No. 24-

IN THE

Supreme Court of the United States

GUILLERMO GRAY,

Petitioner,

v.

KILLICK GROUP, L.L.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit violated 28 U.S.C. § 1291 when it ruled on the merits of Petitioner's Fair Labor Standards Act claim when the district court had not previously decided the issue.

2. Whether the Fifth Circuit erred when it failed to view the facts of Petitioner's FLSA claim in the light most favorable to the non-movant.

3. Whether the Fifth Circuit erred by failing to consider a factor under the FLSA's Economic Realities test which requires a court to determine whether Petitioner's work was an integral part of the employer's business.

PARTIES TO THE PROCEEDING

Guillermo Gray, Petitioner here, was the plaintiff-appellant in the Court of Appeals.

Killick Group, L.L.C., Respondent here, was the defendant-appellee in the Court of Appeals.

RELATED PROCEEDINGS

Guillermo Gray v. Killick Group, LLC, No. 21-01673, U.S. District Court for the Southern District of Texas. Judgment Entered May 18, 2023.

Guillermo Gray v. Killick Group, LLC, No. 23-20295, U.S. Court of Appeals for the Fifth Circuit. Judgment entered August 28, 2024. Petition for rehearing denied October 31, 2024.

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Guillermo Gray ("Gray") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion, affirming summary judgment and dismissal of Petitioner-Plaintiff, Guillermo Gray's ("Gray") Fair Labor Standards Act case is available at 113 F.4th 543 (5th Cir. 2024). Pet. App. at 1a-12a. The District Court's memorandum opinion and order granting Respondent-Defendant Killick Group, L.L.C.'s ("Killick") motion for summary judgment is unreported, but available at 2022 U.S. Dist. LEXIS 245461 (S.D. Tex. Aug. 2, 2022). Pet. App. 13a–23a.

JURISDICTION

The Fifth Circuit entered judgment on August 28, 2024. Pet. App. 1a. The Fifth Circuit denied Petitioner-Plaintiff's Petition for Rehearing on October 31, 2024. Pet. App. 23a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States

Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title. 28 U.S.C. § 1291.

INTRODUCTION

This case presents three questions warranting the Court's review: 1) whether a federal appellate court may review and decide fact issues which were not first decided by the lower court; 2) whether the Fifth Circuit erred when it decided Gray was an independent contractor under the FLSA when it failed to view the facts in the light most favorable to the non-movant; and 3) whether the Fifth Circuit erred when failing to consider a factor under the FLSA's Economic Realities test.

I. Gray's FLSA Claim was Not a Final Decision

As to the first question, the Fifth Circuit erred when it ruled on the merits of Gray's FLSA claim as this claim was not a "final decision" under 28 U.S.C. § 1291. 28 U.S.C. § 1291 sets forth federal appellate jurisdiction as follows:

> "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the

> jurisdiction described in sections 1292(c) and (d) and 1295 of this title."

28 U.S.C. § 1291. Central to this discussion is the meaning of the term "final decisions" in 28 U.S.C. § 1291. A list of exceptions to this "final decisions" requirement are contained in 28 U.S.C. § 1292, however none are applicable here. *See* 28 U.S.C. § 1292. In *Microsoft v. Baker*, 582 U.S. 23 (2017), this Court explained that Congress, through the Rules Enabling Act, 28 U.S.C. § 2071, authorized the United States Supreme Court to determine when a decision is final for purposes of § 1291, and to provide for appellate review of interlocutory orders not covered by the statute. This Court further explained that "[t]hese changes are to come from rulemaking, however, not judicial decisions in particular controversies or inventive litigation ploys." *Microsoft v. Baker*, 582 U.S. 23, 39 (2017).

This Court previously held that "[a] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). This Court has also explained that "[a]ppeal gives [federal courts of appeal] power of review, not one of intervention" meaning that "[s]o long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). This Court further clarified in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) that final decisions "end [] the litigation on the merits and leave[] nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978). Following this same reasoning, this Court, in an earlier decision held that dismissals without prejudice

of a complaint that grants leave to amend are not final decisions. *Jung v. K. & D. Mining Co.*, 356 U.S. 335, 337 (1958); cf. *Britt v. Dejoy*, 45 F.4th 790, 796 (4th Cir. 2022).

In *Singleton v. Wolfe*, this Court held that as a general rule that federal appellate courts do not consider an issue not passed upon below. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); see also, *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). This Court in *Singleton* went on to say however, that "the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Id.* at 121. Courts that follow this precedent have limited their consideration of matters not first decided in the district court to purely legal issues. *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304, 307 (2d Cir. 1996); *Workman v. Jordan*, 958 F.2d 332, 337 (10th Cir. 1992); *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248, 250-51 (4th Cir. 1971) (dictum); *Nuelsen v. Sorensen*, 293 F.2d 454, 462 (9th Cir. 1961); see also, *Porter v. Zook*, 803 F.3d 694, 699 (4th Cir. 2015).

In 2023 this Court rendered a decision in *Dupree v. Younger*, 143 S. Ct. 1382 (2023). In *Dupree*, this Court held that interlocutory appeals of fact-based denials of summary judgment were not appealable. This Court explained its reasoning as follows:

> "Factual challenges depend on, well, the facts, which the parties develop and clarify as the case progresses from summary judgment to a jury verdict. Thus, [o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion."

Dupree v. Younger, 143 S. Ct. 1382, 1389 (2023) (Internal citations and quotations omitted). This Court went on to state "[a]ppellate review, by its nature, requires a lower court decision to review." *Id.* (citing *Freytag v. Commissioner*, 501 U. S. 868, 895 (1991)). This Court drew a distinction however, between fact-based denials of summary judgment and purely legal issues:

> "While factual issues addressed in summary-judgment denials are unreviewable on appeal, the same is not true of purely legal issues—that is, issues that can be resolved without reference to any disputed facts. Trials wholly supplant pretrial factual rulings, but they leave pretrial legal rulings undisturbed. The point of a trial, after all, is not to hash out the law. Because a district court's purely legal conclusions at summary judgment are not "supersede[d]" by later developments in the litigation …"

Id. at 1389. In an earlier decision, *Freytag v. Commissioner*, 501 U.S. 868 (1991), this Court further clarified that jurisdictional defects not decided in the lower courts could be addressed *sua sponte* in the appellate courts. *Id.* at 896-97 ("Since such a jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it because of waiver would be to give the waiver legitimating, as opposed to merely remedial, effect, *i. e.*, the effect of approving, *ex ante*, unlawful action by the appellate court itself.").

In the present case, the trial court granted Killick's summary judgment motion on the grounds that Gray's

FLSA claim was barred by the doctrine of judicial estoppel. The trial court did not rule upon the merits of Gray's FLSA claim. Gray appealed this decision. The Fifth Circuit, while casting doubt on the trial court's granting of summary judgment on judicial estoppel, affirmed the trial court's grant of summary judgment on the meris of Gray's FLSA claim and held that Gray was not misclassified as an independent contractor. The Fifth Circuit's ruling on Gray's undecided FLSA claim conflicts with 28 U.S.C.§ 1291 and federal case law that only allows an appellate court to consider purely legal or jurisdictional issues for the first time on appeal. (Discussed *supra.*).

The Fifth Circuit justified its right to review Petitioner's FLSA claim by citing to its prior decision in *Mahmoud v. De Moss Owners Ass'n*, 865 F.3d 322, 328 (5th Cir. 2017). However, in *Mahmoud*, the Fifth Circuit did not decide an issue presented to, but not decided by, the lower court. Consequently, the Fifth Circuit decision in *Mahmoud* does not provide any guidance on when an issue presented to, but not decided by, a lower court may be reviewed by an appellate court.

