

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MICHAEL SHANE CHRISTOPHER, ET AL., :

4 Petitioners : No. 11-204

5 v. :

6 SMITHKLINE BEECHAM CORPORATION, :

7 DBA GLAXOSMITHKLINE. :

8 - - - - - x

9 Washington, D.C.

10 Monday, April 16, 2012

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 10:03 a.m.

15 APPEARANCES:

16 THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf

17 of Petitioners.

18 MALCOLM L. STEWART, ESQ., Deputy Solicitor General,

19 Department of Justice, Washington, D.C.; on behalf of

20 the United States, as amicus curiae, supporting

21 Petitioners.

22 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of

23 Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	THOMAS C. GOLDSTEIN, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	MALCOLM L. STEWART, ESQ.	
7	On behalf of the United States,	
8	as amicus curiae, supporting the Petitioners	16
9	ORAL ARGUMENT OF	
10	PAUL D. CLEMENT, ESQ.	
11	On behalf of the Respondent	30
12	REBUTTAL ARGUMENT OF	
13	THOMAS C. GOLDSTEIN, ESQ.	
14	On behalf of the Petitioners	62
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in Case 11-204, Christopher v. SmithKline
5 Beecham.

6 Mr. Goldstein.

7 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

8 ON BEHALF OF THE PETITIONERS

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

11 In the Fair Labor Standards Act, Congress
12 directed the Secretary of Labor to quote/unquote "define
13 and delimit" the statute's outside salesman exemption.
14 By regulation, the Secretary provided that an outside
15 salesman is one who makes sales rather than promoting
16 sales by others. In further guidance, the Secretary
17 elaborated that nonexempt promotion includes either,
18 one, a conversation where there can be no commitment or,
19 two, one where there will be no exchange with the
20 employer.

21 Now, everyone agrees that a pharmaceutical
22 detailer engages in promotion. They tout drugs to
23 doctors. Everyone agrees that there can't be a
24 commitment to issue a prescription. Everyone agrees
25 that a prescription is not an exchange with a

1 pharmaceutical company. But nonetheless, the Respondent
2 argues that pharmaceutical detailers sell drugs directly
3 to doctors as a matter of law. They say that follows
4 from the fact that the Secretary's regulation
5 incorporates the definition of "sale" in the FLSA, which
6 is in the blue brief in the appendix at page 1.

7 That definition, which is section 203(k),
8 provides -- it's the second provision on the page --
9 "'sale' or 'sell' includes any sale, exchange, contract
10 to sell, consignment for sale, shipment for sale, or
11 other disposition." And what you will not find in that
12 language is anything that contradicts the two points the
13 Secretary has made, which is that there has to be a
14 commitment or that, at the very least, there has to be
15 an exchange with the employer.

16 JUSTICE ALITO: Well, is that consistent
17 with the Government's argument? They argue, quote, "an
18 employee does not make a 'sale' for purposes of the
19 'outside salesman' exemption unless he actually
20 transfers title to the property at issue." The statute
21 refers to a consignment for sale. When that occurs,
22 does -- does the consignor actually transfer title to
23 the property at issue?

24 MR. GOLDSTEIN: It is an arrangement for
25 transfer of title, and that's why it's critical that it

1 says a consignment for sale, the sale being the transfer
2 of title. But in all events, this case is not a fight
3 about transferring title or some lesser form of
4 exchange, because there's no exchange between the doctor
5 and the --

6 JUSTICE ALITO: I understand that, but I
7 would appreciate an answer --

8 MR. GOLDSTEIN: Yes.

9 JUSTICE ALITO: -- to my question.

10 MR. GOLDSTEIN: Yes.

11 JUSTICE ALITO: Is the Government's position
12 consistent with the reference to consignment for sale?
13 When a consignment for sale occurs, is there a transfer
14 of title?

15 MR. GOLDSTEIN: There is an agreement for a
16 transfer of title, and I believe there --

17 JUSTICE ALITO: Is there a -- a transfer of
18 title?

19 MR. GOLDSTEIN: I apologize. There is not a
20 transfer of title, but there is an agreement for a
21 transfer of title. They -- just to be clear, the
22 Government says the definition of "sale" includes a
23 transfer of title. And so, all I'm pointing out, if I
24 could just go back to the definition -- I apologize for
25 not answering --

1 JUSTICE ALITO: No, no, I understand. I
2 understand your position to be different from theirs.
3 But I --

4 MR. GOLDSTEIN: Oh, no --

5 JUSTICE ALITO: Perhaps I should ask them
6 about -- about their position.

7 MR. GOLDSTEIN: Sure. Well, I apologize if
8 I've created some --

9 JUSTICE SCALIA: Excuse me. I -- I don't
10 agree that there's an agreement for transfer of title.
11 Where there's a consignment, you give the property to
12 somebody, and he says I will sell it to somebody if
13 somebody will buy it.

14 MR. GOLDSTEIN: Yes.

15 JUSTICE SCALIA: There is no agreement to
16 transfer title.

17 MR. GOLDSTEIN: There is --

18 JUSTICE SCALIA: It's purely a future
19 contingency. If someone will buy it, I will sell
20 them -- sell it to that person on your account.

21 MR. GOLDSTEIN: Yes. I believe -- I will
22 allow you -- I apologize saying "I will allow you."
23 The --

24 (Laughter.)

25 MR. GOLDSTEIN: It would be -- you can do, I

1 know, whatever you want.

2 The Government can explain it --

3 JUSTICE ALITO: No, not really, but
4 anyway, go ahead.

5 MR. GOLDSTEIN: Yes. All right. It is --
6 the statute refers to a consignment for sale. I believe
7 they're defining a sale in that phrase. But in all
8 events, the debate over whether it includes or is
9 limited to a transfer of title is not at issue in this
10 case, because what the -- because all the statute
11 requires is that there, at the very least, be some
12 exchange of some part. There's going to be an -- a
13 binding agreement, a commitment, and that commitment
14 will involve an exchange with the employer. What
15 happens in pharmaceutical detailing is that there can't
16 be any commitment to issue a prescription at all --

17 JUSTICE GINSBURG: Because -- because the
18 limitation on sale is they can't sell -- by Federal law,
19 they can't sell. And you -- you are debating about
20 exchange, sale. What strikes one about this case is
21 that these are workers -- they work autonomously. They
22 don't clock in and out. They work outside the
23 workplace. After they're trained, they have minimal
24 supervision.

25 Is there any other category of exempt

1 workers that have that kind of autonomy and yet come
2 under the wage and hours law?

3 MR. GOLDSTEIN: I'm sorry. So, your premise
4 is that they are exempt to begin with? There -- I can
5 tell you that there are a large number of employees who
6 do work outside the workplace and are substantially more
7 autonomous than are pharmaceutical detailers, who have
8 to operate from very strict scripts. There are -- it's
9 literally --

10 JUSTICE GINSBURG: For example, what are
11 the -- that's what I wanted to know. What are the
12 categories of people that seem to be autonomous, not the
13 type that clocks in and out?

14 MR. GOLDSTEIN: Sure. Well, you can have
15 emergency service workers that are working outside.
16 There are lots of people -- so, for example, you may
17 well --

18 JUSTICE SCALIA: I don't -- I don't
19 understand what that is.

20 MR. GOLDSTEIN: I apologize.

21 JUSTICE SCALIA: What's an emergency service
22 worker?

23 MR. GOLDSTEIN: A police officer or a
24 fireman, an ambulance driver. They are constantly
25 outside the office. You can also have lots of different

1 kinds of promotion --

2 JUSTICE SCALIA: Excuse me. They're not on
3 duty all the time. Aren't -- don't they have hours of
4 duty? My goodness. Some of them make enormous overtime
5 wages because they've put in hours beyond their regular
6 hours of duty --

7 MR. GOLDSTEIN: Well, that -- my --

8 JUSTICE SCALIA: These people have no hours
9 of duty.

10 MR. GOLDSTEIN: That is not quite right,
11 Justice Scalia. They are expected -- the joint appendix
12 explains -- to be in the doctors' offices between 8:30
13 and 5:00 p.m. They work additional time. The fact
14 that --

15 CHIEF JUSTICE ROBERTS: Well, doesn't that
16 just -- I mean, that's when the doctors are there.

17 MR. GOLDSTEIN: That's -- but that is when
18 they are supposed to be in the doctors' offices. That's
19 dictated by the company.

20 JUSTICE GINSBURG: What about -- what about
21 the extras? I mean, we're told that part of this job is
22 to have a good relationship with the doctors. It
23 includes dinners. It may be conventions.
24 Entertainment, maybe golf. If -- if you're right, would
25 the time on the golf course get time and a half?

1 MR. GOLDSTEIN: Well, a couple things about
2 that, Justice Ginsburg.

3 (Laughter.)

4 MR. GOLDSTEIN: There actually are very
5 strict restrictions. That kind of activity is under the
6 PhRMA Code, which is trying to interpret Federal law, is
7 actually very heavily restricted. But whatever it is
8 that the employee is doing to further the employment
9 relationship is going to be hours on duty. It is really
10 important I think that while it is true that a
11 pharmaceutical detailer has many of the characteristics
12 of an outside salesman, the one they don't have is
13 selling.

14 And that is the line that Congress drew.
15 It --

16 JUSTICE GINSBURG: You were -- you were
17 giving examples, and we just stopped at --

18 MR. GOLDSTEIN: Sure.

19 JUSTICE GINSBURG: -- emergency service
20 worker. But you said there are many examples --

21 MR. GOLDSTEIN: Sure.

22 JUSTICE GINSBURG: -- of people who are
23 highly autonomous and still come under the hours
24 regulation.

25 MR. GOLDSTEIN: Sure. Another example would

1 be insurance adjusters. There are people who are
2 outside cleaning people that are not -- that don't have
3 any --

4 JUSTICE KENNEDY: And these are all -- these
5 are all within the Fair Labor Standards Act?

6 MR. GOLDSTEIN: Yes. Yes, Justice Kennedy,
7 they absolutely are.

8 JUSTICE KENNEDY: Are there any occupations
9 or pursuits that are not covered by the Fair Labor
10 Standards Act because -- on the rationale that they are
11 out, that they are unsupervised, and so forth. In other
12 words, if you were arguing the case of the Respondent,
13 would you -- would you have any close analogies to areas
14 that are not -- that are exempt; in other words, they
15 wouldn't be salesmen, but there'd be some other
16 classifications to fit them in?

17 MR. GOLDSTEIN: I would, but they would all
18 be one of two things. They would either fall within the
19 administrative exemption, which is, Justice Ginsburg,
20 what is -- Congress was talking about when it talked about
21 people who have a lot of autonomy, and which is not true
22 of detailers -- or some other exemption. So, to give an
23 example, certain outside buyers are exempt under the
24 Fair Labor Standards Act. A good -- that's a good
25 example, because if you're an outside buyer of poultry,

1 then you are exempt, but if you are an outside buyer of
2 meat, you aren't.

3 It is one of a lot of different places --
4 there are 50-some exemptions from the Fair Labor
5 Standards Act. And Congress drew incredibly fine lines.

6 JUSTICE SCALIA: Congress can draw -- draw
7 even silly lines.

8 MR. GOLDSTEIN: Yes.

9 JUSTICE SCALIA: If Congress draws it, it's
10 a line. But the line you're suggesting here -- both
11 your brief and the Government's, as I recall, say, my
12 goodness, if we find for the Respondent here, there'll
13 be so much uncertainty in the future. I'm not sure
14 there isn't a lot of uncertainty if we -- if we find in
15 your direction.

16 Now, let me give you an example. One of my
17 law clerks -- my law clerks supplement my sparse life
18 experience.

19 (Laughter.)

20 JUSTICE SCALIA: One of my law clerks is
21 familiar with the -- the framing business. Okay? Now,
22 salesmen of frames do not sell the frames at the time
23 that they visit the -- the framing company or the
24 framing store. They get a commitment that in the
25 future, that person will order from the framing company.

1 Now, is that a sale?

2 MR. GOLDSTEIN: That is a sale, but the
3 difference here is that there's neither a commitment --
4 remember, the commitment is illegal as a matter of law.

5 JUSTICE SCALIA: Well, but there is a
6 commitment. There is a commitment to -- what they're
7 trying to get is a commitment to consider this drug if
8 it's appropriate for prescription to patients in the
9 future. That's a commitment.

10 MR. GOLDSTEIN: Justice Scalia, if that is
11 the commitment, then all of promotion I think is going
12 to be a sale, because every promoter who walks up to you
13 on the street saying will you try my product, will you
14 go into the store, is trying to get you to say I'll go
15 in. And that is much more of a direct commitment than
16 you saying I'll consider it in an appropriate
17 circumstance.

18 The commitment by a doctor is precatory at
19 most. They do not make any commitment in any instance
20 that can be binding in any way that they will prescribe
21 a drug for anyone.

22 And remember, there is the second -- the
23 second distinction. So, that's one. But the second is
24 that -- remember, there is a purchase in your
25 hypothetical of framing, a purchase from the framing

1 store. But the second part of the Secretary's guidance
2 is that when the doctor decides to issue a prescription,
3 they're not exchanging anything with the drug company.
4 There -- nothing is acquired from the drug company.
5 That is a very significant difference.

6 JUSTICE SCALIA: It's a peculiar line of
7 commerce. And -- and you're saying that what
8 constitutes a sale -- a salesman cannot take account of
9 the fact that this is a weird line of commerce, where
10 you're selling to people who cannot make a commitment.

11 MR. GOLDSTEIN: Well, there are two things.
12 The first is the commitment, and they are not selling
13 anything to the doctor. Remember, just to frame this
14 industry, the pharmaceutical company sells its products;
15 it sells them to pharmaceutical wholesalers, which sell
16 them to pharmacies -- pardon me -- which sell them to
17 customers, which have a relationship with a doctor, who
18 may or may not have met with a detailer.

19 There is a sale here in this industry, but
20 it is to a pharmaceutical detailer, and that is a very
21 significant difference. The critical point as well for
22 purposes of --

23 JUSTICE KAGAN: May I ask you --

24 JUSTICE KAGAN: Mr. Goldstein, doesn't --

25 JUSTICE GINSBURG: May I ask you to follow

1 up on other -- other categories of employee? You gave
2 me cleaning workers, emergency service workers. Are any
3 of those categories people who get paid commissions?

4 MR. GOLDSTEIN: Those are not, but the
5 example that I gave to Justice Kennedy would be, which
6 is that there are outside buyers who do receive
7 commissions. And remember, of course, that there are
8 outside salesmen who do not receive commissions but are
9 nonetheless exempt. Congress didn't write an exemption
10 about commissions; it wrote them about whether it's an
11 outside person who engages in sales.

12 And the other point I was trying to make is
13 that -- and Justice Scalia echoed it to some extent --
14 and that is that the FLSA draws very fine lines. If you
15 work for a movie theater you are exempt, but not a
16 playhouse. If you work for a small newspaper but not a
17 small magazine, you're exempt. If you care for the
18 elderly but not the young, you're exempt.

19 And what Congress said is that there has to
20 be -- you are an outside salesman and that -- it is true
21 that this is a peculiar industry, but the peculiarity of
22 it is that you don't make sales.

23 If I could reserve the remainder of my time.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Stewart.

1 ORAL ARGUMENT OF MALCOLM L. STEWART
2 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONERS

4 MR. STEWART: Mr. Chief Justice, and may it
5 please the Court:

6 It's common ground in this case that in
7 order to be an outside salesman, an employee must make
8 sales. And in theory there are two different ways in
9 which Respondent could have attempted to establish that
10 the PSRs in this case fit that criteria.

