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# Show Me the Money: On Whether Car Dealership Service Advisors Are Entitled to or Exempt from Overtime Pay Under the FLSA

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SHOW ME THE MONEY: ON WHETHER CAR  
DEALERSHIP SERVICE ADVISORS ARE  
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OVERTIME PAY UNDER THE FLSA

*Seth Andrew Yarkony\**

INTRODUCTION

Mercedes-Benz of Encino (“MB Encino”) has served the San Fernando Valley region of greater Los Angeles since 1964.<sup>1</sup> The swanky, community-focused dealership invites individuals to stop by and enjoy a cup of coffee while browsing its showroom and gift boutique,<sup>2</sup> and proudly shares on Instagram images of social events and customers enjoying its luxury automobiles.<sup>3</sup> An interactive enterprise, MB Encino also uses social media to feature friendly photos of employees and depicts employee portraits on its website.<sup>4</sup>

While MB Encino and its employees have joined forces to bring together individuals in the San Fernando Valley community, a recent dispute involving the dealership and a subset of its employees—this time as adverse parties—has caused a rift in the legal community. In *Navarro v. Encino Motorcars, LLC*,<sup>5</sup> Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, and Reuben Castro, all “service advisors” at MB Encino, sued the dealership alleg-

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\* J.D. Candidate, University of Notre Dame Law School, 2017; B.S., Finance and Management & Leadership, Boston College, 2014. I would like to thank Professor Barbara Fick for her thoughtful and challenging guidance, the members of the *Notre Dame Law Review* for their editorial assistance, and my grandfather Charles Kohlmeyer, who has the same enthusiasm for this Note as he did every baseball, soccer, and basketball game I played growing up—none of which he missed. This Note is dedicated to my family.

1 *About Us*, MERCEDES-BENZ OF ENCINO, <http://www.mbencino.com/about-us/> (last visited Mar. 20, 2016).

2 *Id.*

3 Mercedes-Benz of Encino in LA (@mercedes818), INSTAGRAM, <https://instagram.com/mercedes818/> (last visited Mar. 20, 2016). Events hosted by MB Encino include a ladies-only charity gala, a promotional function for the automaker’s 2014 S-Class line, and Friday night musical performances. *Id.*

4 *Id.*; *Staff*, MERCEDES-BENZ OF ENCINO, <http://www.mbencino.com/staff/> (last visited Mar. 20, 2016).

5 780 F.3d 1267 (9th Cir. 2015), *cert. granted*, *Encino Motorcars, LLC v. Navarro* (2016).

ing it had violated the Fair Labor Standards Act<sup>6</sup> (FLSA) by failing to pay time and one-half overtime wages.<sup>7</sup> To determine MB Encino's liability, the United States Court of Appeals for the Ninth Circuit had to weigh the reasonableness of a Department of Labor (DOL) regulation that effectively entitles service advisors to time and one-half overtime pay.

The FLSA overtime-pay requirement "mandat[es] that all hours worked in excess of 40 hours [in a seven-day work week] be paid at one and one-half (150%) of the employee's normal hourly rate."<sup>8</sup> However, the overtime requirement does not apply to a host of exempted employees across various industries.<sup>9</sup> As set forth in 29 U.S.C. § 213(b)(10)(A) (the "Dealership

6 29 U.S.C. §§ 201–219 (2012). A central element of the New Deal, the FLSA, enacted in 1938, "has three objectives: [(1)] to establish minimum wages [29 U.S.C. § 206], [(2)] to discourage the employment of workers for long hours [29 U.S.C. § 207] . . . and [(3)] to discourage the employment of 'oppressive child labor' [29 U.S.C. § 212]." E. Merrick Dodd, *The Supreme Court and Fair Labor Standards, 1941–1945*, 59 HARV. L. REV. 321, 321 (1946) (quoting 29 U.S.C. § 212(c)). The law "was intended to lessen the effects of the Great Depression by creating an incentive for businesses to hire more employees." ROBERT K. ROBINSON & GERALYN McCLURE FRANKLIN, *EMPLOYMENT REGULATION IN THE WORKPLACE* 240 (2d ed. 2015).

7 *Encino Motorcars*, 780 F.3d at 1269–70.

8 AM. FED'N OF GOV'T EMPs., *FAIR LABOR STANDARDS ACT MANUAL 2*, <http://www.afge477.org/flsaguide.pdf> (last visited Mar. 20, 2016). The time and one-half overtime pay requirement, codified in 29 U.S.C. § 207(a)(1), "creat[es] an incentive for businesses to hire more employees" by penalizing employers for workers employed more than 40 hours during a 168-hour workweek. ROBINSON & FRANKLIN, *supra* note 6, at 240. For example, if an employer has one employee who works 80 hours a week at a rate of \$10 per hour, the FLSA requires a weekly pay of \$1,000 ( $\$10 \times 40$  hours +  $\$15 \times 40$  hours). "To avoid the overtime penalty, the employer is limited to two options. He or she could reduce the hours worked by his or her current employee[.]. The option presents the obvious downside of there being not enough man-hours to complete the scheduled work." *Id.* at 241. Alternatively, the "other option offered an economically sound way to avoid the overtime penalty by increasing the size of the workforce by hiring more employees." *Id.* Thus, in our example, if the employer hired one more worker, he or she would be able to accomplish 80 man-hours of work while simultaneously reducing payroll costs; the cost of employing two workers at 40 hours per week is \$800 ( $\$10 \times 40$  hours +  $\$10 \times 40$  hours). This results in a 20% savings as compared to a workforce of one employee working 40 hours per week. "The idea was that this would create more employment for Americans during the Great Depression when over one-third of all workers were without jobs." *Id.*

9 29 U.S.C. § 213(a)–(b). Employees listed under § 213(a) are exempt from both the minimum wage *and* time and one-half overtime requirements of the FLSA. On the other hand, employees listed under § 213(b) are exempt only from the law's overtime requirement. With respect to overtime exemptions (the focus of this Note), the intent behind their existence is debated. The DOL has noted that "specific references . . . in the legislative history are scant" regarding the § 213(a)(1) exemption for executive, administrative, and professional workers. *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22122, 22123 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541). Nevertheless, the DOL suggests these employees were exempted because "the type of work they perform[] was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding

Employee Exemption” or the “Exemption”), one such employee that is not entitled to time and one-half overtime pay is, “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.”<sup>10</sup>

Administration of the FLSA, and thus interpretation of its exemptions, is carried out by the DOL’s Wage and Hour Division, which the Act created.<sup>11</sup> The DOL’s interpretation of the Dealership Employee Exemption, as set forth in 29 C.F.R. § 779.372 (the “DOL Dealership Regulation” or the “Regulation”), has always considered service advisors, who are broadly defined as dealership employees responsible for diagnosing and soliciting repair and maintenance services for vehicles,<sup>12</sup> as outside the definition of “salesm[e]n . . . primarily engaged in selling or servicing automobiles,” and therefore entitled to time and one-half overtime pay.<sup>13</sup>

Agency regulations duly promulgated after a notice-and-comment period, such as the DOL Dealership Regulation,<sup>14</sup> are subject to the deferential standard of review set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>15</sup> Under this standard, commonly known as *Chevron* def-

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the potential job expansion intended by the FLSA[.]” *Id.* at 22124. Cf. Natalie Slavens Abbott, Comment, *To Pay or Not to Pay: Modernizing the Overtime Provisions of the Fair Labor Standards Act*, 1 U. PA. J. LAB. & EMP. L. 253, 257 & n.40 (1998) (indicating exemptions for employees in “highly specific industries”—such as “persons employed in the catching, cultivating, or first canning of fish or shellfish; employees of local newspapers with circulations of less than four thousand; . . . employees engaged in the processing of maple sap into sugar or syrup; and taxicab operators”—arise from the efforts of special-interest lobbying groups); see also *infra* text accompanying note 185 (discussing the potential impact of lobbyists in enactment of the Dealership Employee Exemption). For an excellent summary of employees who are exempt from FLSA requirements, see BARBARA KATE REPA, *YOUR RIGHTS IN THE WORKPLACE* 9–12 (8th ed. 2007).

10 29 U.S.C. § 213(b)(10)(A) (2012).

11 *Id.* § 204.

12 See DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, *OCCUPATIONAL OUTLOOK HANDBOOK*, 1980–81 EDITION 191–92 (1980); Neil G. Chirico & Joanne Helperin, *Roles of the Dealership Staff . . . Who Does What?*, EDMUNDS.COM (May 5, 2009), <http://www.edmunds.com/car-care/roles-of-the-dealership-service-staff-who-does-what.html>. Service advisors have also commonly been referred to as “service manager,” “service writer,” and “service salesman.” See *infra* text accompanying notes 43, 52, 55, 158.

13 See 29 C.F.R. § 779.372 (2011); 29 C.F.R. § 779.372 (1973); 29 C.F.R. § 779.372 (1972). Although the text of the 1970s regulations varies from that of the 2011 regulation, the regulation’s substantive position with respect to service advisors remains the same. *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1272 (9th Cir. 2015) (“[The] regulatory definitions [of ‘salesman,’ ‘partsman,’ and ‘mechanic’] have not changed in any relevant way since 1970.”).

14 *Encino Motorcars*, 780 F.3d at 1272 (“The regulation was adopted by the responsible federal agency through notice and comment rulemaking.”).

15 467 U.S. 837 (1984).

erence, “legislative regulations are given controlling weight”<sup>16</sup> if a two-part test is satisfied. First, the court must determine that “the statute [interpreted by the regulation] is silent or ambiguous with respect to the specific issue.”<sup>17</sup> Second, the regulation must be reasonable in that it is not “arbitrary, capricious, or manifestly contrary to the statute.”<sup>18</sup> In addition to the standard set forth in *Chevron*, the Supreme Court has dictated that “[FLSA] exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [contexts] plainly and unmistakably within their terms and spirit.”<sup>19</sup>

Accordingly, in *Encino Motorcars*, the Ninth Circuit had to determine whether the DOL Dealership Regulation should be afforded *Chevron* deference.<sup>20</sup> The Ninth Circuit panel unanimously held that it should<sup>21</sup>—i.e., that the DOL Dealership Regulation, which excludes service advisors from the Exemption’s definition of “salesman,” is a reasonable interpretation of the Dealership Employee Exemption. As a result, MB Encino (and other car dealerships in the Ninth Circuit) may not rely on the Dealership Employee Exemption to refuse time and one-half overtime pay to service advisors.

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16 *Id.* at 844. As discussed in Section I.C below, the Fourth Circuit found the DOL Dealership Regulation to be *interpretive* rather than *legislative* and reviewed the Regulation under a standard less deferential than that of *Chevron*. Three years after the Fourth Circuit’s decision, the Supreme Court held that *interpretive* regulations are reviewed under *Chevron* “[w]here an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, [and] where the resulting rule falls within the statutory grant of authority.” *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007). *Chevron* is a highly deferential standard of review. See *infra* note 164. This Note argues that the DOL Dealership Regulation cannot be afforded deference even under this most deferential standard. Therefore, this Note proceeds under the assumption that the DOL Dealership Regulation, if *interpretive* rather than *legislative*, satisfies the *Long Island Care at Home* requirements and is thus entitled to *Chevron* scrutiny. Since the DOL Dealership Regulation cannot pass *Chevron* muster, it also would not satisfy less deferential standards of review. Accordingly, even if the Supreme Court reviewed the DOL Dealership Regulation under a standard less deferential than *Chevron*, the DOL Dealership Regulation would remain unreasonable.

