess, but really -- of what might be
24 wrong based on what the customer says. I mean,
25 sometimes the customer goes in and says: I

1 want a 20,000-mile check -- servicing. And the
2 service advisor just sends it back and says we
3 need a 20-mile -- 20,000-mile servicing. Now,
4 maybe the mechanic --

5 CHIEF JUSTICE ROBERTS: That's a
6 different -- that's a different example.

7 MR. FELDMAN: -- finds something. But
8 even --

9 CHIEF JUSTICE ROBERTS: Sometimes -- I
10 -- I guess what I'm saying, sometimes the
11 primary decision in servicing the car is going
12 to be made by the service advisor, at least the
13 initial thing. You know, send something down.

14 The -- the mechanic may well look at
15 it himself or herself, but the service advisor
16 says it's a distributor cap or whatever, and it
17 turns out it is, they put it on, and it's done.

18 MR. FELDMAN: Yeah, I -- I think
19 actually the service advisor's job -- they may
20 make a guess as to what's wrong and give the
21 customer -- say, well, it might be the
22 distributor cap. But it's up to the mechanic
23 to actually figure out what's wrong, not the
24 service advisor.

25 JUSTICE KENNEDY: Suppose the service

1 advisor meets the customer in the morning and
2 he said: I'm a service advisor. I'm here to
3 supervise and to plan the servicing of your
4 automobile. Is that correct for him to say?

5 MR. FELDMAN: I -- well, actually, I
6 don't think so. I don't think they supervise
7 the servicing of the automobile. I think they
8 serve a communications function. They don't in
9 any sense supervise the mechanic.

10 JUSTICE KENNEDY: Well, how about to
11 arrange for?

12 MR. FELDMAN: Yes, I think it is
13 correct to say they arrange for it. But I
14 think there -- there's a huge difference
15 between --

16 JUSTICE KENNEDY: But if -- if that's
17 true, it seems to me he's engaged in servicing
18 the automobile.

19 MR. FELDMAN: No, I don't think so
20 because I -- I think there's a huge difference,
21 as a matter of -- he's definitely not servicing
22 the automobile just because he's arranging for
23 it. There's many people who arrange for the
24 provision of services but don't perform the
25 service themselves.

1 If somebody is -- I will take the
2 example of some salesmen. This is particularly
3 true of the difference between sales and
4 service, which are pretty much two distinct
5 categories. If somebody's going door to door
6 and selling house painting services, says, you
7 know, do you want your house painted, that
8 person is selling and maybe arranging for
9 painting the house, but they are not painting
10 the house. If somebody's at a --

11 JUSTICE KENNEDY: But if they -- but
12 if they picked out the color and -- and -- and
13 advised all about the quality of the paint,
14 paint to use, and different costs, and
15 scheduled the timing and so forth, I think they
16 could be -- they could be supervising the
17 painting of the house.

18 MR. FELDMAN: Well, I mean, actually
19 supervising service, supervising a repair also
20 isn't the same thing as repairing. But I do
21 think that it's quite clear, and you can look
22 at the machinist's brief, these people in no
23 sense supervise the mechanics. They tell the
24 mechanics what the problem is and what the
25 customer wants and it's primarily to serve as a

1 communication link. It's up to the mechanic or
2 whoever else working is working on it in the
3 back to figure out what to do.

4 CHIEF JUSTICE ROBERTS: Well, but, I
5 mean, just in -- and maybe this isn't the best
6 guide to the interpretation, but it's sort of
7 common understanding if you over several years
8 dropped your car off whenever you're supposed
9 to or whenever it's broken and -- and you talk
10 to Fred about getting it fixed, and -- and
11 somebody comes to you later and says something
12 -- I've got a problem with my car, you would
13 say my service guy is Fred, go see him.

14 It's just sort of your general
15 reaction is that is part of the service -- not
16 only that, it's the part, the only part that
17 you have experience with. But you would think
18 of Fred as the person who services your car,
19 no?

