No. 20-1093

In the

Supreme Court of the United States

JUST ENERGY MARKETING CORP., et al.,
Petitioners,

v.

DAVINA HURT and DOMINIC HILL, individually and on behalf of all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND THE DIRECT SELLING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL P. CORCORAN
CARLA G. GRAFF
DECHERT LLP
2929 Arch Street
Philadelphia, PA
19104

MICHAEL H. MCGINLEY
Counsel of Record
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
Michael.McGinley@dechert.com
(202) 261-3300

Counsel for Amici Curiae

MARCH 15, 2021

TARA S. MORRISSEY
STEPHANIE A. MALONEY
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

BRIAN BENNETT
DIRECT SELLING
ASSOCIATION
1667 K Street, NW
Suite 1100
Washington, DC 20006

Counsel for the Direct Selling Association

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION
OF INDEPENDENT
BUSINESS, SMALL
BUSINESS LEGAL
CENTER
555 12th Street, NW
Suite 1001
Washington, DC 20004

Counsel for the National Federation of Independent Business

QUESTION PRESENTED

Whether, as the Second Circuit held, Petitioners' door-to-door solicitors are exempt "outside salesmen" under the FLSA or, as the Sixth Circuit held, Petitioners' door-to-door solicitors are not exempt "outside salesmen" under the FLSA because the sales agreements remain subject to regulatory checks and Petitioners' ultimate approval.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. A vital function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The National Federation of Independent Business ("NFIB") is the voice of small business, advocating on behalf of America's small and independent business owners, both in Washington, D.C., and in all 50 state capitals. NFIB is nonprofit, nonpartisan, and member-driven. Since its founding in 1943, NFIB has been exclusively dedicated to small and independent businesses, and remains so today. NFIB regularly files *amicus* briefs in cases, like this one, that raise issues of vital concern to its members and small businesses around the nation.

---

[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, their members, and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice of *amici curiae*'s intent to file this brief at least 10 days prior to the due date. All parties have consented to the filing of this brief.

The Direct Selling Association ("DSA") is a 110-year-old national trade association that represents companies which market products and services directly to consumers through an independent, entrepreneurial salesforce. Familiar to the public as party plan, door-to-door and similar in-person sales, the DSA serves to promote, protect and police the direct selling industry. In 2019, there were 6.8 million direct sellers in the United States, with retail sales of approximately $35.2 billion. DSA estimates that its 107 member companies, which include some of the country's most well-known and respected businesses, account for the vast majority of the industry's annual sales.

INTRODUCTION AND SUMMARY OF ARGUMENT

The circuit split on the question presented could not be more obvious, and the impact of the lower court's decision will reverberate far beyond the parties in this case. In *Flood v. Just Energy Marketing Corp.*, 904 F.3d 219, 229 (2d Cir. 2018), the Second Circuit held that Petitioners' door-to-door salespeople are exempt from the overtime and minimum wage requirements of the Fair Labor Standards Act ("FLSA"), in line with this Court's decision in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). However, in the decision below, the Sixth Circuit rejected the Second Circuit's analysis. It held that indistinguishable door-to-door salespeople are *not* exempt under the FLSA—even though they worked for the same Petitioners, performed the same tasks, and sought the same sales.

The consequences of that circuit conflict will harm not only Petitioners, but businesses and salespeople nationwide.[2] The sales industry is massive, with millions of Americans involved in direct selling in particular. Those businesses offer entrepreneurial opportunities for people coast-to-coast. And salespeople generate billions of dollars in economic growth annually—which is critical to the nation's post-pandemic economic recovery. But the Sixth Circuit's decision causes confusion in the industry, while creating competitive imbalances based on no more than geographic happenstance.

In particular, the new split will warp competition, leaving individuals who make their living as salespeople and the companies with whom they are associated in the Sixth Circuit at a distinct disadvantage to those in the Second Circuit. And it will leave similarly situated salespeople and businesses throughout the rest of the country guessing as to which rule will eventually apply to them. As Congress recognized when enacting the FLSA and its "outside salesman" exemption, the salesperson's role does not fit neatly within the FLSA's standard hourly wage and overtime requirements. Salespeople work flexible hours, earning commissions or other income on the sales they make, often with the freedom to set their own schedule and work when they choose. To force that sort of flexible role into hourly wage and

---

[2] *Amici* note that, when salespeople are deemed independent contractors, rather than employees, the FLSA does not apply. Because the petition does not raise that question, *amici* assume for the purposes of argument that the sales representatives in this case are employees under the FLSA.

overtime requirements thus imposes a burden on businesses *and* the salespeople themselves, who might see their flexible work opportunities disappear if the Sixth Circuit's rule prevails.

