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 IN OPPOSITION

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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.

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INTRODUCTION

Two courts of appeals addressed whether Petitioners could deny Respondents a basic, minimum wage and overtime based on the "outside salesman" exception to the Fair Labor Standards Act (FLSA). Both set out the relevant statutory and regulatory text, interpreted the exception in light of *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142 (2012), and applied this law to the distinct records before them. Petitioners are happy with one outcome and unhappy with the other. But this Court's review is reserved for important questions of federal law, and this petition raises none.

This Court has stressed that the application of the outside-sales exemption to a given case requires "a functional, rather than a formal, inquiry." *Id.* at 161. The FLSA applies across all industries, but not all industries operate the same way. And so, courts tasked with determining whether a given employee falls within the exemption, and outside the FLSA's protections, must "view[] an employee's responsibilities in the context of the particular industry in which the employee works." *Id.*

The Sixth Circuit below followed that command when reviewing the jury's verdict that Respondents did not fall within the outside-sales exemption. Respondents were hired to go to homes identified by Petitioners and convince those residents to complete an application to purchase electricity and natural gas from Petitioners. When a resident signed an application, Respondents dropped out of the picture: They had no role in, or control over, whether Petitioners finalized that application. Petitioners had unfettered discretion to decide whether to eventually sell these commodities to a resident. And the trial record showed that Petitioners exercised that discretion to such a degree that some Respondents *never* received a commission tied to a "sale" despite submitting many completed applications.

In the context of the power industry, and on the record before it, the Sixth Circuit explained that Respondents did not fall within the outside-sales exemption. The connection between Respondents' activities and any eventual sale was so attenuated, in light of Petitioners' frequent, unexplained exercise of their complete discretion not to finalize a contract, that the mere act of securing an application did not amount to a completed "paradigmatic sale of a commodity." *Id.*

at 164. And there was no reason to believe that, in this industry, a sale was viewed as anything other than a completed contract to provide that commodity.

There is no need for this Court to review this decision. Petitioners suggest that the Sixth Circuit split with the Second Circuit because that court held that other employees, operating in another state, under different employment conditions fell within the exemption. But the Sixth Circuit correctly explained that the different outcomes are explained by the different factual records before the two courts, not a disagreement on the law. Petitioners further suggest that the Sixth Circuit unreasonably cabined this Court's decision in *Christopher*. But it is Petitioners who would twist the "functional" inquiry that *Christopher* endorsed into a formalist, per se rule that any employee who is a but-for cause of an eventual sale falls within the outside-sales exemption.

The petition for certiorari should be denied.

STATEMENT

A. Statutory and Regulatory Background

Congress enacted the FLSA, 29 U.S.C. § 201 *et seq.*, "to protect all covered workers from substandard wages and oppressive working hours." *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2121 (2016) (internal quotation marks omitted). Employees subject to the FLSA are owed a minimum wage, 29 U.S.C. § 206(a), and overtime for work above a forty-hour weekly maximum, *id.* § 207(a). The FLSA contains a series of exemptions, and an employee who falls within an exemption is not entitled to these basic protections. *Id.* § 213.

The outside-sales exemption is one of these exemptions from the FLSA's coverage. The minimum wage and overtime protections do not apply to "any employee employed * * * in the capacity of outside salesman." *Id.* § 213(a)(1). The FLSA does not define that term; instead it authorizes the Secretary of Labor to promulgate regulations to do so. *Id.* ("as such terms are defined and delimited from time to time by regulations of the Secretary" subject to the requirements of the Administrative Procedure Act).

The Secretary has promulgated regulations under that authority. Under these regulations, there are two requirements: (1) that an employee work "outside," which he does if he "is customarily and regularly engaged away from the employer's place or places of business in performing [his] primary duty," 29 C.F.R. § 541.500(a)(2); and (2) that an employee's "primary duty" is "making sales [as defined in 29 U.S.C. § 203(k)]" or "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer," *id.* § 541.500(a)(1)(i)-(ii).[1]

The regulations thus incorporate the FLSA's general definition of sale into the outside-sales exemption regulation. Under that definition, a sale "includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). In *Christopher*, this Court examined that definition and held "that the catchall phrase 'other

[1] Other regulations flesh out these concepts in more detail. *See* 29 C.F.R. § 541.502 (defining working "away"); *id.* § 541.700(a) (defining "primary duty"); *id.* § 541.2 (an employee's "salary and duties" determine his status, not a "job title alone").

disposition' is most reasonably interpreted as including those arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity." 567 U.S. at 164.