20 MR. FELDMAN: I -- I -- I -- I would
21 just respectfully disagree. I actually think
22 --

23 CHIEF JUSTICE ROBERTS: It's
24 different, go to different shops, I guess?

25 MR. FELDMAN: I -- I think you would

1 -- I think you would think of Fred as the
2 person you would give the car to. The person
3 to service is to maintain a repair, and the
4 person in the back who actually works on the
5 car is the person who services the car.

6 JUSTICE BREYER: You can read it that
7 way. I have no doubt that might even be the
8 most natural reading. Suppose the word were
9 involved in instead of engaged in?

10 MR. FELDMAN: Involved in would bring
11 it much closer and actually --

12 JUSTICE BREYER: Yeah, it would. And
13 so what we're doing is we're trying to parse
14 the difference between "engaged in" and
15 "involved in" in a fairly technical statute
16 involving one of 40,000 different kinds of
17 workers as part of a very general statute.

18 Now, that to me rings a bell that if
19 this isn't a question for an agency, what is?

20 Now, all right. So, if I'm thinking
21 that, maybe no one else is, I'm only speaking
22 for myself, I was sort of surprised that nobody
23 in the Ninth Circuit referred to a doctrine
24 that nobody refers to anymore. It's called
25 primary jurisdiction. And it can be used to

1 ask the relevant department to file a brief,
2 and nobody did that.

3 MR. FELDMAN: No.

4 JUSTICE BREYER: Now, suppose I --
5 suppose -- suppose I -- I think, gee, I don't
6 know the answer to this question. It's highly
7 technical. I do look to purpose. The purpose,
8 apparently, was that they put these mechanics
9 in there because they had farm equipment
10 somewhere, that people go in the middle of the
11 night, so they didn't have fixed hours.
12 Whether that was so or not, I don't know.

13 And maybe the service person would
14 call at 2 in the morning and tell the farmer
15 he's coming, in which case he doesn't have
16 fixed hours, so he should be exempt too.

17 I don't know. So suppose I start --
18 you see the attitude? Have you any advice for
19 me at all?

20 MR. FELDMAN: Yeah, I do.

21 (Laughter.)

22 MR. FELDMAN: In the first place, if
23 you look at the -- if you look at the car
24 dealership, it's not the case that there are
25 three main people in the car dealership: The

1 salesmen, the partsmen, and the mechanics.

2 JUSTICE BREYER: Uh-huh, uh-huh.

3 MR. FELDMAN: There's salesmen who
4 sell financing, insurance, and warranties.
5 There -- not cars.

6 There's salesmen who sell underbody
7 coatings and other accessories like that.
8 There's lube technicians. There's body people
9 who work on painting, on upholstery, on body
10 repairs. There's car jockeys. There's
11 dispatchers who allocate the work. So there's
12 many different people who work at a car dealer.

13 Congress picked out only three and
14 they picked out those three for a particular
15 reason. And if you look at actually the things
16 that we cite, all three of those share
17 something in common, and service advisors not
18 only don't share that but have a different
19 quality that makes them much more likely to be
20 in the statute.

21 JUSTICE BREYER: Well, if the
22 mechanics are in there because they did call
23 farmers at 2 in the morning, did the service
24 advisor call the farmer too?

25 MR. FELDMAN: There's -- as far as I

1 know in the history of the auto industry --

2 JUSTICE BREYER: No?

3 MR. FELDMAN: -- there's never been an
4 example of a service advisor who worked off
5 site and probably very rarely, if ever,
6 irregular hours. Those were the keys to why
7 Congress wanted partsmen and mechanics in
8 there.

9 They're also clearly the most
10 important reason why they wanted salesmen in
11 there, because salesmen in those days and still
12 today at luxury dealerships, I'm told, salesmen
13 will come and bring the car to you to go take a
14 test drive. And car salesmen --

15 JUSTICE GINSBURG: How about Congress
16 got it wrong in what they perceived the
17 partsman job was? They were right about the
18 partsman who work on farm equipment, but they
19 were wrong about the partsman who work on
20 automobiles, who works regular hours.