17 *Chevron*, 467 U.S. at 843.

18 *Id.* at 844. In *Chevron* cases, the Supreme Court will hold an agency interpretation “manifestly contrary” to the statute when it determines there is “‘unambiguous congressional intention’ contrary to the agency’s interpretation of the statute.” Dudley D. McCalla, *Deference (and Related Issues)*, 14 TEX. TECH. ADMIN. L.J. 363, 388 (2013) (quoting *Chem. Mfrs. Ass’n v. Nat. Res. Def. Council*, 470 U.S. 116, 129 (1985)). For further reading on courts’ application of the “arbitrary” and “capricious” standards, see *id.*

19 *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

20 *Encino Motorcars*, 780 F.3d at 1271 (“We conduct the familiar two-step inquiry to determine whether to defer to the agency’s interpretation.”).

21 *Id.* at 1277 (“[W]e hold that Plaintiffs are not exempt under 29 U.S.C. § 213(b)(10)(A).”).

The Ninth Circuit's decision in *Encino Motorcars* directly conflicts with prior decisions in the Fourth and Fifth Circuits—resulting in a circuit split.<sup>22</sup> In *Brennan v. Deel Motors, Inc.*,<sup>23</sup> the Fifth Circuit rejected the DOL Dealership Regulation, reasoning “a common sense interpretation and application of [the Dealership Employee Exemption] mandates inclusion of service [advisors] within its scope.”<sup>24</sup> Similarly, in *Walton v. Greenbrier Ford, Inc.*,<sup>25</sup> the Fourth Circuit concluded “the [DOL Dealership Regulation] is flatly contrary to the [Dealership Employee Exemption’s] text.”<sup>26</sup> In holding the opposite, the *Encino Motorcars* court found that “there are two reasonable ways to read the [Dealership Employee Exemption].”<sup>27</sup> Focusing on the “primarily engaged in” language of the Exemption, the *Encino* court found reasonable the DOL’s determination that service advisors are not “salesm[e]n” because “[i]t is hard to imagine, in ordinary speech, a ‘salesman . . . primarily engaged in . . . servicing automobiles.’”<sup>28</sup>

On January 15, 2016, the Supreme Court granted certiorari to MB Encino’s appeal of the Ninth Circuit’s judgment.<sup>29</sup> This is not the first time the Court has been presented a circuit split over an FLSA exemption for employees categorized as “salesmen.” In its 2012 decision in *Christopher v.*

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22 Michael Warren & Benjamin Emmert, *Ninth Circuit Finds Auto ‘Service Advisors’ Not Exempt Under FLSA*, LITTLER MENDELSON (Mar. 31, 2015), <https://www.littler.com/ninth-circuit-finds-auto-service-advisors-not-exempt-under-flsa>.

23 475 F.2d 1095 (5th Cir. 1973). Effective as of October 1, 1981, the Fifth Circuit was divided into two circuits: the Fifth Circuit and a new Eleventh Circuit. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994. Under the rule set forth in *Bonner v. City of Prichard*, the Fifth Circuit’s decision in *Deel Motors* is also binding precedent in the Eleventh Circuit. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (“[T]he decisions of the United States Court of Appeals for the Fifth Circuit . . . as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit.”).

24 *Deel Motors*, 475 F.2d at 1097.

25 370 F.3d 446 (4th Cir. 2004). The decision in *Encino Motorcars* also directly conflicts with several U.S. district courts and the Montana Supreme Court. One conflicting case is an unreported decision from the U.S. District Court for the Eastern District of Michigan that was affirmed without opinion by the Sixth Circuit. See *Brennan v. North Bros. Ford, Inc.*, No. 40344, 1975 WL 1074 (E.D. Mich. 1975), *aff’d sub nom.* *Dunlop v. North Bros. Ford, Inc.* 529 F.2d 524 (6th Cir. 1976) (Table). Other decisions at the district court level at odds with *Encino Motorcars*—and thus aligned with *Deel Motors* and *Greenbrier Ford*—include *Yenney v. Cass Cty. Motors Co.*, No. 76-0-294, 1977 WL 1678 (D. Neb. Feb. 8, 1977), and *Brennan v. Import Volkswagen, Inc.*, No. W-4982, 1975 WL 1248 (D. Kan. Oct. 21, 1975). The Montana Supreme Court held service advisors are exempt from the FLSA’s overtime provisions in *Thompson v. J.C. Billion, Inc.*, 294 P.3d 397, 402 (Mont. 2013).

26 *Greenbrier Ford*, 370 F.3d at 451.

27 *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1277 (9th Cir. 2015).

28 *Id.* at 1275.

29 Petition for Writ of Certiorari, *Encino Motorcars, LLC v. Navarro*, 2016 WL 205945 (No. 15-415); *Orders in Pending Cases*, U.S. SUPREME COURT (Jan. 15, 2016), [http://www.supremecourt.gov/orders/courtorders/011516zr\\_l5gm.pdf](http://www.supremecourt.gov/orders/courtorders/011516zr_l5gm.pdf).

*SmithKline Beecham Corp.*,<sup>30</sup> the Court resolved a split between the Second and Ninth Circuits over the FLSA's "outside salesman" exemption.<sup>31</sup> In a 5-4 vote, a divided Court held "pharmaceutical sales representatives whose primary duty is to obtain nonbinding commitments from physicians to prescribe their employer's prescription drugs" qualify as outside salesmen exempt from time and one-half overtime pay.<sup>32</sup>

This decision had significant repercussions. The *Christopher* majority recognized the "more than 90,000 [pharmaceutical sales representatives] nationwide" to which its holding denied time and one-half overtime compensation.<sup>33</sup> Supreme Court resolution of the disagreed-upon exemption for service advisors will have similar consequences: in its petition for writ of certiorari, MB Encino estimated nearly 45,000 service advisors are employed by 18,000 car dealerships nationwide.<sup>34</sup>

This Note analyzes the merits of the *Encino Motorcars*, *Deel Motors*, and *Greenbrier Ford* decisions in light of the text and legislative history of the Dealership Employee Exemption and *Christopher v. SmithKline Beecham Corp.* Part I summarizes the Exemption, the DOL Dealership Regulation interpreting the Exemption, and the decisions whether to defer to the DOL Dealership Regulation by the *Encino Motorcars*, *Deel Motors*, and *Greenbrier Ford* courts. Part II analyzes the text and legislative history of the Exemption, and concludes that the DOL Dealership Regulation should not be afforded *Chevron* deference because it is manifestly contrary to the Exemption. Part III considers the Exemption in light of the Supreme Court's decision in *Christopher*, and advances additional reasons for why the Court, when deciding *Encino Motorcars*, should side with the interpretation of the Dealership Employee Exemption advanced by the Fourth and Fifth Circuits.

## I. THE EXEMPTION, DOL REGULATION, AND THE CIRCUIT SPLIT

Although the FLSA was enacted in 1938, the Dealership Employee Exemption came about nearly thirty years later as part of the Fair Labor Standards Amendments of 1966.<sup>35</sup> The Exemption was codified in 29 U.S.C. § 213(b)(10)(A).

An employee is understood to be ineligible for overtime under the Exemption if he or she satisfies two requirements. First—the noncontroversial aspect of the Exemption—the employee must be "employed by a non-manufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers."<sup>36</sup> The DOL Dealership Regulation interpreting this requirement has long held that an employer sat-

30 132 S. Ct. 2156 (2012).

31 *Id.* at 2164–65. The outside salesman exemption is codified at 29 U.S.C. § 213(a)(1) (2012).

32 *Christopher*, 132 S. Ct. at 2161.

33 *Id.* at 2164.

34 Petition for Writ of Certiorari, *supra* note 29, at 3.

35 Pub. L. No. 89-601, § 209, 80 Stat. 830, 836 (1966).

36 29 U.S.C. § 213(b)(10)(A).

ifies this definition if “over half of the [employer’s] annual dollar volume of sales made or business done [comes] from sales of the enumerated vehicles.”<sup>37</sup> Courts nationwide, without reference to the DOL Dealership Regulation, commonly agree that most car dealerships (as nonmanufacturing establishments that are primarily engaged in selling vehicles to the ultimate purchaser) are employers that meet this requirement.<sup>38</sup>

The second—highly controversial (in the interpretive sense)—requirement of the Exemption is that the employee of the car dealership must be a “salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles.”<sup>39</sup> The way in which this phrase is interpreted is decisive in the determination of whether service advisors are included within the scope of the Exemption.<sup>40</sup> This Part analyzes how the DOL has historically interpreted this requirement and the conflicting decisions of federal appellate courts regarding whether to afford deference to the DOL Dealership Regulation.

### A. DOL Regulation of the Exemption

Since the 1966 enactment of the Dealership Employee Exemption, the DOL has gone back-and-forth in its opinion whether service advisors are included as exempt salesmen.<sup>41</sup> The DOL’s formal regulatory position set forth in the Code of Federal Regulations, however, has *always* reflected the belief that service advisors are *not* exempt salesmen, and therefore may not be denied time and one-half overtime pay.<sup>42</sup>

The DOL’s initial interpretation of the Dealership Employee Exemption, which came in a July 1967 opinion letter from the Administrator of the

37 29 C.F.R. § 779.372(d) (2011); 29 C.F.R. § 779.372(d) (1971).

38 See, e.g., *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1270 (9th Cir. 2015); *McBeth v. Gabrielli Truck Sales, Ltd.*, 768 F. Supp. 2d 383, 388 (E.D.N.Y. 2010); *Yenney v. Cass Cty. Motors Co.*, No. 76-0-294, 1977 WL 1678, at \*1 n.1 (D. Neb. Feb. 8, 1977); *Atkins v. Old River Supply, Inc.*, 150 So. 3d 976, 980 (Miss. Ct. App. 2014) (“[T]he exemption acknowledges that dealerships do more than just sell cars. So what matters is that the dealership be *primarily* engaged in selling vehicles, and not simply selling vehicles to a limited extent.” (citation omitted)).

39 29 U.S.C. § 213(b)(10)(A).

40 The DOL Dealership Regulation states, “*primarily engaged* means the major part or over 50 percent of the salesman’s, partsman’s, or mechanic’s time must be spent in selling or servicing the enumerated vehicles.” 29 C.F.R. § 779.372(d) (2011) (emphasis added). Thus, with respect to exempt dealership employees, the phrase has dual meaning. First, like the requirement that an Exemption-subject dealership be an establishment in which over half the annual dollar volume of business comes from sales of vehicles, an exempt salesman, partsman, or mechanic is one who spends greater than 50 percent of his or her time selling or servicing vehicles. Second, however, there is disagreement among courts “whether . . . [the] ‘primarily engaged in selling or servicing’ [requirement] refers to the act of *personally* selling or servicing automobiles or instead to ‘the general business’ of selling or servicing automobiles. Petition for Writ of Certiorari, *supra* note 29, at 13–14.

41 *Encino Motorcars*, 780 F.3d at 1272–73.

42 See *supra* text accompanying note 13.

Wage and Hour Division, concluded that service advisors are exempt employees.<sup>43</sup> However, in August 1967, less than one month later, a different opinion letter from the Administrator concluded the opposite: “Employees variously described as . . . service advisor . . . [do] not qualify for exemption under [the Dealership Employee Exemption].”<sup>44</sup>

The text and substance of the August 1967 opinion letter—which did not provide much, if any, support for its conclusions—was largely incorporated into the original version of the DOL Dealership Regulation, promulgated in 1970.<sup>45</sup> In relevant part, the original DOL Dealership Regulation explained:

As used in [the Dealership Employee Exemption], a *salesman* is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicles or farm implements which the establishment is primarily engaged in selling. . . .