11 JUSTICE SOTOMAYOR: Could you answer
12 Justice Alito's question? Your brief to the Second
13 Circuit and the Ninth Circuit suggested that a sale is
14 a -- is a transaction, a transfer of some sort, or at
15 least a promise to purchase. But your brief here calls
16 it a much more rigid test, that there has to be a
17 transfer of title. And he pointed to the language of
18 3(x) -- 3(k), that says "consignment for sale," which
19 doesn't have a transfer of the title. So, what is the
20 Government's position?

21 MR. STEWART: Well, the DOL regulations have
22 since 19 -- I believe it's since 1949, have said that
23 "make a sale" within the meaning of 203(k), the term
24 "making a sale" within the meaning of 3(k) includes a
25 transfer of title. And in theory, the verb "includes"

1 could leave open the possibility that other things could
2 be included as well. We've never encountered a
3 situation in which DOL has found a sale of goods without
4 a transfer of title. But in direct answer to your
5 question, Justice Alito, about --

6 JUSTICE SCALIA: Well, excuse me.
7 Consignment salesmen are -- are not exempt?

8 MR. STEWART: It would be -- with specific
9 respect to consignments for sale, it would have been
10 more precise to say that there has to be a transfer of
11 possession in contemplation of a transfer of title.

12 JUSTICE ALITO: And what about salesmen
13 who -- whose objective is to obtain a rental? The lower
14 courts have said that they qualify. Does the Government
15 disagree with that?

16 MR. STEWART: DOL believes that they
17 qualify, but not as sales of goods. And if the -- the
18 Court could look at the appendix to the blue brief on
19 page 4. This is the pertinent regulation that refers to
20 making sales or obtaining orders.

21 And it says: "Section 541.500 requires that
22 the employee be engaged in making sales within the
23 meaning of section 3(k) of the Act or obtaining orders
24 or contracts for services or for the use of facilities."
25 And DOL's view is that a rental agreement would be a

1 contract for services or for the use of facilities.

2 And the way --

3 JUSTICE SCALIA: Excuse me. How can they
4 put in number (2)? I -- I thought that 3(k) is 3(k).
5 Can -- can they supplement 3(k)?

6 MR. STEWART: They have supplemented 3(k),
7 and they did that --

8 JUSTICE SCALIA: What's the authority to do
9 that?

10 MR. STEWART: The -- this is discussed in
11 the Stein Report, which was issued in 1940, and what had
12 happened was that the question had arisen -- and the
13 Stein report lays this out in a fair amount of detail.
14 The question had arisen whether individuals who
15 negotiate for contracts to buy time on the radio or sell
16 time -- sell advertising space in newspapers or sell --
17 negotiate contracts for carriage of freight by rail or
18 truck -- the question arose whether they were outside
19 salesmen within the meaning of the statute.

20 And the Stein Report explained that the Wage
21 and Hour Division had taken the position that they were
22 not because it interpreted "sales" -- it appears to have
23 interpreted "sales" to refer only to sales of goods, and
24 people who were engaged in those sorts of businesses
25 were not selling goods. But the Stein Report said:

1 However, these people are commonly regarded as salesmen;
2 the contracts they negotiate are treated as sales.

3 JUSTICE SCALIA: Well, that's wonderful.
4 Then if you can go beyond 3(k), I guess really the
5 question before us is whether it's arbitrary or
6 capricious for the agency not to extend their -- their
7 power to supplement 3(k) to this situation, which these
8 people look like salesmen to me.

9 And so, if they can do number (2) there, I
10 don't know why -- why the agency couldn't say, oh, and
11 by the way, detailers are also included.

12 MR. STEWART: Well --

13 JUSTICE SCALIA: And the issue would be
14 whether it's unreasonable for them not to say that.

15 MR. STEWART: The agency has taken the
16 position that, even though it has construed 3(k) to
17 refer only to sales of goods, that sales of services or
18 contracts for the use of facilities can be covered.
19 However, there's a big difference between the
20 interaction between a detailer and a physician and the
21 interaction between the -- the person who sells time on
22 the radio. The person --

23 JUSTICE SCALIA: Sure there is; sure there
24 is. But once you -- once you concede that it doesn't
25 have to be within 3(k) and that it's within the power of

1 the agency to grant the exemption anyway, then we really
2 have a different -- a different argument before us here.

3 MR. STEWART: Well, the -- the theory on
4 which the Stein Report proceeded was that, even though
5 sales of time on the radio were not sales of goods, they
6 were still customarily regarded as sales, and they had
7 the essential attributes of sales; namely, an exchange
8 of something valuable that the seller possessed in
9 return for consideration from the buyer. And you don't
10 have any of that when the detailer deals with the --
11 with the --

12 JUSTICE KAGAN: Mr. Stewart, there's this
13 other regulation which is I guess in the coverage
14 section, 779.241, which says that if an employee
15 performs any work that in a practical sense is an
16 essential part of consummating the sale of the goods,
17 he'll be considered to be selling the goods.

18 So, I guess this question is a two-part
19 question. Do you agree that that regulation does cover
20 the -- these detailers? And the second part is, if you
21 do, you know, how does it work that we should understand
22 "sale" one way for purposes of coverage and another way
23 for purposes of exemption?

24 MR. STEWART: Well, the first thing I would
25 say is that we wouldn't agree that this would cover

1 detailers. That is, if the relevant sales are, as we
2 believe, GSK's sales to -- the transfer of drugs to
3 wholesalers and pharmacies in return for consideration,
4 the detailers don't play an essential role in the
5 consummation of those sales. They don't participate in
6 those sales. It's true that their mission is to engage
7 in activities which set in motion a chain of events that
8 will make those sales more likely to occur, but we
9 wouldn't regard them as --

10 JUSTICE KAGAN: But that seems a little bit
11 blind to the way the industry actually works. The way
12 this industry actually works is the real work is done by
13 the detailer getting the doctor to say, yes, I'm going
14 to start prescribing this where it's medically
15 appropriate. The actual sales from the company to the
16 pharmacy just follows from however successful the
17 detailer is.

18 MR. STEWART: But I think much the same
19 thing could have been said about all the promotional
20 workers that DOL has done with -- has dealt with in the
21 past. That is, the premise, the justification for a
22 company to hire a promotional worker, is that the
23 promotional activities will increase the overall sales
24 of the company, will either directly or indirectly set
25 in motion a chain of events that leads people to buy the

1 product. But DOL has historically regarded those
2 activities as distinct from selling the product.

3 JUSTICE ALITO: Well, do those employees
4 work on commissions?

5 MR. STEWART: Some employees may work on
6 commission. Some --

7 JUSTICE ALITO: Promotional workers do work
8 on commissions?

9 MR. STEWART: It's -- I don't think there is
10 necessarily a uniform rule one way or the other. The
11 Stein Report did say in 1940 that, although it was
12 characteristic for outside salesmen to receive
13 commissions, that was not the test, that that was a
14 quirk of compensation. The other thing I would say --

15 JUSTICE SCALIA: Did we have detailers in
16 1940? Gee, that's a long time ago. Did we have
17 detailers in 1940? That's almost a century ago.

18 MR. STEWART: There were detailers in that
19 era, and --

20 JUSTICE BREYER: That's my point, actually.
21 That's where I'm sort of bothered, just exactly what
22 Justice Scalia said, that if you look through what I've
23 seen so far by the materials, they're pretty evenly
24 balanced, and there are tens of thousands of people who
25 work in this industry, and there's a history of 75 years

1 of nobody said anything.

2 So you would think -- and it isn't the only
3 problem that has just been recognized in other
4 industries, too. If the agency is going to reverse, not
5 reverse, but suddenly do something it hasn't done for
6 75 years, the right way to do it is to have notice and
7 comment, hearings, allow people to present their point
8 of view, and then make some rules or determine what
9 should happen. Perhaps they'd say for the future let's
10 do this, but not let's give people a windfall for the
11 past. Perhaps they'd say some and not others. Okay?

12 That's my instinctive reaction, not
13 necessarily legal, but informed by administrative law.
14 But why shouldn't I try to get there?

15 MR. STEWART: I guess I'd say two things,
16 one general and one specific to detailers. The general
17 thing is that DOL has consistently drawn a distinction
18 between promotional work --

19 JUSTICE BREYER: No, I've read those.

20 MR. STEWART: Okay.

21 JUSTICE BREYER: I've read those, and I find
22 them beautifully ambiguous.

23 (Laughter.)

24 JUSTICE BREYER: I'll go back and read them
25 again, and if they're absolutely clear, you win, fine,

1 that's the end of it.

2 JUSTICE KENNEDY: And it's gone on for
3 70 years, and you're -- and instead of doing a
4 regulation, amended regulation, as Justice Breyer
5 indicates, you're filing amicus briefs quietly in
6 different -- different courts. It seems to me that's
7 not nearly as fair or straightforward or as candid as --
8 as an agency ought to be.

9 MR. STEWART: Well, with respect to where
10 the industry expectation arose, we have only one data
11 point or at least only one data point that has been
12 identified in the briefs. That is the National
13 Federation of Independent Small Business Legal Center
14 has filed an amicus brief on Respondent's side, and then
15 they -- they identify one DOL opinion letter, of which
16 we were previously unaware, that dates from 1945. And
17 in the opinion letter, the employer of the detailer
18 asked for an opinion to the effect that its detailers
19 were covered by the administrative exemption. That
20 employer didn't request a ruling that these were outside
21 salesmen. And DOL --

22 JUSTICE BREYER: You're right about that,
23 and so, they're at fault, too. But on the other hand,
24 their employees might have been satisfied, and this is
25 done to protect the employees.

1 So, I'm asking, not saying, but what is the
2 process here? How do you know -- at what level was this
3 agency decision made to suddenly go ahead with this?
4 Who made it? What was the input? How do you know
5 they're on your side? You do know; you're right. But I
6 mean, what's the process internally?

7 MR. STEWART: Internally, the -- the
8 Solicitor's Office at the Department of Labor would
9 consult with the Wage and Hour Division. The
10 Solicitor's name went on the briefs both that were filed
11 in the Ninth Circuit and the brief -- I mean, the Ninth
12 Circuit and also the Novartis brief in the Second
13 Circuit. And the Solicitor's name is on the
14 Government's brief in this Court. The Solicitor is the
15 third-highest-ranking individual within the Department
16 of Labor.

17 CHIEF JUSTICE ROBERTS: Do you -- I'm sorry
18 to interrupt your answer, but does your office review
19 the amicus filings in the courts of appeals by the
20 agencies?

21 MR. STEWART: There was SG authorization for
22 the amicus brief to be filed.

23 CHIEF JUSTICE ROBERTS: Is that the normal
24 procedure?

25 MR. STEWART: Yes.

1 JUSTICE SCALIA: But this is part of a
2 regular program that the agency has now instituted, to
3 run around the country and file amicus briefs; is that
4 it?

5 MR. STEWART: To clarify -- well, to clarify
6 the agency's view of what the proper understanding of
7 the law is. And in terms of --

8 JUSTICE SCALIA: Yes, right, to get --
9 instead of doing rulemaking, instead of doing
10 adjudication, we're going to file amicus briefs, and the
11 court will accept our view in that amicus brief and,
12 hey, presto, we have -- we have made law.

13 MR. STEWART: Well, maybe yes, maybe no --

14 JUSTICE SCALIA: That's extraordinary.

15 MR. STEWART: Well, in comparison to the
16 alternative step of filing enforcement actions, it's
17 both --

18 JUSTICE BREYER: Well, the alternative step
19 ..-- well, did the Secretary of Labor herself or himself,
20 depending on when it was, consider this matter?

21 MR. STEWART: I don't know whether the
22 Secretary --

23 JUSTICE BREYER: No, we don't. All right.
24 So --

25 MR. STEWART: But --

1 JUSTICE BREYER: So, the alternative is not
2 enforcement actions, necessarily. The alternative is
3 for the agency to focus on the question and decide what
4 it actually wants to do.

5 MR. STEWART: And the agency has regarded
6 the application of its promotion sales regulations to
7 the facts of this case as clear. That is, if you asked
8 GSK's highest level management why does it make sense to
9 employ detailers, they wouldn't say because they get
10 these commitments from physicians which are of value to
11 the company. The commitments or the quasi-commitments
12 from physicians in and of themselves are of no value.

13 JUSTICE SCALIA: There are 90,000 of these
14 people, and you have not -- the agency has not brought
15 any action for these -- lo, these many years. Ninety
16 thousand of them. And all of a sudden, you say -- you
17 come in and say, oh, you have been in violation of the
18 law in the past, and you're going to have to pay a lot
19 of money for all these people that you didn't give
20 overtime to in the past.

21 I just think that's extraordinary.

22 MR. STEWART: Well, to the extent that there
23 was an industry expectation that was based on anything
24 DOL had said, it was based on, as far as we know, based
25 on the 1945 opinion letter, which said not --

1 CHIEF JUSTICE ROBERTS: Well, but you -- you
2 didn't even know about that.

3 MR. STEWART: Right.

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: And yet, you expect
6 the industry to know all about it; and yet, it escaped
7 your attention.

8 MR. STEWART: Again, our argument is not
9 that they should have known from the -- about the
10 opinion letter. Our argument is that the proper
11 application of the promotion sales regulation to the
12 facts of this case is pretty clear, and that if GSK's
13 top-level management was asked to defend the use of
14 detailers, they would say these people are important
15 because if they persuade physicians to write more
16 prescriptions and those are filled with GSK products,
17 then pharmacies will reorder the drug and our
18 wholesalers will reorder it from us.

19 JUSTICE SOTOMAYOR: Counsel, can I --

20 JUSTICE SCALIA: So, you have been guilty of
21 malfeasance for 70 years, right? These 90,000 people
22 out there who have been in violation of the law and the
23 agency has done not a blessed thing?

24 MR. STEWART: To return to the 1945 opinion
25 letter, the opinion letter was based on the premise that

1 the employees exercised discretion and independent
2 judgment in the performance of their duties. That's
3 what the -- what DOL said in concluding --

4 JUSTICE SOTOMAYOR: Counsel, I thought that
5 this whole system was set up on giving industries the
6 opportunity to ask the government for an opinion letter,
7 correct?

8 MR. STEWART: Right.

9 JUSTICE SOTOMAYOR: I saw in the briefing
10 hundreds of opinion letters by hundreds of different
11 industries. Outside of this 1945 letter, did anybody
12 else, any other pharmaceutical company, ever set out for
13 the government or seek an opinion letter that you're
14 aware of?

15 MR. STEWART: I'm aware of only one
16 instance. I think this is not a matter of public
17 record, but there was one request in, I believe,
18 December of 2007 for an opinion to the effect that the
19 detailers were covered by the outside salesman
20 exemption. DOL never responded one way or the other.

21 JUSTICE SCALIA: You don't suggest -- you're
22 not arguing for a rule that if -- if an individual does
23 not seek an opinion letter, he's guilty? Is that --

24 MR. STEWART: No, I'm not arguing for that
25 rule. The --

1 JUSTICE GINSBURG: Mr. Malcolm -- Mr.
2 Stewart, is it -- is it true that that option is no
3 longer available, that the Department of Labor no longer
4 gives opinion letters?

5 MR. STEWART: It does -- it has phased out
6 the opinion letter program and gives other forms of
7 administrative guidance. That is, DOL's rationale was
8 that the opinion letter program had not been cost
9 effective because often the bottom line -- may I --
10 often the bottom-line answer to the question would turn
11 on factual nuances of a particular employer and wouldn't
12 provide much guidance to others. And so, it's tried to
13 provide forms of guidance that are -- speak to the
14 industry or a class of employees as a whole.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr.
16 Stewart.