Previous Fifth Circuit decisions have seemingly followed the rule that an appellate court should only decide legal or jurisdictional issues in the first instance. In *Gilbert v. Donahoe*, 751 F.3d 303 (5th Cir. 2014), the court reiterated its right to review any issue presented to the trial court but chose not to do so as the district court did not address those grounds. *Gilbert v. Donahoe*, 751 F.3d 303, 313 (5th Cir. 2014) ("We elect not to examine whether Gilbert has failed to state a claim or the propriety of summary judgment, as the district court has not had occasion to consider these contentions."). In *Gilbert*, the

only issues the Fifth Circuit addressed that were not first decided by the lower court pertained to subject matter jurisdiction and standing; in other words, jurisdictional matters. *Id.*, 715 F.3d at 311-13. When viewed with the facts of this case, the decision in *Gilbert* suggests that the Fifth Circuit's "final decision" analysis allows it discretion to render an opinion on any issue presented regardless of whether the trial court has ruled upon it or whether it was a purely legal question or one pertaining to jurisdiction of the courts. This procedure violates 28 U.S.C. § 1291 and case law that has expounded upon it.

As discussed above a split exists in several circuits as to what a federal appellate court may consider for the first time on appeal. As such, this Court should grant certiorari and reverse and overturn the incorrect precedent that a federal appellate court has discretion to rule upon fact-based matters not ruled upon by a trial court.

This Court should grant certiorari and reverse.

II. The Fifth Circuit Applied an Incorrect Standard When Reviewing Gray's FLSA Claim

The second issue is whether the Fifth Circuit applied the incorrect standard when reviewing Petitioner's FLSA claim. This incorrect precedent affects all future appeals in the Fifth Circuit. Under a *de novo* review of a motion for summary judgment a court must "…construe all facts and inferences in the light most favorable to the nonmov[ant]…." *Murray v. Earle*, 405 F.3d 278, 284 (5th Cir. 2005). The Fifth Circuit violated this standard by cherry picking facts and construing them in the light most favorable to Killick. The Fifth Circuit's failure to review

Gray's FLSA claim in the light most favorable to the non-movant is in error. This court should grant certiorari and reverse and overturn the incorrect precedent.

This Court should grant certiorari and reverse.

III. The Fifth Circuit Erred by Failing to Consider a Factor Under the Economic Realities Test

The third issue is whether the Fifth Circuit erred by failing to consider a factor under the FLSA's Economic Realities test. The Economic Realities test is used in FLSA cases to determine whether a worker qualifies as an employee or an independent contractor. These factors are: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the putative employee and employer; (3) the degree to which the "employee's" opportunity for profit and loss is determined by the "employer"; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008). In 2020 the Fifth Circuit added a sixth factor to the FLSA Economic Realities test: the extent to which the workers job is an integral part of the employer's business. *Hobbs v. Petroplex Pipe & Constr., Inc.*, 946 F.3d 824, 836 (5th Cir. 2020). " The Fifth Circuit failed to address this factor when ruling on Gray's FLSA claim. A split exists in the various circuits with at least two (2) federal circuit's adopting this factor when applying the FLSA's Economic Realities test. *Acosta v. Off Duty Police Servs., Inc.*, 915 F.3d 1050, 1055 (6th Cir. 2019); *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1443 (10th Cir. 1998). As such, this Court can settle this issue by reversing and overturning the Fifth Circuit's decision.

This Court should grant certiorari and reverse.

STATEMENT OF THE CASE

I. Factual Background

Killick is an oil and gas pipeline inspection company and employed Gray as a pipeline inspector from 2013 to 2020. Killick classified Gray as an independent contractor. For this reason, Killick refused to pay Gray overtime wages. After leaving Killick, Gray sued Killick under the Fair Labor Standards Act ("FLSA") for misclassifying him as an independent contractor and for not paying him overtime wages. Killick moved for summary judgment, in part, on grounds that Gray was barred from asserting that he was an employee, and not an independent contractor, under the doctrine of judicial estoppel. This is because prior to filing suit against Killick, Gray stated he was an independent contractor in a state court proceeding when he applied to obtain an essential-need license. Importantly, Gray's status as an independent contractor under the FLSA was not at issue in the state court's decision to grant Gray his essential-need license. Instead, the state court's decision rested on whether Gray had an essential need for the license. Killick also moved for summary judgment on Gray's claim he was as employee and not an independent contractor under the FLSA. The district court for the Southern District of Texas did not rule on the merits of Gray's FLSA claim but granted Killick's motion for summary judgment on the basis that Gray was estopped from asserting he was an employee under the doctrine of judicial estoppel. Pet. App. 17a-18a. Gray appealed the decision.

On appeal, the Fifth Circuit cast doubt on the district court's grant of summary judgment on judicial estoppel but did not make a ruling on this issue. Pet. App. 5a. Instead, the Fifth Circuit affirmed the decision on the merits of Gray's FLSA claim and held that Gray was not an employee under the FLSA. Pet. App. 6a. In doing so, the Fifth Circuit violated 28 U.S.C. § 1291, did not review the facts in the light most favorable to the non-movant, and failed to consider a factor under the FLSA's Economic Realities test.

A. Gray's Employment with Killick

Killick provides third-party inspection services in the oil and gas industry. C.A. ROA.553[1]. From 2013–2020, Gray was paid an hourly wage by Killick for performing third-party inspection services. C.A. ROA.698. Throughout his employment with Killick, Gray was treated like an employee, and not an independent contractor. In an email to Gray relating to an ongoing project, Killick's vice-president of operations stated: "You are not fired from Killick Group as you are considered one of our 'Go to' inspectors in the field." C.A. ROA.810. In a "Qualification Reference" form completed by Killick for clients, its president, former defendant Jack Lawlor, holds himself out as Gray's "Current Supervisor." C.A. ROA.69.

Killick managed virtually every facet of an inspector's project. For example, a Killick "form outlines all details of [an] assignment, including invoicing." C.A. ROA.813. Gray was required to comply with a host of additional requirements when completing a project that Gray was not

1. C.A. ROA refers to the court of appeals record on appeal.

free to disobey. These procedures include Killick's safety protocols: "From a Safety perspective, all Field Personnel are required to follow all Safety Policies and Procedures at all Supplier Facilities we visit on behalf of Killick Group. If an emergency is to arise, you are required to contact your SQS Coordinator immediately." C.A. ROA.813.

Killick required its purported contractors, like Gray, to sign a "scope of work" agreement before each assignment which contained Killick's expectations for its inspectors. C.A. ROA.754–55. Killick instructed its inspectors on how to create resumes to be used by Killick in soliciting work. C.A. ROA.738. Killick provided these inspector resumes to potential clients so they could choose which inspector they wanted on a job. C.A. ROA.754–55. Gray's Killick-approved resume contained Killick's logo. C.A. ROA.785-87.

Killick also encouraged its contractors to obtain specific certifications because it would lead to "'Opportunity to' work on Pipeline Projects in the future." C.A. ROA.684. Gray testified that Killick made it clear that if inspectors did not obtain these certifications, inspectors would not continue working for Killick. C.A. ROA.721 at p. 20, lines 8–20. Killick assisted Gray in obtaining these certifications. C.A. ROA.174-178. Killick also represented to third parties that Gray "has been a senior inspector with Killick Group covering many disciplines …." C.A. ROA.177; *see also,* C.A. ROA.662; C.A. ROA.729 at p. 142, lines 10–235.

From 2013 to 2020, the years Gray worked for Killick, he rarely worked for another company. C.A. ROA.729 at p. 144, lines 18-22. Killick controlled Gray's rate of pay,

costs, and expenses. C.A.ROA.731. When Gray's car windshield was damaged, Killick reimbursed him for it. C.A. ROA.825. Killick also paid Gray a *per diem*, paid for his rental car, and paid for down time when Killick sent Gray out of town. C.A. ROA.733 at p. 158, lines 1-18. Eventually, Gray asked Killick to make him a W-2 employee; Killick responded that it would cost them too much money. C.A. ROA.739 at p.153, lines 8-14. Gray often worked more than 40 hours a week. C.A. ROA.762. In 2020 Gray decided to leave Killick, in part, due to his frustration at Killick's refusal to pay him his overtime compensation.