As used in [the Dealership Employee Exemption], a *partsman* is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.

As used in [the Dealership Employee Exemption], a *mechanic* is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive . . . mechanics, body or fender mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile . . . for its use and operation as such. . . .

Employees variously described as . . . service advisor . . . who are not themselves primarily engaged in the work of a salesman, partsman, or mechanic as described above *are not exempt* under [the Dealership Employee Exemption]. This is true despite the fact that such an employee’s principal function may be diagnosing [sic] the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics.

As used in [the Dealership Employee Exemption], *primarily engaged* means the major part or over 50 percent of the salesman’s[,] partsman’s, or mechanic’s time must be spent in selling or servicing the enumerated vehicles.<sup>46</sup>

Thus, the original DOL Dealership Regulation explicitly took the position that service advisors were not exempt salesmen.

Since the Regulation’s initial promulgation in 1970, as the *Encino Motors* court noted, “the Department of Labor occasionally has adopted [] broader definitions [of salesman] . . . in documents other than regula-

43 U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (July 6, 1967) (“The manager of a service department of an automobile dealership who is primarily engaged in diagnosing the mechanical condition of care brought in for repair . . . *would be exempt* from the overtime pay requirements of the [FLSA].” (emphasis added)).

44 U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (Aug. 4, 1967) (emphasis added).

45 *See id.*; 29 C.F.R. § 779.372 (1971); Fair Labor Standards Act as Applied to Retailers of Goods or Services, 35 Fed. Reg. 5856, 5895–96 (Apr. 9, 1970).

46 29 C.F.R. § 779.372(c)–(d) (1971) (emphases added).

tions.”<sup>47</sup> For example, in a 1978 opinion letter, the Wage and Hour Division stated “[o]ur present position is that employees variously described as . . . service advisor . . . may qualify for [the Dealership Employee Exemption].”<sup>48</sup> In 1987, the Wage and Hour Division amended its Field Operations Handbook to state that service advisors are “construed as within the [E]xemption,” and that it would revise the DOL Dealership Regulation to reflect this position “as soon as is practicable.”<sup>49</sup>

It is difficult to determine whether 2008 was as soon as practicable for the DOL to revise the Dealership Regulation to reflect the position set forth in its 1987 Handbook, but that is when the agency first proposed amending the formal regulation to reflect a broader definition of “salesman,” one that would officially include service advisors within the Exemption.<sup>50</sup> In doing so, the DOL acknowledged its lingering 1987 position and asserted its desire to conform to the then-existing (pre-*Encino Motorcars*) uniformity among the courts as to the exemption of service advisors from entitlement to overtime pay.<sup>51</sup>

The DOL never formally adopted its proposed amendment to the Dealership Regulation. Instead, in 2011, the agency ultimately decided against adopting the 2008 proposal.<sup>52</sup> In explaining its decision, the DOL recognized compelling arguments of both supporters and opponents of the 2008 proposal.<sup>53</sup> The DOL concluded the then-current Dealership Regulation,

47 780 F.3d 1267, 1273 (9th Cir. 2015).

48 U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (July 28, 1978).

49 U.S. DEP’T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK, at 24L04-4 (1987), [https://www.dol.gov/whd/FOH/FOH\\_Ch24.pdf](https://www.dol.gov/whd/FOH/FOH_Ch24.pdf).

50 Updating Regulations Issued Under the Fair Labor Standards Act, 73 Fed. Reg. 43654, 43658-59, 43671 (proposed July 28, 2008). The proposed DOL Dealership Regulation reads as follows: “Employees variously described as . . . service advisor . . . are exempt under [the Dealership Employee Exemption].” *Id.* at 43671 (emphasis added).

51 *Id.* at 43658-59 (noting that “[u]niform appellate and district court decisions . . . hold that service advisors are exempt . . . because they are ‘salesmen’ who are primarily engaged in ‘servicing’ automobiles,” and that “[b]ased upon the court decisions, the [DOL] has adopted an enforcement position since 1987 that . . . the regulation would be revised” (first citing *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095 (5th Cir. 1973); *Brennan v. North Bros. Ford, Inc.*, No. 40344, 1975 WL 1074 (E.D. Mich. 1975), *aff’d sub nom.* *Dunlop v. North Bros. Ford, Inc.*, 529 F.2d 524 (6th Cir. 1976) (Table)).

52 Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18832, 18833, 18837-38 (Apr. 5, 2011) (“The Department is . . . not proceeding with the proposed rule that service managers, service writers, service advisors, and service salesman are exempted from the overtime provision.”).

53 *Id.* at 18838. One supporter, nationwide labor and employment law firm Littler Mendelson, P.C., argued the 2008 proposal would eliminate confusion between the 1987 Field Operations Handbook and the existing DOL Dealership Regulation, and would not be a change in the law. *Id.* Twelve members of Congress—a group that included Senators Barack Obama, Hillary Clinton, Edward Kennedy, and Bernie Sanders—stated they were “deeply troubled” with the proposal because it would “abandon [the DOL’s] longstanding and correct interpretation of [the Dealership Employee Exemption]” set forth in the DOL Dealership Regulation and would “ignore[] the Supreme Court’s command that FLSA

which “limit[ed] the [E]xemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles” was reasonable, and that it no longer agreed with the Fourth Circuit’s holding in *Walton v. Greenbrier Ford, Inc.*, which held that the regulation “impermissibly narrows” the Dealership Employee Exemption.<sup>54</sup>

Somewhat ironically, in 2011, the same time the DOL decided against including service advisors within the Exemption, the agency officially *removed* from the Dealership Regulation the paragraph that explicitly placed service advisors outside the Exemption.<sup>55</sup> The removal of this paragraph, however, did not amount to a change in position by the DOL.<sup>56</sup> Instead, the DOL slightly adjusted the Dealership Regulation’s definitions of “salesman,” “partsmen,” and “mechanic,” none of which include service advisors within their scope.<sup>57</sup>

Three federal appellate courts have considered whether the DOL Dealership Regulation reasonably excludes car dealership service advisors from the scope of the Dealership Employee Exemption—two of them found it does not.<sup>58</sup>

### B. *Brennan v. Deel Motors, Inc. (Fifth Circuit)*

In *Brennan v. Deel Motors, Inc.*, the Fifth Circuit considered a challenge by four Florida car dealership service advisors who alleged their employer failed to pay overtime to which they were entitled under the FLSA.<sup>59</sup> The court

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exemptions must be narrowly construed.” Letter from Twelve Members of Congress to Richard M. Brennan, Dir., Office of Interpretations and Regulatory Analysis, Wage and Hour Div., Emp’t Standards Admin., U.S. Dep’t of Labor (Sept. 26, 2008) [hereinafter Letter from Twelve Members of Congress]. Other opponents of the 2008 proposal included the AFL-CIO and the National Employment Lawyers Association. Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. at 18832, 18838.

54 76 Fed. Reg. 18832, 18838 (Apr. 5, 2011).

55 See 29 C.F.R. § 779.372 (2011). Thus, the new, post-2011 DOL Dealership Regulation *no longer contains* section (c)(4), promulgated in 1971, which articulated,

Employees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsmen, or mechanic as described above *are not exempt* under [29 U.S.C. § 213(b)(10)(A)]. This is true despite the fact that such an employee’s principal function may be diagnosing [sic] the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics.

29 C.F.R. § 779.372(c)(4) (1971) (emphasis added).

56 See *supra* text accompanying note 13.

57 See 29 C.F.R. § 779.372(c) (2011). The *Encino Motorcars* court explained, “[the] Plaintiffs [service advisors] do not fit within any of [the] definitions” of ‘salesman,’ ‘partsmen,’ or ‘mechanic,’ set forth in the DOL Dealership Regulation. *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1271 (9th Cir. 2015).

58 See *Encino Motorcars*, 780 F.3d 1267; *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095 (5th Cir. 1973).

59 475 F.2d 1095, 1096 (5th Cir. 1973).

unanimously rejected the challenge and accordingly declined to follow the DOL Dealership Regulation's assertion that "[e]mployees variously described as . . . service advisor . . . *are not exempt* under [the Dealership Employee Exemption]."<sup>60</sup> The court held "a common sense interpretation and application of [the Exemption] mandates inclusion of service [advisors] within its scope."<sup>61</sup>

*Deel Motors*, which was decided in 1973, preceded the Supreme Court's 1984 decision in *Chevron*. Therefore, the Fifth Circuit did not undergo the two-step *Chevron* analysis when determining whether to defer to the DOL Dealership Regulation. Instead, the court sought to ascertain the "best interpretation" of the Dealership Employee Exemption.<sup>62</sup>

The Fifth Circuit's conclusion that service advisors are exempt under the Dealership Employee Exemption rested on a two-pronged analysis.<sup>63</sup> First, the court opined, "service [advisors] are *functionally similar* to the mechanics and partsmen who service the automobiles. All three work as an integrated unit, performing the services necessary for the maintenance of the customer's automobile. The mechanic and partsman provide a specialized service with the service [advisor] co-ordinating these specialties."<sup>64</sup> Second, the court noted, "the intended scope of [the Dealership Employee Exemption] is not entirely clear."<sup>65</sup> As a result, the court reasoned, when determining which employees are "primarily engaged in selling or servicing" automobiles,

[i]n the absence of clear intent to the contrary, we [cannot] assume that Congress intended to treat employees with functionally similar positions differently, especially when the exemption by its own terms refers to "any salesman . . . engaged in selling or servicing automobiles[.]" This is exactly what a service salesman does.<sup>66</sup>

The Fifth Circuit found supplementary support for its interpretation of the Exemption in the legislative history of the statute.<sup>67</sup> First, the court cited a report issued by the Senate Committee on Labor and Public Welfare during the drafting of the Exemption for its proposition that "[i]t is the intent of this exemption to exclude from the coverage of [the FLSA overtime pay provisions] *all mechanics and salesman* [and thus, service salesmen] . . . employed by an automobile . . . dealership."<sup>68</sup> Second, the court quoted a statement

60 29 C.F.R. § 779.372(c)(4) (1973) (emphasis added).

61 *Deel Motors*, 475 F.2d at 1097.

62 *Id.*

63 *See id.* at 1097–98.

64 *Id.* at 1097 (emphasis added).

65 *Id.* at 1098. As noted in Part II below, the Fifth Circuit overlooked conclusive evidence regarding the intended scope of the Exemption, thus rendering this conclusion erroneous.

66 *Id.* at 1097–98 (quoting Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 209, 80 Stat. 830, 836).

67 *See id.*

68 *Id.* at 1097 n.2 (quoting S. REP. NO. 89-1487, at 32 (1966)). In *Encino Motorcars*, the Ninth Circuit criticized the Fifth Circuit for selectively quoting from this passage. *See infra* text accompanying notes 99–103. As explained in Section II.C, however, (a) it is unlikely

from the Congressional Record that explained the Exemption was intended for all commission-based employees of dealerships, such as salesmen, partsmen, and mechanics.<sup>69</sup> From this statement, the court reasoned that because the plaintiff service advisors received a substantial part of their payment via commissions, they were therefore meant to be included as exempt employees.<sup>70</sup>

Accordingly, the DOL Dealership Regulation's declaration that service advisors are not within the scope of the Dealership Employee Exemption was overruled, and the plaintiff service advisors were held exempt employees not entitled to overtime pay.<sup>71</sup>

### C. *Walton v. Greenbrier Ford, Inc. (Fourth Circuit)*

In *Walton v. Greenbrier Ford, Inc.*, the Fourth Circuit considered a challenge by a Virginia car dealership service advisor who alleged his employer failed to pay overtime to which he was entitled under the FLSA.<sup>72</sup> As was the case in *Deel Motors*, the central issue in *Greenbrier Ford* was whether the court should defer to the DOL Dealership Regulation, which stated "[e]mployees variously described as . . . service advisor . . . are not exempt under [the Dealership Employee Exemption]."<sup>73</sup> Unlike the court in *Deel Motors*, however, the *Greenbrier Ford* court considered the issue after the Supreme Court decided *Chevron*.

