

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ENCINO MOTORCARS, LLC, :

4 Petitioner, : No. 15-415

5 v. :

6 HECTOR NAVARRO, ET AL., :

7 Respondents. :

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9 Washington, D.C.

10 Wednesday, April 20, 2016

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:27 a.m.

15 APPEARANCES:

16 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of
17 Petitioner.

18 STEPHANOS BIBAS, ESQ., Philadelphia, Pa.; on behalf of
19 Respondents.

20 ANTHONY A. YANG, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; for
22 United States, as amicus curiae, supporting Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	STEPHANOS BIBAS, ESQ.	
7	On behalf of the Respondents	25
8	ORAL ARGUMENT OF	
9	ANTHONY A. YANG, ESQ.	
10	For United States, as amicus curiae,	
11	supporting the Respondents	45
12	REBUTTAL ARGUMENT OF	
13	PAUL D. CLEMENT, ESQ.	
14	On behalf of the Petitioner	54
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:27 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 15-415, Encino Motorcars v. Navarro.

5 Mr. Clement.

6 ORAL ARGUMENT OF PAUL D. CLEMENT

7 ON BEHALF OF THE PETITIONER

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

10 Service advisors are salespeople principally
11 engaged in the servicing of automobiles. I do not think
12 there is any realistic dispute here that service
13 advisors are, in fact, salespeople. And it seems clear
14 to me that service advisors, as their name suggests, are
15 principally engaged in the servicing of automobiles.

16 Thus, under the plain and literal terms,
17 of -- of the statutory overtime exemption, these
18 individuals are exempt because the statute exempts any
19 salesperson, mechanic, or partsman who are primarily
20 engaged in selling or servicing an automobile, a truck,
21 or a farm implement.

22 Now, my friends on the other side will
23 essentially concede that those last three statutory
24 nouns -- automobiles, trucks, and farm implements --
25 apply to every other noun-verb combination in the

1 statute. So they don't take the position, for example,
2 that trucks and farm implements only go with servicing
3 and automobiles only goes with selling.

4 But they do take the position that, with
5 respect to the gerund "selling," that it goes uniquely
6 with salesmen, and therefore, even if you accept for a
7 minute that there is a class of people who exist who are
8 salesmen primarily engaged in the servicing of
9 automobiles, my friends would say they're not covered by
10 the statute.

11 Now, I would submit that the statute has
12 multiple textual indicators of breadth that suggests
13 that's not the right way to interpret the statute.
14 There are not --

15 JUSTICE GINSBURG: Mr. Clement, may I ask
16 you, what is the significance of the position you are
17 taking? Does it have any real consequences, given the
18 separate exemption for people who are working on
19 commission?

20 MR. CLEMENT: It -- it does -- it does have
21 real-world consequences, Justice Ginsburg, principally
22 for those service advisors who right now are not
23 compensated on a commission basis.

24 JUSTICE GINSBURG: And what -- in -- in this
25 field, what percentage of service advisors are not

1 commissioned rather than salaried employees?

2 MR. CLEMENT: Justice Ginsburg, I don't have
3 a specific statistical breakdown, but I'm reliably
4 informed that it's a significant number. So it's not
5 that almost everybody is on a commissions basis and
6 there's a couple of outliers who are primarily salaried.

7 I do think the -- the archetypical service
8 advisor is paid on a commission basis, and therefore --
9 what I take to be the import of your question -- might
10 also qualify under the 207(i) exemption that's generally
11 applicable across industries to commissioned
12 individuals.

13 But there are significant numbers of
14 individuals who are primarily compensated for salary,
15 and they like it that way. And of course, as I think
16 the Court is aware, these Fair Labor Standard Act rules
17 are not waivable. So if you have a service advisor
18 who's been paid primarily by salary and likes the
19 stability that comes with that, they've had that --

20 JUSTICE SOTOMAYOR: That's every employee.

21 MR. CLEMENT: What's that?

22 JUSTICE SOTOMAYOR: That's every employee
23 who's salaried. They -- if they want a job, it's a job,
24 and unless the law protected them, no employer would pay
25 overtime.

1 MR. CLEMENT: Well, I understand that,
2 Justice Sotomayor. I was --

3 JUSTICE SOTOMAYOR: I don't know how I can
4 take from the fact that service advisors accept what's
5 given to them because they have no choice, why they
6 prefer not to have overtime.

7 MR. CLEMENT: I don't know that I was making
8 that strong claim; I was just trying to be responsive
9 that this case does have real-world implications
10 notwithstanding the 7(i) exemption.

11 JUSTICE BREYER: So what example -- what --
12 if we're only talking about those of the -- the people
13 who sell service who are not on commission, what basis
14 is there for giving them an exception? Do they work
15 regular hours? I take it if they work regular hours and
16 if they aren't paid on commission, why wouldn't they be
17 treated like secretaries or others?

18 I mean, apparently Congress thought that the
19 mechanics themselves were special because they go out
20 into agricultural areas or something in the middle of
21 the night and fix a tractor. So -- so they work
22 irregular hours. But these people don't work irregular
23 hours and they're not paid on commission. So why
24 wouldn't they be treated like a secretary or a -- you
25 see, you've got my question.

1 MR. CLEMENT: I get your question. I think
2 I would try to rephrase it slightly by saying why should
3 they be treated differently from partsmen or mechanics
4 if they're also paid on a more salaried basis? And so
5 they don't qualify --

6 JUSTICE BREYER: Well, the answer would be
7 because the partsmen and mechanics, so Congress thought,
8 in agricultural areas, would have to go at 3:00 in the
9 morning to fix the tractor, and that's why they get
10 within this special treatment. And -- and whether
11 that's still true or not, I don't know. But that's why
12 they're there in the statute, and that isn't true of the
13 service salesmen.

14 MR. CLEMENT: Here, Justice Breyer --

15 JUSTICE BREYER: Now, what about that?

16 MR. CLEMENT: Yeah, no, I do want to be very
17 responsive to that because I do think whatever, you
18 know, Senator Bayh was thinking about farm implements
19 back in the day.

20 JUSTICE BREYER: Right.

21 MR. CLEMENT: I think today there's a very
22 good reason to treat the service advisors the same way
23 as the partsmen and mechanics for purposes of the
24 overtime exception. So the first thing to focus on here
25 is that we are talking about an exemption under the FLSA

1 only to the overtime provisions. So however you decide
2 this case, minimum-wage provisions are going to apply.

3 But here's the reason that all the people on
4 the service team, the partsmen, the mechanic and the
5 service advisors, really need this exemption. Because
6 most customers of auto -- automobile dealerships who
7 need service themselves work pretty regular hours, sort
8 of 9:00 to 5:00, Monday through Friday. So the busy
9 times at a dealership are what they call the morning
10 rush and the afternoon discharge for the day. And then
11 also on Saturday, over 90 percent of automobile
12 dealerships' service departments are open on Saturdays.

13 So with respect to the partsmen, and with
14 respect to the mechanics, they end up working a little
15 more than 40 hours a week, because they're there a
16 little bit earlier than most people, they leave a little
17 bit later, and then they're there on Saturday.

18 Now, most of them in fact are paid at least
19 partially on commission, and the way most of this works
20 is that everybody, the partsmen, the mechanics and the
21 sales advisors, all kind of share in the commission. So
22 if they bring in a certain amount of sales, they all
23 share in that.

24 So as a practical matter, it makes an awful
25 lot of sense to exempt all of these people from the

1 overtime rules. They're all paid well. They're all
 2 paid above the minimum wage, which is -- the exemption
 3 doesn't apply to anyways -- and they all have a reason
 4 to work, like, about 50, 46 hours a week instead of 40
 5 hours a week. And it would be very, very disruptive to
 6 all of a sudden take the service advisors, who are an
 7 integral part of the team, and also happen to be the
 8 best paid on average of the three, and say we're going
 9 to pluck you out and you alone are not going to be
 10 exempt from the overtime rules.

11 I think that would be very disruptive. And
 12 the industry has understandably come upon these
 13 arrangements during the three-plus decades when my
 14 friends at the Labor Department acquiesced to this
 15 arrangement because they had an interpretive regulation.
 16 They went out and brought some enforcement actions, and
 17 even though it was the Wage and Hour Division themselves
 18 that were litigating these cases, they could not
 19 convince a single Federal judge that they were right
 20 about their interpretation of the statute.

21 Now, I think those Federal --

22 JUSTICE SOTOMAYOR: But, Mr. Clement, those
 23 courts were before Chevron.

24 MR. CLEMENT: Oh, they were, Justice
 25 Sotomayor, but --

1 JUSTICE SOTOMAYOR: So you know, I take less
2 value in what the courts said because every one of them
3 said the provision was ambiguous.

4 MR. CLEMENT: Well --

5 JUSTICE SOTOMAYOR: They just thought that
6 the better argument -- this was before Chevron --
7 favored your interpretation. So I'm -- I'm not quite
8 sure that -- that it's accurate to point to those older
9 cases as supporting your position unequivocally.

10 MR. CLEMENT: So Justice Sotomayor, I think
11 it's fair to take the older cases with one grain of
12 salt, but I wouldn't take it with two or three. And the
13 reason is that Chevron, with all due respect, didn't
14 invent deference to agencies. And that's why I think
15 it's important to recognize that all those early cases,
16 those were cases that were enforcement actions brought
17 by the Wage and Hour Division. And they weren't just
18 cases where a private party was coming in.

19 So I don't think the judges in that case --
20 those cases, when they were sitting there listening to
21 the Wage and Hour Division lawyers, didn't have some
22 deference in mind --

23 JUSTICE SOTOMAYOR: I have a very practical
24 question. Are these sales advisors specially trained in
25 some way? Do they go to mechanic -- mechanic school?

1 Do they -- how are they trained?

2 MR. CLEMENT: I -- I'm -- so I'm going a
3 little bit out of the record here, and I haven't read
4 anything that's directly on point. My strong suspicion,
5 though, is that there are these kind of academies that
6 are put together, including by the National Automobile
7 Dealers Association. And they would get some training
8 that included both sales training but also some training
9 in some diagnostic. But I'm -- I want to be candid that
10 that's -- that's --

11 JUSTICE SOTOMAYOR: Because, to be candid
12 with you, it scares me to think that every time I take
13 my car to a dealer, that a non-mechanic is telling me
14 what's wrong with it.

15 MR. CLEMENT: Well -- and I understand that,
16 but I think that's actually why these people may be
17 nonmechanics, but they're not outside the servicing
18 lane.

19 JUSTICE SOTOMAYOR: Well --

20 MR. CLEMENT: And there are costs for -- you
21 know, for the dealers. This is something that, you
22 know, I'm more familiar with. There are real costs to
23 the dealership if the original diagnostic is wrong and
24 they end up ordering the wrong part. All of that is
25 stuff that they do try to minimize.

1 And I do think -- to get back to the Chevron
2 point, though -- it's also worth recognizing that two of
3 the cases that have rejected the Labor Department's
4 position were post-Chevron cases, both the Fourth
5 Circuit decision in Walton --

6 JUSTICE GINSBURG: But now the Labor
7 Department had a chance to rethink. Originally they
8 said that these people, these salespeople are not
9 exempt. And then there were these -- the letter, the
10 opinion letter and the handbook. And then in -- was it
11 2011 or 2012?

12 MR. CLEMENT: 2011.

13 JUSTICE GINSBURG: They said now we're going
14 to rethink this, and our decision is that we were right
15 the first time, that these people are not exempt. And
16 that decision is made in the Chevron era when we defer
17 to the expert, and this Department of Labor is certainly
18 expert in this area.

19 MR. CLEMENT: Well, Justice Ginsburg, I
20 don't think what the agency did in 2011 merits Chevron
21 deference. And the Labor Department of course asked for
22 deference, but they're -- they're studiously vague about
23 what they'd like you to defer to.

24 And if you look at what they did in 2011, I
25 don't think there's anything you can really defer to

1 there. Because up until 2011, the interpretive rights
2 that date back to 1970 had a specific provision, (c)(4),
3 that addressed service advisors, and it explained the
4 rationale why service advisors weren't exempt. I don't
5 think it was particularly persuasive to any of the
6 courts, but at least there was something that addressed
7 service advisors specifically.

8 Now, in 2011 in the process of this
9 notice-and-comment rulemaking, they actually removed
10 that entirely. So the interpretive regs no longer have
11 anything that addresses the service advisors
12 specifically. So they're now relying only on the
13 language in (c)(1) that addresses salesmen and says
14 salesman is somebody who sells a car, which we think is
15 an incomplete recognition of what the statute actually
16 says.

17 But what I'm making is really two points. I
18 don't think they're really entitled to, in 2011, take
19 something out of the regs and then all of a sudden say,
20 well, because we took them out of the regs for
21 notice-and-comment rulemaking, we now get Chevron
22 deference where previously we might not have.

23 JUSTICE KAGAN: I guess I don't understand
24 that. I mean, it's kind of the case for Chevron
25 deference and notice-and-comment rulemaking. They

1 clearly considered exactly this question. They made a
2 judgment on it. They have effected that judgment within
3 a notice-and-comments setting. I mean, if that's not
4 Chevron, what is?

5 MR. CLEMENT: Well, two things, Your Honor,
6 and then I want to remind you that if this statute is
7 clear, you don't get to Chevron.

8 JUSTICE KAGAN: Of course.

9 MR. CLEMENT: But two things cause Chevron.
10 Here is the first, which is, I would agree with you if
11 what they did is at the end of the notice-and-comment
12 rulemaking, they came up with, say, a new definition of
13 "servicing," and that informed why they came up with the
14 decision that they did, but that's not what they did.
15 They came up with a decision that took out the provision
16 that specifically addressed service advisors, and then a
17 single paragraph of the preamble to the notice -- to the
18 rules, because there's nothing in the rules that really
19 addresses it anymore.

20 So the only thing you can look to is the
21 preamble. It's on pages C5 and C6 of the Appendix of
22 the red brief. There is one paragraph there that is the
23 sum total of their explanation. I think it's worth a
24 read, Your Honor, because what it principally says is,
25 we're doing this because we don't think the statute

1 covers it, which is not really the kind of explanation
2 that I think ought to get them something other than what
3 the statute means.

4 And then this is my second point --

5 JUSTICE KAGAN: Yeah. Because the first one
6 is not so good. The first -- I mean, agencies do this
7 all the time. They say, this is the way we read the
8 statute. This is the way we want to read the statute.
9 And this Court has never been in the business of saying,
10 oh, when you think that the statute says something, you
11 don't get deference. Whereas when you think the statute
12 is ambiguous but you give other reasons, you do get
13 deference. I mean, that would be a -- a completely
14 unadministrable line to use.

