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

REPLY BRIEF FOR PETITIONERS

SHANNON K. PATTON
EDWARD H. CHYUN
ALEX R. FRONDORF
LITTLER MENDELSON, P.C.
1100 Superior Ave.
20th Floor
Cleveland, OH 44114

BRADLEY A. SHERMAN
SHERMAN BOSEMAN LEGAL GROUP LLC
800 W. St. Clair Ave.
4th Floor
Cleveland, OH 44114

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

KEVIN M. NEYLAN, JR.
KIRKLAND & ELLIS LLP
601 Lexington Ave.
New York, NY 10022

Counsel for Petitioners

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REPLY BRIEF

When confronted with a petition documenting a square split in authority, respondents typically point to differences in the industries involved in the cases or at least differences between the companies involved. That is not an option here, because the same employer is involved in both sides of the split. Petitioners' door-to-door solicitors are exempt from the FLSA's minimum-wage and overtime requirements in the Second Circuit, but are non-exempt in the Sixth Circuit. Respondents here cannot really deny that, so they are reduced to arguing that there were different records in the two cases. That is true only in the technical sense that every case has its own record, but there are no material differences here, as Judge Murphy explained in dissent. Both cases involved the door-to-door solicitors of the same employer, and both cases applied this Court's decision in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). The Second Circuit applied *Christopher* faithfully to find Petitioners' door-to-door solicitors exempt; the Sixth Circuit majority minimized *Christopher* as an industry-specific case and found the same workers non-exempt. Any minor differences in how or how often sales were consummated reflect routine credit checks or trivial differences in regulatory regimes—the precise thing that *Christopher* held should not dictate whether the outside-salesperson exemption is satisfied. And even if there were some meaningful distinction between Petitioners' New York and Ohio door-to-door solicitors, it would still leave Petitioners in a wholly untenable position, as even Petitioners' New York employees have been allowed to opt into the Sixth Circuit's nationwide collective action.

In short, this is as stark a circuit split as this Court is likely to see. The same employees of the same employer are exempt in the Second Circuit and non-exempt in the Sixth Circuit. That circuit split plainly puts Petitioners in an impossible position, but the impact goes far beyond Petitioners, as *amici* attest. In the Sixth Circuit, *Christopher* is essentially limited to the pharmaceutical industry, and the outside-sales exemption depends on minor differences in how sales are consummated. In the Second Circuit, *Christopher* is given its proper scope, and technical differences do not vitiate the exemption. This Court should grant plenary review to reaffirm *Christopher* and to eliminate an extraordinary circuit split *within* Petitioners' door-to-door workforce.

I. The Sixth Circuit's Decision Squarely Conflicts With The Second Circuit's Decision.

Respondents contend that the conflicting Second and Sixth Circuit decisions are the result not of "different *legal* interpretations" but of "differences in the records." BIO.15, 18. Given that both "records" involved the same employees of the same employer, Respondents' claim is unsustainable. The Second and Sixth Circuits adopted starkly divergent views of the law, which produced different outcomes concerning the same door-to-door solicitors.

For example, the Second and Sixth Circuits plainly diverge on whether an employer's discretion to reject a contract removes an employee from the outsides-salesperson exemption. In the Second Circuit, such discretion plays no role in the analysis: "the proper focus for the 'making sales' inquiry is

whether the employee has obtained a commitment to buy the employer's product, not whether the employer retains some after-the-fact discretion to decline to go through [with] a transaction to which the buyer has otherwise committed." *Flood v. Just Energy Mktg. Corp.*, 904 F.3d 219, 232 (2d Cir. 2018). Thus, the unsurprising fact that Petitioners "retained a right to reject any contract that [plaintiff] secured" (for reasons ranging from creditworthiness to regulatory compliance) did "not create a genuine issue of material fact about whether he or other plaintiffs were 'making sales.'" *Id.* at 233.

In the Sixth Circuit, by contrast, that same discretion plays an enormous—if not dispositive—role.[1] The majority held that Petitioners' "discretion to finalize the sale is not merely a technicality immaterial to the analysis." App.14. In its view, an employee is not "making sales" if the employer "retains and/or exercises" discretion "to accept or reject any transactions." App.11-13, 24-25. And it repeatedly emphasized Petitioners' discretion in concluding that Respondents were not "making sales," holding that Respondents "could not finalize customer agreements and complete sales" given Petitioners' "choice to retain ultimate discretion." App.15.