As applied to the pharmaceutical industry at issue in *Christopher*, that meant that representatives who obtained commitments from physicians to prescribe their employers' drugs were "making sales" within the meaning of the outside-sales regulation. Securing that commitment was "the most that" these representatives "were able to do to ensure the eventual disposition of the products" because a physician would need to make a patient-by-patient prescribing decision, and a patient would then need to make a purchasing decision at a pharmacy. *Id.* at 165. "This kind of arrangement, in the unique regulatory environment within which pharmaceutical companies must operate" fell within the exemption. *Id.*

The outside-sales exemption was "premised on the belief" that employees that fell within its umbrella would not need the FLSA's protections. *Id.* at 166. These employees typically earned "well above the minimum wage and enjoyed other benefits." *Id.* (internal quotation marks omitted). And they typically performed work that employers could not standardize to a 40-hour workweek or transfer between employees to maintain a 40-hour workweek for each worker. *See id.*

B. Procedural History

1. Petitioner Just Energy Group, Inc. supplies "electric power and natural gas to residential and commercial customers." Pet. App. 2. In seven states, including Ohio, it operates through Commerce Energy, Inc., its licensed subsidiary. *Id.* It markets these energy

commodities through Just Energy Marketing Corp. *Id.*[2]

Respondents are a group of people hired by Just Energy Marketing to perform services for Commerce Energy. *Id.* They were hired "as door-to-door solicitors" for the power and natural gas supplied by Commerce Energy. *Id.* The position did not require any minimum level of education or any sales experience. *Id.* at 3.

Respondents worked out of Just Energy's offices, where their activities were tightly controlled. *See Hurt* v. *Com. Energy, Inc.*, No. 1:12-CV-00758, 2013 WL 4427257, at *1–3 (N.D. Ohio Aug. 15, 2013). They "were typically required to attend daily morning meetings" before being driven "into the field" by a Just Energy supervisor. Pet. App. 3. As some testified, Just Energy required them to work on certain days, at certain times. *Id.* Respondents were required to wear Just Energy-branded clothing, and Just Energy decided where Respondents would work, giving them "maps with highlighted streets showing where they were required to work for the day." *Id.* And Just Energy supervised them in the field, controlling any breaks they took. *Id.*

Just Energy also controlled what Respondents did once they reached a door. They "were instructed to follow a script verbatim." *Id.* If a resident "became

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[2] Petitioners often refer to the electricity and natural gas that they provide as "services," *see, e.g.*, Pet. 7, presumably because doing so implies that the portion of the outside-sales exemption that refers to "obtaining orders or contracts for services," is in play. 29 C.F.R. § 541.500(a)(1)(ii). The Sixth Circuit held otherwise because Sixth Circuit precedent deems electricity and natural gas to be "commodities." Pet. App. 19–20.

interested," Respondents "filled out a 'customer agreement' " which the customer signed, sometimes referred to as "an 'application.' " *Id.* at 3–4. This application "was non-binding and did not finalize the transaction." *Id.* at 4.

An application cut off Respondents' interaction with Commerce Energy's potential future customers. Respondents would use the resident's phone to place a call to a third-party verifier but were required to leave the residence before the call began. *Id.* The verifier would then confirm that the customer was not being pressured and understood the potential terms. *Id.* Respondents "were not allowed to return or speak to the customer after the call." *Id.* That is, they "had no ability to personally follow-up, answer questions and assuage concerns, or confirm the transaction with the customer." *Id.* at 14. "Customers were instructed to direct any questions or concerns to Just Energy's customer service." *Id.* at 18. If Respondents violated these procedures, they could be fired. *Id.* at 4.

After Respondents' involvement ended, the process of finalizing the agreement continued. Just Energy ran a credit check on the potential customers. *Id.* And "Just Energy could approve the application and finalize the sale or choose to reject the application." *Id.* As the application made clear, it had "unfettered discretion" to do so. *Id.* (internal quotation marks omitted).

Respondents were paid on a commission basis for sales that were *finalized*, not for applications. "Just Energy exercised its discretion to reject applications frequently," and Respondents often received no explanation for why it had done so. *Id.* at 5. Just Energy exercised this discretion to reject applications to such

a degree that one plaintiff, for example, "never received a commission even after working six to seven days a week for at least a month and turning in three to five signed customer agreements to Just Energy every day." *Id.* at 6; *see also id.* at 5–6 (detailing the lack of finalized agreements).

2. Davina Hurt and Dominic Hill brought this action on behalf of themselves and others in their position to recover for unpaid minimum wages and overtime wages. Pet. App. 1–2. They raised claims under the FLSA and the parallel Ohio Minimum Fair Wage Standards Act. *Id.* at 6. The FLSA claims proceeded as a collective action, and the state-law claims proceeded as a Rule 23 class action. *Id.*[3]

The case proceeded to trial after the district court denied summary judgment. Petitioners claimed that the outside-sales exemption applied, an issue on which they bore the burden of proof. *See, e.g.*, *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 196-197 (1974). The court identified several genuine issues of material fact that precluded summary judgment. These included, for example, the level of control that Just Energy exercised over finalizing applications and the level of control that it exercised over Respondents'

[3] Petitioners refer to Respondents who worked out of offices in New York, not Ohio. *See* Pet. 9, 33. 1,370 people opted in to the FLSA collective action, and the Rule 23 class under the Ohio Minimum Fair Wage Standards Act contained 8,006 members. *See* CA6 Opening Br. at 5. The trial established that 12 plaintiffs worked out of a New York Commerce Energy office. *See* Trial Ex. J-14; Trial Tr. Vol. 5, RE 850, Page ID #15462. Petitioners did not argue before the Sixth Circuit that these 12 plaintiffs were differently situated than any other plaintiff, for example, by identifying any difference between their working conditions or arguing that any such differences supported a different outcome.

work and Respondents' ability to control whether applications were finalized. Pet. App. 8; *see also Hurt*, 2013 WL 4427257, at *4–8.