15 MR. CLEMENT: Well, I don't -- I don't want
16 to quibble too long with you on that. I don't think
17 that would be unadministrable at all. This Court has
18 recognized the exact same principal in the hour context,
19 which is to say that if all you do is parrot the
20 statute, then that doesn't really gain you any extra
21 deference, and I think all --

22 JUSTICE KAGAN: This is not parroting the
23 statute. This is saying we read this statute in a way
24 which we think is better than another way.

25 MR. CLEMENT: And so I want to get to my

1 second one. I would just say, though, I do think it's
2 worth reading that paragraph on C5 and C6, because
3 particularly in the unique circumstance, and this is the
4 segue to my second point, in this is a unique
5 circumstance where every Court that has looked at the
6 statute, since you first took the position that it meant
7 X, has said, no, it means not X. To then, just because
8 you had a rule -- a notice-and-comment rulemaking,
9 which, by the way, started with the proposal to codify
10 the rule that all the courts had adopted, just because
11 in that process you say, well, we still think we have
12 the better view, I don't think that's enough to get you
13 deference. But even if you disagree with me so far, I
14 mean, I do think Fox, and State Farm before it, say that
15 when an agency is changing its position, it has to
16 account for the reliance interests that have been
17 engendered. And you'll see nothing in that paragraph
18 about the fact that, well, for 33 years, we, the Labor
19 Department, agree that this was clear the other way --
20 JUSTICE KAGAN: So, I mean, the question is
21 on the reliance interests, if you think people have been
22 relying and will be punished for that reliance. And I
23 guess the question to you is, well, why would that be
24 so? Because this rule applies not retroactively but
25 only prospectively, and there is a particular provision

1 in the Portal-to-Portal Act, which essentially says if
2 you relied on an old interpretation, don't worry. You
3 won't be subject to any damages with respect to that
4 interpretation.

5 MR. CLEMENT: So two points on that, Your
6 Honor. The first is, just to be clear, the complaint in
7 this case was filed in September 2012. It didn't say
8 and we hereby seek damages only after the May 2011
9 effective date of the regulation. So in terms of what
10 we're facing with here, I mean, you'd at least have to
11 trim it back based on the Portal-to-Portal Act
12 provision.

13 But here's the reason I think even that's
14 nonresponsive to what the dynamic here is. And it's a
15 pretty unique dynamic, I'll grant you. With this
16 acquiescently circuit cases. I mean, my -- my clients
17 are in the Ninth Circuit, but I think this is even
18 clearer.

19 Think about a dealership in the Fourth and
20 the Fifth Circuits, okay? They already have circuit
21 precedent that says that the service advisors are
22 exempt. Now, if all the agency does in a rulemaking is
23 says, gosh, darn it, we still think we have the better
24 view, what are they supposed to do? Are they really
25 supposed to change their operations overnight and

1 conform to this, even though they have an extant circuit
2 precedent that says they're right and the Labor
3 Department's wrong? And that is what, at least in this
4 narrow circumstance, makes this different. I mean, if
5 they had come in and say, boy, we are going to come up
6 with a whole new C4, and we are going to have a new
7 explanation for why these guys are exempt, then maybe
8 the auto dealers in the Fourth and Fifth Circuit would
9 think, well, this is a whole new day. Maybe we better
10 change our practices.

11 But I would have a hard time advising a
12 client in the Fourth or Fifth Circuit that you ought to
13 change your practices, notwithstanding that Walton is
14 still on the books, notwithstanding that the Fifth
15 Circuit decision is still on the books.

16 JUSTICE KAGAN: Well, I suspect, Mr.
17 Clement, you would say to your clients, you know, you
18 are taking a risk because now the agency has changed
19 their minds. And so going forward, don't worry. You're
20 off the hook with respect to everything you've done in
21 the past. But going forward, given this doctrine called
22 Chevron Deference, the agency is going to get a thumb on
23 the scales, and it's very possible that you're going to,
24 you know, be subject to damages if you keep doing what
25 you're doing.

1 MR. CLEMENT: Well, Justice Kagan, I try to
2 be a careful lawyer. So I probably would tell my
3 clients there is now some additional risk than there was
4 before. But, boy, if you have a lot of workers who
5 really like the fact that they are compensated mostly by
6 salary and they're service advisors, I'm not sure I'd go
7 through all of the trouble of reorienting all of them
8 and putting them on a commission basis so we can get on
9 to 7(i) and get the benefit of that exemption just
10 because the Labor Department has told us that after 33
11 years of acquiescence, that when they had an NPR that
12 told us they were going to codify their acquiescence,
13 that they changed their mind on no better analysis than
14 to simply say, you know, we like our position back from
15 1970. I would probably tell them if you want to be
16 really, really careful, you should change your policy.
17 But I like our chances in the courts.

18 And I would tell them as well, that don't
19 worry too much about Chevron, because I really don't
20 think the statute is ambiguous at all. I think the
21 literal reading of the statute makes it crystal clear
22 that if you are a salesman primarily engaged in
23 servicing automobiles, you come within the plain terms
24 of the statute. "Or" means "or" in that context. And
25 even if in -- in the course of advising them, I would

1 have come across the Reddendo canon last used by this
2 Court in 1918, I would have said, well, don't worry
3 about that either because what the Reddendo canon, all
4 it does is it says, when you're reading a statute and it
5 has a bunch of nouns separated by "or" and a bunch of
6 verbs separated by "or" and you apply them all as you
7 should, if you get to something that just is a barking
8 cat, there is just no such thing, then all the Reddendo
9 canon says is, don't lose a lot of sleep over it. Go on
10 to the next noun/verb combination and continue to
11 interpret the statute. Don't like completely reorder
12 the way you're thinking about the statute and say now
13 because I came across a barking cat, I could put the
14 first noun with the first verb and the second noun with
15 the second verb and, well, if I had two -- three nouns
16 and two verbs, I -- I don't know what I'd do -- throw up
17 my hands --

18 JUSTICE GINSBURG: If I may, given the
19 grammar for a moment, just on a fact question: You said
20 there weren't -- the parts and the partsmen and the
21 mechanics, they -- they were -- they all work no more
22 than a 40-hour work week, and you mentioned 46.

23 There was something in the submissions here
24 that said the service advisors are working a
25 6:00-a.m.-to-7:00-p.m. shift, and so it would come, on

1 average, to 15 hours more.

2 MR. CLEMENT: Yeah. Justice --

3 JUSTICE GINSBURG: Is that incorrect?

4 MR. CLEMENT: Well, I think what I recall
5 from the complaint is it was -- is that it was 7:00 to
6 6:00, and so that would still get you -- if you don't
7 rotate them around, that might get you a 55-hour
8 workday. What I was doing on the 46 hours is I think
9 that's in the National Automobile Dealers Association
10 amicus brief as the average kind of system-wide.

11 JUSTICE SOTOMAYOR: Were -- in 1966, were
12 there service advisors in existence?

13 MR. CLEMENT: Yes, there were.

14 JUSTICE SOTOMAYOR: And were they paid the
15 same way as now? Were they salaried, or commissioned?

16 MR. CLEMENT: I think there was a mix back
17 then, as there is now.

18 JUSTICE SOTOMAYOR: I went to the Dictionary
19 of Occupations, which was in existence in 1966, and it
20 appears to have different entries for salesmen, service
21 advisors, partsmen, mechanic. Do I read something from
22 the fact that -- or should I read something, or why
23 can't I read something -- from the fact that Congress
24 knew that these different positions existed, they were
25 defined in the Dictionary of Occupations differently,

1 and it decided to use only "salesmen," which under the
2 dictionary meant a salesperson of cars; a "partsmen,"
3 which was defined the way one would think; and a
4 "mechanic," but it didn't include sales advisors.

5 MR. CLEMENT: Well, here's what I would say
6 that you should read into that, Justice Sotomayor, which
7 is you should read into the fact that Congress used the
8 term "any" and "any salesmen," and then modified it not
9 just by selling vehicles, but also by servicing
10 vehicles, to think that Congress didn't need to
11 separately add the service advisors in, because they
12 were already covered by the language of the statute.

13 I would also --

14 JUSTICE SOTOMAYOR: But they thought it
15 important. The partsmen could arguably service
16 automobiles because they provide the parts for the
17 automobile, yet Congress found the need to be explicit
18 and to add partsmen. Why wouldn't it have -- if it's
19 intended to include service advisors as opposed to
20 mechanics and partsmen, why didn't it use that
21 occupational term? It's a term of art.

22 MR. CLEMENT: Well, Justice Sotomayor, I
23 don't think if they had omitted the partsmen, I think it
24 would be an awfully hard argument to say that the
25 partsmen are mechanics. I mean, you could make it, and,

1 you know, I'm not so sure I wouldn't try, but I think it
2 would be a much harder argument than to say that the
3 service advisors are covered by the term --

4 JUSTICE SOTOMAYOR: Except the dictionary
5 doesn't use the words -- the functions as functions of
6 selling a car. And -- and it doesn't use the word
7 "service" in a traditional sense. It says it's going to
8 evaluate cars, it's going to give the work to mechanics,
9 but it doesn't use the word "servicing" a car.

10 MR. CLEMENT: Which doesn't, the --

11 JUSTICE SOTOMAYOR: The occupational
12 handbook.

13 MR. CLEMENT: Well, I mean, I guess I would
14 still say, though, the question -- I'd make two points,
15 one I've already made, which is I do think, since they
16 used any salesman, I think they thought that they
17 already had it covered.

18 The second thing I would say is I think if
19 they were going to include service advisors into the
20 statute, I think what the statute would say is exactly
21 what it says now, which is it would say "any salesman,
22 service advisor, partsman, or mechanic engaged" --
23 "primarily engaged in" -- "in selling or servicing
24 automobiles," trucks, or farm implements.

25 And what I think that shows is that there's

1 nothing at all unnatural to say that the service
2 advisors are primarily engaged in servicing automobiles.
3 That is what they do. They're part of the servicing
4 process.

5 The way I would think about this is if you
6 imagine a very small automobile dealership and they have
7 one person in the service department. That person is
8 going to come out. They're going to greet the customer.
9 They're going to work with the customer to diagnose what
10 the problem is.

11 Once they figure out what the problem is,
12 they'll give them an estimate. Then if they have to fix
13 a part, they'll go in the back, they'll grab the part,
14 then they'll take the part, and then they'll put it in
15 the car and they'll fix the part. And then they'll go
16 back and talk to the customer and tell them what they
17 did.

18 Now, in a modern automobile dealership, all
19 of that is done by three different people working as a
20 team. And it seems to me quite clear that the service
21 advisors are part of that servicing process.

22 Indeed, my friends on the other side I think
23 almost give us that, which is to say -- they seem to
24 come close to saying that if the statute said
25 "salesman... primarily engaged in" the servicing

1 process, they would grant us that the -- that the sales
2 advisors are covered.

3 I mean, they can quibble if they want, but
4 that's the way I read the position. They simply say,
5 but the statute doesn't say "process." And so what they
6 have in mind is the statute must mean something very
7 narrow by servicing. This is that you have to be under
8 the hood or grease under your nails or something like
9 that.

10 And the big problem with that is the
11 partsmen. The partsmen are no more in the main, under
12 the hood, or getting their nails dirty by actually
13 servicing the automobile, but they are an integral part
14 of the servicing process. And because they're covered,
15 I think we know that Congress used the term "servicing"
16 in a more capacious sense and not in some narrow sense
17 that you have to do the servicing personally.

18 If I could reserve the balance in my time.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Bibas.

21 ORAL ARGUMENT OF STEPHANOS BIBAS

22 ON BEHALF OF THE RESPONDENTS

23 MR. BIBAS: Mr. Chief Justice, and may it
24 please the Court:

25 The FLSA exempts salesmen who sell cars and

1 partsmen and mechanics who service cars. Service
2 advisors don't sell cars. Nor do they service cars,
3 which requires automotive manual labor. They merely
4 write up paperwork.

5 Petitioner's argument fails for three
6 reasons: First, selling services is not the same thing
7 as servicing. Petitioner's argument is an end-run
8 around the statute's three direct objects of selling:
9 Cars, trucks, and farm implements. Selling services is
10 not listed.

11 Second --

12 JUSTICE ALITO: Could you pick up where
13 Mr. Clement left off? What would be the -- what is the
14 basis for covering partsmen?

15 MR. BIBAS: Yes, Your Honor. Several. The
16 first one is, unlike service advisors, they're expressly
17 named in the statute.

18 Secondly, they're working as mechanics'
19 right-hand men or women. Some partsmen grind down parts
20 or build them up. Some use calipers and measure how
21 they fit on cars. Some of them remanufacture parts.
22 They use brake drum lathes and engine head grinders and
23 valve refacers.

24 Even those who are not are involved with --
25 with mechanics in requisitioning and dispensing parts.

1 JUSTICE ALITO: Well, as to those who are
2 not, as to those who obtain parts, don't change the
3 parts, supply the correct part to the mechanic, they
4 would still be engaged in servicing automobiles, you
5 would say?

6 MR. BIBAS: If they are physically
7 dispensing the parts, handing them over, and doing so in
8 sync with the mechanic's work. So take a transmission
9 job. If an automatic transmission is being redone, the
10 partsman has to know that the mechanic first needs to
11 build the clutch units. So he first dispenses the
12 clutch disks and plates and the clutch drum bushings.

13 The mechanic is working on them. The
14 partsman goes back, gets the remainder of the automatic
15 transmission assembly, and goes and hands them to the
16 mechanic. This is a back and forth. It's a
17 mechanic-facing role, not a customer-facing role.

18 JUSTICE ALITO: Yes. They are -- they are
19 more closely connected with the actual repairs of the
20 car. There's no question about that. But they are not
21 engaged in manual labor. That type of partsman is not
22 engaged in actually doing anything physically with the
23 car.

24 So if they are covered, if that's -- if
25 servicing automobiles includes that, then you have to

1 explain why the line is drawn between that activity and
2 the activity of the -- of the employees who are at issue
3 here.

4 MR. BIBAS: I have a couple of responses.
5 The first one is if there's a line to be drawn, that of
6 course is for the agency.

7 Secondly, I would say that they are engaged
8 in the dictionary definition, repairing or maintaining
9 automobiles. And in the reply belief, at page 11,
10 Petitioner comes very close to conceding, well, they're
11 not repairing in the way that repairing -- servicing is
12 used in several other statutes that we cite. But our
13 theory is they are part of this general process, or
14 integral on core sales and service, which they're adding
15 to the statute.