Respondents attempt to minimize this difference in legal approach, but the difference is real and reflected in the bottom line of the conflicting decisions. Petitioners' door-to-door solicitors were held exempt in *Flood* despite Petitioners' discretion to reject a

[1] Respondents do not dispute that "the customer agreements in [*Flood*] gave [Petitioners] the same 'discretion' to reject agreements that exists" here. App.51 (Murphy, J., dissenting).

contract, and held non-exempt below in large measure because of that same discretion. Respondents suggest that the discretion was exercised less frequently in *Flood* than here, but that does not explain the different outcomes, because the Second Circuit properly concluded that Petitioners' discretion to reject contracts was beside the point. Moreover, Petitioners have no greater incentive to exercise that discretion arbitrarily or unnecessarily in Ohio than New York. Petitioners' business model depends on moving forward with the contracts obtained by door-to-door solicitors, not rejecting them arbitrarily.

Relatedly, the Second and Sixth Circuits adopted starkly different views of *Christopher*. The Second Circuit firmly rejected the argument that "*Christopher* should be confined to the peculiarities of the pharmaceutical sales market," because nothing in *Christopher* suggests it "lack[s] general applicability to other cases." 904 F.3d at 230-31. The Second Circuit then applied *Christopher* to find the outside-salesperson exemption applicable *a fortiori* here, explaining that the plaintiff's "primary duties were more in the nature of 'making sales' than the primary duties of the representatives at issue in *Christopher*." *Id.* at 231. The Sixth Circuit, by contrast, repeatedly emphasized the "unique regulatory environment" and "unique factual setting" in *Christopher*, underscored its "limited import," and concluded that *Christopher* "does not readily transfer to other industries." App.13-14. Having thus minimized *Christopher*, the Sixth Circuit found it no obstacle to finding Respondents non-exempt because "[n]o such regulatory environment" is present here. App.14.

Respondents suggest that the Sixth Circuit merely observed that *Christopher* "does not *necessarily* apply to other industries.'" BIO.16 (quoting App.13) (emphasis added). But that ignores both the actual result below (declining to apply *Christopher* to a non-pharmaceutical industry) and the Sixth Circuit's reasoning, which makes clear that it views *Christopher* as "unique," of "limited import," and not "readily transfer[able] to other industries." That is no way to treat this Court's precedents and decidedly not the way the Second Circuit treated the same precedent. Indeed, there is really no denying that difference. The Second Circuit not only treated *Christopher* as having "general applicability," but actually applied it outside the pharmaceutical industry to hold Petitioners' employees exempt.

Rather than meaningfully confront the circuits' conflicting approaches to the outside-salesperson exemption and *Christopher*, Respondents insist that "differences in the records between the two courts explain the different outcomes." BIO.15. But any factual differences are immaterial. Respondents principally emphasize Petitioners' discretion to reject signed agreements and argue that here it was exercised "frequently" and "without explanation," while in *Flood* it was exercised "only 'occasionally'" and for purportedly different reasons. BIO.15-16; *see also id.* at 2, 7-8. But as noted, none of that mattered to the Second Circuit, 904 F.3d at 233, and Petitioners have no incentive in either circuit to reject sales agreements unnecessarily or arbitrarily.

The only other factual difference Respondents note is that the *Flood* plaintiffs could "return[] to the

customer after the third-party verification call," whereas here Respondents had to "leave the residence before the call began." BIO.7, 16. This trifling distinction was entirely driven by minor differences in the applicable state regulatory regimes. None of that mattered to the Second Circuit, where a door-to-door solicitor is "making sales" as long as she had "obtained a commitment to buy" from the customer (which is a necessary precondition for a verification call in either jurisdiction). *Flood*, 904 F.3d at 232. And *Christopher* should have made clear beyond cavil that such trivial distinctions in regulatory requirements are immaterial, and that what matters is whether a salesperson is consummating sales to the degree allowed by the applicable regulatory environment. Thus, what explains the difference in outcomes is not subtle differences in the record, but the differential application of *Christopher*. The Second Circuit faithfully applied *Christopher* and found the outside-salesperson exemption applicable here *a fortiori*. The Sixth Circuit inexplicably treated *Christopher* as a precedent good for-one-industry-only and treated door-to-door solicitors who come far closer to finalizing a sale than any pharmaceutical sales representative as non-exempt.

Notably, Respondents do not defend some of the other minor differences invoked by the Sixth Circuit, like differences in the employees' "control over their work, sale methods, and compensation," or in the cases' "procedural posture[s]." App.18. Instead, Respondents contend that "there is no conflict" over how the Second and Sixth Circuits view the relevance of "external indicia" to the outside-salesperson analysis. BIO.17. That too is wrong. The Second

Circuit "doubt[ed]" whether "external indicia" should be considered at all "when deciding if an employee is 'making sales,'" much less whether they could convert an employee from exempt to non-exempt. 904 F.3d at 234. By contrast, the Sixth Circuit did not hesitate to "apply these indicia" and examine factors like Respondents' supervision, App.21-23, which the Second Circuit deemed irrelevant, *see* 904 F.3d at 235.