The trial proceeded in two phases: a jury trial on liability followed by a bench trial on damages. The jury was asked to decide whether Petitioners met their burden of establishing the outside-sales exemption; if not, whether any FLSA violation was willful; and whether Just Energy Group was also an employer liable to Respondents. The jury found that Petitioners violated the FLSA because they did not show that the exemption applied, that the violation was not willful, and that Just Energy Group was liable as an employer. Special Verdict Form, RE 808, Page ID ##13871–72.

After the liability phase, the district court entered judgment. It awarded damages to plaintiffs who established the amount of their unpaid wages during the limitations period. It declined to award damages to other plaintiffs based on statute of limitations and evidentiary grounds. Judgment, RE 960, Page ID ##19264–66.

3. The Sixth Circuit affirmed, with Judge Stranch and Judge Clay forming the panel majority.

The court first held that Petitioners' post-trial appeal of the denial of their summary judgment motion was precluded. An appeal of such a denial is permitted only if it raises " 'purely legal' issues capable of resolution 'with reference only to undisputed facts.' " Pet. App. 7 (quoting *Ortiz* v. *Jordan*, 562 U.S. 180, 188-190 (2011)). But the legal issue—whether the outside-sales exemption applied—would be resolved only by reference to facts that *were* disputed: "the level of supervision and independence [Respondents] had in

the field, the particular requirements on work hours, breaks, assignments, and solicitation locations, and the sales completion procedures." *Id.* at 8.

The court then addressed the denial of Petitioners' motion for judgment as a matter of law. It began with the standard of review. Petitioners had to show that "viewing the evidence in the light most favorable to [Respondents], there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of [Petitioners]." *Id.* at 9 (internal quotation marks omitted).

Petitioners did not meet that high burden. The panel majority explained that Petitioners' argument boiled down to the following: Respondents' job was to obtain completed applications, and under this Court's decision in *Christopher* a non-binding commitment like a completed application is always a "sale" within the meaning of the outside-sales exemption. *Id.* at 12. The panel majority rejected this formalistic argument as out of step with the relevant statutory and regulatory text and *Christopher* itself.

The panel majority recognized that an employee may fall within the outside-sales exemption even if he does not complete a sale. "The definition of 'sale' is broad, and the list of transactions defining a 'sale' in the regulations represents 'an attempt to accommodate industry-by-industry variations in methods of selling commodities.' " *Id.* at 11 (quoting *Christopher*, 567 U.S. at 163–164). Thus, whether the exemption applies "should not depend on technicalities," for example if a customer rather than the employee " 'types the order into a computer system and hits the return button.' " *Id.* (quoting *Christopher*, 567 U.S. at 149).

But the panel majority rejected Petitioners' argument that simply because Respondents played a role in the sales chain—from when a potential customer is approached to when the transaction is finalized—they were outside salespeople. It explained that this Court in *Christopher* had not interpreted the outside-sales exemption that way. There, this Court held that pharmaceutical sales representatives are "making sales [as defined in 29 U.S.C. § 203(k)]," 29 C.F.R. § 541.500(a)(1)(i), because "in the unique regulatory environment" they operated in, obtaining a doctor's promise to prescribe a certain drug where medically appropriate was "the most" they could do. *Christopher*, 576 U.S. at 165. The panel majority explained that this conclusion could not be applied unthinkingly "to other industries" that operated in other regulatory environments. Pet. App. 13.

The panel majority concluded that the evidence at trial allowed an inference that the discretion Petitioners retained "to finalize the sale is not merely a technicality immaterial to the analysis." *Id.* at 14. This setup was not driven by the "regulatory environment"; instead, it was Petitioners' decision to end Respondents' involvement after a completed application was secured. *Id.* Petitioners' control over the finalization of the sales—and exclusion of Respondents from the end stage of a transaction—was thus "a factor in determining whether [Respondents] were making sales." *Id.* at 15.

The panel majority addressed the Second Circuit's decision in *Flood* v. *Just Energy Marketing Corp.*, 904 F.3d 219 (2d Cir. 2018). *Flood* involved people hired by Just Energy Marketing to solicit customers for Just Energy's New York subsidiary, Just Energy New York Corp. *Id.* at 223–224 & n.1. Unlike Respondents, the

Flood plaintiffs could re-engage with a potential customer after the third-party verification call. *Id.* at 225. This was, according to Just Energy, "a critical point of the sale" at which these plaintiffs obtained a signed "agreement" and "close[d] the sale." *Id.* (internal quotation marks omitted). These agreements could be rejected if a customer "had poor credit" or had a block "that prevented the customer from switching" energy suppliers. *Id.* The Second Circuit did not identify any other reason why an agreement might not become effective. *See id.* at 229 (stating that the only reason agreements did not become effective were "for technical and legal reasons involving a customer's later change of mind, failure of creditworthiness, or inability to change energy providers").