II. The Decisions Below

On April 27, 2021, Gray filed his original complaint alleging Killick violated the Fair Labor Standards Act, 29 U.S.C. 201, *et seq*., among other causes of action. C.A. ROA.21—29. Killick later filed its motion for summary judgment asserting judicial estoppel and that Gray failed to prove he was misclassified as an independent contractor under the FLSA. C.A. ROA.553–572. The district court granted summary judgment on all of Gray's live claims on May 18, 2023. Pet. App. 13a.

The district court granted summary judgment on the grounds of judicial estoppel and did not address the merits of Gray's FLSA claim. In granting summary judgment on judicial estoppel the district court focused on a single sentence in an application Gray filed for an essential needs license wherein Gray stated: "Petitioner would further show that he is currently self-employed as a Welding Inspector, primarily in the oil and gas industry." C.A. ROA.629; C.A. ROA.958. In doing so, the district court

ignored established case law which states "[a] person's subjective opinion that he is a businessman rather than an employee does not change his status" for purposes of the FLSA. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 346 (5th Cir. 2008). Gray filed an appeal to the Fifth Circuit.

A. The Fifth Circuit Affirmed Summary Judgment on Grounds That Gray was not Misclassified Under the FLSA

The Fifth Circuit cast doubt on the district court's grant of summary judgment based on judicial estoppel. Pet. App. 5a. But the Fifth Circuit affirmed the district court's order on grounds that the Gray was not misclassified as an independent contractor under the FLSA. The Fifth Circuit should not have affirmed the district court's decision on these grounds as Gray's FLSA claim was not decided by the district court. And The Fifth Circuit's decision was in error as the Fifth Circuit's review of Gray's FLSA claim failed to apply the proper standard and did not apply all of the factors under the FLSA's Economic Realities test.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Ruling on Gray's FLSA Claim Violates 28 U.S.C. § 1291 and Supreme Court Precedent Regarding Appellate Court Review of Undecided Issues

Certiorari should be granted to resolve whether an undecided fact issue that was subject to a trial court's

grant of summary judgment under the doctrine of judicial estoppel constitutes a final decision under 28 U.S.C. § 1291. The Fifth Circuit erred when it ruled on the merits of Gray's FLSA claim as this claim was not a "final decision" under 28 U.S.C. § 1291. This is because the district court had not ruled on Gray's FLSA claim that Killick misclassified him as an independent contractor. Section 1291 states, in pertinent part, that federal appellate courts shall have jurisdiction over "final decisions" of district courts. 28 U.S.C. § 1291.

This Court previously held that "[a] 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). This Court has also explained that "[a]ppeal gives [federal courts of appeal] power of review, not one of intervention" meaning that "[s]o long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). This Court further clarified in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) that final decisions "end [] the litigation on the merits and leave [] nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978).

In *Singleton v. Wolfe*, this Court held that, as a general rule, federal appellate courts do not consider an issue not passed upon below. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); see also, *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). This Court went on to say, however, that "the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Id.* at 121.

Courts that follow this precedent have limited their consideration of matters not first decided in the district court to purely legal issues. *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304, 307 (2d Cir. 1996); *Workman v. Jordan*, 958 F.2d 332, 337 (10th Cir. 1992); *Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248, 250-51 (4th Cir. 1971) (*dictum*); *Nuelsen v. Sorensen*, 293 F.2d 454, 462 (9th Cir. 1961); see also, *Porter v. Zook*, 803 F.3d 694, 699 (4th Cir. 2015).

In 2023 this Court rendered a decision in *Dupree v. Younger*, 143 S. Ct. 1382 (2023). In *Dupree*, this Court held that interlocutory appeals of fact-based denials of summary judgment were not appealable. This Court explained its reasoning as follows:

> "Factual challenges depend on, well, the facts, which the parties develop and clarify as the case progresses from summary judgment to a jury verdict. Thus, [o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion."

Dupree v. Younger, 143 S. Ct. 1382, 1389 (2023) (Internal citations and quotations omitted). This Court went on to state "[a]ppellate review, by its nature, requires a lower court decision to review." *Id.* (citing *Freytag v. Commissioner*, 501 U. S. 868, 895 (1991)). This Court drew a distinction however, between fact-based denials of summary judgment and purely legal issues:

> "While factual issues addressed in summary-judgment denials are unreviewable on appeal,

> the same is not true of purely legal issues—that is, issues that can be resolved without reference to any disputed facts. Trials wholly supplant pretrial factual rulings, but they leave pretrial legal rulings undisturbed. The point of a trial, after all, is not to hash out the law. Because a district court's purely legal conclusions at summary judgment are not "supersede[d]" by later developments in the litigation …"

Id. at 1389.

In an earlier decision, *Freytag v. Commissioner*, 501 U.S. 868 (1991), this Court held that jurisdictional defects not decided in the lower courts could be addressed *sua sponte* in the appellate courts. *Id.* at 896-97 ("Since such a jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it because of waiver would be to give the waiver legitimating, as opposed to merely remedial, effect, *i.e.*, the effect of approving, *ex ante*, unlawful action by the appellate court itself."). The effect of these decisions was to limit an appellate court's right to review factual issues not addressed or denied in a motion for summary judgment.

In the present case, the trial court granted Killick's summary judgment motion on the grounds that Gray's FLSA claim was barred by the doctrine of judicial estoppel. Pet. App. 13a. The trial court did not rule upon the merits of Gray's FLSA claim. Pet. App. 17a-18a. Gray appealed this decision. The Fifth Circuit, while casting doubt on the trial court's granting of summary judgment on judicial estoppel, affirmed the trial court's decision on the basis that Gray was not misclassified under the

FLSA. Pet. App. 1a. The Fifth Circuit's ruling on Gray's undecided FLSA claim conflicts with 28 U.S.C. § 1291 and federal case law that only allows an appellate court to consider purely legal or jurisdictional issues for the first time on appeal. (Discussed *supra.*).

The Fifth Circuit justified its right to review Petitioner's FLSA claim by citing to its prior decision in *Mahmoud v. De Moss Owners Ass'n*, 865 F.3d 322, 328 (5th Cir. 2017). However, in *Mahmoud*, the Fifth Circuit did not decide an issue presented to, but not decided by, the lower court. Consequently, the Fifth Circuit decision in *Mahmoud* does not provide guidance on when an issue presented to, but not decided by, a lower court may be reviewed and decided by the Fifth Circuit in the first instance.

In a previous Fifth Circuit decision, *Gilbert v. Donahoe*, 751 F.3d 303 (5th Cir. 2014) the Fifth Circuit reiterated its right to review any issue presented to the trial court but chose not to do so, as the district court did not address those grounds. *Gilbert v. Donahoe*, 751 F.3d 303, 313 (5th Cir. 2014) ("We elect not to examine whether Gilbert has failed to state a claim or the propriety of summary judgment, as the district court has not had occasion to consider these contentions."). In *Gilbert*, the only issues the Fifth Circuit addressed, that were not first decided by the lower court, pertained to subject matter jurisdiction and standing; in other words, jurisdictional issues. *Id.*, 715 F.3d at 311-13. When viewed with the present case, the decision in *Gilbert* suggests the Fifth Circuit's "final decision" analysis allows it discretion to render an opinion on any issue presented regardless of whether the trial court has ruled upon it, or whether it

was a question of pure law or jurisdiction of the courts. This procedure violates 28 U.S.C. § 1291 and this Court's precedent that has expounded upon it.

In the present case, Gray's FLSA claim involved the fact specific question of whether Gray was misclassified as an independent contractor. The Fifth Circuit applied the FLSA's Economic Realities test which uses a six-factor test to decide the issue of the worker's classification. *Hobbs v. Petroplex Pipe & Constr., Inc.*, 946 F.3d 824, 836 (5th Cir. 2020). The Fifth Circuit then considered the facts as presented in the record giving its assessment as to their applicability as to each of the factors under the Economic Realities test. Pet. App. 7a-12a. The Fifth Circuit's ruling on the merits of Gray's FLSA claim was a determination of fact and law in the first instance which violates 28 U.S.C. § 1291 and this Court's established precedent with regards to the same.