Worse, because the split exists as to the very same type of salespeople, many of whom travel between states, the Sixth Circuit's decision creates uncertainty as to who counts as an "outside salesman," and how companies should associate with salespeople who, for instance, might cover territory spanning from western New York (the Second Circuit), across Pennsylvania (the Third Circuit), and into Ohio (the Sixth Circuit). That disconnect between the Circuits' rules could hamper economic growth at a time when millions of Americans are looking for job opportunities and millions of consumers are relying on alternative forms of retail. And the Sixth Circuit's decision is fundamentally inconsistent with the fairness embodied by the FLSA and this Court's reading of its exemptions. At bottom, not only does the Sixth Circuit's rule threaten confusion by splitting from the Second Circuit, but it is squarely at odds with the text, structure, and history of the FLSA. This Court should therefore grant certiorari and establish a uniform, nationwide rule to avoid that legal uncertainty and economic disruption.

ARGUMENT

I. The Decision Below Will Sow Confusion And Hamper Economic Growth.

The sales industry is massive and critical to our Nation's economy. By offering flexible earning opportunities to millions of Americans, the industry has long been an entrepreneurial and economic

powerhouse, driving innovation and commercial growth. Yet the circuit split created by the decision below could throw that industry into confusion, chilling an economic bright spot and hampering growth at a time when the country needs it most. And by treating identical salespeople differently, the circuit split will warp competition and create doubt as to how companies should treat the salespeople they engage—stifling the industry and harming the individuals whom the Sixth Circuit's decision purported to benefit.

A. The Sales Industry Provides Flexible Earning Opportunities, Despite Challenging Economic Conditions.

Salespeople have long been a staple of the American workforce.[3] From the travelling salesmen of the nineteenth century to virtual sales today, salespeople have driven our economy, connecting retailers and manufactures to customers while expanding demand for new products.[4] Across the economy, the scope and importance of the sales industry is significant.[5] Driven by the simple fact that many consumers enjoy receiving in-person sales presentations, and appreciate the personalized touch

---

[3] *See generally, e.g.*, Morris L. Mayer, *Direct Selling in the United States: A Commentary and Oral History* (1995), *available at* https://bit.ly/3uwl2Kb.

[4] *See* Walter A. Friedman, BIRTH OF A SALESMAN: THE TRANSFORMATION OF SELLING IN AMERICA 196 (2009).

[5] *See id.*; *The Business of Direct Selling*, PBS (last visited March 14, 2021), https://to.pbs.org/3aWhby0.

of a salesperson, the sales industry has played a crucial role in our country's economic development.[6]

Today, millions of Americans build businesses, and even more have established careers selling high quality products. For example, about 6.8 million people chose to pursue direct sales opportunities in 2019, generating $35.2 billion in retail sales.[7] Those direct sellers served more than 36.9 million customers, selling merchandise and services ranging from wellness products to educational items.[8] In turn, those direct sellers and customers create a network of businesses that collectively involve more than 16.5 million people in the United States alone.[9] And that network is part of a global direct selling industry that encompasses nearly 120 million sellers and generates more than $180 billion annually.[10]

Moreover, sales opportunities offer uniquely flexible and entrepreneurial opportunities to millions of Americans. Compared to other careers or professions—such as law, medicine, or even taxi driving—a career in the sales industry generally

---

[6] *See* Friedman, BIRTH OF A SALESMAN 196, *supra*; Direct Selling Association, *2020 Consumer Attitudes and Entrepreneurship Study* (last visited March 14, 2021), https://bit.ly/3aS8s00.

[7] Direct Selling Association, *Direct Selling in the United States: 2019 Industry Overview* (last visited March 14, 2021), https://bit.ly/2Nx9jKR.