17 Mr. Clement.

18 ORAL ARGUMENT OF PAUL D. CLEMENT

19 ON BEHALF OF THE RESPONDENT

20 MR. CLEMENT: Mr. Chief Justice, and may it
21 please the Court:

22 Petitioners are two pharmaceutical sales
23 representatives. They were hired for a sales job. They
24 were given sales training. They attend sales
25 conferences. They are assigned a sales territory, and

1 they are evaluated and compensated as sales people.

2 CHIEF JUSTICE ROBERTS: And they don't make
3 sales.

4 JUSTICE BREYER: That's --

5 MR. CLEMENT: With respect --

6 CHIEF JUSTICE ROBERTS: Your long list sort
7 of stopped one step short. They don't make sales.

8 MR. CLEMENT: With respect,
9 Mr. Chief Justice, we disagree. We think they do make
10 sales in the way that is relevant in this industry, and
11 we do think they make sales in some sense, which is the
12 practical construction that the agency has always put on
13 the sales requirement in the --

14 JUSTICE SOTOMAYOR: Can you give me what
15 your regulation is going to be?

16 MR. CLEMENT: What's that?

17 JUSTICE SOTOMAYOR: And would it exempt
18 everybody from coverage? Meaning, you seem to be saying
19 if in some sense they make sales, it seems that every
20 promotional person will be a salesman, that all
21 industries have to do is put one or two forms of sales
22 activities involved in the work of their worker, and
23 they're exempt. Give me your definition? As long as
24 it's in some sense, that covers everybody's exempt?

25 MR. CLEMENT: Yes, but, Justice Sotomayor,

1 if I could, there's two important qualifications that
2 avoid the slippery slope concerns you're talking about.
3 One is it's, I think, common ground among everybody that
4 you -- to qualify for any exemption or certainly all of
5 these relevant exemptions here, it has to be your
6 primary duty. So, you can't just slip in a little sales
7 activity for something and get that person qualified.
8 The other thing, and I think this is very --

9 JUSTICE SOTOMAYOR: Well, it seems like the
10 sale here is not the primary duty. The sale here is to
11 schmooze the doctor and give him information. That's
12 what you said in one of your briefs -- your company said
13 in one of its briefs in -- in a products liability
14 litigation.

15 MR. CLEMENT: With respect, Your Honor, the
16 commitment is very important in this industry. It is
17 the objective of the sales call. It's to get a
18 commitment to prescribe when medically necessary.

19 Now, it is true that there is prologue to
20 that, and there is efforts to promote before you get
21 that particular sale. But the regulations address that
22 particularly, and they say, as long as you --

23 JUSTICE SOTOMAYOR: Primary duty is one of
24 the limiting, and what was the second limiting
25 principle?

1 MR. CLEMENT: The second limiting principle
2 is actually what I'm talking about now, which is if you
3 look at 503, which are the regulations that draw the
4 distinction between promotion and between being outside
5 sales, they do not say that promotion is nonexempt
6 activity. What they say is it depends who does the
7 promotion. And as long as the outside salesperson does
8 the promotion in conjunction with his or her own sales
9 or solicitations, then that is exempt activity. And
10 what they're trying to --

11 JUSTICE GINSBURG: But it also says -- it
12 also says promotional work incidental to sales made by
13 someone else.

14 MR. CLEMENT: Is not covered.

15 JUSTICE GINSBURG: -- is nonexempt.

16 MR. CLEMENT: You're right, but --

17 JUSTICE GINSBURG: And these sales -- I
18 mean, eventually there is a sale to a hospital, to a
19 pharmacy, and that sale is not made by the detailer.

20 MR. CLEMENT: But, Justice Ginsburg, I think
21 it's important to recognize that the reason that 503
22 draws a distinction between promotional activity in
23 conjunction with the salesperson's own sales or
24 promotional activity with respect to somebody else's
25 sales is they're concerned about the consideration where

1 somebody else is going to follow up with the same
2 customer to close the deal.

3 And if you look at the regulatory
4 commentary, that's what they're concerned -- they don't
5 want to sort of have double counting, where somebody
6 promotes with a sales target and then somebody else
7 follows up to close the sale. And --

8 JUSTICE KAGAN: Well, that might be one
9 thing that they are concerned about, but it may not be
10 the only thing. I mean, if you look at these
11 regulations, it seems as though what they're trying to
12 do is draw a distinction between people who actually
13 consummate transactions, transactional people, and
14 people who are pitchmen. And -- and what the Department
15 of Labor here is saying is detailers are people who make
16 pitches; they're not people who consummate the
17 transactions.

18 MR. CLEMENT: Well, Justice Kagan, I really
19 think if you look at the regulations as a whole and the
20 commentary in the Stein Report and the Weiss Report,
21 they're not worried about sorting out the pitchmen
22 because they understand that that classic outside
23 salesperson is a pitchman who then tries to get a
24 commitment to buy or some other commitment from the
25 sales target.

1 So, what they're trying to do is really
2 distinguishing not between pitchmen and sales people,
3 but between what they refer to as missionary men or
4 people who pave the way for somebody else to make the
5 sale. And I really think that's the focus of the 503
6 regulation.

7 And so, the Government's argument really
8 boils down to the notion that there's nobody in this
9 industry that makes enough of a commitment with the
10 doctor for anybody to be involved in anything but
11 promotion with the doctor. And that seems --

12 JUSTICE KAGAN: But why isn't that possible?
13 I mean, your brief seemed to suggest that in every
14 industry there needs to be some group of people who
15 would be classified as outside salesmen. And that's not
16 necessarily the case. There may be some industries, and
17 here it's a result of regulation, or it may be because
18 of other business practices, where there just isn't
19 anybody who's an outside salesman.

20 MR. CLEMENT: Justice Kagan, it's
21 theoretically possible, but it would be odd, especially
22 in an industry that employs 90,000 people, in order to
23 get a commitment to prescribe from the doctor. And I
24 think if you look across --

25 JUSTICE KENNEDY: What is -- what is this

1 commitment? Is the commitment in writing?

2 MR. CLEMENT: The commitment is generally
3 not in writing, Justice Kennedy.

4 JUSTICE KENNEDY: Would it be lawful to make
5 it -- put it in writing?

6 MR. CLEMENT: I don't know that anything
7 would turn on whether it was in writing or not because
8 what --

9 JUSTICE KENNEDY: Would it be lawful to put
10 it in writing?

11 MR. CLEMENT: I -- I think the answer is
12 yes. It's important for the commitment not to be
13 binding because of the nature of the doctor's role.
14 Nobody wants to go into a doctor's office, let alone
15 these sales people, and say, look, whoever is the next
16 person who walks in the door, prescribe them the
17 product.

18 JUSTICE KENNEDY: That sounds to me it's not
19 a commitment, unless the doctor says: Well, I'll look
20 at this, this is interesting; I'll go home and read your
21 material, I'll think about it.

22 Is that -- is that a --

23 MR. CLEMENT: That's not the kind of
24 commitment they're looking for, Justice Kennedy.
25 They're looking for a commitment that -- sometimes it's

1 the next patient that presents the condition for which
2 the medicine is medically appropriate, that they will
3 prescribe. And if you think just practically --

4 JUSTICE GINSBURG: But it's got to be non-
5 binding.

6 MR. CLEMENT: It has to be non-binding. I
7 agree. But I don't think that the Government --

8 JUSTICE KENNEDY: And that's why -- and
9 that's why it's not in writing.

10 MR. CLEMENT: Well, but you can have a
11 non-binding commitment in writing. You can have a
12 binding commitment that's oral, as long as it's -- you
13 know, I don't want to get into the statute of frauds
14 here. But it seems to me that the binding nature is not
15 dispositive either. You can have a situation -- look,
16 if I agree as -- that I'm going to buy something, I can
17 often return it. Sometimes there is a cooling-off
18 period, things like that.

19 JUSTICE KENNEDY: Well, let me ask you this,
20 and I'm not well versed in all -- in all of the
21 specifics, but my understanding is that the Federal
22 Government has expressed new concerns, has new
23 regulations, new rules about these outside sales.

24 Does that mean that the nature of the work
25 has changed in the last 5 or 10 years, so that the

1 70 years we are talking about is not relevant? Would
2 you comment on that?

3 MR. CLEMENT: I'd love to, Justice Kennedy.
4 I think, to the contrary, I think that -- I mean, the
5 Government actually ironically says that the 2004
6 rulemaking, which was the last time there was any
7 rulemaking, didn't change anything substantively. We
8 think that's wrong. We actually think there was an
9 important substantive change to the 503(c) regulations
10 and others which addressed the following problem, which
11 is not that the basic role of the outside salesperson
12 has changed, but the technology has changed in such a
13 way that it would be silly to draw a distinction between
14 whether the salesperson actually takes the order and
15 writes it down or gets a form in triplicate, or rather
16 gets a commitment to buy from the sales target who then
17 actually enters the order on a computer on their own.

18 And that I think is the specific situation
19 that the agency was confronted with. And in 2004 they
20 said: We don't want things to turn on who enters the
21 order, whether it's the customer on their own computer
22 or the outside salesperson.

23 JUSTICE KAGAN: But, Mr. Clement, I thought
24 that in 2004 there were two proposals, really, and one
25 was the proposal that was changed, and the other was the

1 proposal to get rid of this promotional stuff and to
2 allow people who promoted products to qualify as outside
3 salesmen, and the agency specifically rejected that
4 suggestion.

5 MR. CLEMENT: Absolutely, Justice Kagan, but
6 there has always been an effort to try to get all
7 promotional people treated as being exempt. But that's
8 different from what's being asked for here, which is the
9 last person who makes a visit to the person who places
10 the relevant order in the industry and gets the
11 commitment from that person. That, in contrast to
12 general promotion, often directed at the world at large,
13 has always been the hallmark of a sale in the
14 Department's own flexible approach. And I think that's
15 really important because if --

16 JUSTICE GINSBURG: But that seems to be
17 inconsistent with this -- this opinion letter. The
18 request is put in by the pharmaceutical company, and
19 they want an exemption under administrative employee.
20 In the Department of Labor's response allowing that
21 exemption, it says that these detailers, and they use
22 the word "detailers," medical detailers, are engaged in
23 a form of promotional or missionary work.

24 MR. CLEMENT: Well, Justice Ginsburg, I -- I
25 want to say two things about that. One is to say,

1 obviously, that may depend a little bit on how the
2 particular role was described. If you're reading from
3 the 1945 opinion letter, I mean, that may be somewhat
4 different. But I do think that what's important here is
5 that promotional activity itself is not problematic.
6 Promotional activity is exempt as long as it's in
7 conjunction with the person's own sales or
8 solicitations, is the word of the regulation. So, I
9 don't think that's dispositive.

10 JUSTICE GINSBURG: This goes -- the letter
11 goes on to say that these detailers are engaged in a
12 form of promotion not having for its object the making
13 of specific transactions.

14 MR. CLEMENT: Well, and again, Justice
15 Ginsburg, we would take issue with that and say, no,
16 there is an interest in getting a specific commitment.
17 It is commitment to prescribe. It may be somewhat -- it
18 is non-binding, and it may be somewhat forward-looking,
19 but I don't think that distinguishes this industry from
20 many industries. It's not --

21 JUSTICE GINSBURG: But as far as your
22 70 years, it's suspect for two reasons. One is we're
23 told that in the early years, at least, before there
24 were regulations restricting the sale of prescription
25 drugs, that these detailers did two things. They did

1 have their informational function, but they also did
2 direct sales to pharmaceutical companies, to hospitals.
3 So, for at least 20 years of those 70 years, these
4 people were engaged in what the department would call
5 sales. So, that's suspect.

6 And then when we have the commitment, the
7 opinion letter that says we have a category for these
8 people; they are engaged in instruction, in information;
9 they are not engaged in sales; but because they're so
10 independent, we rank them as administrative -- in the
11 particular case we rank them as administrative people.

12 So -- so, it's not so that there was a
13 sudden about-face as you suggest. We have a
14 categorization as -- as administrative employees, but
15 not sales employees, and we have a history of these
16 detailers at one time actually selling.

17 MR. CLEMENT: Well, Justice Ginsburg, let me
18 say -- I mean, certainly as the regulatory environment
19 has changed, the nature of how the sales are transacted
20 in this industry have changed, but I think the focus is
21 very much on the doctors appropriately because they're
22 the ones that place the order. But I also want to be
23 responsive to the administrative exemption.

24 JUSTICE SCALIA: You wouldn't -- you
25 wouldn't mind being exempt as administrative, would you?

1 MR. CLEMENT: I wouldn't, Justice Scalia --

2 JUSTICE SCALIA: Yes.

3 MR. CLEMENT: -- but I do want to --

4 JUSTICE SCALIA: But they've changed their
5 -- their view.

6 MR. CLEMENT: They've changed their view on
7 that, too. And I certainly don't want this Court to
8 think that the industry somehow has the administrative
9 exemption as an ace up their sleeve or in their back
10 pocket. And it's really the same exact issue, because,
11 once again, the agency has changed their view. And once
12 again, their view is not based on anything that has to
13 do with label --

14 JUSTICE GINSBURG: Did you claim -- did you
15 claim exemption as administrative employee?

16 MR. CLEMENT: We did, Your Honor, in the
17 district court. It's not before this Court because we
18 got summary judgment in our favor on the outside sales
19 exemption.

20 But I really would think it would be a -- a
21 mistake for this Court to say --

22 JUSTICE GINSBURG: So, that would -- then
23 that would be still open if you lose on the outside
24 sales?

25 MR. CLEMENT: It would, Justice Ginsburg.

1 But you're just deferring the same inquiry, because the
2 Government's position once again is after 70 years of
3 having the industry proceed on the assumption that these
4 individuals were exempt, they now have changed their
5 mind. And, again, their view has everything to do with
6 FDA regulation --

7 JUSTICE KAGAN: Well, Mr. Clement --

8 MR. CLEMENT: -- and nothing to do --

9 JUSTICE KAGAN: I'm sorry.

10 MR. CLEMENT: -- and nothing to do with
11 labor policy, because what they say is that now because
12 of the government's own off-label prosecutions, these
13 outside salespeople have to stick to a script and -- in
14 order to avoid off-label liability. And because they
15 have to stick to the script, they are told they don't
16 exercise sufficient discretion to come within the
17 administrative exemption.

18 And the problem here is the Labor
19 Department, instead of looking at this and making a
20 rational judgment about labor policy and whether these
21 individuals who make \$93,000 on -- for the median should
22 rationally be the kind of workers that are protected by
23 the Fair Labor Standards Act, instead they're looking at
24 things that have everything to do with FDA regulation
25 and nothing to do with labor policy.

1 JUSTICE KAGAN: You've suggested --

2 JUSTICE BREYER: The --

3 JUSTICE KAGAN: I'm sorry.

4 JUSTICE BREYER: Are they paid commissions?

5 If they're -- if the salesman or the promotion agent, as
6 the case may be, is successful in his territory in
7 getting doctors to prescribe the drug, does he receive
8 extra pay?

9 MR. CLEMENT: He receives incentive
10 compensation.

11 JUSTICE BREYER: What does that mean? Does
12 he -- I mean, an outside salesman -- in one document, it
13 says is a person who often obtains a commission on his
14 sales.

15 MR. CLEMENT: Right.

16 JUSTICE BREYER: And now what I'm trying to
17 figure out -- I might not have the right words to ask
18 the question -- are these people, people who in some
19 sense or other receive commissions on their sales?

20 MR. CLEMENT: And the answer is -- for the
21 Petitioners on this record, the answer is yes. They're
22 not the commissions that are a one-to-one
23 correspondence, but what they do is they receive
24 substantial incentive compensation, about 25 percent of
25 the total, and it's based on the sales of the product in

1 their sales territory. So, if the --

2 JUSTICE SOTOMAYOR: How's that different
3 from a bonus that an employee gets? How is it any
4 different than what most companies do in -- in giving a
5 bonus at the end of the year?