21 MR. FELDMAN: I don't think they were
22 wrong. I think what they decided is they
23 wanted to include partsmen and mechanics, who I
24 think reasonably are both said to be servicing
25 cars, and they then decide to include the whole

1 categories and not just limit it to -- to farm
2 implements or a particular kind of mechanic or
3 partsman, as long as they're servicing cars.
4 That was the limitation.

5 JUSTICE KAGAN: But your definition of
6 servicing, which I think is a very natural one,
7 I mean, and not just, you know, natural, it's
8 the dictionary definition of servicing, but it
9 has to cope with this partsmen word.

10 How does -- how do partsmen fit within
11 your definition of servicing?

12 MR. FELDMAN: Well, I do -- I think
13 partsmen are reasonably said to be servicing
14 cars. If the mechanic is -- needs a fan belt,
15 is working on a car and walks over two steps or
16 five steps or 10 steps to pick up a fan belt
17 off the wall and bring it back to the car, I
18 think the mechanic is that whole time repairing
19 or maintaining the car.

20 And what the partsman is doing is
21 taking over a function, one part of the
22 function of what the mechanic does, and instead
23 the partsman's doing it. And that's why it
24 works very closely, as we talk about in the
25 brief, they work very closely with parts --

1 with mechanics. They try to get the parts to
2 them in the order in which they need them on
3 complex repairs and so on.

4 And I think that it's very reasonable
5 too. And -- and I guess also a car is nothing
6 but the sum of its parts. And for all those
7 reasons I think it's very reasonable to say
8 that they are servicing cars.

9 CHIEF JUSTICE ROBERTS: Well, but
10 diagnosis is part of the servicing as well, and
11 the service advisors at least do that. I mean,
12 the mechanic isn't going to know what -- he
13 needs to know what the problem is. And the
14 service advisor will spend a fair amount of
15 time trying to get a description from the
16 customer -- sometimes it's easy, you know, the
17 -- the car won't start. Other times, it's --
18 it's -- it's -- it's going to be harder, and
19 they need to get a good description.

20 You know, is the -- is the -- the --
21 the person who takes down your symptoms at the
22 doctor's office before the doctor comes in, is
23 -- is she or he part of the medical treatment?

24 MR. FELDMAN: I -- I think actually
25 the relevant question is, is he or she

1 providing the treatment? And I would say no.
2 They're giving an initial guess.

3 CHIEF JUSTICE ROBERTS: No, no, the
4 statute talks about being engaged in. So is
5 that person engaged in the medical treatment?

6 MR. FELDMAN: I don't think he's
7 engaged in treating. He -- he may be -- may be
8 a part of the process of --

9 CHIEF JUSTICE ROBERTS: I guess maybe
10 it's the --

11 JUSTICE KENNEDY: But the dictionary
12 definition of engaged says to do or take part
13 in something.

14 MR. FELDMAN: Right. And -- and, you
15 know, there is, as far as engaged in goes, this
16 Court has, I mean, I actually did a Lexis
17 search, and this Court does -- has used the
18 term 500 times. It's used about 2,000 times in
19 the U.S. Code.

20 It's used in the FLSA. In actually
21 one of the provisions, in 2 -- 213(d) in the
22 same statute, it's engaged in the delivery of
23 newspapers. It's an extremely common word.

24 And I can't find any instance in which
25 any court has ever construed it to mean

1 anything other than what Black's Law Dictionary
2 says, which is to do something customarily or
3 regularly or continually.

4 It doesn't mean doing something that's
5 ancillary to that activity. So if you're --
6 203(d) talks about engaged in the delivery of
7 newspaper, and there's an exemption for people
8 like that.

9 If you're calling somebody up on the
10 phone and saying: Would you like your home
11 delivery of your newspaper, I don't think that
12 person is covered under that provision. And if
13 this Court were to construe "engaged in" to be
14 a term of breadth like that in this case, I
15 think it would actually upset a lot of settled
16 expectations across broad areas of the law.

17 When Congress wants to include --
18 wants to broaden out a term, it uses terms like
19 necessary and -- consequent and necessary to,
20 which -- I'm sorry, necessary and incidental
21 to, which it uses in a couple of the FLSA
22 provisions that we cite, or it uses terms like
23 "the process of," which it uses regularly
24 throughout the U.S. Code.