In sum, there is no seriously denying that had Respondents filed suit in the Second Circuit, they would have lost. The reason they won in the Sixth Circuit is not because they had a different factual record, but because they had a different court that reached the opposite conclusion about the scope of the outside-salesperson exemption and the proper reading of *Christopher*. As a result of those legal differences, Petitioners have a circuit split within their own workforce of door-to-door solicitors. That conflict, and the competing mandates to which Petitioners are now subject, unquestionably warrants this Court's review.

II. The Sixth Circuit's Decision Is Incorrect.

Respondents' arguments on the merits are equally unpersuasive. Tasked with explaining why Petitioners' door-to-door salesforce is not making sales and not covered by the FLSA's exemption for outside salespeople, Respondents do not engage with the FLSA's text—which broadly defines "sale" to include "any sale" or "contract to sell," 29 U.S.C. §203(k)—or relevant regulatory guidance—which provides that employees are "making sales" if "they obtain a commitment to buy from the customer," 69 Fed. Reg. 22122, 22162 (Apr. 23, 2004). Nor do Respondents deny that "obtain[ing] a commitment to buy" is

"precisely what [they] did," *Flood*, 904 F.3d at 229: they went door-to-door "to convince customers to buy electricity and natural gas products" by entering into "customer agreement[s]," App.2-4.

Respondents instead argue that "sale" under the FLSA means a *consummated* sale—or, in their words, a "full sale," a "completed transaction," or a "finalized agreement"—and because Petitioners retained discretion to reject a contract, their employees were not "making sales." BIO.19-20. That would have been a difficult argument before *Christopher*, given the FLSA's broad and inclusive conception of a sale, but after *Christopher* it is—or at least should be—a complete non-starter. Undeterred, Respondents posit that *Christopher* "recognizes" that in "most industries," a "sale is … a completed transaction," and that it merely noted a carve-out for "some industries" operating in "unique regulatory environment[s]," where "acts further removed from the finalized transaction" can qualify as a "sale." BIO.20. That argument may reveal the source of the Sixth Circuit's error, but it essentially inverts what this Court held in *Christopher*. In squarely rejecting the argument that a "sale" "requires a 'firm agreement' or 'firm commitment' to buy" in light of "Congress' intent to define 'sale' in a broad manner," 567 U.S. at 159, 163, *Christopher* did not preserve the very requirement it rejected for "most industries." (And, in all events, the discretion Petitioners retained to reject uncreditworthy customers is a practice that prevails in "most industries.")

Respondents attack a strawman in suggesting that Petitioners contend that "*anything* in the sales

chain that is less than a full 'sale' … is always a sale," or "*any* step toward a sale" constitutes "making sales." BIO.19-20. In reality, as Petitioners (and the Second Circuit and Judge Murphy) have explained, Petitioners' solicitors were "making sales" under the FLSA simply because they—and no others—were "trying to persuade … customers to sign up then-and-there for" Petitioners' products, and they "obtained commitments to buy from customers." *Flood*, 904 F.3d at 229; App.44 (Murphy, J., dissenting). The door-to-door solicitors are Petitioners' outside salesforce, just as pharmaceutical sales representatives are the outside salesforce for the pharmaceutical industry. Carving either outside salesforce from the outside-salesperson exemption blinks reality.

Respondents defend the Sixth Circuit's failure to cite *Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134 (2018), and its holding that FLSA exemptions should be read fairly, not narrowly, because in their view, that "interpretive guide" does "*not* apply" here. BIO.22. But that is just one more way that Respondents and the Sixth Circuit majority are out of step with this Court, the Second Circuit, and Judge Murphy. A whole line of this Court's recent cases, including *Christopher* and *Encino Motorcars*, have corrected decisions giving crabbed readings to FLSA exemptions and windfalls to employees who were fully compensated under their employment agreements. That the decision below made virtually the same mistake that this Court corrected in *Christopher* can only be explained by a failure to heed this Court's precedents. It is no coincidence that the two opinions that acknowledged *Encino Motorcars* concluded that Petitioners' employees are exempt. *See Flood*, 904

F.3d at 228; App.39 (Murphy, J., dissenting). The decision below is out of step with this Court's precedents.