The panel majority reasoned that *Flood*'s assessment of the New York employees did not control the status of the Ohio employees. The two sets of employees worked at worksites "that functioned very differently." Pet. App. 17. In Ohio, unlike in New York, Respondents were excluded from the "critical point" of re-engaging with the customer after the third-party verification call. And, unlike the record before the *Flood* court, this record showed that Petitioners frequently exercised their total discretion to stop an agreement from being finalized. *Id*. at 17–18. These differences shook out in the employees' commissions, as many Ohio employees earned next to nothing in commissions, whereas the lead *Flood* plaintiff earned over $70,000 a year in commissions. *Id.* at 18.

In sum, the panel majority concluded that a jury could conclude, based on the disparity between the applications Respondents collected and the applications that Petitioners finalized, that Respondents were not the ones "making sales." *Id.* at 19.

The panel majority found no error in the district court's consideration of the additional factors this Court discussed in *Christopher*. In *Christopher*, this Court noted that the sales representatives "bear all of the external indicia of salesmen," such as being hired because of their sales experience and being subject to minimal supervision. 567 U.S. at 165–166. As in *Christopher*, the external indicia supported a conclusion that Respondents were not outside salespeople. Pet. App. 21. And in *Christopher*, this Court noted that its holding "comports with the apparent purpose of the FLSA's exemption for outside salesmen," as the sales representatives held the kind of high-earning, independent, difficult to standardize jobs the exemption was geared at. 567 U.S. at 166–167. As in *Christopher*, consideration of the purpose of the outside-sales exemption supported a conclusion that Respondents were not outside salespeople. Pet. App. 22–23.

The panel majority rejected Petitioners' remaining arguments. The denial of judgment as a matter of law as to a separate portion of the outside-sales exemption, relating to "obtaining orders or contracts for services," was correct because energy is a commodity under Sixth Circuit precedent. *Id.* at 19–20 (quoting 29 C.F.R. § 541.500). Petitioners' challenge to the jury instructions' direction "to consider the extent to which the employee has the authority to bind the company to the transaction at issue" lacked merit for the same reason as its judgment as a matter of law arguments: It rested on a formalistic argument that mere participation in the sales chain placed Respondents within the outside-sales exemption. *Id.* at 24–25. And Petitioners' argument that the district court should not have allowed evidence about Respondents' compensation was wrong because that evidence was necessary

to establish that Petitioners did not pay Respondents the minimum and overtime wages that the law required.

Judge Murphy dissented and would have reversed the denial of judgment as a matter of law. *Id.* at 54. In his view, the facts relevant to the outside-sales exemption were "largely undisputed" and the district court should have answered the question whether the exemption applied itself. *Id.* at 37, 39. And the district court should have answered that question in the affirmative because Respondents "brought about any later finalized contracts by persuading customers to enter them." *Id.* at 41 (internal quotation marks omitted).

4. Petitioners sought rehearing. No judge requested a vote on the rehearing petition, and it was denied. *Id.* at 55–56. This petition followed.

REASONS FOR DENYING THE PETITION

I. THIS COURT'S REVIEW IS NOT NEEDED TO RECONCILE TWO DECISIONS THAT APPLIED THE SAME LAW TO DIFFERENT FACTUAL RECORDS.

Petitioners claim that the Sixth Circuit adopted a different interpretation of the outside-sales exemption than the Second Circuit offered in *Flood*. But as the panel majority explained, "[a] comparison of these two cases"—*Flood* and *Just Energy*—"shows that no circuit split exists." Pet. App. 17. The Sixth Circuit reached a different conclusion based on the distinct record before it. That is not an appropriate basis for this Court's review.

The Sixth Circuit and Second Circuit both set out the same governing law. Both decisions walked through the relevant statutes and regulations. *See id.* at 9–11; *Flood*, 904 F.3d at 228. And both decisions recognized that, in light of *Christopher*, a person who does not "obtain binding commitments" may, but does not "necessarily," fall within the outside-sales exemption. Pet. App. 13; *see Flood*, 904 F.3d at 229–230 (noting that the FLSA's definition of sale "negated a conclusion that a sale cannot occur unless there is a fully consummated transaction").

As the Sixth Circuit explained, differences in the records between the two courts explain the different outcomes. The Sixth Circuit concluded that Just Energy's' "discretion to finalize the sale is not merely a technicality immaterial to the analysis." Pet. App. 14. The evidence introduced at trial showed that the discretion was not exercised mechanically, that is, the evidence showed that Just Energy's Ohio affiliate did not finalize all applications that Respondents submitted that met certain criteria or finalize all applications so long as certain conditions were met. Instead, it "frequently" rejected applications without explanation. *Id.* Respondents "could not finalize customer agreements and complete sales due to Just Energy's choice to retain ultimate discretion and to require certain solicitation procedures at its Ohio workplace." *Id.* at 15.

The record before the Second Circuit established that Just Energy's New York affiliate operated "very differently." *Id.* at 17. It only "occasionally" declined to finalize applications, and "the completion of the transaction depended on technical contingencies" such as whether a customer failed a credit check or

changed his mind. *Flood*, 904 F.3d at 231. Flood himself gave deposition testimony that "he was unaware of any situation in which Just Energy arbitrarily rejected a sale." *Flood* v. *Just Energy Mktg. Corp.*, No. 7:15-cv-2012 (KBF), 2017 WL 280820, at *2 (S.D.N.Y. Jan. 20, 2017). And it allowed its employees to participate in what Just Energy described as "a critical point of the sale": returning to the customer after the third-party verification call and ensuring that they were committed to the agreement. *Flood*, 904 F.3d at 225 (internal quotation marks omitted).