As discussed above a split exists in several circuits as to what a federal appellate court may consider for the first time on appeal. This Court should grant certiorari and reverse and overturn the incorrect precedent that a federal appellate court has discretion to rule upon fact-based matters not ruled upon by a trial court.

This Court should grant certiorari and reverse.

II. The Fifth Circuit Used the Incorrect Standard in Reviewing Gray's FLSA Claim

The second issue is whether the Fifth Circuit applied the incorrect standard when reviewing Gray's FLSA claim. The use of an incorrect standard of review threatens all

parties who may bring a motion for summary judgment for review before the Fifth Circuit. Under a *de novo* review of a motion for summary judgment a court must "…construe all facts and inferences in the light most favorable to the nonmov[ant]…." *Murray v. Earle*, 405 F.3d 278, 284 (5th Cir. 2005). The Fifth Circuit violated this standard by cherry picking facts and construing them in the light most favorable to Killick. Indeed, the Fifth Circuit's opinion is missing any discussion of the applicable standard for reviewing a summary judgment motion. Instead, the Fifth Circuit's opinion sets forth the standard of review for judicial estoppel. Pet. App. 5a. As already discussed, the Fifth Circuit did not render a decision as to the district court's grant of summary judgment on judicial estoppel.

The Fifth Circuit's failure to use the appropriate standard of review for a motion for summary judgment reiterates why a court of appeals should not decide issues of fact in the first instance. With regard to the first factor under the Economic Realities test, the degree of control exercised by the alleged employer, Killick's counsel admitted during oral argument that Gray formed Veritas Inspectors at the urging of Killick's owner Jack Lawlor. *See also* C.A. ROA.730, ¶¶147:13-148:10. The Fifth Circuit ignores this, and states that it is uncontested that Gray formed his own company. Pet. App. 7a. Next, the Fifth Circuit states that Killick marketed his company Veritas Inspectors, when the only evidence is that he made a business card. *Compare* Pet. App. 7a, *with* C.A. ROA.634.

The Fifth Circuit also looked at the following facts: 1) Gray formed his own company—Veritas Inspectors; 2) marketed his company's services to the public; 3) Gray worked for other entities in 2019 and 2020; 4) Gray worked

on a project-to-project basis and possessed the freedom to accept and reject projects; 5) when he accepted a project for Killick, he performed his work independently and without supervision; 6) during the commission of a project, Gray used his own vehicle, laptop, and cell phone; after completing a project, Gray would prepare an invoice to Killick for payment, which he submitted under the name Veritas Inspectors. Pet. App. 8a.

The Fifth Circuit held that these facts established that Gray was an independent contractor.

However, the Fifth Circuit omitted facts that showed control by Killick. For example, a Killick "form outlines all details of [an] assignment, including invoicing." C.A. ROA.813. Gray was required to comply with a host of additional requirements when completing a project that Gray was not free to disobey. These procedures include Killick's safety protocols: "From a Safety perspective, all Field Personnel are required to follow all Safety Policies and Procedures at all Supplier Facilities we visit on behalf of Killick Group. If an emergency is to arise, you are required to contact your SQS Coordinator immediately." C.A. ROA.813. Further, Killick required each of its employees, like Gray, to sign a "scope of work" agreement before each assignment which contained Killick's expectations for its inspectors. C.A. ROA.754-55, ¶¶99:3-100:20. Killick instructed its inspectors how to create resumes to be used by Killick in soliciting work. C.A. ROA.738, ¶¶44:18-48:8. Killick provided these inspector resumes to potential clients so they could choose which inspector they wanted on a job. *Id.* Gray's Killick-approved resume contained Killick's logo. C.A. ROA.785-87. From 2013 to 2020, the years Gray worked for Killick,

Gray rarely worked for another company. C.A. ROA.729, p. 144, ¶¶18-22. The Fifth Ciruit also cites to an instance in 2020 where Gray worked for another company, however the record indicates that Gray had quit working for Killick at that time. C.A. ROA.730, p. 146, ¶¶16-24.

Killick required Gray to obtain work specific certifications. C.A. ROA.684. In an email, Killick's vice president informs all of Killick's inspectors that if they obtain a certain certification, it would allow the "'[o]pportunity to'[sic] work on Pipeline Projects in the future." *Id.* Killick employees like Gray were expected to pay for these certifications out of pocket. C.A. ROA. 724, p. 91, ¶¶11-20.

During his deposition, Gray testified that Killick made it clear that if inspectors did not obtain these certifications, inspectors would not continue working for Killick. C.A. ROA. 721, p. 20, ¶¶8-20. Killick employees, including Jack Lawlor, would assist Gray in obtaining these certifications. C.A. ROA.174-178. In one email pertaining to a work specific certification, Jack Lawlor represents that Mr. Gray was employed by Killick as an "inspector" with "Killick Group". C.A. ROA.177.

In *Hopkins v. Cornerstone Am.*, the Fifth Circuit found that a worker was an employee when, as here, the employer … partially controlled the advertising…" of the workers. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 344 (5th Cir. 2008). Moreover, in *Hopkins*, the court found that the employer "…exclusively determined the type and price of insurance products that the [workers] could sell." *Id.* In the present case, Killick advertised Gray's services and exclusively determined Gray's rate of pay. C.A. ROA.822.

As such, the Fifth Circuit's opinion as to the first factor, the degree of control exercised by an alleged employer, is in conflict with the Fifth Circuit's decision in *Hopkins*. And these facts, when viewed in the light most favorable to the non-moving party, militate toward Gray's classification as an employee. Because the Fifth Circuit viewed these facts in the light most favorable to Killick, the movant, the Fifth Circuit's decision conflicts with well-established law requiring an appellate court to review summary judgment decisions in the light most favorable to the non-moving party. See, e.g., *Murray v. Earle*, 405 F.3d 278, 284 (5th Cir. 2005).

As to the second factor, the extent of the relative investment of the employee and employer. The Fifth Circuit found that Gray was an independent contractor because he used his own, laptop, machinery, and supplies to perform his work projects. Pet. App. 8a-9a. However, the Fifth Circuit did not compare the relative investments of the employer and employee as required under the Economic Realities test. "In applying the relative-investment factor, we compare each worker's individual investment to that of the alleged employer." *Hopkins*, at 344. In *Hopkins*, the court ruled in favor of employee status when it considered "…that Cornerstone's investment--including maintaining corporate offices, printing brochures and contracts, providing accounting services, and developing and underwriting insurance products--outweighs the personal investment of any one Sales Leader." *Id.*

Here, it is undisputed that Killick employs dozens of full-time employees known as SQS Coordinators and maintains offices in three (3) countries. *See, e.g.*,

C.A. ROA.728, p. 140, ¶¶10-20; *and* C.A. ROA.769. This investment dwarfs Gray's investment in his laptop, phone, etc. As such, these facts support employee status. And thus, the Fifth Circuits opinion is at odds with decision in *Hopkins*, which further illustrates the Fifth Circuit did not apply the correct standard in reviewing the facts.

Under the third factor, the Fifth Circuit decided that Gray was an employee because he took tax deductions on his income tax return. Pet. App. 10a. This analysis ignores the Fifth Circuit's opinion in *Hobbs v. Petroplex Pipe & Constr., Inc.*, 946 F.3d 824 (5th 2020). Although the Fifth Circuit was correct at analyzing the degree to which a party may control its own costs, the Fifth Circuit ignored another consideration in this analysis: "…whether the putative employer's control over the worker's schedule and pay had the effect of limiting the worker's opportunity, as an independent contractor, for profit or loss." *Hobbs v. Petroplex Pipe & Constr., Inc.*, 946 F.3d 824, 833 (5th 2020).