25 But I don't think there's any basis to

1 take in this statute, which is very, actually,
2 finely written, to take the word servicing or
3 engaged in servicing and say: Well, no, no,
4 they mean something, like, in the criminal law,
5 you might say someone is an accessory before
6 the fact if they helped the crime before it's
7 committed or after the fact if they help it
8 afterwards.

9 I don't think -- but -- but in the
10 criminal law, actually, if you didn't have 18
11 U.S.C. Section 2, which made those people
12 liable as principals, they wouldn't be liable
13 for the crime.

14 And I do think it's the same principle
15 here. When they're talking about engaged in
16 servicing, they're talking about the people who
17 service, not the people who I would concede do
18 things that are necessary and incidental to the
19 servicing. There's many people who do that.

20 JUSTICE KAGAN: Mr. Feldman, when you
21 talked about the purposes, you focused on the
22 fact that service advisors work on-site and
23 don't work irregular hours.

24 I believe that Mr. Clement's argument,
25 and he'll correct me if I'm wrong, focuses on

1 the fact of commissions, that these people,
2 like other kinds of salesmen and like
3 mechanics, are often compensated through
4 commission schemes.

5 What about that?

6 MR. FELDMAN: I -- I think that
7 commissions are actually completely irrelevant
8 to this provision. There's many other people
9 at the car dealership, including some -- many
10 of the ones who I mentioned who are paid on
11 commissions, who are not exempt. There's many
12 people at car dealerships and throughout the
13 economy who are exempt and who are not paid on
14 commissions.

15 In fact, if -- where Congress was
16 interested in commissions as a basis for an
17 exemption, they provided one in 207(i). If
18 you're paid more than 50 percent on commissions
19 and you make more than one and a half times the
20 minimum wage, then you can get -- you can be
21 exempt under that provision.

22 It is possible that at least going
23 forward -- and I would correct my friend -- at
24 the time of the complaint, one thing that was
25 true here that's alleged in the complaint is

1 that the dealership was not, up until recently,
2 it says, keeping track of the time and the
3 hours spent.

4 So, actually, they would have had a
5 hard time keeping track -- even though they're
6 required by law to do that, they would have had
7 a hard time keeping -- making out the 207(i)
8 exemption. But -- but going forward, it may be
9 in this case that these people are covered by
10 207(i).

11 You know, they're -- as far as the
12 reliance interest that my friend mentioned, I
13 actually think the reliance argument cuts
14 exactly the other way. In -- when this Court
15 had the case before, they were -- the question
16 that the Court said it was interest -- it was
17 concerned with about reliance was whether the
18 19 -- people had been relying on the 1978 DOL
19 letter and whether the agency in 2011 was
20 required to give some explanation of why it
21 changed its mind.

22 That's actually -- so that question is
23 no longer in the case. The regulation, the
24 Court said, is not controlling here.

25 But what has happened is, in 2011, DOL

1 did tell everybody that it thought service
2 advisors are not exempt from the -- from the --
3 are not exempt. And in 2015, the Ninth Circuit
4 decided a case. In 2016, about two years ago,
5 this Court remanded the case to the Ninth
6 Circuit.

7 By that time and long before that,
8 probably from 2000 -- in fact, I know from 2011
9 on, dealerships were being informed that
10 service advisors -- advisors might well be
11 covered here and that there is -- they might --
12 you might -- they might be entitled to
13 overtime. And it was certain --

14 JUSTICE KENNEDY: Well, could you add
15 to that, or correct me if I'm wrong, that in
16 the two circuit cases that ruled against the
17 FLSA, the government had taken the opposite
18 position?

19 MR. FELDMAN: That's right. That's
20 right. But I -- I think my point about
21 reliance is if you actually -- there's a
22 two-year statute of limitations here.
23 Everybody has known since 2011, and certainly
24 since two years ago when this Court decided the
25 case last time, that there -- that these people

1 might be entitled to overtime.