16 The only way that Petitioner manages to add
17 that to the statute is saying that the phrase "engaged
18 in" somehow broadens the ordinary meaning of servicing.
19 But it doesn't, for three reasons.

20 The dictionary definitions cited by the
21 government engaged in means employed in or taking part.
22 So then Petitioner falls back and says, well, the FLSA,
23 when it uses "engaged in" means something broader. They
24 cite a definition provision, 203(j) in the reply brief.
25 And they say that the definition means that "engaged in"

1 includes any closely-related process.

2 So we pulled the actual subsection which
3 says precisely the opposite of that. It does not
4 provide separate definitions of "produced" and "engaged
5 in producing," as Petitioner's quotation suggests. It
6 defines "produced" equal as "engaged in the production
7 of goods" if the subject is engaged in doing the action.

8 Now, what that section says that actually
9 broadens it is language Petitioner doesn't quote. It
10 says, "An employee shall" --

11 CHIEF JUSTICE ROBERTS: I'm sorry. Can you
12 tell us where you're reading from, if this is available
13 to us?

14 MR. BIBAS: Okay. This is 29 U.S.C. 203(j).
15 It's the Petitioner's reply brief at page 11.

16 CHIEF JUSTICE ROBERTS: Thank you.

17 MR. BIBAS: But the -- they don't quote the
18 section of full. If you look at 29 U.S.C. 203(j), it
19 says "An employee shall be deemed to have been engaged
20 in production if employed in a related process." It is
21 the deeming that sweeps in closely related processes.
22 It's not the language of "engaged."

23 And then we look at this Court's case law
24 interpreting that very provision. So this Court has
25 interpreted that provision as contrasting the narrower

1 phrase, "actually engaged in production," with the
2 broader phrase, "every process or occupation affecting
3 production." That's this Court's case, Farmers
4 Reservoir, 337 U.S. at 759 to 60.

5 So far from proving that "engaged in" opens
6 the door to the ill-defined "process of servicing,"
7 Section 203(j) and this Court's precedent confirm that
8 it does not broaden the verb "servicing." And
9 "servicing" means repairs, maintenance, and similar
10 automotive manual labor.

11 Now --

12 CHIEF JUSTICE ROBERTS: Well, is it just --
13 I suspect it differs from place to place and how many
14 people they have and all that, but why is it -- I mean,
15 are these the people that when you go in, and you know,
16 you go and say the car's making a funny noise or
17 something, do they go out and look at the car, listen to
18 the noise? What's it -- I mean, that seems to me to be
19 more like a process. And then they go to the mechanic
20 and say, well, you need to do this, or you want to look
21 at this or whatever.

22 MR. BIBAS: So my understanding is --

23 CHIEF JUSTICE ROBERTS: No. I'm just trying
24 to -- you earlier said they're just doing paperwork, and
25 I'm trying to put a finger on exactly how much they do

1 with that and how much they do the other.

2 MR. BIBAS: Right. So my understanding is
3 that the important difference between service advisors
4 and partsmen, to answer both questions together, the
5 service advisor is a customer-facing role. He's
6 advising the customer, not advising the mechanic. Goes
7 up to the customer, has a clipboard, records whatever
8 symptoms the customer says; it's making a squealing
9 noise, or it's not driving well.

10 Now, only in that sense is he recording
11 something with the automobile. He's not going under the
12 hood. He's not taking parts apart. He's not rendering
13 a final diagnosis on which the work will be based. He
14 relays that information back. It's the mechanic who
15 hooks the car up to the --

16 JUSTICE KENNEDY: No, no. You've missed --

17 JUSTICE GINSBURG: If --

18 JUSTICE KENNEDY: You've missed a process.
19 And some of us up here are experts in having to go to
20 auto agencies and coming back.

21 (Laughter.)

22 MR. BIBAS: Yes.

23 JUSTICE KAGAN: The first thing he does is
24 give you an estimate.

25 MR. BIBAS: Yes.

1 JUSTICE KENNEDY: And -- both in cost and in
2 time, and make recommendations for, well, maybe you
3 should replace it, and it would cost you X dollars.
4 So -- so just to say that he puts something and then
5 it's up to the mechanic, that's incorrect.

6 MR. BIBAS: You are correct, Your Honor.
7 The -- he's giving a preliminary estimate based on we
8 think the squealing noise means you need a new timing
9 belt. That's how much it would cost. Have you had your
10 brakes done, et cetera?

11 But it goes back to the mechanic. And the
12 mechanic may come back and say, no, actually, you need
13 an overhaul or something else, after going under the
14 hood.

15 CHIEF JUSTICE ROBERTS: I don't mean to be
16 too particular, but if there's a squealing sound and it
17 might be the fan belt, you're saying he's not going to
18 open the hood and look at the fan belt?

19 MR. BIBAS: Well, he's not -- he's not going
20 to be measuring the tension on the fan belt, touching
21 the fan belt, doing any of that. That's back in the
22 shop bay. For liability reasons, they can't do the work
23 in the front. The insurance requires all of that be
24 done in the back, is my understanding.

25 JUSTICE GINSBURG: What --

1 MR. BIBAS: The question --

2 JUSTICE GINSBURG: But how would you
3 describe what this employee is engaged in? You say he's
4 not engaged in selling cars and he's not engaged in
5 servicing cars. So what is it, what other category is
6 there other than selling and servicing?

7 MR. BIBAS: There are people in auto
8 dealership who do lots of things that might be part of a
9 general process. The Petitioner leaves the impression
10 that there are three or four kinds of employees and
11 you're just carving one out from an otherwise exempt
12 unit. There are at least 20 categories of employees in
13 the service department, as the Machinists' brief
14 explains. There are dozens of kinds of employees in the
15 sales Department, in parts, in used cars, in leasing.
16 And so they may be engaged in this selling of services,
17 but even if they are, selling services is not the same
18 as servicing.

19 JUSTICE BREYER: Suppose you say -- you
20 phone them up and you say, I'd like the servicing
21 Department, please.

22 MR. BIBAS: Yes.

23 JUSTICE BREYER: Someone answers the phone,
24 hello. Who are you? I'm -- I'm -- I'm the service --
25 what do you call those persons?

1 MR. BIBAS: Service advisor.

2 JUSTICE BREYER: Yeah, service advisor. Are
3 you engaged in servicing? Why would I be here if I
4 wasn't engaged in servicing? I'd be over in the selling
5 Department.

6 I think you read this either way, frankly.
7 I mean, I -- I don't really -- I can't get too far with
8 language, which is why I have a question which isn't
9 related to language.

10 MR. BIBAS: I would say if -- if you don't
11 think it's clear, of course Chevron deference --

12 JUSTICE BREYER: Yeah, well, that's the
13 question. And I don't hold you responsible for knowing
14 every word I've written in every case, but still, I did
15 in Fox make a point of an administrative rule that I
16 think is important, an administrative law rule, that
17 when an agency changes its mind, it should explain it.
18 And I probably in Fox thought that more than many of my
19 colleagues. All right?

20 Given my position there, and here we have
21 the agency going along and issuing a manual where they
22 say the opposite of what you're saying now. And then we
23 see what happened when after 30 years they changed their
24 mind. And I -- I thought Mr. Clement was right, and if
25 you read their reason, their reason happens to be this:

1 The Fourth Circuit says the opposite, but we think not.

2 Now, I know they didn't use those words, but
 3 I wouldn't call that or the equivalent a reason. And --
 4 and so is there somewhere in this document, C1 through,
 5 you know, 5, is there somewhere a reason why they
 6 changed their mind other than, oh, we think this is a
 7 better interpretation? Because that doesn't address the
 8 problem that I thought was at issue in Fox. And if I
 9 were to use one word to describe that problem, it is the
 10 word they've used. It's called reliance. I'm not
 11 saying it predominates, but doesn't the agency at least
 12 have to address it?

13 MR. BIBAS: Your Honor, there are about four
 14 questions in there, if I might take them in turn.

15 You asked about your own writing and your
 16 own position on reliance. I'd point to your own opinion
 17 in Long Island Care, where first of all you took the
 18 position that intermediate agency enforcement changes
 19 its set of rules, and it's -- Smiley, the Court said the
 20 same thing -- don't count as changes of position in the
 21 first place.

22 JUSTICE BREYER: I -- that's a good point,
 23 and I don't know how absolute we ought to be there.
 24 And -- and the reason this is now facing me with that
 25 problem. Of course they can't do everything for every

1 employee in the agency, and they get all kinds of
2 informal advice. It's a practical problem.

3 But here we have a kind of extreme,
4 30 years, manuals, noting explicitly that it's a change
5 of position. I mean, it's not just one part of the
6 agency can't always be consistent with every other part,
7 so that's exactly what you put your finger on that I --
8 why I asked the question.

9 MR. BIBAS: Okay.

10 JUSTICE BREYER: And the fact that I said it
11 that way that time at most is going to show I'm not
12 always perfectly consistent, which is -- I'll admit.

13 MR. BIBAS: I think Your Honor was also
14 correct in saying in Long Island Care that the
15 notice-and-comment rulemaking process makes any -- the
16 potential for any unfair surprise unlikely.

17 It's also quite noteworthy in the reliance
18 area that, as the professor's brief pointed out, in the
19 several days after the April 2011 rule was promulgated,
20 even before its effective date, counsel below for
21 Petitioners and a number of other law firms and
22 Petitioners' amicus in that were all publicizing to the
23 members: This new rule came out. It's becoming
24 effective in a month. You need to take account of that.

25 You also had a component in your question

1 that was about the basis for the rulemaking and for the
2 changes in position. It's not just the paragraph at
3 page C5 to C6 of our brief. The two pages before that,
4 from C3 to C5, have the comments, there were seven
5 comments that addressed this issue; five of them favored
6 the position that the agency --

7 JUSTICE SOTOMAYOR: Could you give me the
8 pages where it's in your brief?

9 MR. BIBAS: The back of the red brief. The
10 pages C3 to C6 is the reasoning. So at the bottom of
11 C5, the agency says "and as commentators point out," so
12 it's incorporating by reference the two pages of
13 comments discussion that preceded it. And on the
14 previous pages, such as page C4, several of the amici --
15 sorry, no, the commenters point out there are line
16 drawing problems here: These are not classic mechanics
17 or servicers. They are just coordinating. They have
18 this administrative function. They're not -- just
19 because they're integrated doesn't make them in fact
20 selling or servicing. In essence --

21 JUSTICE BREYER: Why did they change? As
22 the commentators point out, then they go on to say what
23 it is in that sentence that the commentators point out.
24 So I agree, other people agreed with them, sure, that's
25 true. But the question is, why the change?

1 And I do get this. We changed it because we
2 think that we're more consistent than the statute than
3 we used to think that was consistent with the statute.
4 I'll go that far. And now I have to figure out, is that
5 a good enough reason.

6 MR. BIBAS: There's --

7 JUSTICE BREYER: We didn't think it then,
8 but we think it now.

9 MR. BIBAS: There's more --

10 JUSTICE BREYER: And that's -- is there
11 anything else?

12 MR. BIBAS: There's more, Your Honor. On
13 page C5 NELA points out some line drawing problems. The
14 1978 opinion letter had some -- it had drawn a line
15 between warranty work versus non-warranty work because
16 presumably the warranty work was sold previously and
17 you're not selling it now. And there are administrative
18 problems with drawing these kinds of lines. It's
19 cleaner and simpler for the agency to revisit the issue
20 for the first time with notice-and-comment rulemaking
21 and say, let's just treat these people as a class and
22 not require bookkeeping of what's warranty versus
23 nonwarranty work.

24 So when NELA makes the line drawing
25 reference in there, I think that's what it's referring

1 to, and the agency is saying, just as a class, they're
2 not selling vehicles; they're not servicing vehicles.
3 They're selling the servicing of vehicles.

4 JUSTICE KAGAN: If I might: Mr. Clement
5 suggested that you might be seeking damages for pre-2011
6 conduct. Are you?

7 MR. BIBAS: Our complaint was filed in
8 September 2012. The two-year limitations period goes
9 back to September 2010. We have noted that as for
10 anything before the effective date of this new
11 regulation, May 5, 2011, the Portal-to-Portal Act could
12 be pled and it could perhaps be proven. That's an issue
13 for remand; it's not in this case at this stage. But
14 Congress has dealt with this issue, and there's nothing
15 retroactive about applying a 2011 regulation.

16 JUSTICE KENNEDY: Is that the good-faith
17 reliance provision?

18 MR. BIBAS: Yes, that's 29 U.S.C. 259.

19 JUSTICE KENNEDY: And is that applicable --
20 is that an open issue on remand?

21 MR. BIBAS: That's an issue -- it hasn't
22 been pled; it's an open issue on remand.

23 JUSTICE KENNEDY: And that's both as to
24 pre-2011 and post -- post-2011 damages?

25 MR. BIBAS: It's not -- not as to post May

1 5, 2011, because the opinion letter has no force past
2 the effective date of the new regulation.

3 CHIEF JUSTICE ROBERTS: I'm sorry. You were
4 about to say there's nothing retroactive about --

5 MR. BIBAS: About applying a 2011 regulation
6 to post-2011 conduct. The only -- the government's
7 brief deals with this. Well, that the kinds of serious
8 reliance interest that count for these purposes are
9 criminal penalties or civil penalties on actions that
10 were already done before the regulation. And that's --

11 CHIEF JUSTICE ROBERTS: What about the
12 damages you're seeking before 2011?

13 MR. BIBAS: The Portal-to-Portal Act may
14 well be a defense in that situation if they can plead
15 and prove reliance.

16 JUSTICE GINSBURG: May I ask --

17 JUSTICE KENNEDY: But you are seeking
18 damages?

19 MR. BIBAS: We have a damages claim, but
20 they have a defense.

21 CHIEF JUSTICE ROBERTS: Well, but even
22 though the regulation took -- the regulation had changed
23 the interpretation that took effect 2011?

24 MR. BIBAS: The notice-and-comment
25 regulation took effect May 5th, 2011.

1 CHIEF JUSTICE ROBERTS: And that changed the
2 Department understanding of the statute.

3 MR. BIBAS: It maintained the former
4 regulation; it rescinded the enforcement materials that
5 said they would not enforce during that period of time.

6 JUSTICE GINSBURG: You --

7 CHIEF JUSTICE ROBERTS: So the Department
8 said -- I just want to get -- the Department said they
9 would not enforce prior to 2011?

