No. 13-3818

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RAMON ALVARADO, et al.,
Plaintiffs-Appellants,

v.

CORPORATE CLEANING SERVICE, INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Honorable Edmond E. Chang

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of plaintiffs-appellants, employees of a high-rise building window cleaning company who have been deemed exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA" or "Act") under its exemption for commission-paid employees of retail or service establishments, 29 U.S.C. 207(i) ("section 7(i)"). As set forth below, the district court wrongly determined that a company that cleans high-rise buildings' windows meets section 7(i)'s requirements for a retail or service establishment.

INTEREST OF THE SECRETARY

The Secretary has a substantial interest in the proper interpretation of the FLSA's statutory provisions because he administers and enforces the Act. *See* 29 U.S.C. 204, 211(a), 216(c), 217. Section 7(i) exempts from overtime pay any employee of a retail or service establishment who earns more than half of his or her wages in commissions and whose regular rate is more than one and one-half times the minimum hourly rate required under the FLSA. *See* 29 U.S.C. 207(i). The Act's exemptions are to be narrowly construed. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). By concluding that a high-rise building window washing company is a retail or service establishment, the district court expansively interpreted section 7(i) in such a way that the employees were improperly excluded from the Act's overtime requirements.

Indeed, there are indications that some employers are turning to section 7(i) as a means to limit the Act's overtime protections. For example, the Secretary recently participated as *amicus curiae* in *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308 (11th Cir. 2013), in which the court of appeals ruled that the cable installation technicians were likely employees, not independent contractors. In response to the ruling, the employer moved to amend its answer to allege that its technicians were exempt from overtime compensation pursuant to

section 7(i). *See Scantland v. Jeffry Knight, Inc.*, No. 09-CV-1985, Dkt. No. 236 (M.D. Fla. Dec. 30, 2013). An overly broad view of what constitutes a retail or service establishment will likely cause employers to increasingly use section 7(i) as a means to avoid the FLSA's overtime requirements.

STATEMENT OF THE ISSUE

Whether the district court correctly held that a company that cleans high-rise buildings' windows is a "retail or service establishment" for purposes of section 7(i)'s overtime exemption.

STATEMENT OF THE CASE

1. Section 7(i) was added to the FLSA by the Fair Labor Standards Amendments of 1961, which expanded the scope of employees covered by the Act. *See* Pub. L. No. 87-30, § 6(g), 75 Stat. 65, 70 (1961). Section 7(i) provides that a "retail or service establishment" will not violate the Act's overtime pay requirements with respect to an employee whose workweek exceeds 40 hours if: "(1) the regular rate of pay of such employee is in excess of one and one-half times the [applicable minimum wage], and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services." 29 U.S.C. 207(i) (reprinted in full as Addendum A). Exemptions from the FLSA's overtime requirements, such as section 7(i), "are to be narrowly construed against the

employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Ben Kanowsky,* 361 U.S. at 392.[1]

Section 7(i) was enacted to exempt retail or service establishments from paying overtime to commission-based employees under specified circumstances. *See* 29 C.F.R. 779.414. "These employees are generally employed in so-called 'big ticket' departments and those establishments or parts of establishments where commission methods of payment traditionally have been used, typically those dealing in furniture, bedding and home furnishings, floor covering, draperies, major appliances, musical instruments, radios and television, men's clothing, women's ready to wear, shoes, corsets, home insulation, and various home custom orders." *Id*.

Section 7(i) does not define "retail or service establishment"; however, when section 7(i) was added to the FLSA, there existed in section 13(a)(2) of the Act an exemption from its minimum wage and overtime requirements for employees employed in certain retail or service establishments. *See* 29 C.F.R. 779.307, 779.312. The term "retail or service establishment" for purposes of section 13(a)(2) was defined as

[1] This Court has interpreted the Supreme Court's narrow construction rule to operate as a "tie breaker" in close cases involving whether an FLSA exemption applies. *Yi v. Sterling Collision Ctrs.*, 480 F.3d 505, 508 (7th Cir. 2007).