[8] *Id.*

[9] Direct Selling Association, *Impact of Direct Selling By State, 2018* (2019), https://bit.ly/3dJfh5X.

[10] World Federation of Direct Selling Associations, *Fact Sheet* (last visited March 14, 2021), https://bit.ly/37J4t3V.

requires minimal start-up cost, allowing people to join the workforce with little risk or barrier to entry.[11] Salespeople typically enjoy flexible hours, with 89% of direct sellers working part time with the freedom to pursue other opportunities or responsibilities at home.[12] That freedom is a core reason why many are drawn to the industry: In a recent survey, 65% of respondents said that they became direct sellers for the flexibility and 77% of respondents voiced interest in such entrepreneurial opportunities.[13]

Even with that flexibility, sales opportunities are often economically rewarding.[14] Indeed, both this Court and the federal government have recognized that many salespeople "'earn salaries well above the minimum wage' and enjoy[] other benefits that 'set them apart from nonexempt workers entitled to overtime pay.'" *Christopher*, 567 U.S. at 166 (quoting 69 Fed. Reg. 22,124). And the vast majority of direct sellers have a positive view of their situation, with 78% saying they would recommend their position to

---

[11] Direct Selling Association, *2020 Consumer Attitudes and Entrepreneurship Study*, *supra*.

[12] *See id.*; Direct Selling Association, *Direct Selling in the United States: 2019 Industry Overview*, *supra*.

[13] Direct Selling Association, *Direct Selling: An Accessible Path to Entrepreneurship*, at 2 (last visited March 14, 2021), https://bit.ly/3aTTdDK; Direct Selling Association, *2020 Consumer Attitudes and Entrepreneurship Study*, *supra*.

[14] Direct Selling Association, *Direct Selling: An Accessible Path to Entrepreneurship*, at 2, *supra*.

others and 82% describing their work situation as excellent or good.[15]

Put simply, salespeople enjoy the flexibility to earn a good living or supplement their income. That unique opportunity has benefitted a wide range of people, from busy parents to military spouses, who seek an income without the restrictions or entry costs of a more traditional job. Indeed, commentators have noted how direct selling opportunities have historically drawn more women into the economy and empowered them to start their own businesses.[16] And in recent years, younger generations have shown a growing interest in the kinds of opportunities offered by the sales industry.[17]

Crucially, the number of people benefitting from these opportunities has only increased in recent years. Even in the face of economic downturn and online shopping, direct sales is a growing market, with about 2% to 5% expected industry growth in 2020.[18] As

---

[15] *Id.*

[16] Jordan Grant & Caitlin Kearney, *Parties for Plastic: How Women Used Tupperware to Participate in Business*, National Museum of American History (March 15, 2016), https://s.si.edu/3dNfR2A; Kat Escher, *The Story of Brownie Wise, the Ingenious Marketer Behind the Tupperware Party*, Smithsonian Magazine (April 10, 2018), https://bit.ly/2NyNmLo. To this day, women make up 74% of the direct selling workforce. Direct Selling Association, *Direct Selling in the United States: 2019 Industry Overview*, *supra.*

[17] Direct Selling Association, *2020 Consumer Attitudes and Entrepreneurship Study*, *supra.*

[18] Direct Selling Association, *Direct Selling in the United States: 2021 and Beyond* (August 2020).

brick-and-mortar stores close, the sales industry offers a way to fill the gap for consumers who still prefer the human touch in their commercial transactions.[19] And that industry growth comes at a time when the global economy faces severe headwinds from the ongoing COVID-19 pandemic.

B. The Decision Below Creates Confusion and Inefficiency in an Important Industry.

The circuit split created by the Sixth Circuit's decision threatens to inject confusion and inefficiency into this vital industry. Congress designed the FLSA's "outside salesman" exemption for a good reason. As courts recognized just a few years after the statute's enactment, "[t]he reasons for excluding an outside salesman are fairly apparent," since "[t]here are no restrictions respecting the time he shall work and he can earn as much or as little . . . as his ambition dictates." *Jewel Tea Co. v. Williams*, 118 F.2d 202, 207-08 (10th Cir. 1941); *see also Bradford v. Gaylord Prods.*, 77 F. Supp. 1002, 1004-05 (N.D. Ill. 1948). Such salespeople "ordinarily receive[] commissions as extra compensation," and work "away from [their] employer's place of business." *Jewel Tea Co.*, 118 F.2d at 208. Indeed, a key attraction of the sales industry is its flexibility, which permits salespeople to set their own schedule and work extra hours some weeks while cutting back during others. Given the busy lives led