Petitioners incorrectly claim that the Second Circuit adopted a per se rule that an employee's ability to bind a customer is *irrelevant* to whether the outside-sales exemption applies. Pet. 21. The court noted only the proposition—uncontroversial after *Christopher*—that the FLSA does not "*mandate* a showing that an employee has fully consummated a sales transaction." *Flood*, 904 F.3d at 229. Nor are Petitioners correct to characterize the Sixth Circuit as adopting the opposite per se rule, that any later step in the sales chain negates the outside-sales exemption. The court said only that *Christopher*'s holding that obtaining a nonbinding commitment was sufficient to establish the outside-sales exemption for pharmaceutical sales representatives because of "[t]he unique regulatory environment of the pharmaceutical industry" might, but "does not necessarily[,] apply to other industries." Pet. App. 13.

Relatedly, Petitioners are wrong when they argue that the Sixth Circuit "confined" *Christopher* to the pharmaceutical sales industry. Pet. 21. In *Christopher*, this Court stated that the FLSA requires "a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of

the particular industry in which the employee works." 567 U.S. at 161. The Sixth Circuit took this Court at its word when it recognized that its description of what counts as "making sales" in one industry—one where the "most" a salesperson is "able to do" is obtain a non-binding commitment, *id.* at 165—may not "necessarily apply to other industries." Pet. App. 13.

That leaves Petitioners' suggestion that the courts disagree on the relevance of the external indicia that this Court discussed in *Christopher*. Pet. 21. The Sixth Circuit simply followed this Court's lead from *Christopher*. *See* 567 U.S. at 165–166 (noting that "petitioners bear all of the external indicia of salesmen" and discussing the employees' training "to close each sales call," "minimal supervision," and "incentive compensation").

And there is no conflict with how the Second Circuit viewed the relevance of these external indicia. The Second Circuit has *not* held that courts are forbidden from considering these external indicia. *See Vasto* v. *Credico (USA) LLC*, 767 F. App'x 54, 57 (2d Cir. 2019) ("we have not decided whether the indicia mentioned in *Christopher* are relevant to the outside sales exemption"). And even if the Second Circuit expressed "doubt[]" that the external indicia "could transform" an exempt employee who does actually make sales into a non-exempt employee, Pet. 21, the Sixth Circuit did not conduct any such alchemy. The court had already found that Petitioners were not entitled to judgment as a matter of law on the outside-sales exemption based on the trial record. Pet. App. 19. It merely declined to *reverse* the district court for considering the indicia. *Id.* at 20–23.

In sum, the difference between the Sixth Circuit's decision and the Second Circuit's decision in *Flood* does not stem from different *legal* interpretations of the FLSA but merely from different views of how the FLSA applied to the different records before them. This Court generally does not grant petitions where a Petitioner claims to have identified a "misapplication of a properly stated rule of law." Sup. Ct. R. 10. It should not do so here.

II. PETITIONERS' ATTACK ON THE DECISION BELOW LACKS MERIT.

Petitioners disagree with the Sixth Circuit's decision, but their disagreement rests on a formalistic reading of the FLSA that this Court rejected in *Christopher*. As for Petitioners' claim that the Sixth Circuit willfully ignored precedent, it lacks any basis in the court's opinion.

1. Petitioners argue that the Sixth Circuit misapplied the FLSA to the trial record before it. There is no need for this Court to address that fact-specific decision. The Sixth Circuit's decision was correct.

Petitioner's principal argument misreads *Christopher*. The FLSA defines sale to include "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). In *Christopher*, this Court held that the "phrase 'other disposition' " in that definition of sale, "is most reasonably interpreted as including those arrangements that are tantamount, *in a particular industry*, to a paradigmatic sale of a commodity." 567 U.S. at 164 (emphasis added).

This Court then applied that interpretation to the particular industry before it: pharmaceutical sales. The pharmaceutical sales representatives before the

Court met with physicians "to obtain a nonbinding commitment from the physician to prescribe [the] drugs in appropriate cases." *Id.* at 151 (footnote omitted). In their industry, "[o]btaining a nonbinding commitment from a physician to prescribe" was "the most [the representatives] were able to do to ensure the eventual disposition"—that is, a patient's eventual decision to fill a prescription at a pharmacy. *Id.* at 165. For that reason, securing a nonbinding commitment was an "other disposition" within the meaning of the FLSA and these sales representatives fell within the outside-sales exemption. *Id.*

Petitioners read *Christopher* to contain a lesser-includes-the-greater principle. Because some activities will be "other disposition[s]" and thus "sales" within the meaning of the FLSA, *anything* in the sales chain that is less than a full "sale, exchange, contract to sell, consignment for sale, shipment for sale," 29 U.S.C. § 203(k), is always a sale within the meaning of the FLSA. Pet. 27, 29.