6 MR. CLEMENT: Certainly, based on the facts
7 in this record, it -- at the time of this case, it's
8 much more tied to the performance of the product in the
9 sales territory. And I don't think that's -- you know,
10 it's not based on the company's overall performance --

11 JUSTICE SOTOMAYOR: Mr. Clement, you give me
12 one definition of "outside salesmen," the one that you
13 prefer for us to apply here. The Department of Labor
14 gives another, and the one they're giving according to
15 them is a bright-line rule. It's easy to apply. You
16 have to do some sort of transfer of title. That's as --
17 their rule.

18 Tell me what the -- your argument is that --
19 why your rule has to win. Meaning, aren't we supposed
20 to give deference to the expertise of the agency,
21 especially when Congress lets them define --

22 MR. CLEMENT: Justice Sotomayor --

23 JUSTICE SOTOMAYOR: -- the scope of the --

24 MR. CLEMENT: -- two responses to that. One
25 is you can't defer to the Labor Department's preferred

1 construction, because it's flatly inconsistent with the
2 statute. This idea that you have to have a transfer of
3 title cannot be squared with 3(k); it cannot be squared,
4 at least as I understand it, with some of the -- the own
5 advice they've given, which is all you need is a
6 commitment to buy. That's what they've told people
7 since 1949.

8 There's an example in that Weiss Report from
9 1949 involving a jobber where you have a situation where
10 somebody's treated as an outside salesperson even though
11 they never have title over the product. So, they get
12 the commitment to buy from the sales target, and then a
13 jobber who works for a different employer is the one
14 that transfers title. That's at page 11 of the NFIB
15 brief, if you want to look at it. So --

16 JUSTICE KAGAN: Mr. Clement, I guess I'm not
17 sure I understand what you just said.

18 If -- forget the transfer of title business,
19 but if it's just -- we're requiring a transaction here.
20 And we're drawing a line between people who do
21 transactions and people who just advertise or make
22 pitches or whatever you want to do it. That's perfectly
23 consistent with the statute, isn't it? I mean, you can
24 argue about is it the only possible reading; you can
25 even argue about whether it's the best possible reading.

1 But it's surely a -- a possible reading.

2 MR. CLEMENT: It is a possible reading,
3 Justice Kagan. But it's not the one that the Labor
4 Department has advanced in their amicus brief. So, you
5 can't defer to that. I mean, you can decide that it's
6 the best reading of the statute if you want, but --

7 JUSTICE KAGAN: Well, I suppose that that's
8 a question for them. I read their amicus briefs to sort
9 of suggest two things. Sometimes they just talk about
10 transactions, and sometimes they talk about transfer of
11 title.

12 MR. CLEMENT: Well, and with respect,
13 Justice Kagan, that's one of the many problems with
14 deferring to amicus briefs. Because when an agency
15 gives guidance in an interpretative rule or something,
16 there's one place, and they provide "the" answer. Now,
17 I don't know if the Government wants you to defer to the
18 -- defer to the argument on page 12 or the argument on
19 page 20 or the argument on page 24.

20 JUSTICE KAGAN: Well, I think that they
21 would say that it doesn't make any difference, because
22 they've never really seen a person who makes
23 transactions without transferring title. So, I think
24 that --

25 MR. CLEMENT: Well, with respect, they

1 have --

2 JUSTICE KAGAN: -- they would think the --
3 the difference is --

4 MR. CLEMENT: No, with respect, they have
5 seen that person.

6 JUSTICE SCALIA: Consignment, for one, which
7 is legitimate business.

8 MR. CLEMENT: Well, consignment is in the
9 statute, but this jobber example is right out of the
10 Weiss Report in 1949, and the outside salesperson in
11 that case never had title. The title comes from the
12 jobber who works for somebody else. So, the salesperson
13 in that instance never had title, not even in the chain
14 of distribution. Yet, they say that is a clear case
15 where the person is an outside salesperson and exempt.

16 JUSTICE GINSBURG: Did -- did the
17 pharmaceutical companies request -- ever in this period,
18 request a ruling, a rulemaking on the status of these
19 PSRs?

20 MR. CLEMENT: Well, I understand from the
21 Government that there was a request in 2007 and that the
22 Labor --

23 JUSTICE GINSBURG: That was an opinion
24 letter, they said. I thought they said that was an
25 opinion letter.

1 MR. CLEMENT: It was a request for an
2 opinion letter. I'm sorry.

3 JUSTICE GINSBURG: Yes. I asked if there
4 was a request from the pharmaceutical companies for a
5 rulemaking on the proper classification in this case.

6 MR. CLEMENT: No, there wasn't, Justice
7 Ginsburg, but I think that actually cuts in our favor,
8 because in 2004, a lot of companies were coming in with
9 things where they thought it was unclear, where they
10 thought there was some doubt, and asking for
11 clarification. This was so well understood that the
12 outside sales exemption, or perhaps the administrative
13 exemption, covered the outside sales force of this
14 industry --

15 JUSTICE KENNEDY: What's the case that I
16 cite if this opinion is written the way you -- you
17 propose, and the -- this Court says, well, this has been
18 70 years, or maybe in 10 years if you take the new
19 regulations as setting a new regime, and the Department
20 has never made an objection. And, therefore, it follows
21 that the Department's interpretation is implausible or
22 improper, and then I cite some case from our Court.

23 What -- how do I write this?

24 MR. CLEMENT: I would -- I would ask you not
25 to be bound by having to cite a case. I would ask you

1 to just use the following reasoning, though, which I
2 think is 100 percent -- and there's plenty of cases you
3 could cite as perhaps Cf. cites.

4 JUSTICE KENNEDY: Well, I'd like one.

5 (Laughter.)

6 MR. CLEMENT: Sure. Well, here's -- let's
7 start -- let's start with Fox and just the basic notion
8 that in administrative law, if you're going to change
9 your position, you have to acknowledge that you're
10 making a change. I think at a minimum here, if they're
11 going to impose this kind of massive retroactive
12 liability on this industry --

13 JUSTICE KAGAN: But, Mr. Clement, this isn't
14 a change. You've referred to it as a change in a lot of
15 ways -- in a lot of times, but what we have here is an
16 agency that, for some number of years, thought that this
17 was not the most urgent problem on their plate. Indeed,
18 one would think this is a pretty peculiar Department of
19 Labor if they thought that this was the most urgent
20 problem on their plate. So, they didn't enforce it.

21 But now the question has come up. And so,
22 they say we'll look to our regulations. This falls on
23 one side of the regulation. Now, you've been given a
24 gift for all these years is one way of looking at it,
25 because -- because you were not their most urgent

1 problem; and so, they didn't enforce their own
2 regulations against you.

3 MR. CLEMENT: Justice Kagan, here's the
4 thing. We can quibble about whether or not there is a
5 change in their position or whether they just didn't
6 have a position before, but I think the important thing
7 is they've imposed, by taking this position in an amicus
8 brief and asking for deference to it, massive liability
9 on this industry. The PhRMA brief estimates it's
10 billions of dollars.

11 Now, I --

12 JUSTICE GINSBURG: Why must you -- why must
13 you look to an amicus brief? Why not just look to the
14 regulation that defines -- the regulations that define
15 "sale" and that define "promotion"? The 541.503 says
16 promotion work incidental to a sale made by somebody
17 else is not exempt.

18 Why do we get into the amicus brief when we
19 have in these 541 regulations a definition of sales on
20 the one hand, promotion on the other, and then this
21 statement that promotion work incidental to sale made by
22 somebody else is not exempt?

23 Why doesn't -- why isn't that the answer to
24 this case?

25 MR. CLEMENT: Here's the answer as to why

1 that's not the answer, and then let me circle back and
2 say why, if you're going to err on one side or the
3 other, you shouldn't err on the side of imposing massive
4 retroactive liability. The reason that that's not a
5 simple matter of deferring to that is because that same
6 regulation earlier says that promotional work is exempt
7 if it's in conjunction with the individual's own sales
8 or solicitations.

9 Now, I happen to think it's pretty clear
10 that these -- by getting this commitment, which is the
11 functional equivalent of a commitment to buy, which is
12 what the regulations and the regulatory interpretations
13 have always said is a sale in some sense, I think these
14 are sales. Certainly --

15 JUSTICE GINSBURG: Does the -- does the
16 pharmaceutical company have a sales force? I mean, who
17 sells to the wholesalers, the pharmacies, and the
18 hospitals?

19 MR. CLEMENT: It's not this kind of outside
20 sales force. It's a much less sales-oriented
21 transaction. The PhRMA amicus brief, for example, gives
22 the example of a company that has 2,000 outside sales
23 reps and 10 people that handle the movement of transfer
24 of product to the wholesalers and the distributors.

25 If you look at district court's opinion at

1 the page 42a of the petition appendix, the district
2 court addresses this issue and I think gets it exactly
3 right, which is the reason there isn't a sales effort
4 focused on the wholesalers and distributors is because
5 their job is to have on stock the kind of medicines that
6 physicians are prescribing.

7 JUSTICE GINSBURG: But there are -- there
8 are people who sell to them. There may be only a few,
9 but --

10 MR. CLEMENT: There's a handful of people,
11 Justice Ginsburg, but that's -- I mean, there's nothing
12 anomalous about that. Most industries have some sales
13 force that operates on the wholesale --

14 JUSTICE GINSBURG: Is there -- are they
15 exempt, too?

16 MR. CLEMENT: What's that?

17 JUSTICE GINSBURG: The -- the actual sellers
18 from the -- the people on the staff of a pharmaceutical
19 company who sell to the wholesalers, pharmacies, and
20 hospitals, are they exempt?

21 MR. CLEMENT: I don't believe so, Your
22 Honor, at least not under the outside sales exemption,
23 in part because they're not outside, in part because
24 they're not really engaged in a sales effort. It does
25 them no good -- if they can convince some wholesaler or

1 distributor that the GSK product is far superior to a
2 competitor's product and it doesn't make any difference
3 at all because as a result of that -- I mean, they need
4 to have product that actual doctors are writing
5 prescriptions for. That's what drives sales in this
6 industry.

7 There's nothing anomalous about that. If
8 you think about any industry, sales activity is always
9 directed at the people who place orders. In this
10 industry, because of the learned intermediary doctrine,
11 the person who places the order is the doctor, not the
12 ultimate end user.

13 CHIEF JUSTICE ROBERTS: Is there -- let's
14 say the doctor hears the spiel and the doctor says,
15 okay, yours is the first thing I'll think of, you know,
16 when I have a patient with this and this. I mean, is
17 that a sale?

18 MR. CLEMENT: We think it is, Your Honor,
19 but if you have any doubt about that, certainly at the
20 point that the doctor then, when he sees the next
21 patient, writes the prescription, at that point I think
22 there's a sale, because, again, what the regulations and
23 regulatory history looks for is a -- is a commitment to
24 buy. That's the relevant commitment to buy. That's the
25 order in this industry --

1 CHIEF JUSTICE ROBERTS: So, what if the
2 doctor, as I suspect a lot of doctors do, they listen to
3 this guy, and they say, okay, I'll think of -- you know,
4 when it comes up, I'll think of your product; and the
5 next guy comes in from the other company, and he says,
6 okay, when it comes up I'll think of your product -- are
7 those two sales or no sale?

8 MR. CLEMENT: I think they're probably two
9 sales, Your Honor. But, you know, it's the same
10 thing -- imagine somebody who's, you know, just sitting
11 in their house, and they get an encyclopedia
12 salesperson. And they say, you know, I'll -- maybe I'll
13 buy that. That looks good, I'll buy it. And they say,
14 but you know, maybe the State law has a law that says
15 you've got to wait 24 hours before you put the order in,
16 in the computer.

17 CHIEF JUSTICE ROBERTS: But that's a firmer
18 commitment when they say I'll buy it. The physician is
19 just saying I'll think of your product when it -- when
20 the need comes up.

21 MR. CLEMENT: But -- well, if -- I mean,
22 what I was suggesting is maybe you're talking about a
23 State that has a 24-hour waiting rule or something like
24 that. So, it's a commitment that, sure, I'm going to
25 enter the order in 24 hours. Well, maybe another

1 encyclopedia salesman comes in, in 12 hours, and he
2 gives another commitment. One of the two people he's
3 going to put the order in, and one of the two people
4 will certainly have finally had a sale. I think,
5 again --

6 JUSTICE KAGAN: But don't you think that the
7 way this works -- I mean, the way we should all hope it
8 works is that the detailer comes in, the detailer
9 provides information, the doctor says that's very
10 interesting, I want to think about it, I'm going to
11 think about it. Then the doctor reads some medical
12 journals; then maybe the doctor goes to a convention and
13 talks to other doctors about the product.

14 I mean, that's what you would hope that a
15 doctor would do before a doctor decided I'm going to
16 start prescribing this medicine. And the detail work is
17 a part of that, but so are many other things before the
18 doctor actually decides to do something.

19 MR. CLEMENT: Sure, Justice Kagan. But you
20 don't want to look at this like it's an isolated,
21 one-time, you know, sort of interaction. I mean, one of
22 the things that -- that happens in this industry, like
23 other sales industry, is there are multiple trips. The
24 detailer goes there maybe the first time and lays the
25 ground work. Then maybe the doctor reads some other

1 information. Then maybe on the final visit, after all
2 that information is there, finally the detailer gets the
3 commitment to prescribe to appropriate patients.

4 I think one way to think about the absurdity
5 of making the difference turn on the prescription is to
6 compare this salesperson to another salesperson of
7 medical devices who goes in, but these are medical
8 supplies that the doctor uses in the doctor's office.
9 Now, they're both hired for their sales experience.
10 They both get sales training. They both have a sales
11 territory. They're sitting in the same doctor's waiting
12 room, waiting for the same doctor; they have samples in
13 their bags, and they both get a commitment from the
14 doctor.

15 Now, what sense does it make as a matter of
16 the FLSA and its labor policies to say one of those
17 people is exempt and the other one is not exempt,
18 because for perfectly sensible reasons, we say that one
19 of those products is a prescription where the doctor
20 writes the order and then with that order, the end user,
21 the ultimate end user, can make the purchase at the
22 pharmacy, whereas the other one --

23 JUSTICE SCALIA: Mr. Clement, I wanted to
24 ask you about section 501 of the regulations, which --
25 which is on page 4 of the appendix in the blue brief,

1 and was mentioned in the -- in the Government's
2 presentation. It says -- requires that the employee be
3 engaged in (i) making sales within the meaning of 3(k);
4 or (ii) obtaining orders or contracts for services or
5 for the use of facilities.

6 What authorization is there for the agency
7 to invent number (ii)?

8 MR. CLEMENT: Well, Justice Scalia, you
9 heard the Government's explanation; and, as you suggest,
10 if the Government's explanation is right, then this
11 shouldn't be a matter of just trying to limit things to
12 3 -- to the 3(k) definition. I think, even though -- at
13 the 3(k) definition, though, if you look at that
14 definition, it has every hallmark of being broad and
15 functional and flexible.

16 I would want to make one very important
17 point, though, about the ultimate question here, because
18 ultimately the decision whether to go one way or another
19 on this issue has remarkable significance for
20 retroactive imposition of liability.

21 We all know that retroactive rulemaking is
22 disfavored. Well, think about the consequences here.
23 You have massive liability, between 4 and 6 years of
24 effective time and a half, because of the way that the
25 statute works. It has time and a half plus liquidated

1 damages. You are talking about people who are very well
2 paid, close to six figures. So, unlike the classic
3 worker who you might think is covered by the FLSA, who
4 is a relatively low hourly worker, the amounts of
5 damages here are quite significant.