---

[19] *See id.*; James Conca, *The Coronavirus Accelerates Online's Destruction of Brick & Mortar Stores*, FORBES (Aug. 21, 2020), https://bit.ly/37UuYmV; Tamara Charm et al., *Survey: US Consumer Sentiment During the Coronavirus Crisis*, MCKINSEY & CO. (Dec. 8, 2020), https://mck.co/3qVDidH.

by many dual-income families, such flexible arrangements can be particularly attractive for those who wish to find both employment and the time to care for children or relatives.[20]

The FLSA's strict requirements do not account for such flexible working arrangements—except through the statute's exemptions. The default rules set forth in the FLSA are designed around a standard forty-hour workweek, with overtime payment required for any work in excess of those forty hours each week. *See* 29 U.S.C. § 207(a). Because outside salespersons do not fit that standard mold—as this Court itself recognized in *Christopher*, 567 U.S. at 166—Congress exempted the "outside salesman" from the FLSA's normal rules. To ignore the FLSA's deliberate design and superimpose the statute's normal requirements on salespeople like Petitioners' would require companies to somehow "standardize [their] time frame[s]" and track their salespeople's hours, even while they work away from the office and choose when and where to sell. *See id.* That ill-fitting result is antithetical to the very nature of the sales industry, and the rational policy choices that Congress embodied in the FLSA's outside salesman exemption.[21]

---

[20] *See* Natalie Slavens Abbott, Comment: *To Pay or Not to Pay: Modernizing Overtime Provisions of the Fair Labor Standards Act*, 1 U. PA. J. LABOR & EMPLOYMENT LAW 253, 261 (1998).

[21] Consistent with that legislative choice, Congress and several states have statutorily defined direct sellers as independent contractors. *See, e.g.*, 26 U.S.C. § 3508; OHIO REV. CODE ANN. § 4141.01(B)(3)(g). For purposes of highlighting the scope of the sales industry, this brief does not differentiate between outside salespeople and independent contractors. Indeed, should the

Those burdens will only be exacerbated by the Sixth Circuit's failure to offer a meaningful distinction from either *Christopher* or the Second Circuit's decision in *Flood*. By parsing such nuanced and legally irrelevant distinctions among salespeople, the potential for confusion and hardship in the industry is enormous.

II. The Decision Below And Resulting Circuit Split Will Illogically Treat The Same Salespeople Differently.

The outside salesman exemption promotes fairness and practicality. And the sales industry—which includes both salespeople and companies alike—relies on those principles. Yet the circuit split created by the opinion below directly undermines both principles. If left undisturbed, it could result in disparate treatment of similarly situated salespeople and businesses based on no more than geographic happenstance. Because the Sixth Circuit's rule conflicts with the FLSA's text, structure, and history, this Court should grant certiorari and reverse.

A. Congress Intended the "Outside Salesman" Exemption to be Applied In a Fair and Practical Manner.

As its title reflects, the FLSA was fundamentally premised on fairness. By its very text, the FLSA was adopted to eliminate "unfair method[s] of competition in commerce," "labor disputes burdening and obstructing commerce and the free flow of goods in

---

Court fail to correct the Sixth Circuit's rule, it will cause confusion for the entire industry.

commerce," and "interfere[nce] with the orderly and fair marketing of goods in commerce." 29 U.S.C. § 202. As courts have recognized, "Congress intended . . . to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167 (1945) (citation omitted). This "policy of uniformity in the application of the provisions of the Act" can only be achieved with "equality of treatment." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 710 (1945).