2 There -- as far as I can tell, there's
3 been two cases at most, and I'm not sure about
4 both of them, one in the District of Arizona
5 and one in the Western District -- I think it's
6 the Western District of New York, that have
7 been filed claiming that service advisors are
8 entitled to overtime. That's it, two cases.

9 So I think that in the -- the logical
10 inference to be drawn is that most
11 dealerships -- some dealerships are probably
12 paying overtime right now to service advisors.
13 In fact, I know that some are. Some
14 dealerships -- many, many dealerships, probably
15 the vast majority of them, have made -- have
16 arranged things so they come within the 207(i)
17 exemption.

18 And the reliance now, what really is
19 -- what -- what this case easily could be about
20 is whether dealerships can stop paying overtime
21 to people whom they're currently paying and
22 whether dealerships can change the terms of
23 their arrangements with service advisors so
24 that the people who have -- have been coming
25 under 207(i), they can -- they don't have to

1 comply with the limitations of 207(i). They
2 don't have to comply with the minimum -- one
3 and a half times the minimum wage and so on.

4 JUSTICE GINSBURG: Mr. -- Mr. Feldman,
5 I -- I don't understand from what you said
6 whether you are disagreeing with me that there
7 would be no retroactive liability because
8 employers relied in good faith on what had been
9 the agency's position.

10 MR. FELDMAN: The -- I -- I agree with
11 you that would -- there could be good-faith
12 reliance that -- in this case, I think there
13 would be good-faith reliance up until 2011.
14 Then the complaint here was filed in 2012. So
15 we would -- could only go back as far as 2011.
16 There would be good-faith reliance.

17 But the point is that isn't going to
18 be relevant to future cases. There's only two
19 cases, I think, as far as I'm aware. Maybe
20 there's another one that I haven't been able to
21 find, but I've tried to look for them.

22 There's only two cases currently
23 pending, but I think really the Court should be
24 very careful about giving a lot of weight to --
25 to claims of reliance where what well might be

1 happening is people are paying overtime and
2 bringing their service advisors in 207(i) and
3 what they really want to do is stop paying the
4 overtime and stop bringing their service
5 advisors within 207(i).

6 And so I don't think the -- the
7 reliance issue that my friend discussed, I just
8 don't think that's a reason to decide the case
9 that way.

10 JUSTICE KAGAN: Mr. Feldman, the
11 Solicitor General is not here in a case in
12 which one would expect the government to be
13 here. Do you know whether there's any activity
14 taking place in the Department of Labor with
15 respect to this issue?

16 MR. FELDMAN: I don't know. I -- I
17 just don't know about that.

18 Yeah, I would make one -- one other
19 point about the purpose -- the purposes of the
20 statute. So one of them was, these three
21 people and especially auto salesmen, which is
22 where -- what Petitioner says the service
23 advisors are, the three categories that
24 Congress included are people who work irregular
25 hours and off-site where it's hard to keep

1 track of people's hours.

2 Now, the service advisors have a
3 different -- another feature. First of all,
4 they never work off-site. They rarely work
5 irregular hours. But there's another feature
6 of how they work that cuts in the opposite
7 direction.

8 The complaint in this case alleges
9 that service advisors -- the service advisors
10 in this case work 55 hours a week. Now, what
11 Congress wanted to do in the Fair Labor Act was
12 to set minimum standards of working conditions.
13 And at the very least, they did -- they thought
14 that should be 40 hours a week and that should
15 be basically what people are expected to work.

16 Now, mechanics and partsmen, as well
17 as, you know, warranty salesmen, lube
18 technicians, all the other people at the auto
19 dealership work an occasional overtime hour,
20 but these people, this is their standard week
21 after week, regular hours, 55 hours.