The Fourth Circuit nevertheless analyzed the DOL Dealership Regulation under a standard less deferential than that set forth in *Chevron*.<sup>74</sup> The court explained "[i]n interpreting the validity of agency regulations, our standard of review depends upon whether such regulation is *legislative* or *interpretive*."<sup>75</sup> If the court found the DOL Dealership Regulation to be *legis-*

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that the Ninth Circuit was correct in that analysis, and (b) it is clear that the *Encino Motorcars* court itself selectively quoted from this section of the report, omitting a critical sentence central to its meaning.

69 *Id.* at 1098 n.4 ("I want to make sure that the intent of Congress is that those who are primarily retail dealers engaged in selling . . . automobiles have this exemption for *their commission employees* such as parts men and salesmen and mechanics." (quoting 112 CONG. REC. 11290 (1966) (statement of Rep. Andrews))).

70 *Id.* ("The exemption . . . was to be continued for salesman and mechanics in recognition of the traditional incentive pay plans and irregular hours of such employees.").

71 *Id.* at 1098.

72 370 F.3d 446, 449 (4th Cir. 2004). The court noted "[f]actually, *Deel* is nearly on all fours with [this] case." *Id.* at 450.

73 *Id.* at 451 (emphasis added) (quoting 29 C.F.R. § 779.372 (2003)). *Deel Motors*, decided in 1973, and *Greenbrier Ford*, decided in 2004, considered, in relevant part, identical versions of the DOL regulation in 29 C.F.R. § 779.372. The regulation was first changed in relevant, substantive part from its 1972 form in 2011. See *supra* Section I.A.

74 See *Greenbrier Ford*, 370 F.3d at 452.

75 *Id.* (emphases added). The court explained, "*Legislative* regulations are those in which 'Congress has explicitly left a gap for the agency to fill, [thus] there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.'" *Id.* (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S.

lative it would afford the Regulation “controlling weight” under *Chevron*.<sup>76</sup> If the court found the Regulation to be *interpretive* it would give the Regulation “considerable weight”<sup>77</sup> and would “uphold [the Regulation] if [it] ‘implement[ed] the congressional mandate in a reasonable manner.’”<sup>78</sup>

The court found the DOL Dealership Regulation *interpretive* as to the meaning of the Exemption’s term “salesman.”<sup>79</sup> Therefore, rather than reviewing the Regulation under *Chevron*’s “arbitrary, capricious, or manifestly contrary to the statute”<sup>80</sup> framework, the court applied the less deferential “reasonable[ness]” standard.<sup>81</sup>

The Fourth Circuit concluded the DOL Dealership Regulation *should not* be given considerable weight because “the [DOL’s] interpretation of [‘salesman’] is unreasonable, as it is an impermissibly restrictive construction of the [Dealership Employee Exemption].”<sup>82</sup> The court explained:

[The] FLSA itself exempts any salesman “primarily engaged in selling or servicing automobiles” from the overtime requirements. However, [the DOL Dealership Regulation] conflicts with FLSA’s statutory mandate in that it restricts the definition of “salesman” to those employees “primarily engaged in making sales or obtaining orders or contracts for sales [sic] of the vehicles.” Because that restrictive regulatory definition of “salesman” unreasonably implements the congressional mandate, we reject the [DOL’s] interpretation [of the definition of “salesman” set forth] in 29 C.F.R. § 779.372(c)(1).<sup>83</sup>

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837, 843–44 (1984)). On the other hand, “[a]n interpretive regulation serves to ‘clarify ambiguous terms found in the statute or explain how a provision operates.’” *Id.* (quoting *Pelissero v. Thompson*, 170 F.3d 442, 446 (4th Cir. 1999)).

76 *Id.* (quoting *Chevron*, 467 U.S. at 844 (emphasis added)).

77 *Id.* (quoting *Chevron*, 467 U.S. at 844 (emphasis added)).

78 *Id.* (quoting *Pelissero*, 170 F.3d at 446). The Fourth Circuit cited *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), when setting forth its standard of review for *interpretive* regulations. *Greenbrier Ford*, 370 F.3d at 452. The Supreme Court in *Christopher* applied the *Skidmore* standard, which is much less deferential than that of *Chevron*. See *infra*, Part III (discussing the differences between *Chevron* and *Skidmore* deference).

79 *Greenbrier Ford*, 370 F.3d at 452.

80 *Id.* (quoting *Chevron*, 467 U.S. at 844).

81 *Id.* (quoting *Pelissero*, 170 F.3d at 446). Three years after the Fourth Circuit’s decision in *Greenbrier Ford*, the Supreme Court held *interpretive* regulations are entitled to *Chevron* scrutiny if certain requirements are met. Thus, the DOL Dealership Regulation, even if *interpretive*, is not automatically subject to a standard of review less deferential than that of *Chevron*. See *supra* note 16.

82 *Greenbrier Ford*, 370 F.3d at 452.

83 *Id.* (first quoting 29 U.S.C. § 213(b)(10)(A) (2000); then quoting 29 C.F.R. § 779.372(c)(1) (2003)). The *Greenbrier Ford* court agreed with the Fifth Circuit’s decision in *Deel Motors* by rejecting the DOL’s interpretation of 29 C.F.R. § 779.372. However, the *Greenbrier Ford* court distinguished itself from *Deel Motors* by refusing to follow the Fifth Circuit’s “functionally similar” analysis. The *Greenbrier Ford* court explained, “we decline to apply the ‘functionally similar’ analysis [of] the Fifth Circuit . . . because [it] cannot be squared with FLSA’s plain statutory and regulatory language.” *Id.* at 451.

Satisfied that the Exemption’s “statutory text” was sufficient to support its conclusion, the *Greenbrier Ford* court did not venture into the legislative history of the Dealership Employee Exemption.<sup>84</sup>

D. *Navarro v. Encino Motorcars, LLC (Ninth Circuit)*

In *Navarro v. Encino Motorcars, LLC*,<sup>85</sup> the Ninth Circuit considered the five MB Encino service advisors’ challenge that the dealership failed to pay overtime to which they were entitled under the FLSA. Like the courts in *Deel Motors* and *Greenbrier Ford*, the issue presented to the *Encino Motorcars* court was whether it should defer to the DOL Dealership Regulation’s interpretation of the Dealership Employee Exemption.<sup>86</sup>

The Ninth Circuit analyzed the DOL Dealership Regulation under the *Chevron* deference framework.<sup>87</sup> At *Chevron* step one, the *Encino Motorcars* court found the Dealership Employee Exemption ambiguous as to the definition of “salesman.”<sup>88</sup> Accordingly, at *Chevron* step two, the court had to determine whether the DOL Dealership Regulation was “arbitrary, capricious, or manifestly contrary to” the Dealership Employee Exemption.<sup>89</sup>

Before completing the *Chevron* step two analysis, however, the Ninth Circuit provided an excellent summary of the differences between the *Greenbrier Ford* court’s reading of the Dealership Employee Exemption (and also the Montana Supreme Court’s similar reading of the statute in *Thompson v. J.C. Billion, Inc.*<sup>90</sup>), and that of the DOL.<sup>91</sup> The court, which made clear that the difference of opinion between the Fourth Circuit/Montana Supreme Court and the DOL rested upon the interpretation of the term “primarily engaged,” explained,

[The Fourth Circuit and the Montana Supreme Court] read [the Dealership Employee Exemption] as follows: “any salesman, partsman, or mechanic primarily engaged in [*the general business of*] selling or service automobiles.” Service advisors are “salesmen” because their job is to sell services for cars.

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84 *See id.* at 451–53.

85 780 F.3d 1267, 1269–70 (9th Cir. 2015).

86 However, unlike the *Deel Motors* and *Greenbrier Ford* courts, which considered the version of the DOL Dealership Regulation that existed between 1970 and 2011, the *Encino Motorcars* court considered the post-2011 version of the Regulation. The post-2011 Regulation lacks its predecessor’s explicit statement that service advisors do not fall within the Exemption. This distinction is not significant; the post-2011 Regulation is not viewed as a change in position from its predecessor with respect to the DOL’s belief that service advisors are not within the scope of the Dealership Employee Exemption. *See supra* text accompanying notes 55–58.

87 *Encino Motorcars*, 780 F.3d at 1271 (“We conduct the familiar two-step inquiry to determine whether to defer to the agency’s interpretation.”).

88 *Id.* at 1271–72 (“In sum, the statutory text and canons of statutory interpretation yield no clear answer to whether Congress intended to include service advisors within the exemption.”).

89 *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

90 294 P.3d 397 (Mont. 2013).

91 *Encino Motorcars*, 780 F.3d at 1274.

And service advisors are involved in the general business of “servicing automobiles,” because their role is to help customers receive mechanical work on their cars. Accordingly, service advisors fall within the statutory definition. In effect, those courts held that that is the *only* reasonable reading of the statute.

The [DOL] reads the [Exemption] differently: “any salesman, partsman, or mechanic primarily [*and personally*] engaged in selling or servicing automobiles.” Service advisors may be “salesmen” in a generic sense, but they do not personally sell cars and they do not personally service cars. Accordingly, service advisors fall outside the statutory definition. In effect, the [DOL] reads the statute as exempting salesmen who sell cars and partsmen and mechanics who service cars.<sup>92</sup>

Turning to *Chevron* step two, the Ninth Circuit found reasonable the DOL Dealership Regulation’s interpretation that service advisors are not within the Exemption.<sup>93</sup> The court set forth its reasoning in a lengthy contextual analysis that began with a hypothetical “dog-cat” analogy (which this Note will discuss in detail below in Section II.B) to show that when a list of disjunctive subjects is followed by a list of disjunctive verbs, it is not always plausible to link each disjunctive subject to each disjunctive verb.<sup>94</sup> The court applied this theory to the Exemption, reasoning,

A natural reading of the text strongly suggests that Congress did not intend that both verb clauses would apply to all three subjects. For example, it is hard to imagine, in ordinary speech, a “mechanic primarily engaged in selling . . . automobiles.” That is, it seems that Congress intended the subject “mechanic” to be connected to only one of the two verb clauses, “servicing.” The nature of the word “mechanic” strongly implies the actions that the person would take—servicing. The same can be said of the subject “salesman.” It is hard to imagine, in ordinary speech, a “salesman . . . primarily engaged in . . . servicing automobiles.” Congress likely intended the subject “salesman” to be connected to only one of the two verb clauses, “selling.” The nature of the word “salesman” strongly implies the actions that the person would take—selling.<sup>95</sup>

The Ninth Circuit further justified the reasonableness of the DOL’s reading of the Dealership Employee Exemption by noting, “[a]ll three sub-

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92 *Id.* (emphases added). See also Petition for Writ of Certiorari, *supra* note 29, at 3 (“Every other court [than the Ninth Circuit] to consider this issue has . . . recognized that the phrase ‘primarily engaged in . . . servicing automobiles’ encompasses service advisors and partsmen who are engaged in the servicing *process* even though they do not personally service vehicles.”). The *Encino Motorcars* court agreed with the Fourth Circuit’s disapproval of the Fifth Circuit’s “functionally similar” analysis in *Deel Motors*. The Ninth Circuit explained, “*Deel Motors* . . . pre-dated *Chevron* and the modern framework for deferring to an agency’s interpretation. . . . In that regard, we agree with the Fourth Circuit that . . . [n]othing in the statutory text suggests Congress meant to exempt salesmen, partsmen, mechanics, and any other employees with functionally similar job duties.” *Encino Motorcars*, 780 F.3d at 1274.