"an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry." 29 C.F.R. 779.312; Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, § 11, 63 Stat. 910, 917 (1949). Congress repealed the section 13(a)(2) exemption in 1989,[2] but the term "retail or service establishment" for purposes of the section 7(i) exemption has the same meaning as that term had in the section 13(a)(2) exemption. *See* 29 C.F.R. 779.312 ("It is clear from the legislative history of the 1961 amendments to the Act [adding the section 7(i) exemption] that no different meaning was intended by the term 'retail or service establishment' from that already established by the Act's definition, wherever used in the new provisions, whether relating to coverage or to exemption."); 29 C.F.R. 779.411 (for purposes of section 7(i)'s exemption, the term "retail or service establishment" is defined in section 13(a)(2) of Act); *Gieg v. DDR, Inc.*, 407 F.3d 1038, 1047 (9th Cir. 2005) ("The § 207(i) definition of 'retail or service establishment' derives from former 29 U.S.C. § 213(a)(2)."); *Reich v. Delcorp, Inc.*, 3 F.3d 1181, 1183 (8th Cir. 1993) ("When Congress passed § 207(i) in 1961, it specifically stated that the term 'retail or service

[2] *See* Fair Labor Standards Amendments of 1989, Pub. L. No. 101-157, § 3(c)(1), 103 Stat. 938, 939 (1989).

establishment' was to have the same meaning in that section as it did in § 213(a)(2).") (citing 29 C.F.R. 779.411).

In 1970, the Department of Labor ("Department") issued interpretive regulations to provide guidance on the Fair Labor Standards Amendments of 1961 and other amendments. *See* 29 C.F.R. 779.0; 35 Fed. Reg. 5856 (April 9, 1970).[3] The regulations break down section 13(a)(2)'s statutory definition of "retail or service establishment" into three requirements, providing that: (1) the establishment must engage in the making of sales of goods or services, (2) at least 75% of its sales of goods or services must be recognized as retail in the particular industry, and (3) no more than 25% of its sales of goods or services may be sales for resale. *See* 29 C.F.R. 779.313.

2. Plaintiffs-appellants are employed as window washers for defendant-appellee Corporate Cleaning Service, Inc. ("CCS"), which provides professional window washing services in the Chicago area. *See* Plaintiffs-Appellants' Short Appendix ("Short App."), 3-4. The vast majority of CCS' gross sales involve window washing for high-rise buildings; the average height of the buildings is 30 to 40 stories tall. *See id.* at 3-4, 27. Approximately 40% of CCS' gross sales were made to commercial customers — almost exclusively commercial office buildings, and

[3] These interpretive regulations are at a minimum entitled to deference pursuant to *Skidmore v. Swift*, 323 U.S. 134 (1944). *See* 29 C.F.R. 779.8, 779.9; *see also* footnote 7 *infra*.

for many of those jobs, professional management companies were invoiced (no individual building tenants were invoiced by CCS). *See id.* at 4. Additionally, approximately 40% of CCS' gross sales were made to residential condominium and apartment buildings, and for most of those jobs, condominium associations or professional management companies were invoiced (no individual unit owners or tenants were billed by CCS). *See id*. Less than one per cent of CCS' gross sales were made to individual homeowners. *See id*. The employees' building management expert testified that tenants in commercial and residential high-rise buildings generally are not permitted to hire contractors like CCS to perform building maintenance work. *See id*. According to the expert, the property management firm or condominium association arranges for contractors to perform building maintenance work, including window washing, and passes the cost of the work to tenants or residents in the form of rent, property management fees, or assessments. *See id*.

3. The employees sought overtime pay under the FLSA for hours worked over 40 per week. CCS argued that the employees were exempt from the FLSA's overtime requirements under section 7(i) and moved for summary judgment. In June 2010, the district court held that CCS was a retail or service establishment but denied CCS' summary judgment motion because there were disputed

issues of material fact as to whether the employees were paid on a commission basis. *See* Short App., 9-25.

4. Addressing the "retail or service establishment" requirement of section 7(i), the district court noted that there is no definition of "retail or service establishment" in the current FLSA. *See* Short App., 10 n.6. It recognized that "[t]he legislative history of the 1961 amendment indicates that Congress intended that, for purposes of § 207(i), the term 'retail or service establishment' should be defined as set out in § 213(a)(2)." *Id.* The district court focused on whether at least 75% of CCS' sales were not for resale and are recognized as retail in its industry. *See id.* at 10.

The employees argued that CCS' services were purchased by building management or condominium associations and were then resold to individual building tenants who actually paid for the services in the form of rent, property management fees, or assessments. *See* Short App., 10-11. The district court, however, agreed with CCS that building management and condominium associations are not middlemen who resell the services, but instead arrange for the provision of the services, for which the building tenants and residents pay. *See id.* at 12. According to the district court, the management companies and condominium associations "are merely conduits, facilitating the purchase of window washing services by the tenants." *Id*.