But *Christopher* says no such thing. It read the phrase "other disposition" as an industry-specific escape hatch, not a tunnel through which to ram through every FLSA plaintiff who is involved in some way with a potential sale. *See Christopher*, 567 U.S. at 164 ("[T]he catchall phrase 'other disposition' is most reasonably interpreted as including those arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity."); *id.* at 165 n.23 ("[O]ur point is that, when an entire industry is constrained by law or regulation from selling its products in the ordinary manner, an employee who functions in all relevant respects as an outside salesman should not be excluded from that category based

on technicalities."). Put differently, *Christopher* recognizes that for most industries a sale is what most people think a sale is: a completed transaction. But in some industries that operate within a "unique regulatory environment," *id.* at 165, the FLSA's definition encompasses acts further removed from the finalized transaction.

So understood, the Sixth Circuit correctly applied *Christopher*'s teachings to the record before it. On that record, there was no basis to infer that the "paradigmatic" sale of electric power or natural gas was anything other than the finalized agreement. Nor was there any basis to infer that the gaping disparity between the number of completed applications Respondents submitted and the number of applications Petitioners finalized was due to "unique regulatory environment" in Ohio, or even "technicalities," *id.* at 149, as opposed to Petitioners' choices.

As for Petitioners' argument that the FLSA's text demands treating *any* step toward a sale as "making sales" within the meaning of the outside-sales exemption, it is wrong. Pet. 30. The Sixth Circuit's reasoning rests on an eminently reasonable premise. If there is little or no connection between an employee's sales-related activities and the completion of sales, the employee is not "making sales." An employee may *try* to make sales, but someone else in the sales chain exercises control over whether the sale is made. Consider an example: Law-firm associates are hired to "bill" hours to clients. An associate may record many hours, but if a partner intervenes and declines to record those hours on the client's monthly bill, the associate cannot reasonably claim to have billed the client for those hours.

The Sixth Circuit approached the application of the outside-sales exemption in this case as "a functional, rather than a formal, inquiry," following this Court's direction. *Christopher*, 567 U.S. at 161. Petitioners would prefer a formalist inquiry that would sweep in nearly any person involved in a chain leading up to a sale. They are wrong.

2. Petitioners repeatedly level a serious accusation against the Sixth Circuit: that it willfully ignored this Court's precedent. *See* Pet. 13 n.3, 18, 35. Why? Because, they say, its decision does not contain a citation to *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134 (2018). Their charge shows why this Court "does not review lower courts' opinions, but their *judgments*." *Jennings* v. *Stephens*, 574 U.S. 271, 277 (2015).

Encino Motorcars addressed a separate FLSA exemption, one for certain employees at car dealerships. The Court canvassed the various indicia of statutory meaning and found that "service advisors" at dealerships fit within the exemption. *Encino Motorcars*, 138 S. Ct. at 1140–42. It then turned to the Ninth Circuit's use of "the principle that exemptions to the FLSA should be construed narrowly." *Id.* at 1142 (citing *Navarro* v. *Encino Motorcars, LLC*, 845 F.3d 925, 935–936 (9th Cir. 2017) (referring to a "longstanding rule that the exemptions in § 213 of the FLSA are to be narrowly construed against the employers" (internal quotation marks omitted))). This Court "reject[ed] this principle as a useful guidepost," stating that the FLSA's exemptions should be read as any other statutory text, that is, given "a fair reading." *Id.*

Search the Sixth Circuit's opinion for a statement at odds with this decision, and you will come up empty. Unlike the Ninth Circuit decision on review in *Encino*

Motorcars, the Sixth Circuit did not invoke the principle that FLSA exemptions should be narrowly construed. Instead, it did exactly what *Encino Motorcars* said courts should do: approach a question on an FLSA exemption as any other question of statutory applicability would be approached. Pet. App. 10 ("Our review of the applicability of this FLSA exemption is governed by the statutory language, Department of Labor (DOL) regulations, caselaw, and particular facts of the case."). Perhaps this explains why not even the dissenting member of the panel went so far as to accuse the panel majority of willfully ignoring this Court's precedent. *See, e.g.*, *id.* at 39, 45–46, 51 (Murphy, J., dissenting) (noting that *Encino Motorcars* tells courts to apply ordinary interpretive rules to the FLSA exemptions, rather than tip the scale toward a narrow reading).

In short, there is no basis for Petitioners' invitation to read "intransigence" into its decision. Pet. 35. Indeed, it makes all the sense in the world that the Court did not reference an interpretive guide that *did not* apply. Requiring courts to draft opinions that way would be a waste of effort, both the court's and the reader's: "Here is a list of interpretive tools that do not apply when interpreting statutory text of this kind, so rest assured that we have not used them."

In the end, any suggestion that review is needed because the Sixth Circuit's opinion "reflects, at best, a casual disregard for this Court's precedents" itself reflects, at best, a goal of attracting this Court's attention, not a fair reading of the opinion. *Id.*

III. THE PETITION DOES NOT PRESENT AN IMPORTANT QUESTION OR A CLEAN VEHICLE.

1. Petitioners emphasize that *they*—a single set of corporate affiliates—are unsure about how to respond to the conflict they see between *Flood* and *Just Energy*. Pet. 1, 2, 17–18, 24, 33–34. This Court is not in the habit of devoting space on its docket to cases in which a single corporation wants clarity on how a federal statute applies to its workforce. But even if it were, there is no need to do so here.