10 MR. BIBAS: Yes.

11 CHIEF JUSTICE ROBERTS: And yet you still
12 think they should be liable for damages?

13 MR. BIBAS: No, there's the Portal-to-Portal
14 Act --

15 CHIEF JUSTICE ROBERTS: Well, putting
16 aside -- that's a defense. You're saying, well, you
17 might win on that or you might not. Right?

18 MR. BIBAS: Right.

19 CHIEF JUSTICE ROBERTS: But you still think
20 they should be liable for damages when the Department
21 said they were not going to enforce the position that
22 you're articulating.

23 MR. BIBAS: Our position is that the defense
24 may indeed preclude that.

25 CHIEF JUSTICE ROBERTS: Well, I know, but

1 I'm asking -- so in other words, they may not succeed in
2 their Portal-to-Portal Act defense, but you nonetheless
3 think when the Department says, we're not going to
4 enforce the view, that they're liable for damages
5 because they didn't take the opposite view.

6 MR. BIBAS: We are willing to concede the
7 pre-2011 damages.

8 JUSTICE KENNEDY: Is that at this point or
9 is that clear from your -- has that been your position
10 all along?

11 MR. BIBAS: It's never been pleaded or
12 proved.

13 JUSTICE GINSBURG: This hasn't been
14 litigated at all.

15 MR. BIBAS: It hasn't been litigated.

16 JUSTICE GINSBURG: We're dealing with the
17 threshold issue of how do we categorize these people.

18 MR. BIBAS: Yes.

19 JUSTICE GINSBURG: And on that, do you
20 know -- I had asked Mr. Clement -- what is the universe
21 of employees we're talking about? How many of these
22 people would not come out under the -- what is it,
23 701(i) because they are commissioned employees?

24 MR. BIBAS: Well, there's a wide range of
25 compensation methods; however, the -- most of the -- the

1 range of salaries we're talking about is a broad
2 dispersion. The bottom 10 percent of service advisors,
3 based on the figures I've seen, make less than
4 one-and-a-half times the minimum wage. There are
5 entry-level jobs at 22,000 a year. Those are the people
6 who are going to be affected by this ruling. Those are
7 the only ones who would not qualify for a 207(i) if it
8 were restructured for commissions.

9 So we're not talking about the highly paid
10 ones who the dealerships could exempt under 207(i) by
11 structuring it. We're talking about people who are --
12 who are just above the minimum wage, less than
13 one-and-a-half times above.

14 If I might deal with a few questions this
15 Court raised earlier, one of -- the partsmen issue, I'd
16 like to offer an analogy on partsmen. Petitioner's
17 position is as if you have a statute that speaks of
18 someone, a doctor engaged in operating, that makes
19 sense. If the statute says, doctor or nurse engaged in
20 operating, you'd understand you don't normally think a
21 nurse operates, but the O.R. nurse is close enough.

22 What Petitioner is saying, if you exempt the
23 O.R. nurse, you also have to exempt the hospital intake
24 clerk who does paperwork, maybe even the hospital intake
25 nurse who takes vital signs. There is no reason you

1 have to expand beyond the operating room, the person who
2 is right there handing the utensils and scalpels over to
3 go all the way out to the front office --

4 JUSTICE ALITO: I'd feel more comfortable
5 about this if I understood the criteria that Congress
6 applied in choosing the employees who are covered by
7 this provision. So take the case of the -- the
8 salesperson who is not working on commission. Why did
9 Congress include that employee within this category?
10 And what is different about employees of that nature
11 from service advisors who are not working on commission?

12 MR. BIBAS: The understanding of Congress,
13 as discussed in our brief, was that salesmen are selling
14 anywhere they go. Back in the '60s, they would be
15 selling off-hours. They'd be going to people's homes
16 and when they met people at church or clubs or wherever.
17 And that mechanics and partsmen, just as Justice Breyer
18 alluded to, were going out and had to work in the field,
19 at least in some context, and it was hard to track
20 overtime with their regular hours and off-site work.

21 In response to a few other Court problems --

22 JUSTICE SOTOMAYOR: The salesman --

23 JUSTICE ALITO: All of that was true --

24 CHIEF JUSTICE ROBERTS: I'm sorry. Justice
25 Alito is talking.

1 JUSTICE ALITO: All of that was true in
2 1966. That really isn't -- maybe it was. It's not
3 consistent with my -- what I would have imagined car
4 salesmen are doing or partsmen are doing.

5 MR. BIBAS: May I answer?

6 CHIEF JUSTICE ROBERTS: Yes, and then
7 Justice Sotomayor has a question.

8 MR. BIBAS: Yes.

9 If the universe of employees who meet the
10 exemption now has shrunk so it's narrower than the
11 original purposes, that is a reason for Congress to
12 repeal or restrict it. It is certainly not a reason for
13 the courts to expand it.

14 JUSTICE SOTOMAYOR: It was more of Justice
15 Alito's. When did automobile salesmen travel? When did
16 mechanics and partsmen for automobile leave the -- the
17 job --

18 MR. BIBAS: Congress, the Senate discussed
19 that expressly in the '60s. I don't know when that
20 changed.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Mr. Yang.

23 ORAL ARGUMENT OF ANTHONY A. YANG
24 FOR UNITED STATES, AS AMICUS CURIAE,
25 SUPPORTING THE RESPONDENTS

1 MR. YANG: Mr. Chief Justice, and may it
2 please the Court:

3 I'd like to address three points, as well as
4 answer some additional questions. The first is, I'd
5 like to discuss the text of the statute as it was
6 enacted in 1974. Congress enacted the statute in 1974
7 and separated salesmen from partsmen and mechanics in
8 subsection or clause B.

9 Second, I'd like to discuss Petitioner's
10 argument that selling services is being primarily
11 engaged in servicing automobiles. As a textual matter,
12 we think that's just plain wrong.

13 And, finally, I'd like to discuss really
14 what's at issue here. Petitioner has made a lot of
15 policy arguments about high-paid commission, people who
16 are salesmen, they're incentivized to sell. Petitioner
17 has essentially conceded in his argument that what we're
18 really talking is people who aren't paid on commission.
19 Those people are who Congress was concerned about,
20 people who fall outside of 207(i), and there's no reason
21 to expand 213(b)(1)(A) to cover them.

22 So first, when Congress enacted the statute
23 in 1974, and this -- you can see this on page 2A of the
24 government's appendix, you can see the difference of
25 what Congress did.

1 Prior to 1974, there was a single exemption,
2 salesmen, partsmen and mechanics. And that applied to
3 several different types of vehicles. It included
4 applying to trailers and aircraft, as well as
5 automobiles.

6 In 1974, Congress decided to eliminate the
7 exemption for partsmen and mechanics for trailers and
8 aircraft. The legislative history is quite clear on
9 this. When they did that, they created subsection B.
10 So they preserved the exemption for salesmen.

11 But look at subsection B, this is on top of
12 page 3A, it says "Any salesman primarily engaged in
13 selling trailers, boats, or aircraft."

14 That shows you that Congress was -- linked
15 salesmen to selling and, by implication, partsmen and
16 mechanics to servicing. Because when you look at (A),
17 the only time servicing comes in is when partsmen and
18 mechanics were there.

19 So I think as a textual matter, that shows
20 you what Congress was trying to do.

21 Second, "selling" is not servicing.
22 Petitioner says that you're engaged in the selling
23 process or the -- and the servicing process because
24 you're selling servicing. If you are selling plastic
25 surgery, you're not ever thought to be engaging in

1 plastic surgery. You're selling it.

2 Maybe you might be seen to be part of the
3 process of servicing, but it's not natural to say that
4 you're engaged in servicing.

5 And I think it's telling that Petitioner has
6 to rely on Section 203(j), as my brother suggested,
7 203(j) is a definitional section. The only way
8 Petitioner gets to the suggestion that doing things that
9 are essential to the production is production is because
10 the statute says, "For the purposes of this chapter, it
11 shall be deemed production."

12 And as my brother explained, "Farmers
13 Reservoir," and this is a quote, "explains that
14 production in the normal sense is quite different rather
15 than production in the special sense defined here."

16 What we're talking about is the normal sense
17 of being engaged in servicing. That means you are
18 actually taking part in the repairing or the providing
19 maintenance for automobiles. Service advisors do not do
20 that.

21 Moreover, Petitioner's reading, if we really
22 do expand servicing to extend to people who are engaged
23 in the process, why wouldn't you cover salesmen who only
24 sell warranties, salesmen who only sell the antirust
25 coating under the car, salesmen at the counter that sell

1 the key fobs and other things that are branded with the
2 dealership's logo? They're all engaged in selling
3 automobiles in the sense that you got to advertise, you
4 got to sell. This promotes the sale of automobiles.
5 That's wrong.

6 The mechanic that simply fixes the HVAC
7 system or fixes the guts, were they engaged in servicing
8 automobiles? Everybody at a dealership, under
9 Petitioner's view, is essentially engaged in selling or
10 servicing because they're engaged in the process of
11 selling or servicing automobiles. That's just wrong.

12 Line drawing is necessary. Now, we depart a
13 little bit from Respondents in that we think the statute
14 is ambiguous, right? I mean, if the statute had just
15 said, salesmen engaged in selling or servicing, you'd be
16 forced to say, well, Congress must have meant "salesmen"
17 instead of -- intended a distributive meaning when they
18 included "salesmen and partsmen and mechanics." But the
19 line drawing that has to be done here -- if you
20 acknowledge that line drawing has to be done, salesmen,
21 the service advisors are way down the line.

22 They rely on partsmen, but partsmen, as we
23 explained, are working hand-in-hand with mechanics. So
24 they're logically understood to be servicing, but a
25 salesman is not logically understood to be servicing.

1 So what's key about the canon of Reddendo
2 and the recognition of distributive phrasing is not that
3 you have to read the statute that way, but what it does
4 suggest is that there is no such basic rule of grammar
5 that requires the use of "or" to link every antecedent
6 noun with all antecedent gerunds. The question is
7 whether it's ambiguous.

8 So if we get into ambiguity, the agency has
9 construed this statute in notice-and-comment rulemaking.
10 That is entitled to deference.

11 Now, before --

12 JUSTICE KAGAN: Mr. Yang, why was it -- I
13 mean, for the most part this explanation seems like not
14 the world's best explanation to me but perfectly
15 adequate. But Mr. Clement does have a point that
16 somehow the agency took out this more specific
17 explanation and I -- I guess if I were just looking at
18 the explanation itself I would say, you know, not an
19 A-plus job, but fine. But it is a little bit perplexing
20 as to why they took this out. Why was that?

21 MR. YANG: Well, we don't have this in the
22 record, but I have been informed that there was an
23 inadvertent mistake in drafting. All of these are in
24 Subsection C of the statute.

25 JUSTICE KAGAN: Wow. I really did not

1 expect expect you to say that.

2 MR. YANG: It was inadvertent, but it
3 doesn't make a difference, and I'll explain why.

4 The prior (c)4 -- they -- they redid (c)1,
5 2, and 3, and they just didn't reprint 4 because it
6 hadn't changed at all. So -- but it -- the reason it
7 doesn't matter is what (c)4 said before --

8 JUSTICE KAGAN: Not an A-plus explanation.
9 (Laughter.)

10 MR. YANG: It's a passing grade.

11 But what I would say is in (c)4, before --
12 this is reproduced on page 6a of the appendix to our
13 brief. It says sales advisors aren't included unless
14 they're primarily engaged in the work of a salesman,
15 partsman, or mechanic as defined.

16 So what really does the work is the
17 definition of "salesman." And the definition of
18 salesman is what they reenacted as notice-and-comment
19 rulemaking with some modifications to take care of
20 changes since the 1974 amendments.

21 The definition of salesmen covered -- and
22 they say "as used in Section 13(b)10," so they're
23 construing the term "salesman" as used in this statutory
24 provision. It means "someone who is engaged in making
25 sales or obtaining orders for the sales of vehicles."

1 Service advisors don't fall under that
2 category. So they're not salesmen within the meaning of
3 the statute as it has been construed. They're salesmen,
4 sure, in kind of a general sense. But they're not
5 salesmen as construed in this provision, because they're
6 not engaged in selling automobiles.

7 Not the perfect, but a passing grade for --
8 for the agency.

9 JUSTICE BREYER: Now, that's -- maybe this
10 problem in my mind will go away, but I -- I'm with you
11 up to a large point. I think it is ambiguous. I think
12 there is no longer any reason at all for having the
13 mechanics exempt, but they're there. And so then, with
14 the service people, an agency could reason, well, let's
15 not make a bad situation worse, which is what you say.
16 Or they could reason the opposite: These are virtually
17 identical, why not treat them the same.

18 Now, problem. 30 years?

19 MR. YANG: Right.

20 JUSTICE BREYER: And so the real question is
21 don't they have to address this?

22 MR. YANG: Well, they do have --

23 JUSTICE BREYER: Well, do they? I mean, you
24 know, I guess I could -- I'll read that again and -- and
25 try to see do they really address it, and -- but that's

1 where I'm having a problem.

2 And it isn't just -- he's quite right, your
3 colleague, where he says this isn't just a simple
4 reversal of a regulation. It isn't that. They never
5 really had the regulation acquiescing. And they've had
6 to find things in handbooks and so forth. But the
7 practical fact is everybody thought the law was what the
8 Court said. And so now suddenly, in the -- in --

9 MR. YANG: Well, not --

10 JUSTICE BREYER: This is the problem,
11 because after all, different administrations have
12 different policies. And there's some protection in the
13 ABA from preventing too big a shift too quickly, the
14 protection being, address it. Address it. Think about
15 it.

16 MR. YANG: I think what's necessary is for
17 the agency to recognize that it had a prior position,
18 which it did here. It also has to explain what it's
19 doing, which it did here. It explained how it
20 understood the statute to be most appropriately read.

21 Now, to the extent you also have to --
22 you're suggesting that the agency has to explain why its
23 prior interpretation was wrong --

24 JUSTICE BREYER: No. No.

25 MR. YANG: I don't think --

1 JUSTICE BREYER: Because I don't think
2 either would be wrong. But they have to explain why are
3 we, despite 30 years of --

4 MR. YANG: Right.

5 JUSTICE BREYER: -- going long with the
6 other, why now do we think that was a mistake?

7 MR. YANG: I think you can -- you can -- if
8 that were a requirement, we don't think it's necessary.
9 But if it were, you could easily see the answer by
10 reading the -- the 1978 opinion letter in conjunction --
11 if I can follow -- finish. Thank you.