6 Of course, the effort to try to reconstruct
7 these people's hours, given that they were told they
8 were exempt and they were outside the office, trying to
9 reconstruct how many overtime hours they actually worked
10 is going to be a crapshoot at best. So, if you think
11 about all of that, and then you think about, as
12 Justice Breyer indicated, the other option, which is
13 to --

14 JUSTICE BREYER: Let's pursue this for a
15 second.

16 MR. CLEMENT: Sure.

17 JUSTICE BREYER: Because I'd like to go back
18 to Justice Kennedy's question, and this is only me
19 speaking. I don't know how anybody else feels. If this
20 had come up in 1941, you wouldn't have had a chance. I
21 would have said look at the statute; it says the
22 Secretary defines it. You'd say, well, can you define
23 it in a brief? Yes, you have to be careful of briefs,
24 but, yes. And that's the end of the case. It's not a
25 question for judges; it's a question for administrators.

1 All right. But now it's difficult for me
2 because of the passage of 75 years. And we can blame it
3 in part on the industry or in part on the Secretary.
4 There is blame to go around. So, the question is, what
5 do I do as a judge?

6 And partly my instinct is get somebody to
7 decide this other than a lawyer in the Department of
8 Labor, because this is a hard question. And that's
9 where we come to Justice Kennedy's question, which is he
10 says all right, fine, let's write that, and -- and what
11 case do we cite?

12 And I don't agree with you, overturn Auer.
13 I think amicus briefs are often helpful, but use them
14 with care. And then I have the statute here, which
15 talks about the Secretary doing the definition of
16 "outside salesman," and I have lots of rules and
17 regulations and reports, which are fairly ambiguous in
18 my opinion. So, you tell me what to say.

19 MR. CLEMENT: I -- may I answer?

20 CHIEF JUSTICE ROBERTS: Certainly.

21 MR. CLEMENT: I would start by citing -- I
22 know it's not always in fashion to cite lower court
23 opinions, but I'd start by citing Judge Posner's opinion
24 in Yi, because the Seventh Circuit -- they're a very
25 distinguished panel, Judge Posner, Judge Wood, and one

1 other judge. The three of them considered this
2 question -- Judge Sykes. I'm sorry; it slipped my mind.
3 A very distinguished judge.

4 (Laughter.)

5 MR. CLEMENT: The -- it's -- the point being
6 that he said along these lines that the 70 years of
7 history makes a significant difference. And here's the
8 thing. Just like you expect an agency to confront a
9 change in position, you'd at least expect an agency to
10 confront the retroactive consequences and in that sense
11 address them and make sense of it.

12 And I would just simply say this, which is
13 if you had a rulemaking, you could bring in all of the
14 affected parties, including the current sales
15 representatives, who are not the ones bringing these
16 lawsuits, whose jobs are going to be changed, and you
17 could make a comprehensive view, as opposed to just
18 getting one side of an ongoing litigation and then
19 making a decision about an amicus brief.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 JUSTICE BREYER: Thank you. I'll look at
23 it.

24 CHIEF JUSTICE BREYER: Mr. Goldstein, 3
25 minutes.

1 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN
2 ON BEHALF OF THE PETITIONERS

3 MR. GOLDSTEIN: Thank you,
4 Mr. Chief Justice.

5 Three quick points. First, if you read the
6 transcript, you will see that my friend says that the
7 nature of this job has changed. And that is an
8 essential part of understanding this case. And there is
9 an entire amicus brief in addition to our submission on
10 behalf of pharmaceutical representatives, which explains
11 how very much the requirements of pharmaceutical
12 detailers and the restrictions on them have changed
13 dramatically over the last couple of decades in
14 particular. And that's why the continued references to
15 70 years are wrong.

16 The other important point about the FLSA in
17 particular is that there is a statute on this issue, and
18 it says that an employer can request guidance from the
19 agency; and if it doesn't do that, it is not -- it has
20 no defense. Its job is to ask for guidance. And there
21 are 50 different exemptions from the FLSA that cover
22 hundreds of different categories of employees. And if
23 the rule you are going to announce -- because Mr.
24 Clement's view is you shouldn't be bound by any
25 precedent. If the rule you are going to now announce is

1 that there has to be rulemaking with respect to all of
2 those, it's going to be an administrative nightmare.

3 Two quick further points. The Department of
4 Labor's position is that there has to be an actual
5 commitment, not a precatory commitment. And Mr. Clement
6 says, well, that's contrary to the definition of "sale"
7 in 3(k). Please read the definition again, and if you
8 find something in there, something that is not a
9 commitment -- it can be an exchange; it can be a
10 commitment that is even a consignment; it can be a
11 traditional sale. Every one of those things is
12 commitment. It is impossible to find in the definition
13 of "commitment" a rule that says -- excuse me, in the
14 definition of "sale" --

15 JUSTICE ALITO: Where do they say that
16 that's -- that that's their test? Where does the
17 Department of Labor say that's their test, that it has
18 to be a commitment? I thought what they said in their
19 brief was there has to be a transfer of title.

20 MR. GOLDSTEIN: There are two different
21 parts to it. One is that they -- as explained by Mr.
22 Stewart, their view of transfer of title, but the Weiss
23 Report says repeatedly that there has to be a commitment
24 to buy. That is --

25 JUSTICE SCALIA: Well, which is it? I mean,

1 you say, yes, yes, it's both.

2 MR. GOLDSTEIN: You have to agree --

3 JUSTICE SCALIA: Pick one.

4 MR. GOLDSTEIN: You have to --

5 JUSTICE SCALIA: Is it the transfer of title
6 or a commitment?

7 MR. GOLDSTEIN: It is the agreement to
8 transfer title. There are two parts to it.

9 JUSTICE SCALIA: Ah. Okay.

10 MR. GOLDSTEIN: But there has to be the
11 agreement, a firm agreement. It's repeated in the 2004
12 preamble to the regulations as well.

13 Now, the last critical point I want to make
14 is that Mr. Clement says there are commissions on sales
15 in the sales territory. And what he is not talking
16 about is any commitment by a physician. When you go
17 look at the transcript and he talks about sales in the
18 sales territory, he is talking about the sales by the
19 pharmacy. That's where the sale occurs in this
20 industry. It's to the wholesaler and to the pharmacy
21 and to the customer.

22 He is not talking about a sale in the sense
23 of getting a commitment to have --

24 JUSTICE KENNEDY: But the district court
25 here made a finding -- this is at 42a of the appendix

1 for the Petitioners: "Sales volume is directly and
2 exclusively driven by the number of prescriptions
3 written by physicians, and plaintiffs' job was to
4 encourage such prescriptions."

5 MR. GOLDSTEIN: That -- Mr. Justice Kennedy,
6 I don't believe that you can fairly describe that as a
7 finding of fact. That is the judge -- his view of the
8 summary judgment record. It is --

9 JUSTICE SCALIA: It's a finding of logic,
10 for Pete's sake. These are prescriptions. You can only
11 get a prescription from a doctor. Obviously, the number
12 of prescriptions, drugs sold, depends upon the number of
13 prescriptions given by doctors.

14 MR. GOLDSTEIN: Two -- two things about
15 that. First is that a detailer doesn't get a commitment
16 to a prescription. And then in addition, it's clear
17 that there are numerous influences on what a doctor
18 does. There's all the advertising --

19 JUSTICE SCALIA: That's a different point.

20 MR. GOLDSTEIN: It is an important point.
21 It is a different point, but it is --

22 JUSTICE SCALIA: It's not the point you were
23 making.

24 MR. GOLDSTEIN: Justice Scalia, the point
25 that I will make at bottom is that you have to have a

1 firm commitment. That's what the Department says. And
2 there is nothing in the definition in 3(k) that
3 contradicts that.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel,
5 counsel.

6 The case is submitted.

7 (Whereupon, at 11:06 a.m., the case in the
8 above-entitled matter was submitted.)

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22
23
24
25

A				
about-face 41:13	49:12 50:8 63:2	23:22 60:17	appropriately 41:21	66:7
above-entitled 1:12 66:8	administrators 59:25	ambulance 8:24	April 1:10	B
absolutely 11:7 23:25 39:5	advanced 47:4	amended 24:4	arbitrary 19:5	back 5:24 23:24 42:9 52:1 59:17
absurdity 57:4	advertise 46:21	amicus 1:20 2:8 16:2 24:5,14 25:19,22 26:3 26:10,11 47:4 47:8,14 51:7 51:13,18 52:21 60:13 61:19 62:9	areas 11:13	bags 57:13
accept 26:11	advertising 18:16 65:18		argue 4:17 46:24,25	balanced 22:24
account 6:20 14:8	advice 46:5		argues 4:2	based 27:23,24 27:24 28:25 42:12 44:25 45:6,10
ace 42:9	agencies 25:20	amount 18:13	arguing 11:12 29:22,24	basic 38:11 50:7
acknowledge 50:9	agency 19:6,10 19:15 20:1 23:4 24:8 25:3 26:2 27:3,5,14 28:23 31:12 38:19 39:3 42:11 45:20 47:14 50:16 58:6 61:8,9 62:19	amounts 59:4	argument 1:13 2:2,5,9,12 3:3 3:7 4:17 16:1 20:2 28:8,10 30:18 35:7 45:18 47:18,18 47:19 62:1	beautifully 23:22
acquired 14:4	agency's 26:6	analogies 11:13	arisen 18:12,14	Beecham 1:6 3:5
Act 3:11 11:5,10 11:24 12:5 17:23 43:23	agent 44:5	announce 62:23 62:25	arose 18:18 24:10	behalf 1:16,19 1:22 2:4,7,11 2:14 3:8 16:2 30:19 62:2,10
action 27:15	ago 22:16,17	anomalous 53:12 54:7	arrangement 4:24	believe 5:16 6:21 7:6 16:22 21:2 29:17 53:21 65:6
actions 26:16 27:2	agree 6:10 20:19 20:25 37:7,16 60:12 64:2	answer 5:7 16:11 17:4 25:18 30:10 36:11 44:20,21 47:16 51:23,25 52:1 60:19	asked 24:18 27:7 28:13 39:8 49:3	believes 17:16
activities 21:7 21:23 22:2 31:22	agreement 5:15 5:20 6:10,15 7:13 17:25 64:7,11,11	answering 5:25	asking 25:1 49:10 51:8	best 46:25 47:6 59:10
activity 10:5 32:7 33:6,9,22 33:24 40:5,6 54:8	agrees 3:21,23 3:24	anybody 29:11 35:10,19 59:19	assigned 30:25	beyond 9:5 19:4
actual 21:15 53:17 54:4 63:4	Ah 64:9	anyway 7:4 20:1	assumption 43:3	big 19:19
addition 62:9 65:16	ahead 7:4 25:3	apologize 5:19 5:24 6:7,22 8:20	attempted 16:9	billions 51:10
additional 9:13	AL 1:3	appeals 25:19	attend 30:24	binding 7:13 13:20 36:13 37:5,12,14
address 32:21 61:11	Alito 4:16 5:6,9 5:11,17 6:1,5 7:3 17:5,12 22:3,7 63:15	APPEARAN... 1:15	attention 28:7	bit 21:10 40:1
addressed 38:10	agrees 3:21,23	appears 18:22	attributes 20:7	blame 60:2,4
addresses 53:2	Ah 64:9	appendix 4:6 9:11 17:18 53:1 57:25 64:25	Auer 60:12	blessed 28:23
adjudication 26:10	allow 6:22,22 23:7 39:2	application 27:6 28:11	authority 18:8	blind 21:11
adjusters 11:1	allowing 39:20	apply 45:13,15	authorization 25:21 58:6	blue 4:6 17:18 57:25
administrative 11:19 23:13 24:19 30:7 39:19 41:10,11 41:14,23,25 42:8,15 43:17	alternative 26:16,18 27:1 27:2	approach 39:14	autonomous 8:7 8:12 10:23	boils 35:8
	ambiguous	appropriate 13:8,16 21:15 37:2 57:3	autonomously 7:21	bonus 45:3,5
			autonomy 8:1 11:21	bothered 22:21
			available 30:3	bottom 30:9 65:25
			avoid 32:2 43:14	bottom-line 30:10
			aware 29:14,15	bound 49:25
			a.m 1:14 3:2	

62:24	C 1:16 2:1,3,13	22:12	36:2,6,11,23	commitment
Breyer 22:20	3:1,7 62:1	characteristics	37:6,10 38:3	3:18,24 4:14
23:19,21,24	call 32:17 41:4	10:11	38:23 39:5,24	7:13,13,16
24:4,22 26:18	calls 16:15	Chief 3:3,9 9:15	40:14 41:17	12:24 13:3,4,6
26:23 27:1	candid 24:7	15:24 16:4	42:1,3,6,16,25	13:6,7,9,11,15
31:4 44:2,4,11	capricious 19:6	25:17,23 28:1	43:7,8,10 44:9	13:18,19 14:10
44:16 59:12,14	care 15:17 60:14	28:5 30:15,20	44:15,20 45:6	14:12 32:16,18
59:17 61:22,24	careful 59:23	31:2,6,9 54:13	45:11,22,24	34:24,24 35:9
brief 4:6 12:11	carriage 18:17	55:1,17 60:20	46:16 47:2,12	35:23 36:1,1,2
16:12,15 17:18	case 3:4 5:2 7:10	61:21,24 62:4	47:25 48:4,8	36:12,19,24,25
24:14 25:11,12	7:20 11:12	66:4	48:20 49:1,6	37:11,12 38:16
25:14,22 26:11	16:6,10 27:7	Christopher 1:3	49:24 50:6,13	39:11 40:16,17
35:13 46:15	28:12 35:16	3:4	51:3,25 52:19	41:6 46:6,12
47:4 51:8,9,13	41:11 44:6	circle 52:1	53:10,16,21	52:10,11 54:23
51:18 52:21	45:7 48:11,14	Circuit 16:13,13	54:18 55:8,21	54:24 55:18,24
57:25 59:23	49:5,15,22,25	25:11,12,13	56:19 57:23	56:2 57:3,13
61:19 62:9	51:24 59:24	60:24	58:8 59:16	63:5,5,9,10,12
63:19	60:11 62:8	circumstance	60:19,21 61:5	63:13,18,23
briefing 29:9	66:6,7	13:17	63:5 64:14	64:6,16,23
briefs 24:5,12	cases 50:2	cite 49:16,22,25	Clement's 62:24	65:15 66:1
25:10 26:3,10	categories 8:12	50:3 60:11,22	clerks 12:17,17	commitments
32:12,13 47:8	15:1,3 62:22	cites 50:3	12:20	27:10,11
47:14 59:23	categorization	citing 60:21,23	clock 7:22	common 16:6
60:13	41:14	claim 42:14,15	clocks 8:13	32:3
bright-line	category 7:25	clarification	close 11:13 34:2	commonly 19:1
45:15	41:7	49:11	34:7 59:2	companies 41:2
bring 61:13	Center 24:13	clarify 26:5,5	Code 10:6	45:4 48:17
bringing 61:15	century 22:17	class 30:14	come 8:1 10:23	49:4,8
broad 58:14	certain 11:23	classic 34:22	27:17 43:16	company 4:1
brought 27:14	certainly 32:4	59:2	50:21 59:20	9:19 12:23,25
business 12:21	41:18 42:7	classification	60:9	14:3,4,14
24:13 35:18	45:6 52:14	49:5	comes 48:11	21:15,22,24
46:18 48:7	54:19 56:4	classifications	55:4,5,6,20	27:11 29:12
businesses 18:24	60:20	11:16	56:1,8	32:12 39:18
buy 6:13,19	Cf 50:3	classified 35:15	coming 49:8	52:16,22 53:19
18:15 21:25	chain 21:7,25	cleaning 11:2	comment 23:7	55:5
34:24 37:16	48:13	15:2	38:2	company's
38:16 46:6,12	chance 59:20	clear 5:21 23:25	commentary	45:10
52:11 54:24,24	change 38:7,9	27:7 28:12	34:4,20	compare 57:6
55:13,13,18	50:8,10,14,14	48:14 52:9	commerce 14:7	comparison
63:24	51:5 61:9	65:16	14:9	26:15
buyer 11:25	changed 37:25	Clement 1:22	commission	compensated
12:1 20:9	38:12,12,25	2:10 30:17,18	22:6 44:13	31:1
buyers 11:23	41:19,20 42:4	30:20 31:5,8	commissions	compensation
15:6	42:6,11 43:4	31:16,25 32:15	15:3,7,8,10	22:14 44:10,24
	61:16 62:7,12	33:1,14,16,20	22:4,8,13 44:4	competitor's
C	characteristic	34:18 35:20	44:19,22 64:14	54:2