93 *Encino Motorcars*, 780 F.3d at 1273–77.

94 See *id.* at 1275.

95 *Id.* (citations omitted).

jects (salesman, partsman, and mechanic) and both verbs (selling and servicing) retain meaning; it is just that some of the verbs do not apply to some of the subjects. If the [DOL] read out a word altogether, its interpretation likely would be unreasonable.”<sup>96</sup>

Addressing the legislative history of the Exemption, the Ninth Circuit found no conclusive indicators of congressional intent regarding either the intended status of service advisors under the exemption, or the intended meaning of “primarily engaged.”<sup>97</sup> However, the court found the “only possible exception” to the legislative history’s silence regarding the meaning of “primarily engaged” laid in the same section of the Senate Committee on Labor and Public Welfare report previously analyzed by the *Deel Motors* court.<sup>98</sup> The Ninth Circuit quoted the report as follows:

It is the intent of this exemption to exclude from the coverage of section 7 all mechanics and salesmen (other than partsmen) employed by an automobile, trailer, truck, farm implement or aircraft dealership even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership.<sup>99</sup>

The Ninth Circuit asserted, “[t]he Fifth Circuit quoted selectively from that passage for the proposition that the committee intended to exempt all mechanics and salesmen.”<sup>100</sup> The court explained, “the quoted passage also is found in earlier committee reports, which were written *before* the limiting phrase [‘primarily engaged’] was added.”<sup>101</sup> Therefore, the court reasoned, “[b]ecause the passage appeared both before and after the addition of the ‘primarily’ proviso, the best reading of that passage is that the committee was addressing what provisions apply to employees who work in separate buildings, *not what types of salesmen are exempt.*”<sup>102</sup>

Accordingly, the Ninth Circuit concluded, “[i]n sum, there are good arguments supporting both interpretations of the [E]xemption. But where there are two reasonable ways to read the statutory text, and the agency has chosen one interpretation, we must defer to that choice.”<sup>103</sup>

96 *Id.* As noted below, the Ninth Circuit was misguided in making this assertion. *Infra* Part II.

97 *Encino Motorcars*, 780 F.3d at 1275–77.

98 *Id.* at 1277.

99 *Id.* (quoting S. REP. NO. 89-1487, at 32 (1966)).

100 *Id.*

101 *Id.* (citing H.R. REP. NO. 89-871, at 38 (1965)). As noted in Section II.C below, the Ninth Circuit badly ignored critical aspects of this section in both the Senate and House reports it cited, making clear that its conclusion as to the “best reading” of the passage was at best partially correct, and that the passage in fact does address “what types of salesmen are exempt.”

102 *Id.* (emphasis added).

103 *Id.*

## II. TEXT AND LEGISLATIVE HISTORY OF THE DEALERSHIP EMPLOYEE EXEMPTION

At *Chevron* step two, in determining whether an agency has set forth a reasonable interpretation of an ambiguous statute, courts typically base their decisions on “a comparison of the agency’s interpretation with the language of the statute and sometimes also with the legislative history and legislative purpose of the statute.”<sup>104</sup> In deciding the reasonableness of the DOL Dealership Regulation, the Ninth Circuit and pre-*Chevron* Fifth Circuit did just that—first analyzing the text of the Dealership Employee Exemption, and then turning to its legislative history and purpose.<sup>105</sup>

Despite its extensive contextual and legislative history analyses, the Ninth Circuit in *Encino Motorcars* neglected a significant aspect of the Dealership Employee Exemption—its inclusion of “partsman”—an element that discredits the court’s holding that the DOL was reasonable in proclaiming service advisors as outside the Exemption. Additionally, the *Encino Motorcars* court (and also the *Deel Motors* court thirty-two years earlier) overlooked legislative history indicating Congress intended to include service advisors within the Exemption’s definition of “salesman.”

Although the *Greenbrier Ford* court did not consult the legislative history of the Exemption, the “partsman” exemption validates the Fourth Circuit’s textually grounded conclusion that the *only* reasonable way to read the Exemption is “any salesman, partsman, or mechanic primarily engaged in [*the general business of*] selling or service automobiles.”<sup>106</sup> Accordingly, the DOL Dealership Regulation’s effective reading of the Exemption as “any salesman, partsman, or mechanic primarily [*and personally*] engaged in selling or servicing automobiles” should not be afforded *Chevron* deference because there is unambiguous textual and legislative intent for the inclusion of service advisors within the Exemption’s definition of “salesman,” thereby rendering the Regulation manifestly contrary to the statute.

### A. Inclusion of “Partsman” Within the Exemption

In 1961, Congress effectively exempted any car dealership employee from the FLSA’s overtime pay requirement.<sup>107</sup> That law exempted “any employee of a retail or service establishment that is primarily engaged in the business of selling automobiles, trucks, or farm implements.”<sup>108</sup>

104 Note, *The Two Faces of Chevron*, 120 HARV. L. REV. 1562, 1568 (2007). See also Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 824 (2010) (“Legislative history has long been a tool that courts have used (including the Court in *Chevron*) to search for indications of congressional intent.”).

105 *Encino Motorcars*, 780 F.3d at 1273–77; *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1097–98 (5th Cir. 1973).

106 *Encino Motorcars*, 780 F.3d at 1274.

107 See Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9(a)(19), 75 Stat. 65, 73.

108 29 U.S.C. § 213(a)(19) (1964).

As part of the FLSA amendments of 1966, however, Congress narrowed the exemption to its current form, which exempts only “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles.”<sup>109</sup> Congress’s ultimate decision to restrict the Exemption to “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles” was not made arbitrarily. Rather, differing positions existed among three proposed FLSA-amending bills that were entertained by the Eighty-Ninth Congress.<sup>110</sup>

The first bill would have removed in its entirety the exemption for all dealership employees.<sup>111</sup> The second bill would have exempted from the FLSA overtime requirement “any salesman or mechanic” employed by a dealership.<sup>112</sup> Neither of these bills became law.

The third bill, H.R. 13712, enacted into law on September 23, 1966, as the Fair Labor Standards Amendments of 1966, contained the “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles” language of the Dealership Employee Exemption.<sup>113</sup> The language of H.R. 13712, however, varied importantly before reaching its enacted form.

As initially introduced in the House on March 16, 1966, H.R. 13712, like the second bill that did not become law, exempted “any salesman or mechanic” employed by a dealership.<sup>114</sup> Reported by the House on March 29, 1966, the bill added partsmen to the Exemption, which then read “any salesman, mechanic, or partsman” employed by a dealership.<sup>115</sup> This version of H.R. 13712 passed the House on May 26, 1966, and, on May 27, 1966, was read by the Senate and referred to the Senate Committee on Labor and Public Welfare.<sup>116</sup> Thus, none of these first three versions of H.R. 13712 contained the limiting clause “primarily engaged in selling or servicing automobiles” as seen in the enacted law; rather, they broadly exempted *any* salesman, mechanic, or partsman employed by a dealership.

The Senate proposed noteworthy changes to H.R. 13712.<sup>117</sup> As reported by the Senate on August 23, 1966, the Exemption was altered to “any salesman (other than partsman) or mechanic primarily engaged in selling or ser-

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109 Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 209, 80 Stat. 830, 836; (codified as amended at 29 U.S.C. § 213(b)(10)(A) (2012)).

110 See Pub. L. No. 89-601, § 209, 80 Stat. 830, 836 (1966); H.R. 10518, 89th Cong. § 209 (1965); H.R. 8259, 89th Cong. § 305 (1965).

111 H.R. 8259, 89th Cong. § 305 (1965).

112 H.R. 10518, 89th Cong. § 209 (1965).

113 Pub. L. No. 89-601, § 209, 80 Stat. 830, 836 (1966).

114 H.R. 13712, 89th Cong. § 209 (as introduced, Mar. 16, 1966).

115 H.R. 13712, 89th Cong. § 209 (as reported by H. Comm. on Educ. & Labor, Mar. 29, 1966).

116 H.R. 13712, 89th Cong. § 209 (as passed by the House, May 26, 1966 and referred to S. Comm. on Labor & Pub. Welfare, May 27, 1966).

117 See *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1275–77 (9th Cir. 2015); *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1097 n.2 (5th Cir. 1973).

ving automobiles” employed by a dealership.<sup>118</sup> This draft of the bill is extraordinarily significant for two reasons. First, the Senate disagreed with the House’s inclusion of partsmen within the Exemption, and accordingly rewrote the Exemption to specifically *exclude* partsmen.<sup>119</sup> Second, it is the first time the Exemption contained the controversial limiting clause “primarily engaged in selling or servicing automobiles.”<sup>120</sup>

With respect to the inclusion (or exclusion) of partsmen, the Senate, in the Senate Committee on Labor and Public Welfare report analyzed by both the *Deel Motors* and *Encino Motorcars* courts,<sup>121</sup> explained that it removed partsmen from the House version of the bill in order to “lessen the competitive disadvantage of the wholesalers distributors who have had no exemption from either minimum wage or overtime under the [FLSA].”<sup>122</sup>

The legislative history is devoid of any direct explanation as to why the Senate added the “primarily engaged” requirement. Accordingly, the legislative history is also silent as to Congress’s intended meaning of “primarily engaged.” As the Ninth Circuit explained, all that is known is that “sometime in 1966 between May 27 [the date on which the version of the bill that passed the House was referred to the Senate] and August 23 [the date on which the Senate reported its amended version of H.R. 13712], the Senate added that phrase.”<sup>123</sup>

What is known, however, are two important facts that allow a definitive inference as to Congress’s intended meaning of “primarily engaged.” First, the Senate’s attempt to remove partsmen from the Exemption ultimately failed; in its enacted form, the Exemption includes “any salesman, partsmen, or mechanic.”<sup>124</sup> Second, although the Senate’s removal of partsmen was rejected, in its enacted form the Exemption retains the Senate’s addition that exempt dealership employees must be “primarily engaged in selling or servicing automobiles.”<sup>125</sup>

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118 H.R. 13712, 89th Cong. § 209 (as reported by S. Comm. on Labor & Pub. Welfare, Aug. 23, 1966).

119 *Id.*

120 *Id.*

121 *See supra* text accompanying notes 68, 99–103.

122 S. REP. NO. 89-1487, at 15 (1966). Wholesale auto parts dealers—which in theory employ only partsmen (they have no mechanics fixing cars, and no salesmen selling cars, but only partsmen stocking parts)—would be required to pay partsmen overtime under the House version of the bill. This is because wholesalers do not sell to “ultimate purchasers.” Therefore, the Senate believed that by removing the partsmen exemption entirely, wholesale auto parts distributors would be on a more equal playing field with retail dealerships that also employed partsmen, but, under the House version of the bill, would not be required to pay overtime to these employees.

123 *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1276 (9th Cir. 2015).

124 *See* H.R. REP. NO. 89-2004, at 7, 19 (1966) (Conf. Rep.).