12 The 1978 opinion letter was based on the
13 theory that service advisors are selling, they're doing
14 selling. And so as a result, they said, well, when
15 you're working on service under warranty. You're no
16 longer selling, so you don't count for the exemption.
17 Only when you're selling nonwarranty services --

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 MR. YANG: Thank you.

20 CHIEF JUSTICE ROBERTS: Mr. Clement, four
21 minutes.

22 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

23 ON BEHALF OF THE PETITIONER

24 MR. CLEMENT: Mr. Chief Justice, and may it
25 please the Court:

1 Just a few points in rebuttal, starting
2 right where Justice Breyer and my friend from the SG's
3 office left off. Which is to say, I think, you know, if
4 you look at what they did in the preamble, they did what
5 agencies do every day, which is first they say, we have
6 some comments that say this; we have some comments that
7 say that. They simply relate what the comments were.
8 Then there's the money paragraph that explains what they
9 actually did, what justifies their decision, and there's
10 nothing in there about reliance interests at all. So if
11 there's anything to your Fox position, then I think this
12 does not get a passing grade; it gets a flunking grade.

13 And what I'd like to just offer as a
14 potential comparison: As you may know, the agency has
15 also revisited the issue you addressed in Long Island
16 Care, and they did that through notice-and-comment
17 rulemaking. And it's worth a quick look to show what
18 night looks like and what day looks like, because that
19 is all about the reliance interests of the fact that
20 they treated this one way for many, many years, and
21 there are sections of that preamble explaining when they
22 change it how this is going to impose costs and why
23 those costs are justified. It's -- it's -- it is a
24 stark example of how the agency should behave when
25 they're changing the position.

1 And here's the last thing to add about this:
2 It also -- if they give that kind of analysis, it gives
3 some reason for people, especially in the Fourth and the
4 Fifth Circuit, who already have a binding circuit
5 precedent that say that service advisors are not -- are
6 exempt, it gives them a reason to maybe think about
7 changing.

8 But when they do nothing to address the
9 reliance interests and they just say, gosh, we really
10 think we were right all along, why is anybody,
11 especially in the Fourth and Fifth Circuit, supposed to
12 change the way they're doing things, and that's the only
13 way that they say that they can even possibly get within
14 the protection against massive, retroactive damage
15 liability.

16 So I think, in a sense, the State Farm
17 principles or the Fox principles would work hand-in-hand
18 with this concern about retroactivity.

19 JUSTICE SOTOMAYOR: So is it okay if we just
20 send it back?

21 MR. CLEMENT: Sure. As long as it means
22 that there is no retroactive liability. I mean, I --

23 JUSTICE SOTOMAYOR: They've already conceded
24 there's not. So they're -- they're not going to claim
25 any.

1 MR. CLEMENT: No, no. What -- no, no. What
2 they won't concede -- we're not talking about
3 retroactive liability. I'm talking about liability that
4 predates when they clearly explained why they changed
5 their position, which would be sometime in late 2016 as
6 opposed to in 2011. So -- so in that sense, it does
7 make a big difference.

8 Just a couple of other textual points,
9 because I do think you actually don't even need to get
10 to any kind of deference issue.

11 My friend on the other side -- I think we
12 have a better reading of 203(j), if you want to look at
13 it, because Congress specifically -- it's a definition
14 session. Everything in there is what they deem things
15 to mean. And then they deem "production" to mean one
16 thing, and then they mean "engaged in production" to
17 mean something broader.

18 But in all events, my friends concede that
19 "engaged in" means taking part. Well, the service
20 advisors take part in servicing, just like the partsmen
21 take part in servicing.

22 Mr. Chief Justice, if you have any questions
23 about what the service advisors do, a good place to look
24 is the complaint. JA40, they tell you what they are --
25 they evaluate the service and/or repair needs of the

1 vehicle, and they write up an estimate for the repair
2 and services. That, to me, seems to be taking part in
3 the servicing process. I'm not so sure that's not more
4 integral to the servicing process than what the partsmen
5 do.

6 The last point I'd like to make here is that
7 there is a practical anomaly that will be created with
8 siding with the other side, is that the best-paid people
9 in the servicing departments will now be the only ones
10 that are not exempt.

11 On average, the service advisors make about
12 \$66,000 and -- a year. The average partsman makes
13 \$51,000 a year. The average mechanic makes \$59,000 a
14 year.

15 Now, I'd hate to be the person that has to
16 go explain to the partsmen and the mechanics why it is
17 that their better-paid service advisor colleagues are
18 the only ones that aren't exempt from the FLSA overtime
19 provisions and are going to get a windfall in litigation
20 like this. That would be --

21 JUSTICE GINSBURG: Because they would be
22 exempt to the extent they paid on commission which, as I
23 understand it, most of them --

24 MR. CLEMENT: Yes, Justice Ginsburg. But to
25 repeat my answer to you, there are people right now who

1 are service advisors who are not paid principally on a
 2 commission, and they like it that way. And the
 3 consequences of ruling in the other side's favor is that
 4 automobile dealerships are going to have to go to these
 5 people because FLSA provisions are not waivable. And
 6 they're going to have to say, look, I know you like it
 7 this way, but we've got the Supreme Court decision. We
 8 have to rejigger things. You get into this different
 9 7(i) exemption position, so you can no longer be paid
 10 the way you've been paid for the 30-plus years the way
 11 the Labor Department has been acquiescing in this, save
 12 the Ninth Circuit below, and find that service advisors
 13 are salesmen principally involved in servicing
 14 automobiles.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 The case is submitted.

18 (Whereupon, at 12:29 p.m., the case in the
 19 above-entitled matter was submitted.)
 20
 21
 22
 23
 24
 25

A	53:11	6:20 7:8	applied 44:6	59:4
A-plus 50:19	administrative	aircraft 47:4,8	47:2	automobiles
51:8	34:15,16 37:18	47:13	applies 16:24	3:11,15,24 4:3
a.m 1:14 3:2	38:17	AL 1:6	apply 3:25 8:2	4:9 19:23
ABA 53:13	admit 36:12	Alito 26:12 27:1	9:3 20:6	22:16 23:24
above-entitled	adopted 16:10	27:18 44:4,23	applying 39:15	24:2 27:4,25
1:12 59:19	advertise 49:3	44:25 45:1	40:5 47:4	28:9 46:11
absolute 35:23	advice 36:2	Alito's 45:15	appropriately	47:5 48:19
academies 11:5	advising 18:11	alluded 44:18	53:20	49:3,4,8,11
accept 4:6 6:4	19:25 31:6,6	ambiguity 50:8	April 1:10 36:19	52:6 59:14
account 16:16	advisor 5:8,17	ambiguous 10:3	archetypical 5:7	automotive 26:3
36:24	23:22 31:5	15:12 19:20	area 12:18 36:18	30:10
accurate 10:8	34:1,2 58:17	49:14 50:7	areas 6:20 7:8	available 29:12
acknowledge	advisors 3:10,13	52:11	arguably 22:15	average 9:8 21:1
49:20	3:14 4:22,25	amendments	argument 1:13	21:10 58:11,12
acquiesced 9:14	6:4 7:22 8:5,21	51:20	2:2,5,8,12 3:3	58:13
acquiescence	9:6 10:24 13:3	amici 37:14	3:6 10:6 22:24	aware 5:16
19:11,12	13:4,7,11	amicus 1:22	23:2 25:21	awful 8:24
acquiescently	14:16 17:21	2:10 21:10	26:5,7 45:23	awfully 22:24
17:16	19:6 20:24	36:22 45:24	46:10,17 54:22	
acquiescing 53:5	21:12,21 22:4	amount 8:22	arguments	B
59:11	22:11,19 23:3	analogy 43:16	46:15	B 46:8 47:9,11
Act 5:16 17:1,11	23:19 24:2,21	analysis 19:13	arrangement	back 7:19 12:1
39:11 40:13	25:2 26:2,16	56:2	9:15	13:2 17:11
41:14 42:2	31:3 43:2	and/or 57:25	arrangements	19:14 21:16
action 29:7	44:11 48:19	anomaly 58:7	9:13	24:13,16 27:14
actions 9:16	49:21 51:13	answer 7:6 31:4	art 22:21	27:16 28:22
10:16 40:9	52:1 54:13	45:5 46:4 54:9	articulating	31:14,20 32:11
activity 28:1,2	56:5 57:20,23	58:25	41:22	32:12,21,24
actual 27:19	58:11 59:1,12	answers 33:23	aside 41:16	37:9 39:9
29:2	afternoon 8:10	antecedent 50:5	asked 12:21	44:14 56:20
add 22:11,18	agencies 10:14	50:6	35:15 36:8	bad 52:15
28:16 56:1	15:6 31:20	ANTHONY	42:20	balance 25:18
adding 28:14	55:5	1:20 2:9 45:23	asking 42:1	barking 20:7,13
additional 19:3	agency 12:20	antitrust 48:24	assembly 27:15	based 17:11
46:4	16:15 17:22	anybody 56:10	Assistant 1:20	31:13 32:7
address 35:7,12	18:18,22 28:6	anymore 14:19	Association 11:7	43:3 54:12
46:3 52:21,25	34:17,21 35:11	anyways 9:3	21:9	basic 50:4
53:14,14 56:8	35:18 36:1,6	apart 31:12	auto 8:6 18:8	basis 4:23 5:5,8
addressed 13:3	37:6,11 38:19	apparently 6:18	31:20 33:7	6:13 7:4 19:8
13:6 14:16	39:1 50:8,16	APPEARAN...	automatic 27:9	26:14 37:1
37:5 55:15	52:8,14 53:17	1:15	27:14	bay 32:22
addresses 13:11	53:22 55:14,24	appears 21:20	automobile 3:20	Bayh 7:18
13:13 14:19	agree 14:10	appendix 14:21	8:6,11 11:6	becoming 36:23
adequate 50:15	16:19 37:24	46:24 51:12	21:9 22:17	behalf 1:16,18
administrations	agreed 37:24	applicable 5:11	24:6,18 25:13	2:4,7,14 3:7
	agricultural	39:19	31:11 45:15,16	25:22 54:23

behave 55:24	breadth 4:12	calipers 26:20	27:2 36:4	class 4:7 38:21
belief 28:9	breakdown 5:3	call 8:9 33:25	37:21,25 55:22	39:1
belt 32:9,17,18	Breyer 6:11 7:6	35:3	56:12	classic 37:16
32:20,21	7:14,15,20	called 18:21	changed 18:18	clause 46:8
benefit 19:9	33:19,23 34:2	35:10	19:13 34:23	cleaner 38:19
best 9:8 50:14	34:12 35:22	candid 11:9,11	35:6 38:1	clear 3:13 14:7
best-paid 58:8	36:10 37:21	canon 20:1,3,9	40:22 41:1	16:19 17:6
better 10:6	38:7,10 44:17	50:1	45:20 51:6	19:21 24:20
15:24 16:12	52:9,20,23	capacious 25:16	57:4	34:11 42:9
17:23 18:9	53:10,24 54:1	car 11:13 13:14	changes 34:17	47:8
19:13 35:7	54:5 55:2	23:6,9 24:15	35:18,20 37:2	clearer 17:18
57:12	brief 14:22	27:20,23 30:17	51:20	clearly 14:1 57:4
better-paid	21:10 28:24	31:15 45:3	changing 16:15	Clement 1:16
58:17	29:15 33:13	48:25	55:25 56:7	2:3,13 3:5,6,8
beyond 44:1	36:18 37:3,8,9	car's 30:16	chapter 48:10	4:15,20 5:2,21
Bibas 1:18 2:6	40:7 44:13	care 35:17 36:14	Chevron 9:23	6:1,7 7:1,14,16
25:20,21,23	51:13	51:19 55:16	10:6,13 12:1	7:21 9:22,24
26:15 27:6	bring 8:22	careful 19:2,16	12:16,20 13:21	10:4,10 11:2
28:4 29:14,17	broad 43:1	cars 22:2 23:8	13:24 14:4,7,9	11:15,20 12:12
30:22 31:2,22	broaden 30:8	25:25 26:1,2,2	18:22 19:19	12:19 14:5,9
31:25 32:6,19	broadens 28:18	26:9,21 33:4,5	34:11	15:15,25 17:5
33:1,7,22 34:1	29:9	33:15	Chief 3:3,8	18:17 19:1
34:10 35:13	broader 28:23	carving 33:11	25:19,23 29:11	21:2,4,13,16
36:9,13 37:9	30:2 57:17	case 3:4 6:9 8:2	29:16 30:12,23	22:5,22 23:10
38:6,9,12 39:7	brother 48:6,12	10:19 13:24	32:15 40:3,11	23:13 26:13
39:18,21,25	brought 9:16	17:7 29:23	40:21 41:1,7	34:24 39:4
40:5,13,19,24	10:16	30:3 34:14	41:11,15,19,25	42:20 50:15
41:3,10,13,18	build 26:20	39:13 44:7	44:24 45:6,21	54:20,22,24
41:23 42:6,11	27:11	59:17,18	46:1 54:18,20	56:21 57:1
42:15,18,24	bunch 20:5,5	cases 9:18 10:9	54:24 57:22	58:24
44:12 45:5,8	bushings 27:12	10:11,15,16,18	59:16	clerk 43:24
45:18	business 15:9	10:20 12:3,4	choice 6:5	client 18:12
big 25:10 53:13	busy 8:8	17:16	choosing 44:6	clients 17:16
57:7		cat 20:8,13	church 44:16	18:17 19:3
binding 56:4	C	categories 33:12	circuit 12:5	clipboard 31:7
bit 8:16,17 11:3	c 2:1 3:1 13:2,13	categorize 42:17	17:16,17,20	close 24:24
49:13 50:19	50:24	category 33:5	18:1,8,12,15	28:10 43:21
boats 47:13	c)1 51:4	44:9 52:2	35:1 56:4,4,11	closely 27:19
bookkeeping	c)4 51:4,7,11	cause 14:9	59:12	29:21
38:22	C1 35:4	certain 8:22	Circuits 17:20	closely-related
books 18:14,15	C3 37:4,10	certainly 12:17	circumstance	29:1
bottom 37:10	C4 18:6 37:14	45:12	16:3,5 18:4	clubs 44:16
43:2	C5 14:21 16:2	cetera 32:10	cite 28:12,24	clutch 27:11,12
boy 18:5 19:4	37:3,4,11	chance 12:7	cited 28:20	27:12
brake 26:22	38:13	chances 19:17	civil 40:9	coating 48:25
brakes 32:10	C6 14:21 16:2	change 17:25	claim 6:8 40:19	codify 16:9
branded 49:1	37:3,10	18:10,13 19:16	56:24	19:12