Thus, the district court concluded that "CCS's sales of services are not for resale." *Id*.

Regarding whether CCS' services are recognized as retail in the window washing industry, the district court noted that the Department's regulations list the following characteristics associated with a retail or service establishment: (1) selling goods or services to the general public; (2) serving the everyday needs of the community in which it is located; (3) being at the end of the stream of distribution; (4) disposing its goods or services in small quantities; and (5) not taking part in the manufacturing process. *See* Short App., 12-13 (citing 29 C.F.R. 779.318(a)). The district court concluded that "CCS appears to satisfy these characteristics." *Id*. at 13. It rejected the employees' contention that CCS did not sell to the general public because less than one per cent of its sales were made to individuals, pointing to the fact that the Fair Labor Standards Amendments of 1949 allowed business-to-business sales to qualify as retail sales. *See id*. The district court also determined that the buildings' tenants and residents were the "ultimate consumers" of CCS' services, and that those tenants "certainly are members of the general public." *Id.* It further concluded that CCS serves the everyday needs of community members who require clean windows in their homes and workplaces, and that CCS provides services at the end of the

stream of distribution, disposes of its services in small quantities, and does not engage in manufacturing. *See id.* at 14-15.

The district court rejected several of the employees' other arguments as to why CCS' services are not retail. In particular, the employees argued that CCS' services are related to the "maintenance of loft and office buildings," which is included on the list of businesses found in the Department's regulations, 29 C.F.R. 779.317, that the Department has determined lack a retail concept. *See* Short App., 16. The district court noted that the Department's list also includes "air-conditioning and heating systems contractors, elevator repair businesses, painting contractors, plumbing contractors, and roofing contractors." *Id*. (citing 29 C.F.R. 779.317). However, the district court declined to defer to the Department's view that building maintenance businesses lack a retail concept, noting that the regulation relies on *Kirschbaum v. Walling*, 316 U.S. 517 (1942), which addressed selling space in a loft building but "said nothing about whether the sale of building maintenance services could be considered retail." *Id.* at 16-17. Because the district court concluded that CCS satisfied the criteria in 29 C.F.R. 779.318(a) (characteristics of retail or service establishments), it declined to defer to

the Department's list of businesses lacking a retail concept found in 29 C.F.R. 779.317. *See id*.

5. Although the district court ruled that CCS was a retail or service establishment, it denied CCS' summary judgment motion because of the disputed facts as to whether CCS' compensation system paid employees on a commission basis. *See* Short App., 18-25. The case proceeded to a bench trial on that issue. In November 2013, the district court ruled that the employees were paid on a commission basis and that the section 7(i) exemption applied. *See id.* at 54.

ARGUMENT

THE DISTRICT COURT ERRED BY CONCLUDING THAT CCS IS A RETAIL OR SERVICE ESTABLISHMENT BECAUSE CCS LACKS A RETAIL CONCEPT, DOES NOT SELL ITS SERVICES TO THE GENERAL PUBLIC, FAILED TO DEMONSTRATE THAT ITS SERVICES ARE RECOGNIZED AS RETAIL, AND SELLS ITS SERVICES FOR RESALE

The district court erroneously determined that CCS met the requirements of a "retail or service establishment" for purposes of section 7(i) because: (1) the legislative history, Supreme Court case law, and the Department's regulations and other interpretations show that building maintenance lacks a retail concept; (2) CCS does not sell its services to the general public — a fundamental characteristic of a retail or service establishment; (3) CCS failed to present any evidence that its

sales are "recognized" as retail in the window washing industry; and (4) CCS' sales of services are sales for resale.

1. The Building Maintenance Industry Has Historically Lacked a Retail Concept, and the Categorical Exclusion of this Industry from Having a Retail Concept Has Been Sanctioned by Congress.