Petitioners claim that, because the FLSA provides for collective actions, it is untenable for them to operate under both *Flood* and *Just Energy*. But as the Sixth Circuit explained, the outside-sales exemption requires a context-specific examination of an employee's duties. Pet. App. 17. Where an employer "operate[s] its worksite" in one location differently than another, its employees at one worksite may be covered while employees at another worksite fall within the outside-sales exemption. *Id.* Thus, as the Sixth Circuit explained, its decision applies to "[Respondents'] worksite" whereas *Flood* governed "a separate group of licensed Just Energy subsidiaries that operated in New York at a worksite that functioned very differently." *Id.* That flexibility and local tailoring is critical to the functioning of the FLSA itself.

For similar reasons, Petitioners' fear that the Sixth Circuit's decision will encourage employees to forum shop are overblown. The FLSA requires plaintiffs to affirmatively opt into a collective action, and then to show that they are "similarly situated." 29 U.S.C. § 216(b). Where employees are *not* similarly situated, for example because differences in the conditions of

their employment affect the applicability of the outside-sales exemption, they may not be able to join in a collective action. *See, e.g.*, *Clausman* v. *Nortel Networks, Inc.*, No. IP 02-0400-C-M/S, 2003 WL 21314065, at *4 (S.D. Ind. May 1, 2003) ("[W]here liability to each plaintiff will depend on whether that plaintiff was correctly classified as an 'outside salesman,' the Court will be required to make a fact-intensive inquiry into each potential plaintiff's employment situation.").

And employees' ability to choose their forum may turn on the answer to other, unrelated questions. As Petitioners' own amici point out, for example, one is whether an employer would be subject to personal jurisdiction in the employee's preferred forum. *See* Br. Amicus Curiae for Chamber of Commerce of the United States of America et al. ("Chamber Br.") at 16 n.31. Whether venue would be proper in an employee's preferred forum is another. *See, e.g.*, *Bowers* v. *Tension Int'l, Inc.*, No. 15-cv-2734-WJM-KLM, 2016 WL 3181312, at *5 (D. Colo. June 8, 2016) (enforcing a forum-selection clause and transferring venue under 28 U.S.C. § 1404).

Finally, the FLSA contains a provision an employer may invoke if it is truly surprised by its liability for wage and overtime violations. A court may decline to award damages for a violation if an employer "shows" that it acted "in good faith and * * * had reasonable grounds for believing that [its] act or omission was not a violation." 29 U.S.C. § 260. Petitioners made the choice not to press this defense on appeal to the Sixth Circuit. *See* Opinion & Order, RE 867, Page ID ##15676–79 (district court damages phase opinion finding that Petitioners had not established the defense).

2. Petitioners overstate any risk that the Sixth Circuit's decision will create confusion beyond their corporate headquarters about the scope of the outside-sales exemption.

Much of the confusion Petitioners point to is inherent in the FLSA. Any statute that governs the *entire* national economy, with all its myriad business and employment arrangements, will generate questions about how its general provisions apply in a specific factual scenario. This is especially true where, as with the FLSA, this Court has directed courts to apply a nuanced, context-specific approach when applying a statute's commands. *See Christopher*, 567 U.S. at 161 ("The statute's emphasis on the 'capacity' of the employee counsels in favor of a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works.").

Petitioners' own *amici* make this clear. In raising the possibility of "increasing legal compliance costs," these *amici* rely on an article published nearly *two decades ago* that explains that the FLSA imposes compliance costs because employers must apply its general provisions to their particular workforces. *See* Chamber Br. at 15 & n.27. And in arguing that lawsuits brought to enforce FLSA violations are on the rise, they rely on an article dating this increase to *2013*. *Id.* at 15 & n.28. Petitioners offer no reason to believe that the Sixth Circuit's decision applying one of the FLSA's "over two dozen exemptions," *Encino Motorcars*, 138 S. Ct. at 1142, to a specific set of facts risks any more confusion than any other FLSA decision issued yesterday, or one that may be issued tomorrow.

Indeed, it is quite common for petitions for certiorari involving the FLSA to raise these dire predictions and just as common for this Court to decline to review those petitions. *See, e.g.*, *Integrity Staffing Sols., Inc.* v. *Busk*, No. 18-1154 (cert. denied Oct. 7, 2019); *Provident Sav. Bank, FSB* v. *McKeen-Chaplin*, No. 17-371 (cert. denied Nov. 27, 2017); *E.I. DuPont de Nemours & Co.* v. *Smiley*, No. 16-1189 (cert. denied June 28, 2018); *GEICO Gen. Ins. Co.* v. *Calderon*, No. 15-1346 (cert. denied Oct. 3, 2016).