125 *Id.*

B. “Partsman” Exemption as Conclusive Evidence of Exemption  
for Service Advisors

The Dealership Employee Exemption’s inclusion of partsmen makes clear that the only reasonable way to read the Exemption is “any salesman, partsman, or mechanic primarily engaged in [*the general business of*] selling or service automobiles.”<sup>126</sup> Accordingly, the DOL Dealership Regulation’s effective reading of the Exemption as “any salesman, partsman, or mechanic primarily [*and personally*] engaged in selling or servicing automobiles” is *manifestly contrary* to the intent of the statute, and should not be afforded *Chevron* deference.

The Ninth Circuit’s dog-cat analogy explained,

The Fourth Circuit’s point is that, when Congress uses a list of disjunctive subjects (here, “salesman, partsman, or mechanic”) followed by a list of disjunctive verbs (here, “selling or servicing”), the ordinary interpretation of that construction is that each subject is linked with each verb. For example, if someone says, “if my dogs or cats are eating or drinking, then I know not to pet them,” we understand that phrase to be all-encompassing: the speaker refrains from petting a dog that is eating or drinking and a cat that is eating or drinking. It would contravene the speaker’s intent to include, for example, only cats that were eating but to exclude dogs that were eating.

Critically, however, that analysis depends on context. Consider this slightly modified hypothetical: “if my dogs or cats are barking or meowing, then I know that they need to be let out.” The Fourth Circuit’s grammatical interpretation of that phrase would include a meowing dog and a barking cat. But most English speakers would interpret the sentence to refer only to a barking dog and a meowing cat. At a minimum, that implicit limitation would offer a reasonable interpretation of the speaker’s intent.<sup>127</sup>

Despite the Ninth Circuit’s assertion that analysis “depends on context”<sup>128</sup> in instances when a list of disjunctive subjects (here, “salesman, partsman, or mechanic” and “dogs or cats”) is followed by a list of disjunctive verbs (here, “selling or servicing” and “barking or meowing”) the court erroneously ignored the Exemption’s inclusion of partsmen.

In the dog-cat analogy, it is reasonable to interpret the sentence as referring only to barking dogs and meowing cats. This is because, in that hypothetical, the limiting of each disjunctive subject (dog or cat) to only one of the disjunctive verbs (barking or meowing) is unambiguous. As the *Encino Motorcars* certiorari petition explains, “[m]eowing dogs and barking cats are not covered because there are no such animals.”<sup>129</sup>

The same one-to-one subject-verb linking, however, cannot apply to the Dealership Employee Exemption, which lists three disjunctive subjects (sales-

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126 MB Encino has presented this same argument in its petition for writ of certiorari. See Petition for Writ of Certiorari, *supra* note 29, at 28 (“Congress’ inclusion of partsmen is fatal to the Ninth Circuit’s [holding].”).

127 *Encino Motorcars*, 780 F.3d at 1275.

128 *Id.*

129 Petition for Writ of Certiorari, *supra* note 29, at 28.

man, partsman, or mechanic) to only two disjunctive verbs (selling or servicing)—it is mathematically impossible.<sup>130</sup> A partsman, therefore, must have been understood by Congress to be “primarily engaged” in *at least* one of (a) selling or (b) servicing automobiles.

Under the definition of “partsman” as it was understood by Congress in 1966 and the DOL ever since, the only manner in which a partsman can be “primarily engaged” in *at least* one of (a) selling or (b) servicing automobiles is if that partsman is “primarily engaged in [*the general business of*] selling or service automobiles.” The Congressional Record makes clear that Congress, in enacting the Fair Labor Standards Amendments of 1966, defined “partsman” as one who “classifies, shelves and dispenses parts used by mechanics and sold to customers who come into establishments to make purchases.”<sup>131</sup> Similarly, in the DOL Dealership Regulation, the agency has long defined “partsman” as “any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.”<sup>132</sup>

Applying these definitions to the DOL’s effective reading of the Exemption, it is neither plausible to imagine a “partsman primarily [*and personally*] engaged in selling automobiles,” *nor* a “partsman primarily [*and personally*] engaged in servicing automobiles.” First, a partsman’s duties are in no way related to the selling of vehicles.<sup>133</sup> Second, the mechanic—which, as defined by the DOL, does “mechanical work . . . in the servicing of an automobile”<sup>134</sup>—is the only employee *personally* engaged in servicing vehicles (i.e., the only person *doing* the actual servicing).<sup>135</sup> By definition, the partsman does not *personally* service vehicles. Rather, the partsman merely manages parts so the mechanic can *personally* service vehicles, whether that be installing new parts, fixing existing parts, or otherwise. As one New York dealership explained, “to apply the [statutory] exemption only to ‘partsman’ who [*personally*] work on vehicles would be to define these individuals as mechanics, and thereby render the statutory use of the label ‘partsman,’ superfluous.”<sup>136</sup>

Accordingly, the DOL’s interpretation of the Exemption is unreasonable because (and despite the Ninth Circuit’s assertion to the contrary<sup>137</sup>) it reads out the word “partsman” altogether. As the Supreme Court explained, “one of the most basic interpretive canons [is] that ‘[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoper-

130 *Id.* at 28–29.

131 112 CONG. REC. 20502 (1966) (statement of Sen. Bayh).

132 29 C.F.R. § 779.372(c)(2) (2011); 29 C.F.R. § 779.372(c)(2) (1971).

133 *See supra* text accompanying notes 131–32 (outlining the job duties of partsmen).

134 29 C.F.R. § 779.372(c)(3) (2011).

135 Merriam-Webster defines “personally” as “used to say that something was done or will be done by a particular person and not by someone else.” *Personally*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/personally> (last visited Mar. 20, 2016).

136 *McBeth v. Gabrielli Truck Sales, Ltd.*, 768 F. Supp. 2d 383, 388 (E.D.N.Y. 2010).

137 *See supra* text accompanying note 96.

ative or superfluous, void or insignificant.’”<sup>138</sup> With respect to the Dealership Employee Exemption, the only way in which this requirement can be satisfied is if the Exemption is read as “any salesman, partsman, or mechanic primarily engaged in [*the general business of*] selling or service automobiles.”

Reading the Dealership Employee Exemption as “any salesman, partsman, or mechanic primarily engaged in [*the general business of*] selling or service automobiles,” gives proper effect to the Exemption’s inclusion of partsmen and, consequently, brings service advisors within the scope of the Exemption.<sup>139</sup> Partsman’s shelving and dispensing of parts used by mechanics in servicing vehicles qualifies partsman’s work as primarily engaged in *the general business of* servicing automobiles.<sup>140</sup> Critically, then, service advisors’ solicitation of repairs and maintenance qualifies service advisors as “salesmen . . . primarily engaged in *the general business of* . . . servicing automobiles”—a service advisor is a salesman whose duties affect the whole of a vehicle’s servicing.<sup>141</sup> Therefore, service advisors are not entitled to overtime pay because they fall within the scope of the Dealership Employee Exemption.

### C. Congressional Intent That Service Advisors Be Included in the Definition of “Salesmen”

Although in and of itself the Exemption’s inclusion of “partsman” is determinative as to exemption of service advisors, it is important to understand the true meaning of the House and Senate committee reports analyzed (and disagreed upon) by the *Deel Motors* and *Encino Motorcars* courts. These reports and related Congressional documents suggest, at the time the Dealership Employee Exemption was enacted, Congress considered service advisors as within the definition of exempt salesmen.

In *Deel Motors*, the Fifth Circuit quoted a passage from a 1966 Senate Committee on Labor and Public Welfare report for the proposition that the

138 *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

139 See Petition for Writ of Certiorari, *supra* note 29, at 26 (“[I]f . . . partsmen come within the plain terms of the exemption because they are engaged in the *general process* of selling or servicing automobiles rather than personally engaged in selling or servicing automobiles, then service advisors must also come within the terms of the exemption.”). Thus, reading the Exemption as, “any salesman, partsman, or mechanic primarily engaged in [*the general business of*] selling or service automobiles” is not done for the purpose of incorporating service advisors within its scope. Rather, the “*in the general business of*” interpretation must be adopted in order to properly give effect to the Exemption’s inclusion of partsmen. The inclusion of service advisors within the Exemption is a byproduct of this reading.

140 Merriam-Webster defines “general” as “involving, applicable to, or affecting the whole.” *General*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/general> (last visited Mar. 20, 2016). Thus, a partsman’s duties affect the whole of a vehicle’s servicing.

141 See also Petition for Writ of Certiorari, *supra* note 29, at 16 (“[A] service advisor is the paradigmatic ‘salesman . . . primarily engaged in . . . servicing automobiles.’”).

Exemption was intended to apply to all dealership mechanics and salesmen, including service advisors.<sup>142</sup> In *Encino Motorcars*, the Ninth Circuit recognized the same passage as the “only possible exception” to the legislative history’s otherwise silence as to the meaning of which salesmen (i.e., whether service advisors) are “primarily engaged” in the selling or servicing of vehicles.<sup>143</sup> However, the Ninth Circuit criticized the Fifth Circuit for selectively quoting from that passage, and argued that, because a similar passage also appeared in a 1965 House Committee on Education and Labor report issued before the “primarily engaged” requirement was added to the Exemption, the passage was best interpreted as addressing what provisions apply to employees who work in separate buildings, and not what types of salesmen are exempt.<sup>144</sup>

As it turns out, the Ninth Circuit selectively quoted from the 1966 Senate report, while the Fifth Circuit almost certainly did not. In full, the relevant texts of the 1965 House and 1966 Senate reports are as follows:

**H. Comm. on Education and Labor  
(1965)**

It is the intent of this exemption to exclude from the coverage of section 7 all mechanics and salesmen employed by an automobile, truck, farm implement, or aircraft dealership, even if they work in physically separate buildings or areas so long as they are employed in a department which is functionally operated as part of the dealership.<sup>145</sup>

**S. Comm. on Labor and Public  
Welfare (1966)**

*The exemption, unlike that contained in section 13(b)(19), is not limited to “retail” dealerships.* It is the intent of this exemption to exclude from the coverage of section 7 all mechanics and salesmen (other than partsmen) employed by an automobile, trailer, truck, farm implement or aircraft dealership even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership.<sup>146</sup>

In quoting the 1966 Senate report, the Ninth Circuit omitted the first sentence, emphasized above, of that standalone paragraph<sup>147</sup> that states “[t]he exemption . . . is not limited to ‘retail’ dealerships.”<sup>148</sup> In a preceding section of the report, the Senate expressed its desire to remove partsmen from the Exemption in order to mitigate a competitive disadvantage that

142 See *supra* text accompanying note 68.

143 See *supra* text accompanying note 98.

144 See *supra* text accompanying notes 100–03.

145 H.R. REP. NO. 89-871, at 38 (1965).

146 S. REP. NO. 89-1487, at 32 (1966) (emphasis added).

147 See *supra* text accompanying note 99.

148 S. REP. NO. 89-1487, at 32.

would result for wholesale parts distributors.<sup>149</sup> Thus, by editing the passage (from the 1965 House report version) to (a) recognize that the Exemption is not limited to retail dealerships and (b) say “all mechanics and salesman (other than partsmen),” the Senate explicitly addressed what types of salesmen are exempt.