Although the term "retail or service establishment" was present in the FLSA at its enactment in the form of section 13(a)(2)'s exemption for retail or service establishments, the term was not initially defined in the Act. *See* Pub. L. No. 75-718, § 13(a), 52 Stat. 1060, 1067 (1938). Consistent with the role of administering and enforcing the Act, the Department's Wage and Hour Administrator issued in 1941 an interpretation of the retail or service establishment exemption, particularly the meaning of "retail or service establishment," in Interpretive Bulletin No. 6. *See* U.S. Dep't of Labor, Wage and Hour Division, Office of the Administrator, Interpretive Bulletin No. 6, "Retail and Service Establishments" (June 1941) (relevant excerpts are attached as Addendum B).[4]

Interpretive Bulletin No. 6 noted that the term "service establishment" was intended to capture businesses that were similar to retail establishments and that were usually local in character, usually open to the general consuming public, and

[4] As the title page of Interpretive Bulletin No. 6 makes clear, it was originally issued in December 1938, and a revised version was issued in June 1941.

usually engaged in rendering services to private individuals for direct consumption. *See* Interpretive Bulletin No. 6, ¶¶ 22-23.[5] The Bulletin further noted that such services were "usually purchased in small quantities for private use rather than for industrial or business purposes" and were usually rendered at a "retail" price. *Id.*, ¶ 23. The Bulletin distinguished between establishments that service goods owned by the general consuming public and those establishments that service goods that have only an industrial or business market, where the establishment is similar to a wholesaler with respect to the price and quantity of the services provided. *See id.*, ¶ 25. Significantly, the Bulletin listed specific examples of the types of businesses determined "in the ordinary case" not to be "sufficiently similar in character to retail establishments to be considered service establishments." *Id.*, ¶ 29. Thus, the Department determined that the businesses on this list, including "building contractors" and "companies engaged in repairing elevators," categorically do not qualify as service establishments under the Act's definition. *Id*.

The Department's interpretations in Interpretive Bulletin No. 6 were given "Congressional sanction" in 1949 when section 13(a)(2) of the Act was amended to define "retail or service

[5] Retail establishments sell goods or merchandise. *See* Interpretive Bulletin No. 6, ¶¶ 8-18. Window washing companies sell a service as opposed to goods or merchandise.

establishment." 29 C.F.R. 779.9. In the Fair Labor Standards Amendments of 1949, Congress specifically stated that any order, regulation, or interpretation of the Administrator or the Secretary then in effect "shall remain in effect as an order, regulation, [or] interpretation, . . . except to the extent that any such order, regulation, [or] interpretation . . . may be inconsistent with the provisions of this Act," or may be modified by the Administrator or the Secretary. Pub. L. No. 81-393, § 16(c), 63 Stat. 910, 920 (1949); *see* 29 U.S.C. 208 (historical note). Thus, Congress ratified the Department's interpretation of "retail or service establishment" set forth in Interpretive Bulletin No. 6, including the conclusion that certain businesses such as building contractors and those engaged in elevator repair — businesses that are analogous to CCS' high-rise building window washing business — lack a retail concept.

Subsequent Supreme Court decisions explained Congress' intent behind the Fair Labor Standards Amendments of 1949 and applied in a deferential manner the interpretations in Interpretive Bulletin No. 6. Thus, the Supreme Court stated that the 1949 amendments were not intended "to broaden the fields of business enterprise to which the exemption would apply." *Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 294 (1959). Rather, the amendments' purpose was to overturn the

Supreme Court's decision in *Roland Elec. Co. v. Walling*, 326 U.S. 657 (1946), and to "change the prior law only by making it possible for business enterprises otherwise eligible under existing concepts to achieve exemption even though . . . their sales were to other than private individuals." *Kentucky Fin.*, 359 U.S. at 294 (emphases added).[6] Moreover, in *Kentucky Finance*, the Supreme Court concluded that personal loan companies were not retail or service establishments because Interpretive Bulletin No. 6 had previously expressly determined that they were outside the term's meaning. *See id.* at 291-95. The Court explained that "enterprises in the financial field, none of which had previously been considered to qualify for the exemption [by the Department in Interpretive Bulletin No. 6] regardless of the class of persons with which they dealt, and regardless of whether they were thought of in the financial industry as engaged in 'retail financing,' remained unaffected by the amendment of [section 13(a)(2)]." *Id.* at 294-95.

[6] In *Roland Electric*, the Supreme Court affirmed a Department interpretation that an establishment could not qualify as a retail or service establishment unless it sold its goods or services to private individuals. *See* 326 U.S. at 676-78. The Fair Labor Standards Amendments of 1949 amended section 13(a)(2) to define "retail or service establishment" and to allow sales to businesses to constitute retail sales if they did not involve resale and were recognized in the industry as retail. *See Kentucky Fin.*, 359 U.S. at 293-95 (explaining the legislative history of the 1949 amendment to section 13(a)(2)). No other existing Department interpretations were affected.