The FLSA also carves out several exemptions, which "are as much a part of the FLSA's purpose as the overtime-pay requirement." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). In *Encino Motorcars*, this Court refused to apply a narrowing construction to those exemptions and instead explained that courts "have no license to give the exemption[s] anything but a fair reading." *Id.* That fair-reading approach examines "how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued," and requires "the suppression of personal preferences regarding the outcome."[22]

A fair reading is particularly important with respect to the outside salesman exemption, given its inherent flexibility and practicality. *See supra* Section I.B. The Department of Labor has long regarded the exemption as applying to individuals who "in a

---

[22] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012).

practical sense" engage in activities that "are of the same nature as those of persons making sales."[23] In other words, outside salespeople are individuals who "*in some sense* make a sale," regardless of technical differences or "technological changes in how orders are taken and processed" when obtaining a commitment to buy.[24] Indeed, as the Department of Labor has explained, "[e]xempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button," and proposed changes to the regulations were "intended to avoid" such technical and impractical results.[25]

B. The Decision Below Fosters Unfairness, Impracticality, and Disparate Treatment.

The Sixth Circuit's approach conflicts with the text, structure, and purpose of the FLSA's exemptions. The lower court's meager list of dissimilarities between the sales representatives in *Hurt* and *Flood* hardly establishes that "no circuit split exists." Pet.App.17. On the contrary, the Sixth Circuit ignored key *similarities* between the sales representatives in New York and Ohio who travel door-to-door selling

---

[23] Dep't of Labor, Wage and Hour and Public Contracts Divisions, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition at 45 (Oct. 10, 1940), *available at* http://tinyurl.com/3qpcwx5 (emphasis added).

[24] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,162-63 (Apr. 23, 2004) (emphasis added).

[25] *Id.* at 22,163.

alternative energy on behalf of the same parent company. *Compare* Pet.App.3 *with Flood*, 904 F.3d at 224-25. And, most critically, the Sixth Circuit brushed aside the basic fact that the sales representatives in New York *and* Ohio were *making sales* for Just Energy in any real sense of the term.

In short, as Petitioners explained, "[t]here is no meaningful basis for distinguishing the Sixth and Second Circuit cases because they involve the same category of individuals performing the same sales functions for the same employer." Pet. at 1. Yet, the Sixth Circuit rejected those numerous similarities as irrelevant and posited that "*Flood* involved a separate group of licensed Just Energy subsidiaries that operated in New York at a worksite that functioned very differently from Plaintiffs' worksite." Pet.App.17. In doing so, the Sixth Circuit tasked companies within its jurisdictional bounds with determining whether they "operate" more like the New York subsidiary in *Flood* or the Ohio subsidiary in *Hurt*. Inevitably, this will cause substantially-similar sales representatives, some of them employed by the same company, to be treated differently—and thus unfairly—under the FLSA. *See* Pet.App.28 (Murphy, J., dissenting) ("So two circuit courts are now holding the same company to conflicting legal mandates. That state of affairs is unsustainable.").

Moreover, across the country, businesses engaging salespeople will diverge in their approaches under each circuit's analysis even though they all, "*in some sense*," make sales.[26] Those companies will be

[26] 69 Fed. Reg. at 22,162-63.

left to guess how they should treat their salesforce based on the conflicting factors considered in *Hurt* and *Flood*, plainly increasing legal compliance costs for businesses as they struggle to determine who now counts as an "outside salesman" and who does not.[27] And, when inevitable litigation results—particularly given the increasing number of wage and hour lawsuits being filed in recent years[28]—courts within the Sixth Circuit will be forced to parse minor differences in companies' relationships with salespeople. As a result, similar salespeople and similar businesses in different parts of the country will operate under different approaches to a single FLSA exemption that is intended to be uniformly applied in a fair, reasonable, and practical manner.[29]

---

[27] *See* Gretchen Agena, *What's So 'Fair' About It?: The Need to Amend the Fair Labor Standards Act*, 39 HOUS. L. REV. 1119, 1131 (2002) (noting that "for employers with hundreds or thousands of employees, the burden of engaging in the kind of intensive, individualized determination required to ensure compliance with the FLSA is tremendous").

[28] *See* Nancy Hatch Woodward, *Number of FLSA Lawsuits Increases: Are Your Classifications Up to Date?*, 30 No. 9 Employment Alert 2 (May 2, 2013).