During the drafting of the FLSA Amendments of 1966, Representative Mark Andrews sought to “have clear congressional history”<sup>150</sup> as to the proposed separate buildings policy. As Representative Andrews explained, at that time the DOL’s position was that “any physically separate building is a separate establishment.”<sup>151</sup> Therefore, “since larger dealerships necessarily occupy many buildings separated by streets or alleyways,” such dealerships would have many salesmen, partsmen, and mechanics that, under the DOL’s position, did not meet the Dealership Employee Exemption’s requirement that the establishment for which they work be primarily engaged in selling vehicles to ultimate purchasers.<sup>152</sup> Recognizing that this would frustrate the purpose of the Exemption, Representative Andrews indicated the House’s “intent to be contrary to the [DOL’s then-existing separate building] enforcement policy.”<sup>153</sup>

By retaining the separate buildings provision as set forth in the 1965 House report and discussed on the House floor, the Senate accepted the House’s previous suggestion.<sup>154</sup> However, the Senate supplemented that suggestion with its desired removal of partsmen from the Exemption. Accordingly—despite the Ninth Circuit’s conclusion partially to the contrary—the Senate report passage addresses *both* what provisions apply to employees who work in separate buildings and *also* what types of salesmen are exempt.

In turn, a further reading of the Exemption’s legislative history suggests the Fifth Circuit, which read the Senate report’s phrase “all mechanics and

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149 See *supra* text accompanying note 122.

150 112 CONG. REC. 11289 (1966) (statement of Rep. Andrews).

151 *Id.*; see also 29 C.F.R. § 779.305 (1966).

152 112 CONG. REC. at 11289 (statement of Rep. Andrews). For example, in a large dealership with multiple buildings, a mechanic might perform his duties in a building in which no vehicle sales are made. Under the then-existing DOL position, that mechanic would be entitled to overtime pay because his employer would not qualify as a “nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers” as is required by the Dealership Employee Exemption. 29 U.S.C. § 213(b)(10)(A) (2012). Instead, because each building is a separate establishment, only those salesmen, partsmen, and mechanics who perform their duties in buildings in which vehicle sales are made would be exempt.

153 112 CONG. REC. at 11289 (statement of Rep. Andrews).

154 See *id.* at 20506 (statement of Sen. Javits) (“The [1966 Senate Committee on Labor and Public Welfare] report, at page 32, contains language which I proposed, to make it clear that the exemption will extend to the employer even if certain of the employees are separately housed.”). The DOL conformed the Regulation to Congress’s separate buildings position in its original DOL Dealership Regulation. See 29 C.F.R. § 779.372 (1971); see also Fair Labor Standards Act as Applied to Retailers of Goods or Services, 35 Fed. Reg. 5856, 5896 (Apr. 9, 1970) (to be codified at 29 C.F.R. pt. 776).

salesman” to include service advisors, almost certainly did not selectively quote from the report. In *Encino Motorcars*, the Ninth Circuit claimed there is “no mention [in the legislative history of the Exemption] of service advisors, by name or by role. All references to ‘salesman’ appear to refer to an employee who sells cars only.”<sup>155</sup> Despite this assertion, it remains highly plausible that the Fifth Circuit correctly determined the Senate intended to include service advisors within the definition of “salesmen” for one significant reason—the legislative history makes reference to service advisors.

The Dealership Employee Exemption’s legislative history almost certainly *does* refer to service advisors as “salesmen.” Senator Jacob Javits, in supporting the removal of “partsmen” from the Exemption, explained, “as far as the automobile partsmen were concerned, they did work regular hours, they were not, like the mechanic *and the salesman*, subject to call at any time that a fellow’s car broke down.”<sup>156</sup> By suggesting that both a mechanic *and* salesman are called when a vehicle breaks down, Senator Javits implied the vehicle will be serviced, or at least that servicing of the vehicle will be considered under those factual circumstances. The salesman’s only potential role in such servicing is to diagnose and solicit the necessary repairs—the job of the service advisor.<sup>157</sup> Had Senator Javits stated that only a mechanic is called when a vehicle breaks down, that would suggest the mechanic is responsible for diagnosing and soliciting repairs. In that situation, the salesman *would not* be called “at any time that a fellow’s car broke down,” but only if and when the mechanic diagnosed the vehicle as irreparable, at which point the salesman would be responsible for selling a new car. But Senator Javits did not say this. Senator Javits explicitly stated that when a vehicle breaks down, both a mechanic and salesman are called into duty. Accordingly, he must have considered service advisors as salesmen primarily engaged in servicing automobiles.<sup>158</sup>

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155 *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1276 (9th Cir. 2015) (citing 112 CONG. REC. at 20504 (statement of Sen. Yarborough) (“It would not affect the salesman. He can go out and sell an Oldsmobile, a Pontiac, or a Buick all day long and all night. . . . The salesman tries to get people mainly after their hours of work. In some cases a man will leave his job, get his wife, and go to look at automobiles.”)).

156 112 CONG. REC. at 20506 (statement of Sen. Javits) (emphasis added).

157 This disproves the 2008 statement by members of Congress that, when enacting the Dealership Employee Exemption in 1966, their predecessors (but with respect to Senator Edward Kennedy—whose nearly forty-seven years of Senate service began in 1962—colleagues) “did not intend . . . to exempt service employees who sell mechanical services, because the common understanding was that a car ‘salesman’ sells automobiles and that a salesman does not . . . sell mechanical services.” Letter from Twelve Members of Congress, *supra* note 53, at 7.

158 This conclusion is consistent with the car dealership industry’s employment and understanding of service advisors in 1966, the time the Exemption was enacted. National Labor Relations Board (NLRB) decisions refer to “service salesmen” as early as 1938. See *Hudson & Terraplane Sales Corp.*, 8 N.L.R.B. 72, 74 (1938). Although one early NLRB decision classified service advisors as mechanics, see *Charles Smith Nash Co.*, 83 N.L.R.B. 511, 512 n.5 (1949) (“[S]ervice salesmen are in fact *mechanics*, who examine a customer’s car and prescribe the work required to recondition it.”), subsequent decisions uniformly

In sum, the passage in the 1966 Senate Committee on Labor and Public Welfare report quoted by both the *Deel Motors* and *Encino Motorcars* courts clearly considers what types of salesmen are exempt under the Dealership Employee Exemption. A closer look into the Exemption's legislative history confirms Congress intended to include service advisors within the scope of "salesmen."

### III. ANALYZING THE EXEMPTION IN LIGHT OF *CHRISTOPHER*

In its 2012 decision in *Christopher v. SmithKline Beecham Corp.*,<sup>159</sup> the Supreme Court resolved a circuit split over whether pharmaceutical sales representatives (PSRs) are "outside salesmen" exempt from the FLSA's minimum wage and overtime pay provisions.<sup>160</sup> This is the last time the Court has considered the applicability of a specific FLSA exemption.<sup>161</sup> Much like the three federal appellate courts that have considered the Dealership Employee Exemption, the Court in *Christopher* had to determine whether to afford deference to the DOL's position that PSRs are not exempt outside salesmen (and are therefore entitled to overtime pay).<sup>162</sup> In a close 5-4 decision the Court denied deference to the DOL, holding that PSRs qualify as exempt outside salesmen.<sup>163</sup>

In reviewing the DOL's position on PSRs, the *Christopher* Court applied *Skidmore* deference, a standard of review much less deferential than the *Chevron* standard applied by the Ninth Circuit to the DOL Dealership Regula-

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classified service advisors as salesmen, *see, e.g.*, *Story Oldsmobile, Inc.*, 145 N.L.R.B. 1647, 1649 (1964) ("The service salesman is the first point of contact between [the dealership] and the customer seeking repair work."); *Tulsa Hudson Co.*, 94 N.L.R.B. 646, 646 (1951) ("The service salesman receives customers who drive their automobiles to the Employer's shop for repairs, diagnoses mechanical troubles, writes up customers' repair orders, and advises the mechanics as to the work required on the basis of the customers' orders."); *Hanna Motor Co.*, 94 N.L.R.B. 105, 107 (1951) ("The Employer has four service salesmen in the service department. These men receive automobiles that are brought into the department for repairs, talk to the customers regarding what repairs are here necessary, and prepare order blanks for the repairs."); *Yarbrough Motor Co.*, 85 N.L.R.B. 1296, 1297 (1949) ("Service salesmen fall within the 'salesmen' classification.").

159 132 S. Ct. 2156 (2012).

160 *Id.* at 2161. The FLSA exempts "outside salesmen" in 29 U.S.C. § 213(a). Therefore, unlike qualified dealership employees, who are only exempt from the FLSA's overtime pay provisions, outside salesmen are exempt from both the Act's minimum wage and overtime requirements. *See supra* note 9.

161 *See* Noel P. Tripp, *Ninth Circuit Creates Circuit Split Regarding FLSA Classification of Sales Advisor Position*, JACKSON LEWIS (Mar. 31, 2015), <http://www.wageandhourlawupdate.com/2015/03/articles/departments-of-labor/ninth-circuit-creates-circuit-split-regarding-flsa-classification-of-sales-advisor-position/>.

162 *See Christopher*, 132 S. Ct. at 2165.

163 *See id.* at 2172. PSRs are "sales representatives whose primary duty is to obtain non-binding commitments from physicians to prescribe their employer's prescription drugs in appropriate cases." *Id.* at 2161.

tion.<sup>164</sup> This standard, set forth in *Skidmore v. Swift & Co.*,<sup>165</sup> unlike the *Chevron* standard, does not defer to an agency's interpretation "so long as it is reasonable. Instead, it is merely given 'weight' based on 'the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'"<sup>166</sup> Due to this significantly less deferential standard of review, when reading the *Christopher* Court's contextual analysis of the outside salesmen exemption, it is difficult to draw inferences as to how the Court might interpret the Dealership Employee Exemption in *Encino Motorcars*.

Nevertheless, the *Christopher* majority articulated equitable justifications for denying deference to the DOL's interpretation of the outside salesmen exemption. These justifications are readily adaptable to the analysis of the Dealership Employee Exemption, and thus, beyond the already conclusive text and legislative history of the Exemption,<sup>167</sup> they provide additional support for denying deference to the DOL Dealership Regulation.

#### A. *Skepticism of Extensive Retroactive Liability in Light of Longstanding DOL Guidance and Industry Practice*

Like the plaintiff service advisors in *Deel Motors*, *Greenbrier Ford*, and *Encino Motorcars*, the plaintiff PSRs in *Christopher* sought backpay for the overtime to which they asserted entitlement.<sup>168</sup> The *Christopher* majority took issue with such a remedy. The Court recognized the "[pharmaceutical] industry's decades-long practice of classifying [PSRs] as exempt employees."<sup>169</sup> Further, the Court explained, "Until 2009 [when the DOL first concluded that PSRs are not outside salesmen], the pharmaceutical industry had little reason to suspect that its longstanding [treatment of PSRs] as exempt

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164 See *id.* at 2165–69; see also Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1879 (2015) ("It is often said that [*Chevron*] requires 'strong deference' and [*Skidmore*] requires 'weak deference.'"); Christopher J. Walker, *How to Win the Deference Lottery*, 91 TEX. L. REV. SEE ALSO 73, 75 (2013) (describing the *Skidmore* standard as "less generous" than that of *Chevron*).

165 323 U.S. 134 (1944).

166 Walker, *supra* note 164, at 75 (alteration in original) (quoting *Skidmore*, 323 U.S. at 140). For an excellent summary of the why the Court reviewed DOL's position on PSRs under this less deferential standard, see Robert J. Hurtt, Jr., *Not Making Sales Paid Too Well for Pharmaceutical Reps: Why the Result in Christopher v. SmithKline Beecham Corp. Makes Sense Even if Its Statutory Construction Does Not*, 57 ST. LOUIS U. L.J. 1019, 1034 (2013); Hsuan Li, Note, *Christopher v. SmithKline Beecham Corporation: A Tough Pill to Swallow for Pharmaceutical Sales Representatives?*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 768, 785–90 (2013).