Other Supreme Court cases have embraced *Kentucky Finance*'s analysis and confirmed that the 1949 amendments were not intended to broaden the scope of "retail or service establishment" and that certain types of service businesses categorically do not qualify for the exemption. In *Ben Kanowsky,* the Supreme Court emphasized *Kentucky Finance*'s holding "that the 1949 revision does not represent a general broadening of the exemptions contained in [section 13(a)(2)]." 361 U.S. at 391-92. And in *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 198-202 (1966), the Supreme Court relied on *Kentucky Finance*'s historical approach to reject the employer's view of the meaning of "retail or service establishment." The Court explained that the sale of some services are not "retail" for purposes of section 13(a)(2) even if they are "recognized as retail in the particular industry." *Id.* at 202-05. It relied on the Department's guidance documents and legislative history to indicate that typically "retail" sales will involve goods or services that are usually (but not necessarily always) acquired "for family or personal use." *Id.* at 203-05. The Court explained that "it is generally helpful to ask first whether the sale of a particular type of goods or services can ever qualify as retail whatever the terms of sale" before considering the "terms or circumstances that make a sale of those goods or services a retail sale." *Id.* at 202-03. In concluding that the

businesses at issue were not retail or service establishments, the Court noted that the Department's "considerable discretion" in determining which businesses qualify as retail "should not be understressed." *Id.* at 205.

Embracing the reasoning of these Supreme Court decisions and the interpretations set forth in Interpretative Bulletin No. 6 that were ratified by Congress, the Department issued regulations in 1970 explaining that an establishment must have a "retail concept" to satisfy the exemption:

> The term "retail" is alien to some businesses or operations. . . . As to establishments of such businesses, therefore, a concept of retail selling or servicing does not exist. That it was the intent of Congress to exclude such businesses from the term "retail or service establishment" is clearly demonstrated by the legislative history of the 1949 amendments and by the judicial construction given said term both before and after the 1949 amendments. It also should be noted from the judicial pronouncements that a "retail concept" cannot be artificially created in an industry in which there is no traditional concept of retail selling or servicing. . . . It is plain, therefore, that the term "retail or service establishment" as used in the Act does not encompass establishments in industries lacking a "retail concept". Such establishments not having been traditionally regarded as retail or service establishments cannot under any circumstances qualify as a "retail or service establishment" within the statutory definition of the Act, since they fail to meet the first requirement of the statutory definition. . . . Judicial authority is quite clear that there are certain goods and services which can never be sold at retail.

29 C.F.R. 779.316. This regulation follows Supreme Court precedent in emphasizing the legislative history of the 1949 amendments to the FLSA and traditional understandings of

particular industries. *See id.*; *see also Idaho Sheet Metal*, 383 U.S. at 202-03 (requiring the industry as a general matter to have a "retail concept" in order for a particular business in that industry to qualify as a "retail or service establishment").

The regulations also contain a "partial list" of types of businesses that, based largely on case law as well as legislative history and prior guidance, "have no retail concept" and thus categorically cannot qualify as retail or service establishments. 29 C.F.R. 779.317. The list includes building contractors and elevator repair businesses (as did Interpretive Bulletin No. 6), businesses "engaged in renting and maintenance" of "loft buildings or office buildings," and building maintenance businesses such as air-conditioning and heating systems contractors and painting, plumbing, and roofing contractors. *Id.*[7] CCS' high-rise building window washing business falls squarely within the building service,

[7] The Department's interpretive regulations are at a minimum entitled to *Skidmore* deference. *See* 29 C.F.R. 779.8, 779.9; *see also* footnote 3 *supra*. Moreover, some interpretations in these regulations also have "Congressional sanction" because, as explained *supra*, Congress approved when enacting the Fair Labor Standards Amendments of 1949 all of the Department's pre-1949 interpretations unless they were inconsistent with the 1949 FLSA amendments. 29 C.F.R. 779.9; *see Kentucky Fin.*, 359 U.S. at 292 (citing Pub. L. No. 81-393, § 16(c), 63 Stat. 910, 920 (1949)). The interpretation at 29 C.F.R. 779.317, certainly insofar as it identifies building contractors and elevator repair businesses as being outside the scope of retail or service establishments, has such "Congressional sanction."

maintenance, and repair businesses that the Department has determined since the FLSA's enactment, as subsequently supported by the statutory history and Supreme Court precedent, lack a retail concept and cannot qualify as retail or service establishments.