colleague 53:3	36:25	counsel 25:19	D 1:16 2:3,13	defer 12:16,23
colleagues 34:19	concede 3:23	36:20 45:21	3:1,6 54:22	12:25
58:17	42:6 57:2,18	54:18 59:16	D.C 1:9,16,21	deference 10:14
combination	conceded 46:17	count 35:20 40:8	damage 56:14	10:22 12:21,22
3:25 20:10	56:23	54:16	damages 17:3,8	13:22,25 15:11
come 9:12 18:5	conceding 28:10	counter 48:25	18:24 39:5,24	15:13,21 16:13
18:5 19:23	concern 56:18	couple 5:6 28:4	40:12,18,19	18:22 34:11
20:1,25 24:8	concerned 46:19	57:8	41:12,20 42:4	50:10 57:10
24:24 32:12	conduct 39:6	course 5:15	42:7	defined 21:25
42:22	40:6	12:21 14:8	darn 17:23	22:3 48:15
comes 5:19	confirm 30:7	19:25 28:6	date 13:2 17:9	51:15
28:10 47:17	conform 18:1	34:11 35:25	36:20 39:10	defines 29:6
comfortable	Congress 6:18	Court 1:1,13 3:9	40:2	definition 14:12
44:4	7:7 21:23 22:7	5:16 15:9,17	day 7:19 8:10	28:8,24,25
coming 10:18	22:10,17 25:15	16:5 20:2	18:9 55:5,18	51:17,17,21
31:20	39:14 44:5,9	25:24 29:24	days 36:19	57:13
commentators	44:12 45:11,18	35:19 43:15	deal 43:14	definitional 48:7
37:11,22,23	46:6,19,22,25	44:21 46:2	dealer 11:13	definitions
commenters	47:6,14,20	53:8 54:25	dealers 11:7,21	28:20 29:4
37:15	49:16 57:13	59:7	18:8 21:9	depart 49:12
comments 37:4	conjunction	Court's 29:23	dealership 8:9	department
37:5,13 55:6,6	54:10	30:3,7	11:23 17:19	1:21 9:14 12:7
55:7	connected 27:19	courts 9:23 10:2	24:6,18 33:8	12:17,21 16:19
commission	consequences	13:6 16:10	49:8	19:10 24:7
4:19,23 5:8	4:17,21 59:3	19:17 45:13	dealership's	33:13,15,21
6:13,16,23	considered 14:1	cover 46:21	49:2	34:5 41:2,7,8
8:19,21 19:8	consistent 36:6	48:23	dealerships 8:6	41:20 42:3
44:8,11 46:15	36:12 38:2,3	covered 4:9	43:10 59:4	59:11
46:18 58:22	45:3	22:12 23:3,17	dealerships'	Department's
59:2	construed 50:9	25:2,14 27:24	8:12	12:3 18:3
commissioned	52:3,5	44:6 51:21	dealing 42:16	departments
5:1,11 21:15	construing	covering 26:14	deals 40:7	8:12 58:9
42:23	51:23	covers 15:1	dealt 39:14	describe 33:3
commissions 5:5	context 15:18	created 47:9	decades 9:13	35:9
43:8	19:24 44:19	58:7	decide 8:1	despite 54:3
comparison	continue 20:10	criminal 40:9	decided 22:1	diagnose 24:9
55:14	contrasting	criteria 44:5	47:6	diagnosis 31:13
compensated	29:25	crystal 19:21	decision 12:5,14	diagnostic 11:9
4:23 5:14 19:5	convince 9:19	curiae 1:22 2:10	12:16 14:14,15	11:23
compensation	coordinating	45:24	18:15 55:9	dictionary 21:18
42:25	37:17	customer 24:8,9	59:7	21:25 22:2
complaint 17:6	core 28:14	24:16 31:6,7,8	deem 57:14,15	23:4 28:8,20
21:5 39:7	correct 27:3	customer-facing	deemed 29:19	difference 31:3
57:24	32:6 36:14	27:17 31:5	48:11	46:24 51:3
completely	cost 32:1,3,9	customers 8:6	deeming 29:21	57:7
15:13 20:11	costs 11:20,22		defense 40:14,20	different 18:4
component	55:22,23		41:16,23 42:2	21:20,24 24:19
		D		

44:10 47:3 48:14 53:11,12 59:8 differently 7:3 21:25 differs 30:13 direct 26:8 directly 11:4 dirty 25:12 disagree 16:13 discharge 8:10 discuss 46:5,9 46:13 discussed 44:13 45:18 discussion 37:13 disks 27:12 dispenses 27:11 dispensing 26:25 27:7 dispersion 43:2 dispute 3:12 disruptive 9:5 9:11 distributive 49:17 50:2 Division 9:17 10:17,21 doctor 43:18,19 doctrine 18:21 document 35:4 doing 14:25 18:24,25 21:8 27:7,22 29:7 30:24 32:21 45:4,4 48:8 53:19 54:13 56:12 dollars 32:3 door 30:6 dozens 33:14 drafting 50:23 drawing 37:16 38:13,18,24 49:12,19,20 drawn 28:1,5 38:14	driving 31:9 drum 26:22 27:12 due 10:13 dynamic 17:14 17:15 <hr/> E <hr/> E 2:1 3:1,1 earlier 8:16 30:24 43:15 early 10:15 easily 54:9 effect 40:23,25 effected 14:2 effective 17:9 36:20,24 39:10 40:2 either 20:3 34:6 54:2 eliminate 47:6 employed 28:21 29:20 employee 5:20 5:22 29:10,19 33:3 36:1 44:9 employees 5:1 28:2 33:10,12 33:14 42:21,23 44:6,10 45:9 employer 5:24 enacted 46:6,6 46:22 Encino 1:3 3:4 end-run 26:7 enforce 41:5,9 41:21 42:4 enforcement 9:16 10:16 35:18 41:4 engaged 3:11,15 3:20 4:8 19:22 23:22,23 24:2 24:25 27:4,21 27:22 28:7,17 28:21,23,25 29:4,6,7,19,22	30:1,5 33:3,4,4 33:16 34:3,4 43:18,19 46:11 47:12,22 48:4 48:17,22 49:2 49:7,9,10,15 51:14,24 52:6 57:16,19 engaging 47:25 engendered 16:17 engine 26:22 entirely 13:10 entitled 13:18 50:10 entries 21:20 entry-level 43:5 equal 29:6 equivalent 35:3 era 12:16 especially 56:3 56:11 ESQ 1:16,18,20 2:3,6,9,13 essence 37:20 essential 48:9 essentially 3:23 17:1 46:17 49:9 estimate 24:12 31:24 32:7 58:1 et 1:6 32:10 evaluate 23:8 57:25 events 57:18 everybody 5:5 8:20 49:8 53:7 exact 15:18 exactly 14:1 23:20 30:25 36:7 example 4:1 6:11 55:24 exception 6:14 7:24 exempt 3:18	8:25 9:10 12:9 12:15 13:4 17:22 18:7 33:11 43:10,22 43:23 52:13 56:6 58:10,18 58:22 exemption 3:17 4:18 5:10 6:10 7:25 8:5 9:2 19:9 45:10 47:1,7,10 54:16 59:9 exempts 3:18 25:25 exist 4:7 existed 21:24 existence 21:12 21:19 expand 44:1 45:13 46:21 48:22 expect 51:1,1 expert 12:17,18 experts 31:19 explain 28:1 34:17 51:3 53:18,22 54:2 58:16 explained 13:3 48:12 49:23 53:19 57:4 explaining 55:21 explains 33:14 48:13 55:8 explanation 14:23 15:1 18:7 50:13,14 50:17,18 51:8 explicit 22:17 explicitly 36:4 expressly 26:16 45:19 extant 18:1 extend 48:22 extent 53:21	58:22 extra 15:20 extreme 36:3 <hr/> F <hr/> facing 17:10 35:24 fact 3:13 6:4 8:18 16:18 19:5 20:19 21:22,23 22:7 36:10 37:19 53:7 55:19 fails 26:5 fair 5:16 10:11 fall 46:20 52:1 falls 28:22 familiar 11:22 fan 32:17,18,20 32:21 far 16:13 30:5 34:7 38:4 farm 3:21,24 4:2 7:18 16:14 23:24 26:9 56:16 Farmers 30:3 48:12 favor 59:3 favored 10:7 37:5 Federal 9:19,21 feel 44:4 field 4:25 44:18 Fifth 17:20 18:8 18:12,14 56:4 56:11 figure 24:11 38:4 figures 43:3 filed 17:7 39:7 final 31:13 finally 46:13 find 53:6 59:12 fine 50:19 finger 30:25 36:7
--	--	--	--	---

finish 54:11	functions 23:5,5	34:21 36:11	22:24 44:19	impression 33:9
firms 36:21	funny 30:16	41:21 42:3	harder 23:2	inadvertent
first 7:24 12:15		43:6 44:15,18	hate 58:15	50:23 51:2
14:10 15:5,6	G	54:5 55:22	head 26:22	incentivized
16:6 17:6	G 3:1	56:24 58:19	hear 3:3	46:16
20:14,14 26:6	gain 15:20	59:4,6	HECTOR 1:6	include 22:4,19
26:16 27:10,11	general 1:21	good 7:22 15:6	hello 33:24	23:19 44:9
28:5 31:23	28:13 33:9	35:22 38:5	high-paid 46:15	included 11:8
35:17,21 38:20	52:4	57:23	highly 43:9	47:3 49:18
46:4,22 55:5	generally 5:10	good-faith 39:16	history 47:8	51:13
fit 26:21	gerund 4:5	goods 29:7	hold 34:13	includes 27:25
five 37:5	gerunds 50:6	gosh 17:23 56:9	homes 44:15	29:1
fix 6:21 7:9	getting 25:12	government	Honor 14:5,24	including 11:6
24:12,15	Ginsburg 4:15	28:21	17:6 26:15	incomplete
fixes 49:6,7	4:21,24 5:2	government's	32:6 35:13	13:15
FLSA 7:25	12:6,13,19	40:6 46:24	36:13 38:12	incorporating
25:25 28:22	20:18 21:3	grab 24:13	hood 25:8,12	37:12
58:18 59:5	31:17 32:25	grade 51:10	31:12 32:14,18	incorrect 21:3
flunking 55:12	33:2 40:16	52:7 55:12,12	hook 18:20	32:5
fobs 49:1	41:6 42:13,16	grain 10:11	hooks 31:15	indicators 4:12
focus 7:24	42:19 58:21,24	grammar 20:19	hospital 43:23	individuals 3:18
follow 54:11	give 15:12 23:8	50:4	43:24	5:12,14
force 40:1	24:12,23 31:24	grant 17:15 25:1	hour 9:17 10:17	industries 5:11
forced 49:16	37:7 56:2	grease 25:8	10:21 15:18	industry 9:12
former 41:3	given 4:17 6:5	greet 24:8	hours 6:15,15,22	informal 36:2
forth 27:16 53:6	18:21 20:18	grind 26:19	6:23 8:7,15 9:4	information
forward 18:19	34:20	grinders 26:22	9:5 21:1,8	31:14
18:21	gives 56:2,6	guess 13:23	44:20	informed 5:4
found 22:17	giving 6:14 32:7	16:23 23:13	HVAC 49:6	14:13 50:22
four 33:10 35:13	go 4:2 6:19 7:8	50:17 52:24		insurance 32:23
54:20	10:25 19:6	guts 49:7	I	intake 43:23,24
Fourth 12:4	20:9 24:13,15	guys 18:7	identical 52:17	integral 9:7
17:19 18:8,12	30:15,16,17,19		ill-defined 30:6	25:13 28:14
35:1 56:3,11	31:19 37:22		imagine 24:6	58:4
Fox 16:14 34:15	38:4 44:3,14	hand-in-hand	imagined 45:3	integrated 37:19
34:18 35:8	52:10 58:16	49:23 56:17	implement 3:21	intended 22:19
55:11 56:17	59:4	handbook 12:10	implements 3:24	49:17
frankly 34:6	goes 4:3,5 27:14	23:12	4:2 7:18 23:24	interest 40:8
Friday 8:8	27:15 31:6	handbooks 53:6	26:9	interests 16:16
friend 55:2	32:11 39:8	handing 27:7	implication	16:21 55:10,19
57:11	going 8:2 9:8,9	44:2	47:15	56:9
friends 3:22 4:9	11:2 12:13	hands 20:17	implications 6:9	intermediate
9:14 24:22	18:5,6,19,21	27:15	import 5:9	35:18
57:18	18:22,23 19:12	happen 9:7	important 10:15	interpret 4:13
front 32:23 44:3	23:7,8,19 24:8	happened 34:23	22:15 31:3	20:11
full 29:18	24:8,9 31:11	happens 34:25	34:16	interpretation
function 37:18	32:13,17,19	hard 18:11	impose 55:22	9:20 10:7 17:2