[29] *See* Note, Kathryn S. Crouss, *Employment Law–Welcome to the Jungle: Salespeople and the Administrative Exception to the Fair Labor Standards Act*, 35 W. N.E. L. REV. 205, 246 (2012) ("[U]niform application of the law is essential. It would be fundamentally unfair for a mortgage broker, for example, working for one bank to be ineligible for overtime compensation while a broker working for a different bank would be entitled to overtime pay for identical job duties. At the same time, employers need a uniform standard by which to classify salespeople in order to avoid costly litigation.").

The FLSA's collective action provision will only magnify that disparate treatment. The statute provides that "[a]n action to recover the liability . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). Because companies like Just Energy have salespeople nationwide,[30] a collective action brought by a salesperson in one state might potentially be certified for every state in which the company operates. Plaintiffs will be encouraged to forum shop across circuit lines, choosing the application of the outside salesman exemption that favors their litigation objectives—while attempting to join sellers from other circuits to fit their goals. That disjunction will result in a patchwork of inconsistent opinions, with potentially overlapping and contradictory rulings as to indistinguishable salespeople. Businesses will struggle to manage the overtime requirements for salespeople who work in various states and who are subject to various collective actions.[31] And those

---

[30] R. Todd Eliason, *DSN Announces 2020 Global 100 List*, DIRECT SELLING NEWS (April 1, 2020), https://bit.ly/3sx81OD.

[31] These risks are particularly poignant given the expansive reach of FLSA collective actions. Recently, district courts have split on whether this Court's decision in *Bristol-Myers Squibb v. Superior Court of California*, 137 S. Ct. 1773 (2017), applies to FLSA collective actions. *See, e.g.*, *Waters v. Day & Zimmermann NPS, Inc.*, 464 F. Supp. 3d 455, 459-61 (D. Mass. 2020) (collecting cases; reasoning that collective actions should not be limited to in-state plaintiffs based on the purpose of the statute); *Parker v. IAS Logistics DFW, LLC*, No. 20 C 5103, 2021 WL 170788, at *2-3 (N.D. Ill. Jan. 19, 2021). The circuit split caused by the Sixth

dislocations are especially troubling, given that sales are increasingly done via social media or other online platforms.[32]

This very case illustrates the problem: The plaintiffs here brought both class and collective actions, and the district court certified the plaintiffs' FLSA claim to cover sales representatives associated with Just Energy's subsidiaries in Ohio, Illinois, Pennsylvania, Maryland, California, and New York. Pet. at 9, 33; Pet.App.6, 31-32. But a conditional class of New York sales representatives was also certified in *Flood*. *See generally Flood v. Just Energy Mktg. Corp.*, No, 15 Civ. 2012 (AT), 2016 WL 354078 (S.D.N.Y. Jan. 25, 2016). The Sixth Circuit's application of the outside salesman exemption may therefore apply to some salespeople who are affiliated with Just Energy's New York subsidiaries, while the Second Circuit's contrary rule will apply to others within the same State who perform the same tasks. That internally inconsistent outcome is unworkable and will only sow confusion where the law seeks to provide uniformity. This Court should thus grant certiorari and enforce the single, nationwide, and commonsense rule that the FLSA provides.

Circuit here will be further amplified by inconsistent approaches to FLSA collective actions, as well as any inconsistencies in the treatment of sales representatives as independent contractors. And that confusion will persist until this Court provides clarity on the application of the outside salesman exemption.

[32] Direct Selling Association, *2020 Consumer Attitudes and Entrepreneurship Study*, *supra*.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to grant certiorari and reverse.

Respectfully submitted,

MICHAEL P. CORCORAN
CARLA G. GRAFF
DECHERT LLP
2929 Arch Street
Philadelphia, PA
19104

MICHAEL H. MCGINLEY
Counsel of Record
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
Michael.McGinley@dechert.com
(202) 261-3300

Counsel for Amici Curiae

TARA S. MORRISSEY
STEPHANIE A. MALONEY
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION
OF INDEPENDENT
BUSINESS, SMALL
BUSINESS LEGAL
CENTER
555 12th Street, NW
Suite 1001
Washington, DC 20004

Counsel for the National Federation of Independent Business

BRIAN BENNETT
DIRECT SELLING
ASSOCIATION
1667 K Street, NW
Suite 1100
Washington, DC 20006

Counsel for the Direct Selling Association

MARCH 15, 2021