Even if the Sixth Circuit's decision creates questions about when the outside-sales exemption applies, this Court should not be the first to answer them. The normal way that the FLSA's application to a specific context would become clear is through development in the lower courts. But, other than *Flood* and *Just Energy*, few courts of appeals have had a chance to apply the outside-sales exemption "in the context of" different industries. *Christopher*, 567 U.S. at 161. In some, the answer was simple. *See Gold* v. *New York Life Ins. Co.*, 730 F.3d 137, 145 (2d Cir. 2013) (affirming a conclusion that a person "hired and trained by New York Life to sell insurance" fell within the exemption); *Meza* v. *Intelligent Mexican Mktg., Inc.*, 720 F.3d 577, 578, 585 (5th Cir. 2013) (affirming that a "route salesman" who was the "only sales contact * * * on his route" fell within the exemption); *see also Vasto*, 767 F. App'x at 57 (affirming, after *Flood*, a decision that people hired to solicit applications for Sprint's wireless services fell within the exemption).

Only two other decisions have addressed in any detail when an employee's presence somewhere along the sales chain brings them within the exemption. Both decisions followed the same path as the Sixth Circuit did here: lay out the relevant statutory and

regulatory text, discuss this Court's holding in *Christopher*, and apply those rules to a specific set of facts. *See Beauford* v. *ActionLink, LLC*, 781 F.3d 396, 399, 402–403 (8th Cir. 2015) (holding that "brand advocates" of a wireless company who convinced store employees to recommend products to customers did not fall within the outside-sales exemption); *Killion* v. *KeHE Distribs., LLC*, 761 F.3d 574, 578, 584–585 (6th Cir. 2014) (holding that genuine disputes of material fact precluded summary judgment on whether a food distributor's "sales representatives" made sales or managed inventory).

This Court's ordinary practice when asked to weigh in where few courts of appeals have is to wait for further development.[4] It should follow that course here. Doing so would allow this Court to address the outside-sales exemption—if doing so is eventually warranted—with a better understanding of how any interpretation it adopts might apply "in the context of the particular industry in which" future cases will arise. *Christopher*, 567 U.S. at 161.[5]

Nor, in any event, is this Court's review the only route to addressing any question of the outside-sales

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[4] For an example of this Court's declining to review a question under the FLSA on which few courts had weighed in, see *City of San Gabriel* v. *Flores*, No. 16-911 (cert. denied May 15, 2017).

[5] One explanation for why the outside-sales exemption does not arise frequently, one that reinforces why this question is not important, may be the "persist[ent] employment declines for telemarketers, travel agents, and door-to-door sales workers" driven by advances in technology. Michael Rieley, U.S. Bureau of Labor Statistics, *Inside the decline of sales occupations*, 9 Beyond the Numbers, no. 5, May 2000, *available at* https://tinyurl.com/5jvw9xvp. This decline is projected to continue over the next decade. *See id.*

exemption's scope. If further clarification is needed, the Department of Labor can step in. *See* 29 U.S.C. § 213(a)(1) (referring to "any employee employed * * * in the capacity of outside salesman" as the term is "defined and delimited from time to time by regulations of the Secretary"). It is free to issue a regulation that resolves any question regarding how this exemption applies in the scope of energy sales, or other industries.

3. Even had this petition raised a question worthy of this Court's attention, this case is not a clean vehicle to address it.

Petitioners filed for bankruptcy after filing this petition for certiorari. *See* Letter (Mar. 27, 2021). Under the Bankruptcy Code, a bankruptcy petition "operates as a stay, applicable to all entities, of * * * the commencement or continuation" of any judicial action, such as this one, to recover certain "claim[s] against the debtor." 11 U.S.C. § 362(a)(1). The automatic stay operates to stay appellate proceedings arising out of a suit against a debtor, a category that includes this petition. *See, e.g.*, *TW Telecom Holdings Inc.* v. *Carolina Internet Ltd.*, 661 F.3d 495, 496–497 (10th Cir. 2011) (Gorsuch, J.); *see also DTD Enters., Inc.* v. *Wells*, 558 U.S. 964 (2009) (statement of Kennedy, J., respecting the denial of certiorari) (stating that it may be "best to deny" a petition that falls within the automatic stay).

The bankruptcy court, at Petitioners' urging, entered an order that gives the debtors (Petitioners) the "sole discretion" to waive the stay. Ex. 1 to Letter, ¶ 2(b)(i). Petitioners represent that they have waived the stay, under that provision. *See* Letter (Mar. 27, 2021). However, it is generally understood that the

bankruptcy court, not a debtor, must make the determination of whether to lift a stay because doing so affects all creditors. *See, e.g.*, *Acands, Inc.* v. *Travelers Cas. & Sur. Co.*, 435 F.3d 252, 259 (3d Cir. 2006) (Alito, J.) ("Because the automatic stay serves the interests of both debtors and creditors, it may not be waived and its scope may not be limited by a debtor." (internal quotation marks omitted)); *see also* 11 U.S.C. § 362(d) ("On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay * * * ."). There thus may be a risk that Petitioners' waiver may not be proper. *See Easley* v. *Pettibone Michigan Corp.*, 990 F.2d 905, 909 (6th Cir. 1993) ("A majority of the circuits * * * have held that actions taken in violation of the automatic stay are void."); *see also* Sup. Ct. R. 15.2 (requiring a respondent to preserve non-jurisdictional issues in a brief in opposition).

CONCLUSION

The petition for a writ of certiorari should be denied.

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