The record indicates that from 2013 to 2020, Gray only worked for one other company other than Killick, and Killick controlled, the hours Gray worked and Gray's rate of pay. In an email, Killick's vice president informs all of Killick's inspectors that if they obtain a certain certification, it would allow the, "'[o]pportunity to'[sic] work on Pipeline Projects in the future." C.A. ROA.684. Killick employees like Gray were expected to pay for these certifications out of pocket. C.A. ROA. 724, p. 91, ¶¶11-20. During his deposition, Gray testified that Killick made it clear that if inspectors did not obtain these certifications, inspectors would not continue working for Killick. C.A. ROA. 721, p. 20, ¶¶8-20. When viewing these facts in the

light most favorable to the non-moving party, this factor also militates in the favor of employee status.

Under the fourth factor, the skill and initiative required in performing the job, the Fifth Circuit ignored the evidence in the record that Killick required its inspectors to obtain certifications. Instead, the Fifth Circuit held, "… Gray is a well-credentialed and proficient inspector and has successfully completed numerous welding certifications and exams." Pet. App. 11a. The Fifth Circuit found that this factor weighed in favor of independent contractor status. *Id.* The Fifth Circuit ignored that Gray felt that he was not free to refuse this requirement. C.A. ROA.721, p. 20, ¶¶8-20. The certification requirement was Killick's pay to play scheme whereby Killick received a kickback in the value of services it could market its inspectors for after they completed the certification. Such a kickback violates the FLSA. *See* 29 C.F.R. § 531.35.

Under the second part of this test, the Fifth Circuit found that Gray demonstrated initiative because he formed and marketed his business, obtained industry-specific certifications, worked on a project-by-project basis, was responsible for his own supplies, and worked for other inspection companies. Pet. App. 11a. Again, the undisputed evidence is that Gray formed his company at the behest of Killick; that Gray almost exclusively worked for Killick from 2013 to 2020; Gray obtained industry specific certifications at the urging of Killick; and Gray's own supplies consisted of merely a laptop, phone, and his personal automobile.

In *Hopkins*, the Fifth Circuit analyzed whether the worker had the ability to exercise initiative within the

business. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 345 (5th Cir. 2008). The Fifth Circuit noted that all major components open to initiative, including advertising and pricing, were controlled by the employer. *Hopkins*, at 345. Based on this, the Fifth Circuit found that this factor weighed heavily in favor of employee status. *Id.* In the present case, the record clearly indicates that Killick marketed Gray's services, set Gray's rate of pay, guided him in creating his resume, gave him detailed instructions on how to complete his tasks, and reviewed Gray's work product. (Discussed *supra*.). This evidence reveals that Gray could not exercise initiative within the business; and therefore, these facts support that Gray was an employee.

Under the fifth factor, the permanency of the working relationship, the Fifth Circuit held as follows:

> "We recognize that Gray worked for Killick from 2013 to 2020, nearly seven years. "The inferences gained from the length of time of the relationship depend on the surrounding circumstances." *Id.* Though this fact supports employee status, the project-by-project nature of Gray's work and Gray's decision to work for at least one other company convinces us otherwise. Further, Gray's "valuable skillset shows how the permanency of the relationship may, in reality, be not all that permanent." *Id.* This last factor also supports independent contractor status."

Pet. App. 12a. Under the Economic Realities test, when reviewing the permanency of the relationship, it is not what the parties could have done, but as a matter of

economic reality, what they actually do that is dispositive. *Hopkins*, at 345. Here, the evidence is clear: Gray worked almost exclusively for Killick from 2013 to 2020. As such, this factor also weighs in favor of employee status. The foregoing demonstrates the Fifth Circuit did not review the facts in the light most favorable to Gray, and contradicted its holdings from other FLSA cases. The Fifth Circuit's failure to review Gray's FLSA claim under the proper standard for review of summary judgment motions is in error. Therefore, this Court should grant certiorari and reverse and overturn this incorrect precedent.

This Court should grant certiorari and reverse.

III. The Fifth Circuit Omitted a Factor Under the FLSA'S Economic Realities Test

The third issue is whether the Fifth Circuit erred by failing to consider a factor under the Economic Realities test. This question will affect consistent enforcement of the FLSA across the country with regard to determining whether a worker qualifies as an employee. As already discussed above, the Economic Realities test is used in FLSA cases to determine whether a worker qualifies as an employee or an independent contractor. In 2020 the Fifth Circuit added a sixth factor to the FLSA Economic Realities test: the extent to which the workers job is an integral part of the employer's business. *Hobbs v. Petroplex Pipe & Constr., Inc.*, 946 F.3d 824, 836 (5th Cir. 2020). " The Fifth Circuit failed to address this factor when ruling on Gray's FLSA claim. A split exists in the circuit courts with at least two (2) other circuits adopting this sixth factor under the FLSA's Economic Realities test. *Acosta v. Off Duty Police Servs., Inc.*, 915 F.3d 1050,

1055 (6th Cir. 2019); *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1443 (10th Cir. 1998). As such, this Court can settle this split by reversing and overturning the Fifth Circuit's decision.

This Court should grant certiorari and reverse.

CONCLUSION

This case presents three (3) questions of importance which affect the functioning of the federal appellate system. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 29, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 28, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 23-20295

GUILLERMO GRAY,

Plaintiff-Appellant,

v.

KILLICK GROUP, L.L.C.,

Defendant-Appellee.

Filed August 28, 2024

OPINION

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:21-CV-1673

Before SOUTHWICK, HAYNES, and GRAVES, *Circuit Judges.*

LESLIE H. SOUTHWICK: *Circuit Judge*:

The plaintiff brought suit against his ostensible employer for wages and overtime pay under the Fair Labor Standards Act. The district court granted

summary judgment to the defendant. The court held that the plaintiff was judicially estopped from claiming employee status under the Fair Labor Standards Act based on his previously sworn assertion before a criminal court that he was self-employed.

We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

The defendant Killick Group, L.L.C. provides inspection services to customers in the oil, gas, and energy industries. Once a need for an inspection arises, customers will provide the specifications of their equipment and/or materials and the qualification requirements for an inspector to Killick on a "project-by-project basis." Killick finds the appropriate third-party inspector to meet the needs of the customer. If the inspector confirms a willingness to work on a project, Killick then proposes the inspector to the customer. If the customer selects Killick's inspector and the inspector accepts the assignment, the inspector then performs the inspection and prepares a report of findings.

The plaintiff Guillermo Gray has many years' experience in the oil and gas industry and is a certified welding and coding inspector. In 2013, Gray founded Veritas Inspectors, Inc. That same year, Gray began performing inspection services for Killick on a project-by-project basis. While working on customer projects for Killick, Gray would use his own laptop, cellphone, and vehicle to travel to inspection sites. Gray never worked

from the Killick office or used Killick's equipment. To receive payment for a completed project, Gray would submit to Killick an invoice using the business name "Veritas Inspectors."

In November 2015, the State of Texas convicted Gray for driving while intoxicated. That caused the suspension of his driver's license. Gray then applied for an essential-need license from the Harris County Criminal Court based on his need to use a vehicle to continue his inspection services. On his application, Gray stated "he [was] currently self-employed as a Welding Inspector, primarily in the oil and gas industry" and "he ha[d] no one to depend on but himself to transport him in this employment." Further, on his case information sheet, Gray said his employer was "Veritas Inspections." Once the criminal court approved his application, Gray continued to provide services for Killick and other entities.

In 2017, Killick encouraged its inspectors to obtain the API 1169 Certification to serve customers better and acquire more project opportunities. According to Gray, Killick required its inspectors to pay the cost of that Certification. In August 2018, Gray asked John Lawlor, Killick's president, if he would split the cost. Lawlor stated he would consider paying "some portion [or] sharing of the cost." Killick, however, never paid or reimbursed Gray for the certification. In March 2020, during the rise of COVID-19, Gray stopped accepting projects from Killick.

In April 2021, Gray sued Killick and Lawlor in state court in Harris County, Texas. Gray alleged the

defendants violated the Texas Labor Code and the Fair Labor Standards Act ("FLSA") when they refused to pay Gray wages and overtime. Gray also alleged breach of contract and quantum meruit claims.