In response to the employees' argument that CCS' high-rise building window washing business lacked a retail concept, the district court declined to defer to 29 C.F.R. 779.317. It determined that the regulation identifies the Supreme Court's decision in *Kirschbaum v. Walling* as the basis for including businesses engaged in maintaining office buildings on the list of establishments to which the retail concept does not apply, but *Kirschbaum* "said nothing about whether the sale of building maintenance services could be considered retail." Short App., 16-17. However, even if *Kirschbaum* itself did not directly hold that the sale of building maintenance services lacks a retail concept, the regulation also identifies an instructive statement from Senator Holland, sponsor of the 1949 Senate amendment to section 13(a)(2), regarding building maintenance services. *See* 29 C.F.R. 779.317. Senator Holland stated that the "renting and maintenance of a loft building or of an office building are wholly unrelated to the concept of retail selling or servicing" and that the 1949 amendment would not change that interpretation. 95 Cong. Rec. 12,505 (1949) (emphasis added).

As further evidence of congressional intent, a conference report on the 1949 section 13(a)(2) amendment explains that the agreement reached in conference did not "change the status of . . . firms renting or maintaining loft or office buildings (such as those held non-exempt in *Kirschbaum v. Walling*, 316 U.S. 517)." 95 Cong. Rec. 14,877 (1949).

Given this legislative history with respect to building maintenance services, the district court should have concluded that CCS lacks a retail concept because "a 'retail concept' cannot be artificially created in an industry in which there is no traditional concept of retail selling or servicing." 29 C.F.R. 779.316; *see Kentucky Fin.*, 359 U.S. at 294 ("[N]othing in the debates or reports . . . suggests that Congress intended by the amendment to broaden the fields of business enterprise to which the exemption would apply."); *cf.* 29 C.F.R. 779.355(b)(1) (contracts to maintain buildings or "any other work recognized as an activity of a contracting business rather than a function of a retail merchant" are not retail sales under section 13(a)(2)).

Thus, the conclusion that building maintenance businesses such as CCS' building window washing business categorically lack a retail concept is supported by the Department's prior interpretations in Interpretive Bulletin No. 6, those interpretations' ratification by Congress in 1949, the

legislative history behind the meaning of "retail or service establishment," Supreme Court case law, and the Department's "considerable discretion" in determining which businesses qualify as retail, *Idaho Sheet Metal*, 383 U.S. at 205, which it exercised by promulgating regulations that affirm the historical meaning of "retail or service establishment" as sanctioned by Congress and the Supreme Court. Accordingly, the district court erred by ruling that CCS' window washers are exempt under section 7(i).

2. CCS Lacks a Fundamental Characteristic of a Retail or Service Establishment.

According to the Department's regulations, the salient characteristic of a retail or service establishment is that it sells its goods or services to the general public. *See* 29 C.F.R. 779.318(a).[8] Thus, selling goods or services to the

[8] The 1949 amendment to section 13(a)(2), as discussed in footnote 6 *supra*, established that the exemption was not only available for sales of goods or services to private individuals for family or household use, but was also available to retail establishments that made the same type of sale to a business. *See, e.g.,* 95 Cong. Rec. 12,502 (1949) ("[T]he services of hotels, restaurants, repair garages, filling stations, and the like, whether rendered to private householders or to business customers, will be retail, so long as they are regarded as retail services in such trades. No longer will it be possible [to conclude] that if an automobile dealer sells a truck to the local butcher, baker, or grocer the sale is not retail, but if he sells a passenger car to a private consumer the sale is retail.") (Statement of Senator Holland). The Department's regulations also explain that Congress "intended that the retail exemption extend in some measure beyond consumer goods and services to embrace certain products almost never purchased for

general public is fundamental for an establishment to satisfy the first requirement — making sales of goods or services. *See* 29 C.F.R. 779.313.

CCS' services, however, are akin to specialized industrial maintenance services "which the general consuming public does not ordinarily have occasion to use." U.S. Dep't of Labor, Wage and Hour Division, Field Operations Handbook, § 21ci00 (1990) (available at http://www.dol.gov/whd/FOH/FOH_Ch21.pdf; copy attached as Addendum C). The full provision of the Field Operations Handbook, entitled "Industrial maintenance services," is instructive:

> An organization which cleans air ducts, elevator shafts, air conditioning equipment, ventilating systems, flues, stacks, and the like, and repairs and refills fire extinguishers, fireproofs drapes, decorations, show booths, and the like, and performs maintenance work almost entirely for commercial or industrial establishments is performing specialized services which the general consuming public does not ordinarily have occasion to use. The organization is not engaged in activities which are traditionally recognized as retail even though it may also sometimes sell goods or render services to the general consuming public.