comprehensive 61:17	31:12 46:1	59:6	decades 62:13	describe 65:6
computer 38:17	construed 19:16	court 1:1,13	December 29:18	described 40:2
38:21 55:16	consult 25:9	3:10 16:5	decide 27:3 47:5	detail 18:13
concede 19:24	consummate 34:13,16	17:18 25:14	60:7	56:16
concerned 33:25	consummating 20:16	26:11 30:21	decided 56:15	detailer 3:22
34:4,9	consummation 21:5	42:7,17,17,21	decides 14:2	10:11 14:18,20
concerns 32:2	contemplation 17:11	49:17,22 53:2	56:18	19:20 20:10
37:22	contingency 6:19	60:22 64:24	decision 25:3	21:13,17 24:17
concluding 29:3	continued 62:14	courts 17:14	58:18 61:19	33:19 56:8,8
condition 37:1	contract 4:9	24:6 25:19	defend 28:13	56:24 57:2
conferences 30:25	contracts 17:24	court's 52:25	defense 62:20	65:15
confront 61:8,10	18:15,17 19:2	cover 20:19,25	defer 45:25 47:5	detailers 4:2 8:7
confronted 38:19	19:18 58:4	62:21	47:17,18	11:22 19:11
Congress 3:11	contradicts 4:12	coverage 20:13	deference 45:20	20:20 21:1,4
10:14 11:20	66:3	20:22 31:18	51:8	22:15,17,18
12:5,6,9 15:9	contrary 38:4	covered 11:9	deferring 43:1	23:16 24:18
15:19 45:21	63:6	19:18 24:19	47:14 52:5	27:9 28:14
conjunction 33:8,23 40:7	contrast 39:11	29:19 33:14	define 3:12	29:19 34:15
52:7	convention 56:12	49:13 59:3	45:21 51:14,15	39:21,22,22
consequences 58:22 61:10	conventions 9:23	covers 31:24	59:22	40:11,25 41:16
consider 13:7,16	conversation 3:18	crapshoot 59:10	defines 51:14	62:12
26:20	convince 53:25	created 6:8	59:22	detailing 7:15
consideration 20:9 21:3	cooling-off 37:17	criteria 16:10	defining 7:7	determine 23:8
33:25	CORPORATI... 1:6	critical 4:25	definition 4:5,7	devices 57:7
considered 20:17 61:1	correct 29:7	14:21 64:13	5:22,24 31:23	dictated 9:19
consignment 4:10,21 5:1,12	correspondence 44:23	curiae 1:20 2:8	45:12 51:19	difference 13:3
5:13 6:11 7:6	cost 30:8	16:2	58:12,13,14	14:5,21 19:19
16:18 17:7	counsel 15:24	current 61:14	60:15 63:6,7	47:21 48:3
48:6,8 63:10	28:19 29:4	customarily 20:6	63:12,14 66:2	54:2 57:5 61:7
consignments 17:9	61:21 66:4,5	customer 34:2	delimit 3:13	different 6:2
consignor 4:22	counting 34:5	38:21 64:21	department 1:19 25:8,15	8:25 12:3 16:8
consistent 4:16	country 26:3	customers 14:17	30:3 34:14	20:2,2 24:6,6
5:12 46:23	couple 10:1	cuts 49:7	39:20 41:4	29:10 39:8
consistently 23:17	62:13	<hr/>	43:19 45:13	40:4 45:2,4
constantly 8:24	course 9:25 15:7	D	47:4 49:19	46:13 62:21,22
constitutes 14:8		D 1:22 2:10 3:1	50:18 60:7	63:20 65:19,21
construction		30:18	63:3,17 66:1	difficult 60:1
		damages 59:1,5	Department's 39:14 45:25	dinners 9:23
		data 24:10,11	49:21	direct 13:15
		dates 24:16	depend 40:1	17:4 41:2
		DBA 1:7	depending 26:20	directed 3:12
		deal 34:2	depends 33:6	39:12 54:9
		deals 20:10	65:12	direction 12:15
		dealt 21:20	Deputy 1:18	directly 4:2
		debate 7:8		21:24 65:1
		debating 7:19		disagree 17:15
				31:9

discretion 29:1 43:16	document 44:12	effect 24:18	53:24 58:3	20:7 63:9
discussed 18:10	doing 10:8 24:3	29:18	engages 3:22	exchanging 14:3
disfavored	26:9,9 60:15	effective 30:9	15:11	exclusively 65:2
58:22	DOL 16:21 17:3	58:24	enormous 9:4	excuse 6:9 9:2
disposition 4:11	17:16 21:20	effort 39:6 53:3	enter 55:25	17:6 18:3
dispositive	22:1 23:17	53:24 59:6	enters 38:17,20	63:13
37:15 40:9	24:15,21 27:24	efforts 32:20	Entertainment	exempt 7:25 8:4
distinct 22:2	29:3,20	either 3:17	9:24	11:14,23 12:1
distinction	dollars 51:10	11:18 21:24	entire 62:9	15:9,15,17,18
13:23 23:17	DOL's 17:25	37:15	environment	17:7 31:17,23
33:4,22 34:12	30:7	elaborated 3:17	41:18	31:24 33:9
38:13	door 36:16	elderly 15:18	equivalent	39:7 40:6
distinguished	double 34:5	else's 33:24	52:11	41:25 43:4
60:25 61:3	doubt 49:10	emergency 8:15	era 22:19	48:15 51:17,22
distinguishes	54:19	8:21 10:19	err 52:2,3	52:6 53:15,20
40:19	dramatically	15:2	escaped 28:6	57:17,17 59:8
distinguishing	62:13	employ 27:9	especially 35:21	exemption 3:13
35:2	draw 12:6,6	employee 4:18	45:21	4:19 11:19,22
distribution	33:3 34:12	10:8 15:1 16:7	ESQ 1:16,18,22	15:9 20:1,23
48:14	38:13	17:22 20:14	2:3,6,10,13	24:19 29:20
distributor 54:1	drawing 46:20	39:19 42:15	essential 20:7,16	32:4 39:19,21
distributors	drawn 23:17	45:3 58:2	21:4 62:8	41:23 42:9,15
52:24 53:4	draws 12:9	employees 8:5	establish 16:9	42:19 43:17
district 42:17	15:14 33:22	22:3,5 24:24	estimates 51:9	49:12,13 53:22
52:25 53:1	drew 10:14 12:5	24:25 29:1	ET 1:3	exemptions 12:4
64:24	driven 65:2	30:14 41:14,15	evaluated 31:1	32:5 62:21
Division 18:21	driver 8:24	62:22	evenly 22:23	exercise 43:16
25:9	drives 54:5	employer 3:20	events 5:2 7:8	exercised 29:1
doctor 5:4 13:18	drug 13:7,21	4:15 7:14	21:7,25	expect 28:5 61:8
14:2,13,17	14:3,4 28:17	24:17,20 30:11	eventually 33:18	61:9
21:13 32:11	44:7	46:13 62:18	everybody	expectation
35:10,11,23	drugs 3:22 4:2	employment	31:18 32:3	24:10 27:23
36:19 54:11,14	21:2 40:25	10:8	everybody's	expected 9:11
54:14,20 55:2	65:12	employs 35:22	31:24	experience
56:9,11,12,15	duties 29:2	encountered	exact 42:10	12:18 57:9
56:15,18,25	duty 9:3,4,6,9	17:2	exactly 22:21	expertise 45:20
57:8,12,14,19	10:9 32:6,10	encourage 65:4	53:2	explain 7:2
65:11,17	32:23	encyclopedia	example 8:10,16	explained 18:20
doctors 3:23 4:3	D.C 1:9,16,19	55:11 56:1	10:25 11:23,25	63:21
9:12,16,18,22	1:22	enforce 50:20	12:16 15:5	explains 9:12
41:21 44:7		51:1	46:8 48:9	62:10
54:4 55:2	E	enforcement	52:21,22	explanation
56:13 65:13	E 2:1 3:1,1	26:16 27:2	examples 10:17	58:9,10
doctor's 36:13	earlier 52:6	engage 21:6	10:20	expressed 37:22
36:14 57:8,11	early 40:23	engaged 17:22	exchange 3:19	extend 19:6
doctrine 54:10	easy 45:15	18:24 39:22	3:25 4:9,15 5:4	extent 15:13
	echoed 15:13	40:11 41:4,8,9	5:4 7:12,14,20	27:22

extra 44:8	finding 64:25	function 41:1	go 5:24 7:4	government's
extraordinary	65:7,9	functional 52:11	13:14,14 19:4	4:17 5:11
26:14 27:21	fine 12:5 15:14	58:15	23:24 25:3	12:11 16:20
extras 9:21	23:25 60:10	further 3:16	36:14,20 58:18	25:14 35:7
<hr/>	fireman 8:24	10:8 63:3	59:17 60:4	43:2,12 58:1,9
F	firm 64:11 66:1	future 6:18	64:16	58:10
facilities 17:24	firmer 55:17	12:13,25 13:9	goes 40:10,11	grant 20:1
18:1 19:18	first 14:12 20:24	23:9	56:12,24 57:7	ground 16:6
58:5	54:15 56:24	<hr/>	going 7:12 10:9	32:3 56:25
fact 4:4 9:13	62:5 65:15	G	13:11 21:13	group 35:14
14:9 65:7	fit 11:16 16:10	G 3:1	23:4 26:10	GSK 28:16 54:1
facts 27:7 28:12	flatly 46:1	Gee 22:16	27:18 31:15	GSK's 21:2 27:8
45:6	flexible 39:14	general 1:18	34:1 37:16	28:12
factual 30:11	58:15	23:16,16 39:12	50:8,11 52:2	guess 19:4 20:13
fair 3:11 11:5,9	FLSA 4:5 15:14	generally 36:2	55:24 56:3,10	20:18 23:15
11:24 12:4	57:16 59:3	getting 21:13	56:15 59:10	46:16
18:13 24:7	62:16,21	40:16 44:7	61:16 62:23,25	guidance 3:16
43:23	focus 27:3 35:5	52:10 61:18	63:2	14:1 30:7,12
fairly 60:17 65:6	41:20	64:23	Goldstein 1:16	30:13 47:15
fall 11:18	focused 53:4	gift 50:24	2:3,13 3:6,7,9	62:18,20
falls 50:22	follow 14:25	Ginsburg 7:17	4:24 5:8,10,15	guilty 28:20
familiar 12:21	34:1	8:10 9:20 10:2	5:19 6:4,7,14	29:23
far 22:23 27:24	following 38:10	10:16,19,22	6:17,21,25 7:5	guy 55:3,5
40:21 54:1	50:1	11:19 14:25	8:3,14,20,23	<hr/>
fashion 60:22	follows 4:3	30:1 33:11,15	9:7,10,17 10:1	H
fault 24:23	21:16 34:7	33:17,20 37:4	10:4,18,21,25	half 9:25 58:24
favor 42:18 49:7	49:20	39:16,24 40:10	11:6,17 12:8	58:25
FDA 43:6,24	force 49:13	40:15,21 41:17	13:2,10 14:11	hallmark 39:13
Federal 7:18	52:16,20 53:13	42:14,22,25	14:24 15:4	58:14
10:6 37:21	forget 46:18	48:16,23 49:3	61:24 62:1,3	hand 24:23
Federation	form 5:3 38:15	49:7 51:12	63:20 64:2,4,7	51:20
24:13	39:23 40:12	52:15 53:7,11	64:10 65:5,14	handful 53:10
feels 59:19	forms 30:6,13	53:14,17	65:20,24	handle 52:23
fight 5:2	31:21	give 6:11 11:22	golf 9:24,25	happen 23:9
figure 44:17	forth 11:11	12:16 23:10	good 9:22 11:24	52:9
figures 59:2	forward-looki...	27:19 31:14,23	11:24 53:25	happened 18:12
file 26:3,10	40:18	32:11 45:11,20	55:13	happens 7:15
filed 24:14 25:10	found 17:3	given 30:24 46:5	goodness 9:4	56:22
25:22	Fox 50:7	50:23 59:7	12:12	hard 60:8
filing 24:5 26:16	frame 14:13	65:13	goods 17:3,17	hear 3:3
filings 25:19	frames 12:22,22	gives 30:4,6	18:23,25 19:17	heard 58:9
filled 28:16	framing 12:21	45:14 47:15	20:5,16,17	hearings 23:7
final 57:1	12:23,24,25	52:21 56:2	government	hears 54:14
finally 56:4 57:2	13:25,25	giving 10:17	5:22 7:2 17:14	heavily 10:7
find 4:11 12:12	frauds 37:13	29:5 45:4,14	29:6,13 37:7	helpful 60:13
12:14 23:21	freight 18:17	GLAXOSMI...	37:22 38:5	hey 26:12
63:8,12	friend 62:6	1:7	47:17 48:21	he'll 20:17