17:4 35:7 40:23 53:23 interpreted 29:25 interpreting 29:24 interpretive 9:15 13:1,10 invent 10:14 involved 26:24 59:13 irregular 6:22 6:22 Island 35:17 36:14 55:15 issue 28:2 35:8 37:5 38:19 39:12,14,20,21 39:22 42:17 43:15 46:14 55:15 57:10 issuing 34:21	29:16 30:12,23 31:16,17,18,23 32:1,15,25 33:2,19,23 34:2,12 35:22 36:10 37:7,21 38:7,10 39:4 39:16,19,23 40:3,11,16,17 40:21 41:1,6,7 41:11,15,19,25 42:8,13,16,19 44:4,17,22,23 44:24,24 45:1 45:6,7,14,14 45:21 46:1 50:12,25 51:8 52:9,20,23 53:10,24 54:1 54:5,18,20,24 55:2 56:19,23 57:22 58:21,24 59:16 justified 55:23 justifies 55:9	knew 21:24 know 6:3,7 7:11 7:18 10:1 11:21,22 18:17 18:24 19:14 20:16 23:1 25:15 27:10 30:15 35:2,5 35:23 41:25 42:20 45:19 50:18 52:24 55:3,14 59:6 knowing 34:13	liable 41:12,20 42:4 likes 5:18 limitations 39:8 line 15:14 28:1,5 37:15 38:13,14 38:24 49:12,19 49:20,21 lines 38:18 link 50:5 linked 47:14 listed 26:10 listen 30:17 listening 10:20 literal 3:16 19:21 litigated 42:14 42:15 litigating 9:18 litigation 58:19 little 8:14,16,16 11:3 49:13 50:19 LLC 1:3 logically 49:24 49:25 logo 49:2 long 15:16 35:17 36:14 54:5 55:15 56:21 longer 13:10 52:12 54:16 59:9 look 12:24 14:20 29:18,23 30:17 30:20 32:18 47:11,16 55:4 55:17 57:12,23 59:6 looked 16:5 looking 50:17 looks 55:18,18 lose 20:9 lot 8:25 19:4 20:9 46:14 lots 33:8	M Machinists' 33:13 main 25:11 maintained 41:3 maintaining 28:8 maintenance 30:9 48:19 making 6:7 13:17 30:16 31:8 51:24 manages 28:16 manual 26:3 27:21 30:10 34:21 manuals 36:4 massive 56:14 materials 41:4 matter 1:12 8:24 46:11 47:19 51:7 59:19 mean 6:18 13:24 14:3 15:6,13 16:14,20 17:10 17:16 18:4 22:25 23:13 25:3,6 30:14 30:18 32:15 34:7 36:5 49:14 50:13 52:23 56:22 57:15,15,16,17 meaning 28:18 49:17 52:2 means 15:3 16:7 19:24 28:21,23 28:25 30:9 32:8 48:17 51:24 56:21 57:19 meant 16:6 22:2 49:16 measure 26:20 measuring 32:20
J JA40 57:24 job 5:23,23 27:9 45:17 50:19 jobs 43:5 judge 9:19 judges 10:19 judgment 14:2,2 Justice 1:21 3:3 3:8 4:15,21,24 5:2,20,22 6:2,3 6:11 7:6,14,15 7:20 9:22,24 10:1,5,10,23 11:11,19 12:6 12:13,19 13:23 14:8 15:5,22 16:20 18:16 19:1 20:18 21:2,3,11,14 21:18 22:6,14 22:22 23:4,11 25:19,23 26:12 27:1,18 29:11	K Kagan 13:23 14:8 15:5,22 16:20 18:16 19:1 31:23 39:4 50:12,25 51:8 keep 18:24 KENNEDY 31:16,18 32:1 39:16,19,23 40:17 42:8 key 49:1 50:1 kind 8:21 11:5 13:24 15:1 21:10 36:3 52:4 56:2 57:10 kinds 33:10,14 36:1 38:18 40:7	L labor 5:16 9:14 12:3,6,17,21 16:18 18:2 19:10 26:3 27:21 30:10 59:11 lane 11:18 language 13:13 22:12 29:9,22 34:8,9 large 52:11 late 57:5 lathes 26:22 Laughter 31:21 51:9 law 5:24 29:23 34:16 36:21 53:7 lawyer 19:2 lawyers 10:21 leasing 33:15 leave 8:16 45:16 leaves 33:9 left 26:13 55:3 legislative 47:8 let's 38:21 52:14 letter 12:9,10 38:14 40:1 54:10,12 liability 32:22 56:15,22 57:3 57:3		

mechanic 3:19 8:4 10:25,25 21:21 22:4 23:22 27:3,10 27:13,16 30:19 31:6,14 32:5 32:11,12 49:6 51:15 58:13 mechanic's 27:8 mechanic-faci... 27:17 mechanics 6:19 7:3,7,23 8:14 8:20 20:21 22:20,25 23:8 26:1,25 37:16 44:17 45:16 46:7 47:2,7,16 47:18 49:18,23 52:13 58:16 mechanics' 26:18 meet 45:9 members 36:23 men 26:19 mentioned 20:22 merely 26:3 merits 12:20 met 44:16 methods 42:25 middle 6:20 mind 10:22 19:13 25:6 34:17,24 35:6 52:10 minds 18:19 minimize 11:25 minimum 9:2 43:4,12 minimum-wage 8:2 minute 4:7 minutes 54:21 missed 31:16,18 mistake 50:23 54:6	mix 21:16 modern 24:18 modifications 51:19 modified 22:8 moment 20:19 Monday 8:8 money 55:8 month 36:24 morning 7:9 8:9 Motorcars 1:3 3:4 multiple 4:12 <hr/> N <hr/> N 2:1,1 3:1 nails 25:8,12 name 3:14 named 26:17 narrow 18:4 25:7,16 narrower 29:25 45:10 National 11:6 21:9 natural 48:3 nature 44:10 Navarro 1:6 3:4 necessary 49:12 53:16 54:8 need 8:5,7 22:10 22:17 30:20 32:8,12 36:24 57:9 needs 27:10 57:25 NELA 38:13,24 never 15:9 42:11 53:4 new 14:12 18:6 18:6,9 32:8 36:23 39:10 40:2 night 6:21 55:18 Ninth 17:17 59:12 noise 30:16,18	31:9 32:8 non-mechanic 11:13 non-warranty 38:15 nonmechanics 11:17 nonresponsive 17:14 nonwarranty 38:23 54:17 normal 48:14,16 normally 43:20 noted 39:9 noteworthy 36:17 notice 14:17 notice-and-co... 13:9,21,25 14:11 16:8 36:15 38:20 40:24 50:9 51:18 55:16 notice-and-co... 14:3 noting 36:4 notwithstandi... 6:10 18:13,14 noun 20:14,14 50:6 noun-verb 3:25 noun/verb 20:10 nouns 3:24 20:5 20:15 NPR 19:11 number 5:4 36:21 numbers 5:13 nurse 43:19,21 43:21,23,25 <hr/> O <hr/> O 2:1 3:1 O.R 43:21,23 objects 26:8 obtain 27:2 obtaining 51:25	occupation 30:2 occupational 22:21 23:11 Occupations 21:19,25 off-hours 44:15 off-site 44:20 offer 43:16 55:13 office 44:3 55:3 oh 9:24 15:10 35:6 okay 17:20 29:14 36:9 56:19 old 17:2 older 10:8,11 omitted 22:23 Once 24:11 one-and-a-half 43:4,13 ones 43:7,10 58:9,18 open 8:12 32:18 39:20,22 opens 30:5 operates 43:21 operating 43:18 43:20 44:1 operations 17:25 opinion 12:10 35:16 38:14 40:1 54:10,12 opposed 22:19 57:6 opposite 29:3 34:22 35:1 42:5 52:16 oral 1:12 2:2,5,8 3:6 25:21 45:23 ordering 11:24 orders 51:25 ordinary 28:18 original 11:23 45:11	Originally 12:7 ought 15:2 18:12 35:23 outliers 5:6 outside 11:17 46:20 overhaul 32:13 overnight 17:25 overtime 3:17 5:25 6:6 7:24 8:1 9:1,10 44:20 58:18 <hr/> P <hr/> P 3:1 p.m 59:18 Pa 1:18 page 2:2 28:9 29:15 37:3,14 38:13 46:23 47:12 51:12 pages 14:21 37:3 37:8,10,12,14 paid 5:8,18 6:16 6:23 7:4 8:18 9:1,2,8 21:14 43:9 46:18 58:22 59:1,9 59:10 paperwork 26:4 30:24 43:24 paragraph 14:17,22 16:2 16:17 37:2 55:8 parrot 15:19 parroting 15:22 part 9:7 11:24 24:3,13,13,14 24:15,21 25:13 27:3 28:13,21 33:8 36:5,6 48:2,18 50:13 57:19,20,21 58:2 partially 8:19 particular 16:25
---	--	---	--	--

32:16 particularly 13:5 16:3 parts 20:20 22:16 26:19,21 26:25 27:2,3,7 31:12 33:15 partsman 3:19 23:22 27:10,14 27:21 51:15 58:12 partsmen 7:3,7 7:23 8:4,13,20 20:20 21:21 22:2,15,18,20 22:23,25 25:11 25:11 26:1,14 26:19 31:4 43:15,16 44:17 45:4,16 46:7 47:2,7,15,17 49:18,22,22 57:20 58:4,16 party 10:18 passing 51:10 52:7 55:12 PAUL 1:16 2:3 2:13 3:6 54:22 pay 5:24 penalties 40:9,9 people 4:7,18 6:12,22 8:3,16 8:25 11:16 12:8,15 16:21 24:19 30:14,15 33:7 37:24 38:21 42:17,22 43:5,11 44:16 46:15,18,19,20 48:22 52:14 56:3 58:8,25 59:5 people's 44:15 percent 8:11 43:2 percentage 4:25 perfect 52:7	perfectly 36:12 50:14 period 39:8 41:5 perplexing 50:19 person 24:7,7 44:1 58:15 personally 25:17 persons 33:25 persuasive 13:5 Petitioner 1:4,17 2:4,14 3:7 28:10,16,22 29:9 33:9 43:22 46:14,16 47:22 48:5,8 54:23 Petitioner's 26:5 26:7 29:5,15 43:16 46:9 48:21 49:9 Petitioners 36:21 Petitioners' 36:22 Philadelphia 1:18 phone 33:20,23 phrase 28:17 30:1,2 phrasing 50:2 physically 27:6 27:22 pick 26:12 place 30:13,13 35:21 57:23 plain 3:16 19:23 46:12 plastic 47:24 48:1 plates 27:12 plead 40:14 pleaded 42:11 please 3:9 25:24 33:21 46:2 54:25 pled 39:12,22	pluck 9:9 point 10:8 11:4 12:2 15:4 16:4 34:15 35:16,22 37:11,15,22,23 42:8 50:15 52:11 58:6 pointed 36:18 points 13:17 17:5 23:14 38:13 46:3 55:1 57:8 policies 53:12 policy 19:16 46:15 Portal-to-Portal 17:1,11 39:11 40:13 41:13 42:2 position 4:1,4,16 10:9 12:4 16:6 16:15 19:14 25:4 34:20 35:16,18,20 36:5 37:2,6 41:21,23 42:9 43:17 53:17 55:11,25 57:5 59:9 positions 21:24 possible 18:23 possibly 56:13 post 39:24,25 post-2011 39:24 40:6 post-Chevron 12:4 potential 36:16 55:14 practical 8:24 10:23 36:2 53:7 58:7 practices 18:10 18:13 pre-2011 39:5 39:24 42:7 preamble 14:17	14:21 55:4,21 preceded 37:13 precedent 17:21 18:2 30:7 56:5 precisely 29:3 preclude 41:24 predates 57:4 predominates 35:11 prefer 6:6 preliminary 32:7 preserved 47:10 presumably 38:16 pretty 8:7 17:15 preventing 53:13 previous 37:14 previously 13:22 38:16 primarily 3:19 4:8 5:6,14,18 19:22 23:23 24:2,25 46:10 47:12 51:14 principal 15:18 principally 3:10 3:15 4:21 14:24 59:1,13 principles 56:17 56:17 prior 41:9 47:1 51:4 53:17,23 private 10:18 probably 19:2 19:15 34:18 problem 24:10 24:11 25:10 35:8,9,25 36:2 52:10,18 53:1 53:10 problems 37:16 38:13,18 44:21 process 13:8 16:11 24:4,21 25:1,5,14	28:13 29:1,20 30:2,6,19 31:18 33:9 36:15 47:23,23 48:3,23 49:10 58:3,4 processes 29:21 produced 29:4,6 producing 29:5 production 29:6 29:20 30:1,3 48:9,9,11,14 48:15 57:15,16 professor's 36:18 promotes 49:4 promulgated 36:19 proposal 16:9 prospectively 16:25 protected 5:24 protection 53:12 53:14 56:14 prove 40:15 proved 42:12 proven 39:12 provide 22:16 29:4 providing 48:18 proving 30:5 provision 10:3 13:2 14:15 16:25 17:12 28:24 29:24,25 39:17 44:7 51:24 52:5 provisions 8:1,2 58:19 59:5 publicizing 36:22 pulled 29:2 punished 16:22 purposes 7:23 40:8 45:11 48:10 put 11:6 20:13
--	---	--	--	--

24:14 30:25 36:7 puts 32:4 putting 19:8 41:15	54:10 57:12 real 4:17 11:22 52:20 real-world 4:21 6:9 realistic 3:12 really 8:5 12:25 13:17,18 14:18 15:1,20 17:24 19:5,16,16,19 34:7 45:2 46:13,18 48:21 50:25 51:16 52:25 53:5 56:9 reason 7:22 8:3 9:3 10:13 17:13 34:25,25 35:3,5,24 38:5 43:25 45:11,12 46:20 51:6 52:12,14,16 56:3,6 reasoning 37:10 reasons 15:12 26:6 28:19 32:22 rebuttal 2:12 54:22 55:1 recall 21:4 recognition 13:15 50:2 recognize 10:15 53:17 recognized 15:18 recognizing 12:2 recommendati... 32:2 record 11:3 50:22 recording 31:10 records 31:7 red 14:22 37:9 Reddendo 20:1 20:3,8 50:1 redid 51:4	redone 27:9 reenacted 51:18 refacers 26:23 reference 37:12 38:25 referring 38:25 regs 13:10,19,20 regular 6:15,15 8:7 44:20 regulation 9:15 17:9 39:11,15 40:2,5,10,22 40:22,25 41:4 53:4,5 rejected 12:3 rejigger 59:8 relate 55:7 related 29:20,21 34:9 relays 31:14 reliably 5:3 reliance 16:16 16:21,22 35:10 35:16 36:17 39:17 40:8,15 55:10,19 56:9 relied 17:2 rely 48:6 49:22 relying 13:12 16:22 remainder 27:14 remand 39:13 39:20,22 remanufacture 26:21 remind 14:6 removed 13:9 rendering 31:12 reorder 20:11 reorienting 19:7 repair 57:25 58:1 repairing 28:8 28:11,11 48:18 repairs 27:19 30:9	repeal 45:12 repeat 58:25 rephrase 7:2 replace 32:3 reply 28:9,24 29:15 reprint 51:5 reproduced 51:12 require 38:22 requirement 54:8 requires 26:3 32:23 50:5 requisitioning 26:25 rescinded 41:4 reserve 25:18 Reservoir 30:4 48:13 respect 4:5 8:13 8:14 10:13 17:3 18:20 Respondents 1:7 1:19,22 2:7,11 25:22 45:25 49:13 response 44:21 responses 28:4 responsible 34:13 responsive 6:8 7:17 restrict 45:12 restructured 43:8 result 54:14 rethink 12:7,14 retroactive 39:15 40:4 56:14,22 57:3 retroactively 16:24 retroactivity 56:18 reversal 53:4 revisit 38:19	revisited 55:15 right 4:13,22 7:20 9:19 12:14 18:2 31:2 34:19,24 41:17,18 44:2 49:14 52:19 53:2 54:4 55:2 56:10 58:25 right-hand 26:19 rights 13:1 risk 18:18 19:3 ROBERTS 3:3 25:19 29:11,16 30:12,23 32:15 40:3,11,21 41:1,7,11,15 41:19,25 44:24 45:6,21 54:18 54:20 59:16 role 27:17,17 31:5 room 44:1 rotate 21:7 rule 16:8,10,24 34:15,16 36:19 36:23 50:4 rulemaking 13:9 13:21,25 14:12 16:8 17:22 36:15 37:1 38:20 50:9 51:19 55:17 rules 5:16 9:1,10 14:18,18 35:19 ruling 43:6 59:3 rush 8:10
Q qualify 5:10 7:5 43:7 question 5:9 6:25 7:1 10:24 14:1 16:20,23 20:19 23:14 27:20 33:1 34:8,13 36:8 36:25 37:25 45:7 50:6 52:20 questions 31:4 35:14 43:14 46:4 57:22 quibble 15:16 25:3 quick 55:17 quickly 53:13 quite 10:7 24:20 36:17 47:8 48:14 53:2 quotation 29:5 quote 29:9,17 48:13	R R 3:1 raised 43:15 range 42:24 43:1 rationale 13:4 read 11:3 14:24 15:7,8,23 21:21,22,23 22:6,7 25:4 34:6,25 50:3 52:24 53:20 reading 16:2 19:21 20:4 29:12 48:21			S S 2:1 3:1 salaried 5:1,6,23 7:4 21:15 salaries 43:1 salary 5:14,18 19:6 sale 49:4