The defendants removed the lawsuit to the United States District Court for the Southern District of Texas. The court granted the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) on Gray's Texas Labor Code claim. The district court later dismissed Lawlor from the suit. After extensive discovery, Killick moved for summary judgment on Gray's FLSA, breach of contract, and quantum meruit claims. Killick argued judicial estoppel barred Gray's FLSA claim because Gray admitted in his sworn occupational license application that he was "self-employed." Because the criminal court allegedly relied on Gray's self-employed statement, Killick asserted Gray could not establish he was a Killick employee as a matter of law. In addition to judicial estoppel, Killick argued Gray could not establish an employer-employee relationship under the economic-realities test. Finally, Killick contended there were no genuine disputes as to any material fact on Gray's breach of contract and quantum meruit claims and they failed as a matter of law.

The district court granted Killick's motion for summary judgment. Regarding the FLSA claim, the court relied on judicial estoppel to bar Gray from claiming an employer-employee relationship needed for his *prima facie* FLSA claim. The court also held Gray's breach of contract and quantum meruit claims failed. Gray timely appealed. He seeks reversal only on the FLSA claim, and that is the only one we consider.

Appendix A

DISCUSSION

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "While a grant of summary judgment is generally reviewed *de novo*, we review the use of judicial estoppel only for abuse of discretion." *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 346 (5th Cir. 2008). "[A]n abuse of discretion standard does not mean a mistake of law is beyond appellate correction, because [a] district court by definition abuses its discretion when it makes an error of law." *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999) (alterations in original) (quotation marks and citation omitted). "Accordingly, [t]he abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Id.* (alteration in original) (quotation marks and citation omitted).

The district court determined judicial estoppel on the FLSA claim was appropriate because Gray's self-employed statement on his occupational license application is clearly "inconsistent with his current legal position that he was an employee of Killick." The court also explained that Gray convinced the criminal court to accept his self-employed position, "as evidenced by [the criminal court] granting [Gray's] application."

We conclude there is some doubt about the application of judicial estoppel here. Judicial estoppel requires both that the earlier position taken by a party is clearly inconsistent with the one taken in the current litigation,

and that the earlier court accepted the prior position.[1] *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003). Gray raises a number of arguments about the supposed inapplicability of judicial estoppel. We need not consider them because we can resolve this appeal by evaluating whether Killick even violated the FLSA. We have authority to base our decision on that separate issue because we "may affirm the district court's grant of summary judgment on any ground supported by the record and presented to the district court." *Mahmoud v. De Moss Owners Ass'n*, 865 F.3d 322, 328 (5th Cir. 2017).

Killick argued in its motion for summary judgment that Gray cannot meet his burden to establish an employer-employee relationship. To demonstrate a *prima facie* FLSA case, a worker must prove: "(1) that there existed an employer-employee relationship during the unpaid overtime periods claimed; (2) that the employee engaged in activities within the coverage of the FLSA; (3) that the employer violated the FLSA's overtime wage requirements; and (4) the amount of overtime compensation due." *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 379 (5th Cir. 2019) (citation

1. "[M]any courts have imposed the additional requirement that the party to be estopped must have acted intentionally, *not* inadvertently." *In re Coastal Plains*, 179 F.3d at 206 (emphasis in original); *see*, *e.g.*, *Johnson Serv. Co. v. Transamerica Ins.*, 485 F.2d 164, 175 (5th Cir. 1973). The district court found Gray "did not act inadvertently because he signed the Application under oath, affirming that all representations in his Application were true and correct." Gray does not challenge this finding, and we do not address it.

omitted). The FLSA broadly recognizes "any individual employed by an employer" as an "employee." *Id.* at 378 (quoting 29 U.S.C. § 203(e)(1)).

On appeal, Killick contends Gray was not an employee but instead an independent contractor under this circuit's economic-realities test. "To determine if a worker qualifies as an employee, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself." *Hopkins*, 545 F.3d at 343. Five non-exhaustive factors are considered:

> (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship.

Id. "No single factor is determinative. Rather, each factor is a tool used to gauge the *economic dependence* of the alleged employee, and each must be applied with this ultimate concept in mind." *Id.* (emphasis in original) (citation omitted).

As to the first factor, Killick emphasizes the uncontested fact that Gray formed his own company—Veritas Inspections—and marketed his company's services to the public. Gray's efforts proved successful as

he obtained work and performed services for other entities in addition to Killick during 2019 and 2020.

Killick also describes the nature of Gray's work. Gray worked for Killick on a project-by-project basis and possessed the freedom to accept or reject projects without retaliation. When he accepted a project for Killick, Gray performed his work independently and without supervision. During the commission of a project, Gray used his own vehicle, laptop, and cellphone. After completing a project, Gray would prepare an invoice to Killick for payment, which he submitted under the name "Veritas Inspectors."

We conclude this first factor supports Gray's independent contractor status because he controlled "a meaningful part of the business" and "has a viable economic status that can be traded to other . . . companies." *Parrish*, 917 F.3d at 381 (alteration in original) (citations omitted).

As to the second factor, "we compare each worker's *individual* investment to that of the alleged employer." *Hopkins*, 545 F.3d at 344 (emphasis in original). Gray invested his own time and money into industry-specific certifications and exams. There is no indication in the record that Killick paid or compensated Gray for any of these certifications or exams. Gray also supplied his own vehicle, machinery, and other supplies to perform his work projects, which were listed as deductions on his 2019 and 2020 tax returns.

Before the district court, Gray argued Killick's overall investment in its business outweighs Gray's individual investment. According to Gray, this is evidenced by Killick compensating Gray for a rental car and giving him a *per diem* when he traveled out of town, employing several SQS coordinators,[2] and maintaining numerous offices in multiple countries. We find this case similar to one in which the workers provided their own vehicles, machinery, and tools while the alleged employer provided "some equipment" and employed individuals to help the workers perform their services. *Carrell v. Sunland Constr., Inc.*, 998 F.2d 330, 333 (5th Cir. 1993). Though we recognized that the alleged employer's overall investment "was obviously significant," we classified the workers as independent contractors in part because they supplied their own costly equipment. *Id.* at 333-34. Based on these analogous facts, we conclude this second factor weighs slightly in favor of independent contractor status because Gray paid for his own certifications and exams and used his own vehicle and various supplies.

As to the third factor, we examine "the degree to which the worker's opportunity for profit or loss is determined by the alleged employer." *Parrish*, 917 F.3d at 384 (citation omitted). In this consideration, "it is important to determine how the worker['s] profits [depend] on [his] ability to control [his] own costs." *Id.* (second alteration in original) (quotation marks and citation omitted). Killick argues that "because Gray had extensive autonomy to

2. Gray explained in his deposition that SQS coordinators would "interface with the customers," "contact suppliers," and "maybe set up inspection dates and time."

make decisions that affected his ability to be profitable," this factor favors independent contractor status. We agree. Gray had the ability to negotiate the hourly pay rates for his services on Killick projects and managed his own business expenses.

Though Killick set parameters surrounding the hours and mileage Gray could expend on a project, this is not determinative of employee status. Even if an alleged employer "exerted some control over the [worker's] opportunity for profits by fixing the hourly rate and the hours of work," a worker may still be considered an independent contractor. *Carrell*, 998 F.2d at 334. Gray's tax returns indicate his "profits . . . depended on [his] ability to control [his] own costs." *Id.* On his 2019 tax returns, Gray's sole proprietorship showed a gross income of $75,155, which resulted in $27,735 in net profits after accounting for $47,420 in expenses. The expenses included deductions for his car and truck, supplies, travel and meals, and utilities. Likewise, his 2020 tax returns demonstrate his sole proprietorship generated a gross income of $57,965, which resulted in $29,075 in net profits after deducting $28,890 in expenses. These tax returns are significant evidence that Gray was not reporting salary or wages but business income with an ability to control his expenses.