highest 27:8	imposing 52:3	50:12 51:9	14:2 19:13	31:4,6,9,14,17
highly 10:23	imposition	54:6,8,10,25	40:15 42:10	31:25 32:9,23
hire 21:22	58:20	56:22,23 60:3	53:2 58:19	33:11,15,17,20
hired 30:23 57:9	impossible	64:20	62:17	34:8,18 35:12
historically 22:1	63:12	influences 65:17	issued 18:11	35:20,25 36:3
history 22:25	improper 49:22	information		36:4,9,18,24
41:15 54:23	incentive 44:9	32:11 41:8	J	37:4,8,19 38:3
61:7	44:24	56:9 57:1,2	job 9:21 30:23	38:23 39:5,16
home 36:20	incidental 33:12	informational	53:5 62:7,20	39:24 40:10,14
Honor 32:15	51:16,21	41:1	65:3	40:21 41:17,24
42:16 53:22	included 17:2	informed 23:13	jobber 46:9,13	42:1,2,4,14,22
54:18 55:9	19:11	input 25:4	48:9,12	42:25 43:7,9
hope 56:7,14	includes 3:17	inquiry 43:1	jobs 61:16	44:1,2,3,4,11
hospital 33:18	4:9 5:22 7:8	instance 13:19	joint 9:11	44:16 45:2,11
hospitals 41:2	9:23 16:24,25	29:16 48:13	journals 56:12	45:22,23 46:16
52:18 53:20	including 61:14	instinct 60:6	judge 60:5,23,25	47:3,7,13,20
Hour 18:21 25:9	inconsistent	instinctive 23:12	60:25 61:1,2,3	48:2,6,16,23
hourly 59:4	39:17 46:1	instituted 26:2	65:7	49:3,6,15 50:4
hours 8:2 9:3,5	incorporates 4:5	instruction 41:8	judges 59:25	50:13 51:3,12
9:6,8 10:9,23	increase 21:23	insurance 11:1	judgment 29:2	52:15 53:7,11
55:15,25 56:1	incredibly 12:5	interaction	42:18 43:20	53:14,17 54:13
59:7,9	independent	19:20,21 56:21	65:8	55:1,17 56:6
house 55:11	24:13 29:1	interest 40:16	Justice 1:19 3:3	56:19 57:23
How's 45:2	41:10	interesting	3:9 4:16 5:6,9	58:8 59:12,14
hundreds 29:10	indicated 59:12	36:20 56:10	5:11,17 6:1,5,9	59:17,18 60:9
29:10 62:22	indicates 24:5	intermediary	6:15,18 7:3,17	60:20 61:21,22
hypothetical	indirectly 21:24	54:10	8:10,18,21 9:2	61:24 62:4
13:25	individual 25:15	internally 25:6,7	9:8,11,15,20	63:15,25 64:3
	29:22	interpret 10:6	10:2,16,19,22	64:5,9,24 65:5
I	individuals	interpretation	11:4,6,8,19	65:9,19,22,24
idea 46:2	18:14 43:4,21	49:21	12:6,9,20 13:5	66:4
identified 24:12	individual's	interpretations	13:10 14:6,23	justification
identify 24:15	52:7	52:12	14:24,25 15:5	21:21
ii 58:4,7	industries 23:4	interpretative	15:13,24 16:4	
illegal 13:4	29:5,11 31:21	47:15	16:11,12 17:5	K
imagine 55:10	35:16 40:20	interpreted	17:6,12 18:3,8	Kagan 14:23,24
implausible	53:12	18:22,23	19:3,13,23	20:12 21:10
49:21	industry 14:14	interrupt 25:18	20:12 21:10	34:8,18 35:12
important 10:10	14:19 15:21	invent 58:7	22:3,7,15,20	35:20 38:23
28:14 32:1,16	21:11,12 22:25	involve 7:14	22:22 23:19,21	39:5 43:7,9
33:21 36:12	24:10 27:23	involved 31:22	23:24 24:2,4	44:1,3 46:16
38:9 39:15	28:6 30:14	35:10	24:22 25:17,23	47:3,7,13,20
40:4 51:6	31:10 32:16	involving 46:9	26:1,8,14,18	48:2 50:13
58:16 62:16	35:9,14,22	ironically 38:5	26:23 27:1,13	51:3 56:6,19
65:20	39:10 40:19	isolated 56:20	28:1,5,19,20	Kennedy 11:4,6
impose 50:11	41:20 42:8	issue 3:24 4:20	29:4,9,21 30:1	11:8 15:5 24:2
imposed 51:7	43:3 49:14	4:23 7:9,16	30:15,20 31:2	35:25 36:3,4,9

36:18,24 37:8 37:19 38:3 49:15 50:4 64:24 65:5 Kennedy's 59:18 60:9 kind 8:1 10:5 36:23 43:22 50:11 52:19 53:5 kinds 9:1 know 7:1 8:11 19:10 20:21 25:2,4,5 26:21 27:24 28:2,6 36:6 37:13 45:9 47:17 54:15 55:3,9 55:10,12,14 56:21 58:21 59:19 60:22 known 28:9	23:13 26:7,12 27:18 28:22 50:8 55:14,14 lawful 36:4,9 lawsuits 61:16 lawyer 60:7 lays 18:13 56:24 leads 21:25 learned 54:10 leave 17:1 legal 23:13 24:13 legitimate 48:7 lesser 5:3 letter 24:15,17 27:25 28:10,25 28:25 29:6,11 29:13,23 30:6 30:8 39:17 40:3,10 41:7 48:24,25 49:2 letters 29:10 30:4 let's 23:9,10 50:6,7 54:13 59:14 60:10 level 25:2 27:8 liability 32:13 43:14 50:12 51:8 52:4 58:20,23 life 12:17 limit 58:11 limitation 7:18 limited 7:9 limiting 32:24 32:24 33:1 line 10:14 12:10 12:10 14:6,9 30:9 46:20 lines 12:5,7 15:14 61:6 liquidated 58:25 list 31:6 listen 55:2 literally 8:9 litigation 32:14	61:18 little 21:10 32:6 40:1 lo 27:15 logic 65:9 long 22:16 31:6 31:23 32:22 33:7 37:12 40:6 longer 30:3,3 look 17:18 19:8 22:22 33:3 34:3,10,19 35:24 36:15,19 37:15 46:15 50:22 51:13,13 52:25 56:20 58:13 59:21 61:22 64:17 looking 36:24,25 43:19,23 50:24 looks 54:23 55:13 lose 42:23 lot 11:21 12:3,14 27:18 49:8 50:14,15 55:2 lots 8:16,25 60:16 love 38:3 low 59:4 lower 17:13 60:22	massive 50:11 51:8 52:3 58:23 material 36:21 materials 22:23 matter 1:12 4:3 13:4 26:20 29:16 52:5 57:15 58:11 66:8 mean 9:16,21 25:6,11 33:18 34:10 35:13 37:24 38:4 40:3 41:18 44:11,12 46:23 47:5 52:16 53:11 54:3,16 55:21 56:7,14 56:21 63:25 meaning 16:23 16:24 17:23 18:19 31:18 45:19 58:3 meat 12:2 median 43:21 medical 39:22 56:11 57:7,7 medically 21:14 32:18 37:2 medicine 37:2 56:16 medicines 53:5 men 35:3 mentioned 58:1 met 14:18 MICHAEL 1:3 mind 41:25 43:5 61:2 minimal 7:23 minimum 50:10 minutes 61:25 mission 21:6 missionary 35:3 39:23 mistake 42:21 Monday 1:10	money 27:19 morning 3:4 motion 21:7,25 movement 52:23 movie 15:15 multiple 56:23 <hr/> N <hr/> N 2:1,1 3:1 name 25:10,13 National 24:12 nature 36:13 37:14,24 41:19 62:7 nearly 24:7 necessarily 22:10 23:13 27:2 35:16 necessary 32:18 need 46:5 54:3 55:20 needs 35:14 negotiate 18:15 18:17 19:2 neither 13:3 never 17:2 29:20 46:11 47:22 48:11,13 49:20 new 37:22,22,23 49:18,19 newspaper 15:16 newspapers 18:16 NFIB 46:14 nightmare 63:2 Ninety 27:15 Ninth 16:13 25:11,11 non 37:4 nonexempt 3:17 33:5,15 non-binding 37:6,11 40:18 normal 25:23 notice 23:6
--	--	--	--	---

notion 35:8 50:7	operate 8:8	overall 21:23	19:1,8 21:25	48:17 49:4
Novartis 25:12	operates 53:13	45:10	22:24 23:7,10	52:16 53:18
nuances 30:11	opinion 24:15	overtime 9:4	27:14,19 28:14	62:10,11
number 8:5 18:4	24:17,18 27:25	27:20 59:9	28:21 31:1	pharmacies
19:9 50:16	28:10,24,25	overturn 60:12	34:12,13,14,15	14:16 21:3
58:7 65:2,11	29:6,10,13,18		34:16 35:2,4	28:17 52:17
65:12	29:23 30:4,6,8	P	35:14,22 36:15	53:19
numerous 65:17	39:17 40:3	P 3:1	39:2,7 41:4,8	pharmacy 21:16
O	41:7 48:23,25	page 2:2 4:6,8	41:11 44:18,18	33:19 57:22
O 2:1 3:1	49:2,16 52:25	17:19 46:14	46:6,20,21	64:19,20
object 40:12	60:18,23	47:18,19,19	52:23 53:8,10	phased 30:5
objection 49:20	opinions 60:23	53:1 57:25	53:18 54:9	phrase 7:7
objective 17:13	opportunity	paid 15:3 44:4	56:2,3 57:17	PhRMA 10:6
32:17	29:6	59:2	59:1	51:9 52:21
obtain 17:13	opposed 61:17	panel 60:25	people's 59:7	physician 19:20
obtaining 17:20	option 30:2	pardon 14:16	percent 44:24	55:18 64:16
17:23 58:4	59:12	part 7:12 9:21	50:2	physicians
obtains 44:13	oral 1:12 2:2,5,9	14:1 20:16,20	perfectly 46:22	27:10,12 28:15
obviously 40:1	3:7 16:1 30:18	26:1 53:23,23	57:18	53:6 65:3
65:11	37:12	56:17 60:3,3	performance	Pick 64:3
occupations	order 12:25 16:7	62:8	29:2 45:8,10	pitches 34:16
11:8	35:22 38:14,17	participate 21:5	performs 20:15	46:22
occur 21:8	38:21 39:10	particular 30:11	period 37:18	pitchman 34:23
occurs 4:21 5:13	41:22 43:14	32:21 40:2	48:17	pitchmen 34:14
64:19	54:11,25 55:15	41:11 62:14,17	person 6:20	34:21 35:2
odd 35:21	55:25 56:3	particularly	12:25 15:11	place 41:22
office 8:25 25:8	57:20,20	32:22	19:21,22 31:20	47:16 54:9
25:18 36:14	orders 17:20,23	parties 61:14	32:7 36:16	places 12:3 39:9
57:8 59:8	54:9 58:4	partly 60:6	39:9,9,11	54:11
officer 8:23	ought 24:8	parts 63:21 64:8	44:13 47:22	plaintiffs 65:3
offices 9:12,18	outside 3:13,14	passage 60:2	48:5,15 54:11	plate 50:17,20
off-label 43:12	4:19 7:22 8:6	patient 37:1	person's 40:7	play 21:4
43:14	8:15,25 10:12	54:16,21	persuade 28:15	playhouse 15:16
oh 6:4 19:10	11:2,23,25	patients 13:8	pertinent 17:19	please 3:10 16:5
27:17	12:1 15:6,8,11	57:3	Pete's 65:10	30:21 63:7
okay 12:21	15:20 16:7	PAUL 1:22 2:10	petition 53:1	plenty 50:2
23:11,20 54:15	18:18 22:12	30:18	Petitioners 1:4	plus 58:25
55:3,6 64:9	24:20 29:11,19	pave 35:4	1:17,21 2:4,8	pocket 42:10
once 19:24,24	33:4,7 34:22	pay 27:18 44:8	2:14 3:8 16:3	point 14:21
42:11,11 43:2	35:15,19 37:23	peculiar 14:6	30:22 44:21	15:12 22:20
ones 41:22 61:15	38:11,22 39:2	15:21 50:18	62:2 65:1	23:7 24:11,11
one-time 56:21	42:18,23 43:13	peculiarity	pharmaceutical	54:20,21 58:17
one-to-one	44:12 45:12	15:21	3:21 4:1,2 7:15	61:5 62:16
44:22	46:10 48:10,15	people 8:12,16	8:7 10:11	64:13 65:19,20
ongoing 61:18	49:12,13 52:19	9:8 10:22 11:1	14:14,15,20	65:21,22,24
open 17:1 42:23	52:22 53:22,23	11:2,21 14:10	29:12 30:22	pointed 16:17
	59:8 60:16	15:3 18:24	39:18 41:2	pointing 5:23

points 4:12 62:5 63:3	57:5,19 65:11 65:16	promotes 34:6	36:9 39:18	reads 56:11,25
police 8:23	prescriptions	promoting 3:15	55:15 56:3	real 21:12
policies 57:16	28:16 54:5	promotion 3:17	p.m 9:13	really 7:3 10:9
policy 43:11,20	65:2,4,10,12	3:22 9:1 13:11	<hr/> Q <hr/>	19:4 20:1
43:25	65:13	27:6 28:11	qualifications	34:18 35:1,5,7
position 5:11 6:2	present 23:7	33:4,5,7,8	32:1	38:24 39:15
6:6 16:20	presentation	35:11 39:12	qualified 32:7	42:10,20 47:22
18:21 19:16	58:2	40:12 44:5	qualify 17:14,17	53:24
43:2 50:9 51:5	presents 37:1	51:15,16,20,21	32:4 39:2	reason 33:21
51:6,7 61:9	presto 26:12	promotional	quasi-commit...	52:4 53:3
63:4	pretty 22:23	21:19,22,23	27:11	reasoning 50:1
Posner 60:25	28:12 50:18	22:7 23:18	question 5:9	reasons 40:22
Posner's 60:23	52:9	31:20 33:12,22	16:12 17:5	57:18
possessed 20:8	previously	33:24 39:1,7	18:12,14,18	REBUTTAL
possession 17:11	24:16	39:23 40:5,6	19:5 20:18,19	2:12 62:1
possibility 17:1	primary 32:6,10	52:6	27:3 30:10	recall 12:11
possible 35:12	32:23	proper 26:6	44:18 47:8	receive 15:6,8
35:21 46:24,25	principle 32:25	28:10 49:5	50:21 58:17	22:12 44:7,19
47:1,2	33:1	property 4:20	59:18,25,25	44:23
poultry 11:25	probably 55:8	4:23 6:11	60:4,8,9 61:2	receives 44:9
power 19:7,25	problem 23:3	proposal 38:25	quibble 51:4	recognize 33:21
practical 20:15	38:10 43:18	39:1	quick 62:5 63:3	recognized 23:3
31:12	50:17,20 51:1	proposals 38:24	quietly 24:5	reconstruct 59:6
practically 37:3	problematic	propose 49:17	quirk 22:14	59:9
practices 35:18	40:5	prosecutions	quite 9:10 59:5	record 29:17
preamble 64:12	problems 47:13	43:12	quote 4:17	44:21 45:7
precatory 13:18	procedure 25:24	protect 24:25	quote/unquote	65:8
63:5	proceed 43:3	protected 43:22	3:12	refer 18:23
precedent 62:25	proceeded 20:4	provide 30:12	<hr/> R <hr/>	19:17 35:3
precise 17:10	process 25:2,6	30:13 47:16	R 3:1	reference 5:12
prefer 45:13	product 13:13	provided 3:14	radio 18:15	references 62:14
preferred 45:25	22:1,2 36:17	provides 4:8	19:22 20:5	referred 50:14
premise 8:3	44:25 45:8	56:9	rail 18:17	refers 4:21 7:6
21:21 28:25	46:11 52:24	provision 4:8	rank 41:10,11	17:19
prescribe 13:20	54:1,2,4 55:4,6	PSRs 16:10	rational 43:20	regard 21:9
32:18 35:23	55:19 56:13	48:19	rationale 11:10	regarded 19:1
36:16 37:3	products 14:14	public 29:16	30:7	20:6 22:1 27:5
40:17 44:7	28:16 32:13	purchase 13:24	rationality 43:22	regime 49:19
57:3	39:2 57:19	13:25 16:15	reaction 23:12	regular 9:5 26:2
prescribing	program 26:2	57:21	read 23:19,21	regulation 3:14
21:14 53:6	30:6,8	purely 6:18	23:24 36:20	4:4 10:24
56:16	prologue 32:19	purposes 4:18	47:8 62:5 63:7	17:19 20:13,19
prescription	promise 16:15	14:22 20:22,23	reading 40:2	24:4,4 28:11
3:24,25 7:16	promote 32:20	pursue 59:14	46:24,25 47:1	31:15 35:6,17
13:8 14:2	promoted 39:2	pursuits 11:9	47:2,6	40:8 43:6,24
40:24 54:21	promoter 13:12	put 9:5 18:4		50:23 51:14
		31:12,21 36:5		52:6