sales 8:21,22 10:24 11:8 22:4 25:1 28:14 33:15 51:13,25,25	scalpels 44:2 scares 11:12 school 10:25 second 15:4 16:1 16:4 20:14,15 23:18 26:11 46:9 47:21 Secondly 26:18 28:7 secretaries 6:17 secretary 6:24 section 29:8,18 30:7 48:6,7 51:22 sections 55:21 see 6:25 16:17 34:23 46:23,24 52:25 54:9 seek 17:8 seeking 39:5 40:12,17 seen 43:3 48:2 segue 16:4 sell 6:13 25:25 26:2 46:16 48:24,24,25 49:4 selling 3:20 4:3 4:5 22:9 23:6 23:23 26:6,8,9 33:4,6,16,17 34:4 37:20 38:17 39:2,3 44:13,15 46:10 47:13,15,21,22 47:24,24 48:1 49:2,9,11,15 52:6 54:13,14 54:16,17 sells 13:14 Senate 45:18 Senator 7:18 send 56:20 sense 8:25 23:7 25:16,16 31:10 43:19 48:14,15 48:16 49:3	52:4 56:16 57:6 sentence 37:23 separate 4:18 29:4 separated 20:5,6 46:7 separately 22:11 September 17:7 39:8,9 serious 40:7 service 3:10,12 3:14 4:22,25 5:7,17 6:4,13 7:13,22 8:4,5,7 8:12 9:6 13:3,4 13:7,11 14:16 17:21 19:6 20:24 21:12,20 22:11,15,19 23:3,7,19,22 24:1,7,20 26:1 26:1,2,16 28:14 31:3,5 33:13,24 34:1 34:2 43:2 44:11 48:19 49:21 52:1,14 54:13,15 56:5 57:19,23,25 58:11,17 59:1 59:12 servicers 37:17 services 26:6,9 33:16,17 46:10 54:17 58:2 servicing 3:11 3:15,20 4:2,8 11:17 14:13 19:23 22:9 23:9,23 24:2,3 24:21,25 25:7 25:13,14,15,17 26:7 27:4,25 28:11,18 30:6 30:8,9 33:5,6 33:18,20 34:3	34:4 37:20 39:2,3 46:11 47:16,17,21,23 47:24 48:3,4 48:17,22 49:7 49:10,11,15,24 49:25 57:20,21 58:3,4,9 59:13 session 57:14 set 35:19 setting 14:3 seven 37:4 SG's 55:2 share 8:21,23 shift 20:25 53:13 shop 32:22 show 36:11 55:17 shows 23:25 47:14,19 shrunk 45:10 side 3:22 24:22 57:11 58:8 side's 59:3 siding 58:8 significance 4:16 significant 5:4 5:13 signs 43:25 similar 30:9 simple 53:3 simpler 38:19 simply 19:14 25:4 49:6 55:7 single 9:19 14:17 47:1 sitting 10:20 situation 40:14 52:15 sleep 20:9 slightly 7:2 small 24:6 Smiley 35:19 sold 38:16 Solicitor 1:20 somebody 13:14	sorry 29:11 37:15 40:3 44:24 sort 8:7 Sotomayor 5:20 5:22 6:2,3 9:22 9:25 10:1,5,10 10:23 11:11,19 21:11,14,18 22:6,14,22 23:4,11 37:7 44:22 45:7,14 56:19,23 sound 32:16 speaks 43:17 special 6:19 7:10 48:15 specially 10:24 specific 5:3 13:2 50:16 specifically 13:7 13:12 14:16 57:13 squealing 31:8 32:8,16 stability 5:19 stage 39:13 Standard 5:16 stark 55:24 started 16:9 starting 55:1 State 16:14 56:16 States 1:1,13,22 2:10 45:24 statistical 5:3 statute 3:18 4:1 4:10,11,13 7:12 9:20 13:15 14:6,25 15:3,8,8,10,11 15:20,23,23 16:6 19:20,21 19:24 20:4,11 20:12 22:12 23:20,20 24:24 25:5,6 26:17
---	---	--	--	--

28:15,17 38:2 38:3 41:2 43:17,19 46:5 46:6,22 48:10 49:13,14 50:3 50:9,24 52:3 53:20 statute's 26:8 statutes 28:12 statutory 3:17 3:23 51:23 STEPHANOS 1:18 2:6 25:21 strong 6:8 11:4 structuring 43:11 studiously 12:22 stuff 11:25 subject 17:3 18:24 29:7 submissions 20:23 submit 4:11 submitted 59:17 59:19 subsection 29:2 46:8 47:9,11 50:24 succeed 42:1 sudden 9:6 13:19 suddenly 53:8 suggest 50:4 suggested 39:5 48:6 suggesting 53:22 suggestion 48:8 suggests 3:14 4:12 29:5 sum 14:23 supply 27:3 supporting 1:22 2:11 10:9 45:25 Suppose 33:19 supposed 17:24 17:25 56:11	Supreme 1:1,13 59:7 sure 10:8 19:6 23:1 37:24 52:4 56:21 58:3 surgery 47:25 48:1 surprise 36:16 suspect 18:16 30:13 suspicion 11:4 sweeps 29:21 symptoms 31:8 sync 27:8 system 49:7 system-wide 21:10 <hr/> T T 2:1,1 take 4:1,4 5:9 6:4,15 9:6 10:1 10:11,12 11:12 13:18 24:14 27:8 35:14 36:24 42:5 44:7 51:19 57:20,21 takes 43:25 talk 24:16 talking 6:12 7:25 42:21 43:1,9,11 44:25 46:18 48:16 57:2,3 team 8:4 9:7 24:20 tell 19:2,15,18 24:16 29:12 57:24 telling 11:13 48:5 tension 32:20 term 22:8,21,21 23:3 25:15 51:23	terms 3:16 17:9 19:23 text 46:5 textual 4:12 46:11 47:19 57:8 Thank 25:19 29:16 45:21 54:11,18,19 59:15,16 theory 28:13 54:13 they'd 12:23 44:15 thing 7:24 14:20 20:8 23:18 26:6 31:23 35:20 56:1 57:16 things 14:5,9 33:8 48:8 49:1 53:6 56:12 57:14 59:8 think 3:11 5:7 5:15 7:1,17,21 9:11,21 10:10 10:14,19 11:12 11:16 12:1,20 12:25 13:5,14 13:18 14:23,25 15:2,10,11,16 15:21,24 16:1 16:11,12,14,21 17:13,17,19,23 18:9 19:20,20 21:4,8,16 22:3 22:10,23,23 23:1,15,16,18 23:20,25 24:5 24:22 25:15 32:8 34:6,11 34:16 35:1,6 36:13 38:2,3,7 38:8,25 41:12 41:19 42:3 43:20 46:12 47:19 48:5	49:13 52:11,11 53:14,16,25 54:1,6,7,8 55:3 55:11 56:6,10 56:16 57:9,11 thinking 7:18 20:12 thought 6:18 7:7 10:5 22:14 23:16 34:18,24 35:8 47:25 53:7 three 3:23 9:8 10:12 20:15 24:19 26:5,8 28:19 33:10 46:3 three-plus 9:13 threshold 42:17 throw 20:16 thumb 18:22 time 11:12 12:15 15:7 18:11 25:18 32:2 36:11 38:20 41:5 47:17 times 8:9 43:4 43:13 timing 32:8 today 7:21 told 19:10,12 top 47:11 total 14:23 touching 32:20 track 44:19 tractor 6:21 7:9 traditional 23:7 trailers 47:4,7 47:13 trained 10:24 11:1 training 11:7,8,8 transmission 27:8,9,15 travel 45:15 treat 7:22 38:21 52:17	treated 6:17,24 7:3 55:20 treatment 7:10 trim 17:11 trouble 19:7 truck 3:20 trucks 3:24 4:2 23:24 26:9 true 7:11,12 37:25 44:23 45:1 try 7:2 11:25 19:1 23:1 52:25 trying 6:8 30:23 30:25 47:20 turn 35:14 two 10:12 12:2 13:17 14:5,9 17:5 20:15,16 23:14 37:3,12 two-year 39:8 type 27:21 types 47:3 <hr/> U U.S 30:4 U.S.C 29:14,18 39:18 unadministra... 15:14,17 understand 6:1 11:15 13:23 43:20 58:23 understandably 9:12 understanding 30:22 31:2 32:24 41:2 44:12 understood 44:5 49:24,25 53:20 unequivocally 10:9 unfair 36:16 unique 16:3,4 17:15
--	---	--	---	---

uniquely 4:5	warranties	24:9 27:8	year 43:5 58:12	207(i) 5:10 43:7
unit 33:12	48:24	31:13 32:22	58:13,14	43:10 46:20
United 1:1,13,22	warranty 38:15	38:15,15,16,23	years 16:18	213(b)(1)(A)
2:10 45:24	38:16,22 54:15	44:18,20 51:14	19:11 34:23	46:21
units 27:11	Washington 1:9	51:16 56:17	36:4 52:18	22,000 43:5
universe 42:20	1:16,21	workday 21:8	54:3 55:20	25 2:7
45:9	wasn't 34:4	workers 19:4	59:10	259 39:18
unnatural 24:1	way 4:13 5:15	working 4:18		29 29:14,18
use 15:14 22:1	7:22 8:19	8:14 20:24	Z	39:18
22:20 23:5,6,9	10:25 15:7,8	24:19 26:18	0	2A 46:23
26:20,22 35:2	15:23,24 16:9	27:13 44:8,11	1	3
35:9 50:5	16:19 20:12	49:23 54:15	1 13:13	3 2:4 51:5
uses 28:23	21:15 22:3	works 8:19	10 43:2	3:00 7:8
utensils 44:2	24:5 25:4	world's 50:14	11 28:9 29:15	30 34:23 36:4
	28:11,16 34:6	worry 17:2	11:27 1:14 3:2	52:18 54:3
V	36:11 44:3	18:19 19:19	12:29 59:18	30-plus 59:10
v 1:5 3:4	48:7 49:21	20:2	13(b)10 51:22	33 16:18 19:10
vague 12:22	50:3 55:20	worse 52:15	15 21:1	337 30:4
value 10:2	56:12,13 59:2	worth 12:2	15-415 1:4 3:4	3A 47:12
valve 26:23	59:7,10,10	14:23 16:2	1918 20:2	4
vehicle 58:1	We'll 3:3	55:17	1966 21:11,19	4 13:2 51:5
vehicles 22:9,10	we're 6:12 9:8	wouldn't 6:16	45:2	40 8:15 9:4
39:2,2,3 47:3	12:13 14:25	6:24 10:12	1970 13:2 19:15	40-hour 20:22
51:25	17:10 38:2	22:18 23:1	1974 46:6,6,23	45 2:11
verb 20:14,15	42:3,16,21	35:3 48:23	47:1,6 51:20	46 9:4 20:22
30:8	43:1,9,11	Wow 50:25	1978 38:14	21:8
verbs 20:6,16	46:17 48:16	write 26:4 58:1	54:10,12	5
versus 38:15,22	57:2	writing 35:15		5 35:5 39:11
view 16:12	we've 59:7	written 34:14	2	40:1
17:24 42:4,5	Wednesday 1:10	wrong 11:14,23	2 51:5	5:00 8:8
49:9	week 8:15 9:4,5	11:24 18:3	20 1:10 33:12	50 9:4
virtually 52:16	20:22	46:12 49:5,11	2010 39:9	51,000 58:13
vital 43:25	went 9:16 21:18	53:23 54:2	2011 12:11,12	54 2:14
W	weren't 10:17	X	12:20,24 13:1	55-hour 21:7
wage 9:2,17	13:4 20:20	x 1:2,8 16:7,7	13:8,18 17:8	59,000 58:13
10:17,21 43:4	wide 42:24	32:3	36:19 39:11,15	5th 40:25
43:12	willing 42:6	Y	40:1,5,12,23	6
waivable 5:17	win 41:17	Yang 1:20 2:9	40:25 41:9	6:00 21:6
59:5	windfall 58:19	45:22,23 46:1	57:6	6:00-a.m.-to-7...
Walton 12:5	women 26:19	50:12,21 51:2	2012 12:11 17:7	20:25
18:13	word 23:6,9	51:10 52:19,22	39:8	60 30:4
want 5:23 7:16	34:14 35:9,10	53:9,16,25	2016 1:10 57:5	60s 44:14 45:19
11:9 14:6 15:8	words 23:5 35:2	54:4,7,19	203(j) 28:24	66,000 58:12
15:15,25 19:15	42:1	Yeah 7:16 15:5	29:14,18 30:7	
25:3 30:20	work 6:14,15,21	21:2 34:2,12	48:6,7 57:12	
41:8 57:12	6:22 8:7 9:4			
	20:21,22 23:8			

<p>6a 51:12</p> <hr/> <p>7</p> <hr/> <p>7(i) 6:10 19:9 59:9</p> <p>7:00 21:5</p> <p>701(i) 42:23</p> <p>759 30:4</p> <hr/> <p>8</p> <hr/> <p>9</p> <hr/> <p>9:00 8:8</p> <p>90 8:11</p>				
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