167 See *supra* Part II.

168 See *Christopher*, 132 S. Ct. at 2164; *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1270 (9th Cir. 2015); *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446, 449 (4th Cir. 2004) (noting the plaintiff service advisor asserted "he was owed compensation for 888.75 overtime hours"); *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1096 (5th Cir. 1973).

169 *Christopher*, 132 S. Ct. at 2168.

outside salesmen transgressed the FLSA.”<sup>170</sup> This is because “the DOL only once [in a 1945 opinion letter] directly opined on the exempt status of [PSRs] prior to 2009,”<sup>171</sup> which shows “the DOL never initiated any enforcement actions with respect to [PSRs] or otherwise suggested that it thought the industry was acting unlawfully [in treating PSRs as exempt].”<sup>172</sup> As a result, the Court expressed skepticism of retroactive liability, stating,

[W]here . . . an agency’s announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute. . . .

. . . It is one thing to expect regulated parties to conform their conduct to an agency’s interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for the first time . . . and demands deference.<sup>173</sup>

This unfavorable stance towards significant retroactive FLSA liability is equally—if not more—applicable to the treatment of service advisors under the Dealership Employee Exemption. Unlike the pharmaceutical industry, car dealerships were provided a litany of DOL guidance regarding the inclusion of service advisors within the Exemption. This guidance spanned four decades and included the 1978 opinion letter, 1987 DOL Handbook, and 2008 formal proposal to amend the Dealership Regulation.<sup>174</sup> These administrative materials not only pronounced the DOL’s position that service advisors are exempt salesmen, a position directly contrary to the longstanding language of the DOL Dealership Regulation, but also, in the 1987 Handbook, unequivocally stated the agency’s intention to amend the Regulation to reflect this position.<sup>175</sup>

Further, the DOL’s treatment of the Dealership Employee Exemption was subject to a lengthy period of inaction. The agency first proposed service advisor-related amendments to the DOL Dealership Regulation in 2008, twenty-one years after it pledged to do so, and then ultimately decided to reject those proposed regulations in 2011.<sup>176</sup> As the *Christopher* majority sug-

170 *Id.* at 2167.

171 *Id.* at 2168 n.16.

172 *Id.* at 2168.

173 *Id.*; *see also* Hurtt, *supra* note 166, at 1034 (“[T]he Court found no ‘fair warning,’ given that the interpretation would impose massive liability on Glaxo for conduct that had occurred before the agency’s interpretation had been advanced.” (quoting *Christopher*, 132 S. Ct. at 2167)).

174 *See supra* text accompanying notes 48–51; *see also* Brief for Amici Curiae National Automobile Dealers Ass’n et al. in Support of Petitioner at 4–5, Encino Motorcars, LLC, v. Navarro, 136 S. Ct. 890 (2016) (No. 15-415), 2015 WL 6735818, at \*4–5 (“For more than 40 years, the nation’s automobile dealerships have relied on the FLSA’s [Dealership Employee Exemption] in classifying and compensating their Service Advisors. . . . [Service advisors] are generally classified as exempt employees, often under [the Dealership Employee Exemption].”).

175 *See supra* text accompanying note 49.

176 *See supra* text accompanying notes 49–54.

gested, “[o]ther than acquiescence [to the industry’s treatment of its employees], no explanation for the DOL’s inaction is plausible.”<sup>177</sup>

Accordingly, the car dealership industry had even less reason to suspect its longstanding treatment of service advisors as exempt salesmen transgressed the FLSA than did the pharmaceutical industry with respect to PSRs. As opposed to the DOL’s near silence concerning its stance on PSRs, the agency was highly vocal in its belief that service advisors were overtime-exempt salesmen under the Dealership Employee Exemption. Due to the DOL’s lengthy period of inaction, coupled with consistent authority on which dealerships denying overtime to service advisors could rely, the potential for “unfair surprise” in imposing significant retroactive liability on car dealerships is even greater than that which existed for pharmaceutical companies. Therefore, affording deference to the DOL’s ultimate position that service advisors are entitled to overtime pay would be highly problematic.

### *B. Non-Exemption Would Contravene Longstanding Industry Payment Practices*

The *Christopher* majority took issue with the fact that classifying PSRs as non-exempt employees entitled to overtime would frustrate the “apparent purpose of the FLSA’s exemption for outside salesmen.”<sup>178</sup> The Court explained the outside salesmen exemption is (in part) grounded in “the belief that exempt employees. . . perform[] a kind of work that ‘[is] difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult.’”<sup>179</sup> Recognizing that the plaintiff PSRs worked “10 and 20 hours outside normal business hours each week,”<sup>180</sup> the Court concluded PSRs “are hardly the kind of employees that the FLSA was intended to protect. And it would be challenging, to say the least, for pharmaceutical companies to compensate [PSRs] for overtime going forward without significantly changing the nature of that position.”<sup>181</sup>

This same analysis is applicable to the treatment of service advisors under the Dealership Employee Exemption. As Senator Javits noted, unlike partsmen, service advisors do not work regular hours, but are instead “subject to call at any time that a fellow’s car broke down.”<sup>182</sup> Similarly, in a poetic precursor to the Ninth Circuit’s dog-cat analogy, one Senator explained, “Salesmen are a little different breed of cats, because they go out at unusual hours.”<sup>183</sup> Accordingly, it can be inferred that the nature of an employee’s work schedule was a central factor in Congress’s determination of which

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177 *Christopher*, 132 S. Ct. at 2168.

178 *Id.* at 2173.

179 *Id.* (quoting *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22122, 22124 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 541)).

180 *Id.*

181 *Id.*

182 See 112 CONG. REC. 20506 (1966) (statement of Sen. Javits).

183 *Id.* at 20504 (statement of Sen. Bayh).

dealership employees to exempt. Although the Senate ultimately lost its battle to remove partsmen from the Exemption,<sup>184</sup> its reliance on work schedules as support for their removal makes clear the Dealership Employee Exemption was, like the outside sales exemption, at least in part grounded in “the belief that exempt employees. . . . perform [ ] a kind of work that ‘was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult.’”<sup>185</sup>

Therefore, it would frustrate the purpose of the Dealership Employee Exemption to entitle service advisors to overtime pay. As the *Encino Motorcars* certiorari petition explains, “[D]ealerships and their service advisors have negotiated mutually beneficial compensation plans in good-faith reliance on decades of precedent holding that such employees are exempt from the FLSA’s overtime requirements.”<sup>186</sup> Thus, in the same vein as the *Christopher* majority’s concerns for the pharmaceutical industry should PSRs have gained entitlement to overtime pay, car dealerships would face substantial obstacles in restructuring the service advisor position should the Court hold service advisors are entitled overtime going forward.<sup>187</sup>

#### CONCLUSION

The FLSA Dealership Employee Exemption’s inclusion of “partsmen” demonstrates the only reasonable way in which the Exemption can be read is “any salesman, partsmen, or mechanic primarily engaged in [*the general business of*] selling or servicing automobiles.” As a byproduct of this reading, car dealership service advisors definitively fall within the statute’s exemption from entitlement to overtime pay.<sup>188</sup> Further, the Exemption’s legislative history makes clear that Congress, in enacting the Fair Labor Standards

184 See *supra* text accompanying notes 118–26.

185 *Christopher*, 132 S. Ct. at 2173 (quoting Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. at 22124). But see 112 CONG. REC. at 20505 (statement of Sen. Clark) (suggesting the establishment of the Dealership Employee Exemption was, at least in part, the result of the House of Representatives “yield[ing] . . . to the importunings of the automobile lobby.”). But not all Senators agreed. See *id.* at 20506 (statement of Sen. Javits) (“I do not subscribe to the idea that this [Exemption] is for any automobile lobby.”).

186 Petition for Writ of Certiorari at 3, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 890 (2016) (No. 15-415), 2015 WL 5783210.

187 See *Christopher*, 132 S. Ct. at 2173 (“[I]t would be challenging, to say the least, for pharmaceutical companies to compensate [PSRs] for overtime going forward without significantly changing the nature of that position.”).

188 Importantly, this lack of ambiguity ensures that inclusion of service advisors within the Exemption does not violate the Court’s mandate that “[FLSA] exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [contexts] plainly and unmistakably within their terms and spirit.” *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (citing *Mitchell v. Ky. Fin. Co.*, 359 U.S. 290, 295 (1959)).

Amendments of 1966, intended service advisors to be included within the scope of the Dealership Employee Exemption.<sup>189</sup>

Accordingly, in deciding *Encino Motorcars*, the Supreme Court should not afford the DOL Dealership Regulation *Chevron* deference because it is manifestly contrary to the Exemption. Other than the Ninth Circuit, every court that has considered the FLSA's exemption of service advisors, including the United States Courts of Appeals for the Fourth and Fifth Circuits, numerous other U.S. district courts, and the Montana Supreme Court, has reached this conclusion.<sup>190</sup> The similar factual background of *Christopher v. SmithKline Beecham Corp.*, the Court's most recent foray into the applicability of a specific FLSA exemption, suggests, beyond an interpretation of the Dealership Employee Exemption itself, additional grounds under which the Court may resolve the service advisor-circuit split in favor of the Fourth and Fifth Circuits.

Resolution in favor of the Fourth Circuit's decision in *Greenbrier Ford* and the Fifth Circuit's decision in *Deal Motors* is necessary to avoid disruption of the longstanding approach towards service advisors by car dealerships nationwide. If the DOL's interpretation of the Exemption is upheld, car dealerships and service advisors alike will face significant hurdles in re-attaining the mutually beneficial employment relationship arranged under the assumption that service advisors are included within the Dealership Employee Exemption.

If the Supreme Court's decision in *Encino Motorcars* sides with the Ninth Circuit, congressional action to override such a decision is plausible.<sup>191</sup> When the DOL broke its pledge to change the DOL Dealership Regulation to reflect the position that service advisors fall within the Dealership Employee Exemption, Congress promptly showed disapproval of the agency's backpedaling by attaching a limitation rider to 2012 and 2013 appropriations bills that explicitly barred the DOL from enforcing its position on the FLSA's exemption of service advisors.<sup>192</sup> Any future legislative action, though, may depend on the balance of power in Congress.<sup>193</sup>

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189 See *supra* Section II.C.

190 See *supra* text accompanying note 25.

191 For an excellent summary of recent Supreme Court statutory interpretation decisions overridden by Congress, see generally Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317 (2014).

192 See Continuing Appropriations Resolution, 2013, Pub. L. No. 112-175, § 104, 126 Stat. 1313, 1315 (2012) (providing funds only for projects authorized in the previous fiscal year); Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 113, 125 Stat. 786, 1064 (2011) ("None of the funds made available by this Act may be used by the Secretary [of Labor] to administer or enforce [the DOL Dealership Regulation].").

193 The 2008 Letter from Twelve Members of Congress, *supra* note 53, which argued the Dealership Employee Exemption did not intend to exempt service advisors, was signed by two Democratic members of the House of Representatives (George Miller and Lynn Woolsey), nine Democratic Senators (Sherrod Brown, Hillary Rodham Clinton, Christo-

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pher J. Dodd, Tom Harkin, Edward M. Kennedy, Barbara A. Mikulski, Patty Murray, Barack Obama, and Jack Reed), and then-independent Senator Bernard Sanders, who later became a candidate for the Democratic nomination for President in the 2016 election.