III. The Question Presented Is Important, And This Case Presents It Cleanly.

Respondents do not and cannot dispute that because of the divergent Second and Sixth Circuit decisions, Petitioners now face a circuit conflict within their own workforce. To endure "conflicting legal mandates" from two federal courts of appeals is "unsustainable," App.28 (Murphy, J., dissenting), and a far cry from merely "want[ing] clarity on how a federal statute applies," BIO.23.

Nor do Respondents dispute that Petitioners must now treat even some New York solicitors—those who opted into the collective action here—as non-exempt, even though *Flood* held that Petitioners' New York solicitors *are* exempt. Not even Respondents' misguided insistence that the New York and Ohio worksites "functioned very differently," BIO.23, can explain why the New York solicitors who opted-in here differ from the New York solicitors in *Flood*. Petitioners thus not only face a circuit split among their own multi-state workforce, but even face a circuit split when it comes to their *New York* solicitors. Circuit splits do not get any starker or more practically unsustainable than that.[2]

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[2] The same is true in California: Multiple courts have held that Petitioners' California solicitors are exempt outside salespeople, Pet.23 n.6, but the collective action here includes California solicitors.

Respondents vaguely suggest that venue requirements and the "similarly situated" requirement for FLSA opt-ins will ameliorate the problem. BIO.23-24. But they are missing the point. This problem is not hypothetical. The opt-in plaintiffs from New York and other states have *already been found* to be "similarly situated" to Respondents. *See Hurt v. Com. Energy, Inc.*, 2014 WL 3735460, at *4 (N.D. Ohio July 28, 2014). That finding underscores the practical problems with the circuit split while striking the death knell for Respondents' misguided efforts to deem the work experiences of Petitioners' Ohio and New York solicitors very different. Respondents also cite the "good faith" defense of 29 U.S.C. §260, but it only precludes *double* damages, not liability. *See* 29 U.S.C. §§216(b), 260.

Nor are the difficulties created by the decision below limited to Petitioners, as multiple *amici* attest. *Christopher* appeared to send a clear message that workers who function as an industry's outside salesforce are exempt "outside salespeople," notwithstanding either regulatory limits or less-than-fully-consummated sales. The decision below is problematic for a wide range of businesses, not just because they also employ credit checks before finalizing sales, but because it unsettles what this Court appeared to settle in *Christopher*.

Respondents urge the Court to wait for additional cases applying the outside-sales exemption "in the context of different industries." BIO.26-27 (quotation marks omitted). But that gets matters backwards. If the Sixth Circuit had deemed outside salespeople in some highly specialized industry non-exempt, while

the Second Circuit treated Petitioners' door-to-door solicitors as exempt, Respondents' claims that they operate in very different work environments might have some purchase. It is precisely because the Second and Sixth Circuit decisions address not just the *same* industry but the same employer, that this circuit split is undeniable and the time for percolation is over. When the circuits cannot agree on how to treat the same workforce, that is a sure sign that the decisions "sow confusion where the [FLSA] seeks to provide uniformity," Chamber.Br.17, and that plenary review, and not further percolation, is in order.

Finally, Respondents identify no vehicle problems except to halfheartedly note Petitioners' recent bankruptcy. BIO.28-29. That bankruptcy—precipitated by the weather-related energy crisis in Texas, and from which Petitioners are expected to emerge and continue operating in the ordinary course shortly—might be relevant if the automatic stay were applicable to this case. But as Respondents acknowledge, BIO.28, Petitioners waived the stay in this case with the bankruptcy court's approval. *See* Order 5, *In re Just Energy Group Inc.*, No. 21-30823 (Bankr. S.D. Tex. Mar. 9, 2021), Dkt.23. The unremarkable order allowing that waiver was well within the bankruptcy court's authority, and no creditor or third party objected. There is thus no obstacle to certiorari, as this Court has undertaken plenary review in similar situations. *See, e.g.*, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). Furthermore, Respondents' judgment is secured by a bond, *see* Notice, *Hurt v. Commerce Energy, Inc.*, No. 12-758 (N.D. Ohio Oct. 14, 2020), Dkt.976, so there is

no risk to Respondents. In sum, the bankruptcy proceedings are a non-issue, but the circuit split within Petitioners' workforce is a very real issue that only this Court can redress.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

SHANNON K. PATTON
EDWARD H. CHYUN
ALEX R. FRONDORF
LITTLER MENDELSON, P.C.
1100 Superior Ave.
20th Floor
Cleveland, OH 44114

BRADLEY A. SHERMAN
SHERMAN BOSEMAN LEGAL GROUP LLC
800 W. St. Clair Ave.
4th Floor
Cleveland, OH 44114

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

KEVIN M. NEYLAN, JR.
KIRKLAND & ELLIS LLP
601 Lexington Ave.
New York, NY 10022

Counsel for Petitioners

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