22 Congress when it -- Congress, in the
23 FLSA, thought that that was -- that was the
24 kind of thing they didn't want to have happen
25 and, particularly because there was a second

1 purpose of the maximum hours of the overtime
2 requirement, which is they wanted the people
3 who are -- instead of employing somebody for 55
4 hours, they wanted to say: Well, go hire
5 somebody else to fill in that extra time,
6 because they wanted to expand employment
7 opportunities at the same time as they were,
8 you know, legislating in favor of --

9 JUSTICE KENNEDY: Well, but if -- if
10 you have a service advisor in the morning and
11 then a different one in the afternoon, that's a
12 completely different -- changed dynamic from
13 the same person saying we found a little
14 problem and we went ahead and did X, Y, or
15 whatever.

16 MR. FELDMAN: Well, I mean, I -- I
17 just would say one is that does happen
18 sometimes. Two is another way to deal with
19 this is to have fewer days worked and you can
20 have longer hours. There's many occupations
21 that work that way. You can -- you can share
22 the work around. You can give people time off
23 in the middle of the day. Okay? This
24 dealership doesn't do any of those things.

25 They -- it's a -- it's a 55-hour week.

1 And that's exactly the purpose of the F --
2 these are people that come directly within the
3 purposes of the FLSA. And it's no coincidence
4 that Congress didn't include them in the
5 statute when it included salesmen, partsmen,
6 and mechanics.

7 Another -- I would say also that
8 Petitioner's argument is primarily -- is that
9 service advisors are salesmen. And, actually,
10 on page 5 of the reply brief, Petitioner says
11 they're salesmen because they are principally
12 involved in selling. And that's what you would
13 expect salesmen to do.

14 But that does create a logical problem
15 for Petitioner because, if you're principally
16 involved in -- you can't be principally
17 involved or it's hard to be principally
18 involved in two different things, especially
19 two things as different as selling and
20 servicing.

21 So, if they're principally involved in
22 selling, which is what Petitioner says makes
23 them a salesman, and I think what would make
24 them a salesman if they were, then it's -- it's
25 impossible to say that they're -- then it's

1 hard to turn around and say: No, no, they're
2 principally engaged in servicing.

3 The -- the two categories are distinct
4 in the statute. And as examples I gave are the
5 house painter or the -- a -- a travel agent
6 who's selling guided tours is -- you know, or a
7 AAA person who's selling you roadside
8 assistance. All those people are selling you
9 things. They're not doing them because the
10 idea of selling something is a fundamentally
11 different concept than the idea of actually
12 doing it. And that's a problem -- a problem
13 that I don't think Petitioner can escape.

14 I mean, that is the reason why what
15 Congress did is they -- they put service
16 advisors with all the other people in the auto
17 dealership who I mentioned who are not exempt
18 and who get overtime.

19 I think even Petitioner doesn't
20 actually believe at least in one respect that
21 -- that service advisors are principally
22 engaged in selling -- in servicing automobiles.
23 There are people at the dealership who sell
24 underbody coatings and assorted paint sealants,
25 upholstery treatments, tire treatments. Those

1 people are definitely salesmen. That is their
2 job, is to sell.

3 They -- those -- those things are all
4 services that are provided to the car. And yet
5 Petitioner has conceded from the beginning of
6 this litigation that those people who do that
7 kind of selling, that they are not covered by
8 the statute.

9 And I think that just is a natural
10 conclusion that Petitioner draws because I
11 think that's the natural way to read this
12 statute.

13 Petitioner -- my friend did refer to
14 the -- said that the Department of Labor has
15 taken the position that auto -- that auto body
16 repair people are not covered by the -- the
17 statute. I think that that is actually
18 mistaken.

19 The only cite -- source for that is in
20 a footnote in the reply brief. It's a 1968
21 opinion letter by Department of Labor, and what
22 Department of Labor said there -- first of all,
23 the opinion letter stood for the proposition
24 and addressed the question of whether auto
25 painters are covered by the statute, are

1 exempt, and concluded that they're not exempt.

2 But, secondly, it did then talk about
3 a category it called body and fender mechanics.
4 And it suggested that they are not -- that they
5 are exempt under this statute.

6 Well, I just think it's worthwhile
7 looking at what happened to that. In 1970,
8 body and fender mechanics were included in the
9 original version of the -- of the regulation as
10 an example of the kind of people who are
11 considered mechanics and could be exempt.