Id. The Department has also expressed this position in opinion letters. *See*, *e.g.*, U.S. Dep't of Labor Opinion Letter (July 2,

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family or noncommercial use." 29 C.F.R. 779.318(b). However, "[t]he list of strictly commercial items whose sale can be deemed retail is very small and a determination as to the application of the retail exemption in specific cases would depend upon the consideration of all the circumstances relevant to the situation." *Id.* Here, the nature of CCS' business — particularly the type and scope of services that it provides — does not qualify it as a retail or service establishment under section 7(i).

1992) (opining that the "sale of specialized alarm systems to commercial customers which the general consuming public would never or almost never purchase and the sale of maintenance and monitoring services related to such specialized alarm systems would not be recognized as retail sales") (copy attached as Addendum D); U.S. Dep't of Labor Opinion Letter WH-40, 1970 WL 26408 (June 11, 1970) (opining that a business that predominantly provided cleaning services to industrial and commercial firms using specialized equipment did not provide services to the general consuming public and could not satisfy the definition of a retail or service establishment). Because high-rise building window washing, like other industrial maintenance services, lacks the fundamental characteristic of selling goods or services to the general public, CCS cannot satisfy section 7(i)'s exemption.

3. CCS Failed to Demonstrate That Its Sales Are Recognized as Retail Sales or Services in Its Particular Industry.

Assuming arguendo that CCS does not lack a retail concept and makes sales of goods or services to the general public, "the second requirement for qualifying as a 'retail or service establishment' within that term's statutory definition is that 75 percent of the establishment's annual dollar volume must be derived from sales of goods or services (or both) which are recognized as retail sales or services in the particular

industry." 29 C.F.R. 779.322. The Department's regulations explain that it is "clear from the legislative history and judicial pronouncements that it was not the intent of this provision to delegate to employers in any particular industry the power to exempt themselves from the requirements of the Act." 29 C.F.R. 779.324. This determination "must take into consideration the well-settled habits of business, traditional understanding and common knowledge," including the understanding of "the purchaser as well as the seller, the wholesaler as well as the retailer, the employee as well as the employer, and private and governmental research and statistical organizations" and "others who have knowledge of recognized classifications in an industry." *Id.*

The district court failed to address any of the above criteria for determining whether CCS' sales are recognized as retail sales in the industry; it similarly failed to require CCS to meet its burden of establishing that its sales were "recognized" as retail "in the particular industry." The Supreme Court has made clear that a court may not assume that an employer's sales are recognized as retail without any evidence to support that fact, given that "it is clear that Congress intended that any employer who asserts that his establishment is exempt must assume the burden of proving that at least 75 percent of his sales are recognized in his industry as retail."

Ben Kanowsky, 361 U.S. at 393 (internal quotation marks omitted); *see Owopetu v. Nationwide CATV Auditing Servs., Inc. (Owopetu I)*, No. 10-CV-18, 2011 WL 883703, at *9 (D. Vt. Mar. 11, 2011) (denying summary judgment where employer "has not offered any evidence as to how persons in the industry and with knowledge of the industry view [its] business") (internal quotation marks omitted). CCS put forward no evidence that its sales were recognized as retail in the industry. Instead, it referenced only the characteristics of retail establishments from 29 C.F.R. 779.318 in its summary judgment motion. CCS did not, for example, submit an affidavit explaining in any way how sales of high-rise building window washing services are recognized as retail in that particular industry. *Compare Jones v. Tucker Commc'n, Inc.*, No. 11-CV-398, 2013 WL 6072966, at *9 (M.D. Ga. Nov. 18, 2013) (discussing an affidavit filed by someone familiar with the cable industry); *Owopetu v. Nationwide CATV Auditing Servs., Inc. (Owopetu II)*, No. 10-CV-18, 2011 WL 4433159, at *5 (D. Vt. Sept. 21, 2011) (discussing two affidavits filed by persons with knowledge of the telecommunications industry). Therefore, for this reason as well, CCS failed to establish that it qualifies for section 7(i)'s exemption.