Moreover, Gray would not receive payment from Killick unless he accepted and completed projects for Killick. The more projects he accepted from Killick, the more money Gray would make. Further, Gray never signed a non-compete agreement for Killick; he had the freedom to accept projects for other companies and did so on at

least one occasion. Based on the foregoing, we conclude this third factor favors independent contract status.

As to the fourth factor, we consider "the skill and initiative required in performing the job." *Parrish*, 917 F.3d at 385 (citation omitted). "As a part of this inquiry, whether [workers] have some unique skill set, or some ability to exercise significant initiative within the business is, for obvious reasons, evaluated." *Id.* (quotation marks and citation omitted). Importantly, "[g]reater skill and more demonstrated initiative counsel in favor of [independent contractor] status." *Id.* As we have previously discussed, Gray is a well-credentialed and proficient inspector and has successfully completed numerous welding certifications and exams. Gray argued before the district court that Killick required him to obtain certain certifications to secure Gray's work for Killick. That is not what the evidence showed. Instead, Killick encouraged these certifications. Killick specifically told Gray the API 1169 Certification "is worth looking into" and explained how it could benefit his career. Indeed, there is no indication Killick required or forced Gray to obtain this or any certification as a job prerequisite.

Concerning initiative, Killick emphasizes that Gray formed and marketed his business, obtained industry-specific certifications, worked on a project-by-project basis, was responsible for his own supplies, and worked for other inspection companies. Though Gray's alleged initiative alone may not compel independent contractor status, when these considerations are "viewed by the totality of the circumstances," Gray's "specialized skill weighs heavily in our analysis and persuades us to hold

this factor leans in favor of [independent contractor] status." *Id.* at 386.

The fifth and final factor is the permanency of the relationship. There, numerous considerations apply such as "whether [Gray] worked exclusively for" Killick, "the total length of the relationship between" the two parties, and "whether the work was on a project-by-project basis." *Id.* at 387 (quotation marks and citations omitted). Gray indisputably worked for Killick on a project-by-project basis. "This counsels heavily in favor of [independent contractor] status." *Id.* Moreover, during the period Gray worked for Killick, he worked for at least one other company.

We recognize that Gray worked for Killick from 2013 to 2020, nearly seven years. "The inferences gained from the length of time of the relationship depend on the surrounding circumstances." *Id.* Though this fact supports employee status, the project-by-project nature of Gray's work and Gray's decision to work for at least one other company convinces us otherwise. Further, Gray's "valuable skillset shows how the permanency of the relationship may, in reality, be not all that permanent." *Id.* This last factor also supports independent contractor status.

In summary, our *de novo* survey of these five factors convinces us that Gray was not an employee of Killick. We conclude Gray is an independent contractor outside the purview of the FLSA.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, DATED MAY 18, 2023

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:21-CV-01673

GUILLERMO GRAY,

Plaintiff,

VS.

KILLICK GROUP, LLC,

Defendant.

May 18, 2023, Decided
May 18, 2023, Filed, Entered

ORDER

Before the Court are Defendant Killick Group, LLC's Motion for Summary Judgment (the "Motion") (Doc. #66), Plaintiff Guillermo Gray's Response (Doc. #67), and Defendant's Reply (Doc. #68). Having considered the parties' arguments and the applicable legal authorities, the Court finds that the Motion should be granted.

Appendix B

I. Background

Defendant Killick Group, LLC ("Defendant" or "Killick Group") is an inspection agency that provides third-party inspection services to owners and operators in the oil and gas industry. Doc. #66 at 1. Plaintiff Guillermo Gray is a certified welding, coating, and pipeline inspector who was hired by Defendant from 2013 to 2020 to do inspections for Defendant's customers. Doc. #67 at 1-2. During that time, Plaintiff claims that he was Defendant's employee, and Defendant failed to pay him overtime wages. *Id.* at 1. Plaintiff alleges that he was an employee because Defendant controlled every aspect of his work, including requiring that he obtain work-specific professional certifications. *Id.* at 3-4. According to Plaintiff, Defendant also required inspectors to cover the cost of the certifications. However, on August 21, 2018, Plaintiff told Defendant's President Jack Lawlor that he was preparing to enroll in the course for the certifications and asked if Defendant would split the cost. On February 25, 2019, after Plaintiff obtained the certifications, Lawlor "told Plaintiff to send him the invoice [for the certifications] and Defendant would consider sharing the cost." *Id.* at 17. Defendant avers that Plaintiff was an independent contractor who was self-employed, as evidenced by Plaintiff declaring such in a sworn application filed in the Harris County Criminal Court of Law No. 2. Doc. #66 at 1, 6, 8.

On April 27, 2021, Plaintiff sued Defendant in the 281st Judicial District of Harris County, Texas, alleging that Defendant violated wage-related sections of the

Texas Labor Code and failed to pay wages and overtime as required by the Fair Labor Standards Act ("FLSA"). Doc. #1, Ex. 2 (first citing 29 C.F.R. § 790.21; and then citing 29 U.S.C. § 215(a)(2)). Plaintiff also sued for breach of contract and quantum meruit based on Defendant allegedly failing to partially reimburse him for the cost of the certifications. Doc. #1, Ex. 2. On May 21, 2021, Defendant removed the case pursuant to the Court's federal question jurisdiction. Doc. #1. Defendant moved to dismiss Plaintiff's claims under the Texas Labor Code (Doc. #4), and the Court granted Defendant's Motion to Dismiss with prejudice as to those claims (Doc. #17). Defendant now moves for summary judgment on Plaintiff's remaining claims of FLSA violations, breach of contract, and quantum meruit. Doc. #66.

II. Legal Standard: Federal Rule of Civil Procedure 56

Summary judgment is appropriate if the moving party "shows that there is no genuine dispute as to any material fact" and that it "is entitled to judgment as a matter of law." FED. R. Civ. P. 56(a). "The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact." *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 349 (5th Cir. 2005). "Once the movant does so, the burden shifts to the nonmovant to establish an issue of fact that warrants trial. All reasonable inferences must be viewed in the light most favorable to the party opposing summary judgment, and any doubt must be resolved in favor of the non-moving party." *Lyons v. Katy Indep. Sch. Dist.*, 964 F.3d 298, 302 (5th Cir. 2020) (cleaned up).

III. Analysis

a. FLSA Claims

Defendant first argues that Plaintiff's FLSA claims fail because he cannot establish the requisite employer-employee relationship for his prima facie case. Defendant avers that Plaintiff should be judicially estopped from claiming he is an employee of Killick Group because he filed an Application for Essential Need License ("Application") in 2016 with the Harris County Criminal Court at Law No. 2 that states, "Petitioner [Guillermo Gray] would further show that he is currently self-employed as a Welding Inspector, primarily in the oil and gas industry." Doc. #66 at 8; Doc. #66, Ex. 1 at 57. Plaintiff affirmed under oath that his Application was true and correct. Doc. #66, Ex. 1 at 61. After considering "the verified petition filed by" Plaintiff, Judge Bill Harmon granted Plaintiff's Application for an occupational driver's license. Doc. #66, Ex. 5. Plaintiff argues that Defendant's judicial estoppel argument is a red herring because (1) "Plaintiffs subjective belief that he was self employed does not change his status for the purposes of [the] FLSA"; and (2) Judge Harmon's "decision to grant Plaintiff an occupational license was not based on his status as an employee or independent contractor under the FLSA[,] [b]ut instead, on whether he needed a license to work." Doc. #67 at 14-15.

The FLSA requires employers to pay employees overtime pay when an employee works more than 40 hours in a week. *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 379 (5th Cir. 2019) (citing 29 U.S.C.