12 In 1973, three years later, I think it
13 was the first revision of it, they kept the
14 list of people who are mechanics the same and
15 removed body and fender mechanics. So I think
16 the only thing you can conclude is the
17 Department of Labor has not concluded and there
18 isn't a history of saying that even body and
19 fender mechanics are not covered, but whether
20 they're covered or not would be a different
21 question, but at least auto body repairmen are
22 not.

23 Congress picked three distinct
24 professions who were well recognized at the
25 time of the statute and said, you know, we want

1 those occupations, specific occupations to be
2 exempt for the reasons that I said, that
3 service advisors were a well-recognized
4 occupation at that time.

5 They -- they were recognized in the
6 Occupational Outlook Handbook. They had been
7 recognized in NLRB decisions from the 1940s on,
8 in industry publications. And there's a reason
9 why they're a distinct occupation, because if
10 you look at the jobs that they do, it's
11 actually a completely different job than the
12 job that's done by -- by auto salesmen, who are
13 the people who Congress undoubtedly wanted to
14 include.

15 The one other thing I'd like to say is
16 about the distributive or reddendo canon. I
17 mean, we don't -- we -- what that canon stands
18 for is the proposition that when you have two
19 lists like this that you have to make match up,
20 as -- as dates -- as -- as in the Simms case,
21 is actually a great example, where you have
22 three in the first category and two in the
23 second and you have to match them up, it is
24 common, and there are or's, and they're
25 connected by the word "or," it's common in the

1 English language to say, well, we match up the
2 ones that actually fit according to the
3 context, but we don't have to struggle and
4 strain to twist the ordinary meanings of words
5 or something like that to try to barely find a
6 way in which everything in the first list has
7 to match with everything in the second.

8 And that is all that that canon means.
9 It means that it's perfectly acceptable and was
10 what Congress, I think, did, is to say salesmen
11 match up with sells there, and are logically
12 related, they're semantically related, that's
13 what Congress intended to do, and it matches
14 perfectly.

15 Partsmen and mechanics match up with
16 servicing. Salesmen don't match up with
17 servicing and, in fact, insofar as someone is a
18 salesman, they're almost certainly not a
19 service person.

20 If there are no further questions.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Five minutes, Mr. Clement.

24 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

25 ON BEHALF OF THE PETITIONER

1 MR. CLEMENT: Thank you, Mr. Chief
2 Justice, and may it please the Court:

3 Just a few points in rebuttal. First
4 of all, I'd like to start with the reliance
5 issue. I don't think it is factually accurate
6 at all to say that when the 2011 regulation
7 came in, without any explanation that was
8 ultimately deemed procedurally invalid by this
9 Court, that dealerships just stopped what they
10 were doing and changed 40 years of practices.

11 If that had happened, this suit would
12 not have happened. I mean, the reality is that
13 across the country, based on that unexplained
14 regulation, dealerships continued their
15 traditional practices. That's why the reliance
16 interests are all on our side of this case.

17 Now, there are also reliance interests
18 for the treatment of body repairmen who have
19 from the very beginning been treated as exempt
20 at dealerships.

21 Now, there is the letter that we cite
22 that talks about how painters are not covered
23 and body repairmen are covered. It also cites
24 legislative history -- I'll grant you the
25 legislative history was more focused --

1 JUSTICE SOTOMAYOR: Mr. Clement, how
2 -- Mr. Clement, your new definition, your more
3 expansive definition, tell me how many more
4 people that are involved in the Service
5 Department will be covered.

6 Will it include the dispatchers who
7 tell people -- who don't do anything but assign
8 the work, or the lubesmen, the upholsterers,
9 all those other people who right now for 40
10 years, or more or less, have been paid a
11 salary, are they now going to be subject to
12 automobile dealerships saying: Given this new
13 definition, we can forego paying them minimum
14 wages?