4. CCS Sells Its Services for Resale, Precluding Application of Section 7(i).

Section 7(i)'s third requirement is that no more than 25% of the establishment's annual dollar volume may be from sales of goods or services that are made for resale. *See* 29 C.F.R. 779.330. The common meaning of "resale" is "selling again," and the regulations describe a sale of services for resale as one "where the seller knows or has reasonable cause to believe [that the goods or services] will be resold." 29 C.F.R. 779.331. As the regulations further explain, "sales for distribution by the purchaser for business purposes are sales for resale . . . even though distributed at no cost to the ultimate recipient." *Id.*

CCS sells its window-washing services to building managers and condominium associations, which arrange for building tenants' windows to be cleaned and then pass along, as intermediaries, the cost of this service. There is a well-established line of appellate cases (many of which are cited in the Department's regulations) that view goods or services passed onto another via a third party as sales for resale. For example, in *Gray v. Swanney-McDonald, Inc.*, 436 F.2d 652, 654 (9th Cir. 1971), the Ninth Circuit held that a towing company that towed cars for members of the National Auto Club and for local repair shops was engaged in a sale of services for resale because the Club and the repair shops passed the towing cost on

to their customers in the form of increased membership fees and repair rates. Similarly, in *Mitchell v. Sherry Corine Corp.*, 264 F.2d 831, 835 (4th Cir. 1959), the Fourth Circuit held that a company that sold meals to airlines, which then served the meals to passengers on flights, was engaged in sales for resale because the cost of the meals was "an operating expense taken into account in computing the rates of transportation." And in *Goldberg v. Furman Beauty Supply, Inc.*, 300 F.2d 16, 18-19 (3d Cir. 1962), the Third Circuit held that a beauty supply company that sold products to salons that used the products while providing services to their customers was engaged in sales for resale because the prices charged by the beauty parlor covered the cost of purchasing the beauty supply products. Significantly, the Fifth Circuit held that a company that provided plumbing, heating, and air conditioning services as a subcontractor for a general contractor — providing its services directly to the "ultimate consumer" or "owner" while receiving payment under the subcontract with the general contractor — was engaged in sales for resale. *See Goldberg v. Kleban Eng'g Corp.*, 303 F.2d 855, 858 (5th Cir. 1962). The Fifth Circuit recognized that it was conceivable that a supplier could sell directly to the owner of the building and receive payment directly from the owner for work performed, but in this scenario the general contractor was a "significant intermediary" and

"[n]o intricate web of legalistic theories . . . can convert this accepted commercial transaction between the subcontractor and general contractor into one between the supplier and owner direct." *Id.*

The district court ignored these cases, relying instead on a line of predominantly district court cases allowing food service subcontractors to claim the retail or service exemption on grounds that the educational institutions to which students paid fees for meals were simply conduits through which funds flowed to the food service company/employer that provided those meals. *See* Short App., 11-12; *cf. Hodgson v. ARA Servs., Inc.*, 392 F. Supp. 1167, 1173 (W.D. Va. 1975) (acknowledging the two lines of cases involving the question of sale for resale in "three-partite" business arrangements). The line of appellate cases, however, not only constitutes more persuasive authority, but also contains more persuasive reasoning. Just as the towing company in *Gray* and the building services subcontractor in *Kleban* provided their services directly to the end user or ultimate consumer without charging them because they sold their services directly to the entity that engaged those services, CCS was hired by building managers or condominium associations to clean the windows of building tenants or owners. CCS certainly knew that the cost of its window-washing services would be resold to the building tenants or owners in some form, whether

it be rent, condominium association fees, or specific line item charges for window washing imposed by building managers. Thus, in this case, there was a distinct third party arrangement involving a real intermediary and an actual sale for resale, which precludes application of section 7(i)'s exemption.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's ruling that the employees were exempt from the FLSA's overtime requirements under section 7(i).

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and 32(a)(7)(C), I certify that the foregoing Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants:

(1) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared in a monospaced typeface using Microsoft Word utilizing Courier New 12-point font containing no more than 10.5 characters per inch, and

(2) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 6,429 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Dean A. Romhilt
DEAN A. ROMHILT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants was served this 17th day of July, 2014, via this Court's ECF system and pre-paid overnight delivery, on the following:

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ADDENDUM A

29 U.S.C. 207(i)

No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

ADDENDUM B

ADDENDUM C

ADDENDUM D