§ 207(a)(1)). To bring an FLSA claim for overtime wages, Plaintiff must first prove that there was an employer-employee relationship at the time of the unpaid overtime periods claimed. *Id.*

"Judicial estoppel is 'a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position.'" *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)). Judicial estoppel applies when "(1) the position of the party against which estoppel is sought is plainly inconsistent with its prior legal position; (2) the party against which estoppel is sought convinced a court to accept the prior position; and (3) the party did not act inadvertently." *Jethroe v. Omnova Sols., Inc.*, 412 F.3d 598, 600 (5th Cir. 2005). Judicial estoppel applies to pleadings made under oath in a prior proceeding. *Johnson Serv. Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 175 (5th Cir. 1973). The doctrine was created to protect the judiciary from "parties playing fast and loose with the courts to suit the exigencies of self interest." *In re Coastal Plains, Inc.*, 179 F.3d at 205.

Plaintiff attempts to play "fast and loose with the courts" for his own self-interest. *See id.* Plaintiff swore to the Harris County Criminal Court at Law No. 2 that he was self-employed in 2016 to obtain a driver's license for work. He now seeks to convince this Court that he was actually an employee of Killick Group's from 2013 to 2020 to fall within the ambit of the protections of the FLSA. Judicial estoppel was established to prevent

plainly inconsistent positions such as these from being advanced in the courts. *See In re Coastal Plains, Inc.*, 179 F.3d at 205. Thus, the Court finds that judicial estoppel is appropriately applied in this case. It is clear that Plaintiff's prior legal position—that he was self-employed—is plainly inconsistent with his current legal position that he was an employee of Killick Group's. *See Jethroe*, 412 F.3d at 600. Plaintiff successfully convinced Judge Harmon to accept his prior position, as evidenced by Judge Harmon granting Plaintiff's Application. *See id.* Finally, Plaintiff did not act inadvertently because he signed the Application under oath, affirming that all representations in his Application were true and correct. Doc. #66, Ex. 1 at 61; *see also Jethroe*, 412 F.3d at 600. Accordingly, Plaintiff is judicially estopped from claiming that he was an employee of Killick Group from 2013 to 2020. As a result, Plaintiff cannot establish the employer-employee relationship required to support his prima facie case pursuant to the FLSA, and the Motion is granted as to these claims.

b. Breach of Contract

Next, Defendant argues that Plaintiff's breach of contract claim fails because Plaintiff stated in his response to Defendant's interrogatories that he did not have any contracts with Defendant. Doc. #66 at 18; Doc. #66, Ex. 1 at 64-65. Plaintiff avers that Defendant breached a contract to partially reimburse him for the costs of the professional certifications he obtained. Doc. #67 at 17. Plaintiff asked Defendant's president, Lawlor, to split the cost of the certifications, to which Lawlor responded in part, "Also, send me a copy of the invoice that you paid

and I will look (sic) some portion/sharing of the cost." Doc. #67, Ex. 9 at 2.

Under Texas law, a breach of contract claim requires: "(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach." *Smith Int'l, Inc. v. Egle Grp., LLC*, 490 F.3d 380, 387 (5th Cir. 2007) (quoting *Valero Mktg. & Supply Co. v. Kalama Int'l, L.L.C.*, 51 S.W.3d 345, 351 (Tex. App. 2001)). "A valid contract requires (1) an offer, (2) an acceptance, (3) a meeting of the minds, (4) each party's consent to the terms, (5) execution and delivery of the contract with the intent that it be mutual and binding, and (6) consideration." *Mack v. John L. Wortham & Son, L.P.*, 541 F. App'x 348, 362 (5th Cir. 2013) (per curiam).

Assuming that Plaintiff's email to Jack Lawlor asking him if Defendant would split the cost of a certification class qualifies as an offer, Lawlor's response that he would "look (sic) some portion/sharing of the cost" does not qualify as acceptance. *See id.* And Plaintiff seemingly concedes that Lawlor did not accept the offer in his emailed response. According to Plaintiff, "Jack Lawlor told Plaintiff to send him the invoice and Defendant *would consider sharing the cost.*" Doc. #67 at 17 (emphasis added). By Plaintiff's own account, he understood Lawlor's response to mean that Lawlor was *considering* his offer but had not yet accepted it. Therefore, Plaintiff and Defendant did not enter a valid contract to support a breach of contract claim. Even assuming, for argument's sake, that Lawlor's response was

an acceptance and the parties entered a valid contract, Plaintiff does not allege or show that he submitted the invoices as requested to satisfy the perfoll lance prong of a breach of contract claim. *See* Doc. #67 at 17 (stating that he received the certifications, and that Defendant did not pay for the certifications, but never stating that he submitted the invoices). Accordingly, summary judgment is granted as to Plaintiff's breach of contract claim.

c. Quantum Meruit

Finally, Defendant moves for summary judgment on Plaintiff's quantum meruit claim, alleging that Plaintiff admitted in his deposition that he was paid for the services he performed. Doc. #66 at 19; Doc. #66, Ex. 1 at 20. Plaintiff rebuts that Defendant failed to reimburse him for the aforementioned professional certifications he obtained, he expected to be paid by Defendant, and the certifications were "clearly valuable to Defendant" because they "helped Defendant generate more business." Doc. #67 at 18.

To bring a quantum meruit claim under Texas law, Plaintiff must show: "(1) that he provided valuable services; (2) for the party sought to be charged; (3) the services were accepted and enjoyed by that party; and (4) the circumstances gave notice to the party sought to be charged that the plaintiff expected to be paid by that party." *Williamson v. BOPCO, L.P.*, No. PE:16-cv-79, 2017 U.S. Dist. LEXIS 222848, 2017 WL 5071336, at *9 (W.D. Tex. Sept. 27, 2017) (citing *Vortt Expl. Co., Inc. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990)). To satisfy the fourth prong, Plaintiff "must prove the

offer and acceptance of services occurred 'under such circumstances as reasonably notified the recipient that the plaintiff, in performing, expected to be paid by the recipient.'" 2017 U.S. Dist. LEXIS 222848, [WL] at *11 (quoting *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)).

Assuming that the professional certifications that Plaintiff obtained qualify as "valuable services" that were accepted and enjoyed by Defendant, Plaintiff cannot prove that Defendant had notice that Plaintiff expected the Defendant to reimburse him for the certifications. By Plaintiff's own admission, "Defendant required its inspectors to cover the cost of obtaining these certifications." Doc. #67 at 17. Plaintiff clearly knew before he obtained the certifications that Defendant would not pay for them. But Plaintiff now relies on Jack Lawlor's response to his email regarding the potential splitting of costs for the certifications to suggest that Defendant knew he expected to be partially reimbursed for the cost of the certifications. However, as previously noted, Lawlor replied to Plaintiff's inquiry after Plaintiff obtained the certifications. *See supra* Part I; *see also* Doc. #67, Ex. 9 (Plaintiff inquired about cost-splitting on August 21, 2018, and Lawlor replied on February 25, 2019). Therefore, there is no way that Defendant was "reasonably notified" that when Plaintiff obtained the certifications, Plaintiff would expect for Defendant to reimburse him Such an expectation is plainly contrary to Defendant's requirement that inspectors cover the costs of their certifications. Accordingly, the Motion is granted as to Plaintiff's quantum meruit claim.

IV. Conclusion

In conclusion, the Court finds that Plaintiff is judicially estopped from claiming he was an employee of Killick Group's, thus his FLSA claims fail because he cannot prove the requisite employer-employee relationship. Moreover, Plaintiff's breach of contract claim fails because there was no valid contract between the parties. Finally, Plaintiff's quantum meruit claim fails because Defendant was not notified that Plaintiff would expect reimbursement for the certifications. Accordingly, for the foregoing reasons, Defendant's Motion for Summary Judgment (Doc. #66) is hereby GRANTED, all pending motions are DENIED AS MOOT, and this case is DISMISSED WITH PREJUDICE.

It is so ORDERED.

MAY 18 2023
Date

/s/ Alfred H. Bennett
The Honorable Alfred H. Bennett
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED OCTOBER 31, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-20295

GUILLERMO GRAY,

Plaintiff-Appellant,

versus

KILLICK GROUP, L.L.C.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:21-CV-1673

ON PETITION FOR REHEARING

Before SOUTHWICK, HAYNES, and GRAVES, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.