regulations 16:21 27:6 32:21 33:3 34:11,19 37:23 38:9 40:24 49:19 50:22 51:2,14,19 52:12 54:22 57:24 60:17 64:12	48:17,18,21 49:1,4 62:18 requirement 31:13 requirements 62:11 requires 7:11 17:21 58:2 requiring 46:19 reserve 15:23 respect 17:9 24:9 31:5,8 32:15 33:24 47:12,25 48:4 63:1 responded 29:20 Respondent 1:23 2:11 4:1 11:12 12:12 16:9 30:19 Respondent's 24:14 response 39:20 responses 45:24 responsive 41:23 restricted 10:7 restricting 40:24 restrictions 10:5 62:12 result 35:17 54:3 retroactive 50:11 52:4 58:20,21 61:10 return 20:9 21:3 28:24 37:17 reverse 23:4,5 review 25:18 rid 39:1 right 7:5 9:10,24 23:6 24:22 25:5 26:8,23 28:3,21 29:8 33:16 44:15,17	48:9 53:3 58:10 60:1,10 rigid 16:16 ROBERTS 3:3 9:15 15:24 25:17,23 28:1 28:5 30:15 31:2,6 54:13 55:1,17 60:20 61:21 66:4 role 21:4 36:13 38:11 40:2 room 57:12 rule 22:10 29:22 29:25 45:15,17 45:19 47:15 55:23 62:23,25 63:13 rulemaking 26:9 38:6,7 48:18 49:5 58:21 61:13 63:1 rules 23:8 37:23 60:16 ruling 24:20 48:18 run 26:3 <hr/> S <hr/> S 2:1 3:1 sake 65:10 sale 4:5,9,9,10 4:10,18,21 5:1 5:1,12,13,22 7:6,7,18,20 13:1,2,12 14:8 14:19 16:13,18 16:23,24 17:3 17:9 20:16,22 32:10,10,21 33:18,19 34:7 35:5 39:13 40:24 51:15,16 51:21 52:13 54:17,22 55:7 56:4 63:6,11	63:14 64:19,22 sales 3:15,16 15:11,22 16:8 17:17,20,22 18:22,23,23 19:2,17,17 20:5,5,6,7 21:1 21:2,5,6,8,15 21:23 27:6 28:11 30:22,23 30:24,24,25 31:1,3,7,10,11 31:13,19,21 32:6,17 33:5,8 33:12,17,23,25 34:6,25 35:2 36:15 37:23 38:16 40:7 41:2,5,9,15,19 42:18,24 44:14 44:19,25 45:1 45:9 46:12 49:12,13 51:19 52:7,14,16,20 52:22 53:3,12 53:22,24 54:5 54:8 55:7,9 56:23 57:9,10 57:10 58:3 61:14 64:14,15 64:17,18,18 65:1 salesman 3:13 3:15 4:19 10:12 14:8 15:20 16:7 29:19 31:20 35:19 44:5,12 60:16 salesmen 11:15 12:22 15:8 17:7,12 18:19 19:1,8 22:12 24:21 35:15 39:3 45:12 56:1 salespeople	43:13 salesperson 33:7 34:23 38:11,14 38:22 46:10 48:10,12,15 55:12 57:6,6 salesperson's 33:23 sales-oriented 52:20 samples 57:12 satisfied 24:24 saw 29:9 saying 6:22 13:13,16 14:7 25:1 31:18 34:15 55:19 says 5:1,22 6:12 16:18 17:21 20:14 33:11,12 36:19 38:5 39:21 41:7 44:13 49:17 51:15 52:6 54:14 55:5,14 56:9 58:2 59:21 60:10 62:6,18 63:6 63:13,23 64:14 66:1 Scalia 6:9,15,18 8:18,21 9:2,8 9:11 12:6,9,20 13:5,10 14:6 15:13 17:6 18:3,8 19:3,13 19:23 22:15,22 26:1,8,14 27:13 28:20 29:21 41:24 42:1,2,4 48:6 57:23 58:8 63:25 64:3,5,9 65:9,19,22,24 schmooze 32:11 scope 45:23 script 43:13,15
--	---	--	--	--

scripts 8:8	setting 49:19	40:17,18	Stein 18:11,13	sufficient 43:16
second 4:8 13:22	Seventh 60:24	sorry 8:3 25:17	18:20,25 20:4	suggest 29:21
13:23,23 14:1	SG 25:21	43:9 44:3 49:2	22:11 34:20	35:13 41:13
16:12 20:20	SHANE 1:3	61:2	step 26:16,18	47:9 58:9
25:12 32:24	shipment 4:10	sort 16:14 22:21	31:7	suggested 16:13
33:1 59:15	short 31:7	31:6 34:5	Stewart 1:18 2:6	44:1
Secretary 3:12	side 24:14 25:5	45:16 47:8	15:25 16:1,4	suggesting
3:14,16 4:13	50:23 52:2,3	56:21	16:21 17:8,16	12:10 55:22
26:19,22 59:22	61:18	sorting 34:21	18:6,10 19:12	suggestion 39:4
60:3,15	significance	sorts 18:24	19:15 20:3,12	summary 42:18
Secretary's 4:4	58:19	Sotomayor	20:24 21:18	65:8
14:1	significant 14:5	16:11 28:19	22:5,9,18	superior 54:1
section 4:7	14:21 59:5	29:4,9 31:14	23:15,20 24:9	supervision 7:24
17:21,23 20:14	61:7	31:17,25 32:9	25:7,21,25	supplement
57:24	silly 12:7 38:13	32:23 45:2,11	26:5,13,15,21	12:17 18:5
see 62:6	simple 52:5	45:22,23	26:25 27:5,22	19:7
seek 29:13,23	simply 61:12	sounds 36:18	28:3,8,24 29:8	supplemented
seen 22:23 47:22	sitting 55:10	space 18:16	29:15,24 30:2	18:6
48:5	57:11	sparse 12:17	30:5,16 63:22	supplies 57:8
sees 54:20	situation 17:3	speak 30:13	stick 43:13,15	supporting 1:20
sell 4:2,9,10 6:12	19:7 37:15	speaking 59:19	stock 53:5	2:8 16:3
6:19,20 7:18	38:18 46:9	specific 17:8	stopped 10:17	suppose 47:7
7:19 12:22	six 59:2	23:16 38:18	31:7	supposed 9:18
14:15,16 18:15	sleeve 42:9	40:13,16	store 12:24	45:19
18:16,16 53:8	slip 32:6	specifically 39:3	13:14 14:1	Supreme 1:1,13
53:19	slipped 61:2	specifics 37:21	straightforward	sure 6:7 8:14
seller 20:8	slippery 32:2	spiel 54:14	24:7	10:18,21,25
sellers 53:17	slope 32:2	squared 46:3,3	street 13:13	12:13 19:23,23
selling 10:13	small 15:16,17	staff 53:18	strict 8:8 10:5	46:17 50:6
14:10,12 18:25	24:13	Standards 3:11	strikes 7:20	55:24 56:19
20:17 22:2	SmithKline 1:6	11:5,10,24	stuff 39:1	59:16
41:16	3:4	12:5 43:23	submission 62:9	surely 47:1
sells 14:14,15	sold 65:12	start 21:14 50:7	submitted 66:6	suspect 40:22
19:21 52:17	solicitations	50:7 56:16	66:8	41:5 55:2
sense 20:15 27:8	33:9 40:8 52:8	60:21,23	substantial	Sykes 61:2
31:11,19,24	Solicitor 1:18	State 55:14,23	44:24	system 29:5
44:19 52:13	25:14	statement 51:21	substantially	
57:15 61:10,11	Solicitor's 25:8	States 1:1,13,20	8:6	T
64:22	25:10,13	2:7 16:2	substantive 38:9	T 2:1,1
sensible 57:18	somebody 6:12	status 48:18	substantively	take 14:8 40:15
service 8:15,21	6:12,13 33:24	statute 4:20 7:6	38:7	49:18
10:19 15:2	34:1,5,6 35:4	7:10 18:19	successful 21:16	taken 18:21
services 17:24	48:12 51:16,22	37:13 46:2,23	44:6	19:15
18:1 19:17	55:10 60:6	47:6 48:9	sudden 27:16	takes 38:14
58:4	somebody's	58:25 59:21	41:13	talk 47:9,10
set 21:7,24 29:5	46:10	60:14 62:17	suddenly 23:5	talked 11:20
29:12	somewhat 40:3	statute's 3:13	25:3	talking 11:20

32:2 33:2 38:1 55:22 59:1 64:15,18,22 talks 56:13 60:15 64:17 target 34:6,25 38:16 46:12 technology 38:12 tell 8:5 45:18 60:18 tens 22:24 term 16:23 terms 26:7 territory 30:25 44:6 45:1,9 57:11 64:15,18 test 16:16 22:13 63:16,17 Thank 15:24 30:15 61:20,21 61:22 62:3 66:4 theater 15:15 theirs 6:2 theoretically 35:21 theory 16:8,25 20:3 they'd 23:9,11 thing 20:24 21:19 22:14 23:17 28:23 32:8 34:9,10 51:4,6 54:15 55:10 61:8 things 10:1 11:18 14:11 17:1 23:15 37:18 38:20 39:25 40:25 43:24 47:9 49:9 56:17,22 58:11 63:11 65:14 think 10:10 13:11 21:18	22:9 23:2 27:21 29:16 31:9,11 32:3,8 33:20 34:19 35:5,24 36:11 36:21 37:3,7 38:4,4,8,8,18 39:14 40:4,9 40:19 41:20 42:8,20 45:9 47:20,23 48:2 49:7 50:2,10 50:18 51:6 52:9,13 53:2 54:8,15,18,21 55:3,4,6,8,19 56:4,6,10,11 57:4,4 58:12 58:22 59:3,10 59:11 60:13 third-highest-... 25:15 THOMAS 1:16 2:3,13 3:7 62:1 thought 18:4 29:4 38:23 48:24 49:9,10 50:16,19 63:18 thousand 27:16 thousands 22:24 three 61:1 62:5 tied 45:8 time 9:3,13,25 9:25 12:22 15:23 18:15,16 19:21 20:5 22:16 38:6 41:16 45:7 56:24 58:24,25 times 50:15 title 4:20,22,25 5:2,3,14,16,18 5:20,21,23 6:10,16 7:9 16:17,19,25 17:4,11 45:16 46:3,11,14,18	47:11,23 48:11 48:11,13 63:19 63:22 64:5,8 told 9:21 40:23 43:15 46:6 59:7 top-level 28:13 total 44:25 tout 3:22 traditional 63:11 trained 7:23 training 30:24 57:10 transacted 41:19 transaction 16:14 46:19 52:21 transactional 34:13 transactions 34:13,17 40:13 46:21 47:10,23 transcript 62:6 64:17 transfer 4:22,25 5:1,13,16,17 5:20,21,23 6:10,16 7:9 16:14,17,19,25 17:4,10,11 21:2 45:16 46:2,18 47:10 52:23 63:19,22 64:5,8 transferring 5:3 47:23 transfers 4:20 46:14 treated 19:2 39:7 46:10 tried 30:12 tries 34:23 triplicate 38:15 trips 56:23 truck 18:18	true 10:10 11:21 15:20 21:6 30:2 32:19 try 13:13 23:14 39:6 59:6 trying 10:6 13:7 13:14 15:12 33:10 34:11 35:1 44:16 58:11 59:8 turn 30:10 36:7 38:20 57:5 two 3:19 4:12 11:18 14:11 16:8 23:15 30:22 31:21 32:1 38:24 39:25 40:22,25 45:24 47:9 55:7,8 56:2,3 63:3,20 64:8 65:14,14 two-part 20:18 type 8:13	unsupervised 11:11 urgent 50:17,19 50:25 use 17:24 18:1 19:18 28:13 39:21 50:1 58:5 60:13 user 54:12 57:20 57:21 uses 57:8
<hr/>				
V				
<hr/>				
v 1:5 3:4				
valuable 20:8				
value 27:10,12				
verb 16:25				
versed 37:20				
view 17:25 23:8 26:6,11 42:5,6 42:11,12 43:5 61:17 62:24 63:22 65:7				
violation 27:17 28:22				
visit 12:23 39:9 57:1				
volume 65:1				
<hr/>				
W				
<hr/>				
wage 8:2 18:20 25:9				
wages 9:5				
wait 55:15				
waiting 55:23 57:11,12				
walks 13:12 36:16				
want 7:1 34:5 37:13 38:20 39:19,25 41:22 42:3,7 46:15 46:22 47:6 56:10,20 58:16 64:13				
wanted 8:11 57:23				

wants 27:4 36:14 47:17	worker 8:22 10:20 21:22 31:22 59:3,4	Yi 60:24	19:25 46:3
Washington 1:9 1:16,19,22	workers 7:21 8:1,15 15:2,2 21:20 22:7 43:22	young 15:18	58:3,12,13 63:7 66:2
wasn't 49:6	working 8:15	<hr/> \$ <hr/>	3(x) 16:18
way 13:20 18:2 19:11 20:22,22 21:11,11 22:10 23:6 29:20 31:10 35:4 38:13 49:16 50:24 56:7,7 57:4 58:18,24	workplace 7:23 8:6	\$93,000 43:21	30 2:11
ways 16:8 50:15	works 21:11,12 46:13 48:12 56:7,8 58:25	<hr/> 1 <hr/>	<hr/> 4 <hr/>
weird 14:9	world 39:12	1 4:6	4 17:19 57:25 58:23
Weiss 34:20 46:8 48:10 63:22	worried 34:21	10 37:25 49:18 52:23	42a 53:1 64:25
went 25:10	wouldn't 11:15 20:25 21:9 27:9 30:11 41:24,25 42:1 59:20	10:03 1:14 3:2	<hr/> 5 <hr/>
we'll 3:3 50:22	write 15:9 28:15 49:23 60:10	100 50:2	5 37:25
we're 9:21 26:10 40:22 46:19,20	writes 38:15 54:21 57:20	11 46:14	5:00 9:13
We've 17:2	writing 36:1,3,5 36:7,10 37:9 37:11 54:4	11-204 1:4 3:4	50 62:21
wholesale 53:13	written 49:16 65:3	11:06 66:7	50-some 12:4
wholesaler 53:25 64:20	wrong 38:8 62:15	12 47:18 56:1	501 57:24
wholesalers 14:15 21:3 28:18 52:17,24 53:4,19	wrote 15:10	16 1:10 2:8	503 33:3,21 35:5
win 23:25 45:19	<hr/> X <hr/>	19 16:22	503(c) 38:9
windfall 23:10	x 1:2,8	1940 18:11 22:11,16,17	541 51:19
wonderful 19:3	<hr/> Y <hr/>	1941 59:20	541.500 17:21
Wood 60:25	year 45:5	1945 24:16 27:25 28:24 29:11 40:3	541.503 51:15
word 39:22 40:8	years 22:25 23:6 24:3 27:15 28:21 37:25 38:1 40:22,23 41:3,3 43:2 49:18,18 50:16 50:24 58:23 60:2 61:6 62:15	1949 16:22 46:7 46:9 48:10	<hr/> 6 <hr/>
words 11:12,14 44:17		<hr/> 2 <hr/>	6 58:23
work 7:21,22 8:6 9:13 15:15 15:16 20:15,21 21:12 22:4,5,7 22:25 23:18 31:22 33:12 37:24 39:23 51:16,21 52:6 56:16,25		2 18:4 19:9	62 2:14
worked 59:9		2,000 52:22	<hr/> 7 <hr/>
		20 41:3 47:19	70 24:3 28:21 38:1 40:22 41:3 43:2 49:18 61:6 62:15
		2004 38:5,19,24 49:8 64:11	75 22:25 23:6 60:2
		2007 29:18 48:21	779.241 20:14
		2012 1:10	<hr/> 8 <hr/>
		203(k) 4:7 16:23	8:30 9:12
		24 47:19 55:15 55:25	<hr/> 9 <hr/>
		24-hour 55:23	90,000 27:13 28:21 35:22
		25 44:24	
		<hr/> 3 <hr/>	
		3 2:4 58:12 61:24	
		3(k) 16:18,24 17:23 18:4,4,5 18:6 19:4,7,16	