15 MR. CLEMENT: No, Justice Sotomayor.
16 We're here -- we're on the status quo team. We
17 don't -- we're not trying to get some change --

18 JUSTICE SOTOMAYOR: Well, that's very
19 nice, but tell me your -- but your definition
20 --

21 MR. CLEMENT: Sure, sure.

22 JUSTICE SOTOMAYOR: -- your definition
23 might very well include them --

24 MR. CLEMENT: It might --

25 JUSTICE SOTOMAYOR: -- because you're

1 basically saying anybody involved in servicing
2 is covered.

3 MR. CLEMENT: No, that's where --
4 that's where, with all due respect, you're
5 wrong. We're -- we're giving you a definition
6 of servicing, but we also say it works in the
7 statute together with salesperson, partsman,
8 and mechanic.

9 So, in order to be covered, you have
10 to be both. You have to be one of those three
11 categories of employee, and you have to be
12 primarily engaged in servicing.

13 So nothing's going to change for the
14 non-mechanics, the non-salespeople, the
15 non-partsmen. Things are going to stay the
16 same because we have -- we have a definition of
17 servicing that has to include partsmen, that
18 includes service advisors, and service advisors
19 are included not because -- just because they
20 are primarily engaged in servicing but because
21 they are also salespeople.

22 So I just wanted to say that the
23 legislative history is specific as to fender
24 and bodymen. They -- they were -- they were
25 meant to be exempt mechanics. They're treated

1 as exempt. I hope we don't have another change
2 to deal with.

3 Under the status quo, body repairmen
4 are exempt. Mechanics, traditional mechanics
5 are exempt. Partsmen are exempt, and sales
6 advisors are exempt, and there are real
7 reliance interests on that.

8 As to the Labor Department's position,
9 they're obviously not here. Footnote 9 of our
10 reply brief points out that they have put an
11 advisory out that they are not going to take
12 any enforcement actions against sales advisors
13 until this Court rules in this case, which I
14 think just underscores that the reliance
15 interest, the status quo, is in our favor.

16 There's no current regulatory effort
17 to go after service advisors. And there really
18 hasn't been one from the Labor Department
19 itself since about 1978.

20 And, Justice Breyer, if you're looking
21 for a tie-breaker with an agency somewhere, I
22 think it's four decades of acquiescence.
23 That's the last valid action from the Labor
24 Department. The 2011 regulation was deemed
25 procedurally invalid.

1 So the last word for them is 1978
2 opinion letter, 1987 enforcement manual.
3 For -- for 40 years everybody has understood
4 service advisors to be exempt, whether you
5 think about that as the --

6 JUSTICE KENNEDY: Were there two
7 circuits that ruled in favor of the employees?
8 Was -- was that within the 40-year period?
9 Didn't the agency take the position in -- in
10 those two cases that --

11 MR. CLEMENT: That, Justice Kennedy --

12 JUSTICE KENNEDY: -- they were not
13 covered?

14 MR. CLEMENT: -- is really what starts
15 the 40 years of reliance. So the first of
16 those cases was a Fifth Circuit case called
17 Deel Motors. That was an enforcement action
18 brought by the Labor Department that the Labor
19 Department lost.

20 Shortly thereafter they also lost in
21 the Sixth Circuit, and that's when they started
22 acquiescing. The Fourth Circuit case comes
23 along later, and that's a private party action.
24 It's not an enforcement action.

25 So we do have, you know, roughly, at

1 least since 1978, we've had acquiescence from
2 the Labor Department, which gives rise to all
3 of these reliance interests.

4 In terms of the purpose of the
5 statute, I really thought it was interesting
6 that my friend on the other side emphasized the
7 fact that the service advisors worked 55-hour
8 weeks because Congress, when it dealt with
9 people who by the nature of their job worked
10 long weeks, they had one of two reactions to
11 that.

12 One of it, they said: Boy, that's
13 awful, and we want to have more workers, so
14 we're going to limit them to 40.

15 The other is they said: Oh, yeah,
16 that's the way it is in that industry, and
17 those people are underpaid, so we're going to
18 give them an exemption. That's exactly what
19 they did with service advisors. Thank you,
20 Your Honor.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. The case is submitted.

23 (Whereupon, at 11:02 a.m., the case
24 was submitted.)

25

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