No. 24-814

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. It is settled law that appellate courts can affirm summary judgment rulings on any ground supported by the record, including grounds not reached by the district court.

2. The Fifth Circuit applied the correct standard of review.

3. The Fifth Circuit was not required to address any other factor.

LIST OF PARTIES

1. Petitioner Guillermo Gray was the plaintiff in the district court and the appellant in the court of appeals.

2. Respondent Killick Group, L.L.C. was the defendant in the district court and the appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

There are no publicly held companies that own 10% or more of Killick Group, L.L.C.'s shares. The parent company of Killick Group, L.L.C. is Deermist Holdings, Inc., a non-public entity.

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OPINIONS BELOW

In *Gray v. Killick Group, L.L.C.*, 113 F.4th 543 (5th Cir. 2024), the court of appeals affirmed the final summary judgment on Gray's Fair Labor Standards Act claims.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Fifth Circuit Court of Appeals entered its Judgment on August 28, 2024.

STATUTORY PROVISIONS INVOLVED

Petitioner erroneously maintains this case involves a jurisdictional issue under 28 U.S.C. § 1291. That section provides that courts of appeals have jurisdiction over "final decisions." Here, the district court entered a "final decision" when it granted Respondent's motion for summary judgment and dismissed Petitioner's claims with prejudice. Petitioner then appealed that final decision to the Fifth Circuit Court of Appeals, which affirmed the summary judgment.

Aside from 28 U.S.C. § 1254, this case involves claims under the Fair Labor Standards Act, codified at 29 U.S.C. §§ 201 *et seq.* Because the summary judgment evidence conclusively established that Petitioner was properly classified as an independent contractor to Respondent rather than an employee, the court of appeals properly affirmed the summary judgment on this ground, which both parties fully briefed in the district court.

STATEMENT OF THE CASE

Killick Group, LLC

Killick Group, LLC provides inspection and supply chain services to its customers, which are primarily in the energy business. ROA.647. When Killick's customers order new equipment from a manufacturer, they retain Killick to provide a certified inspector to inspect the equipment at various stages, including fabrication, testing, and pre-shipment. ROA.647.

Once contacted about performing an inspection, Killick engages an independent inspector it believes to be qualified to perform the inspection. ROA.647-48. Killick does not employ these independent inspectors.

If the inspector is available and interested in accepting the project, Killick recommends the inspector to its customer and provides the customer with the inspector's resume, which identifies Killick as the referring party. ROA.648. If the customer selects the inspector Killick recommends, that inspector goes to the fabrication site to inspect the equipment, using his or her own transportation, equipment, knowledge, and experience. ROA.647-48.

After inspecting the equipment, the inspector prepares a detailed report that informs the customer about any deviations from the required specifications. ROA.647. Then, at the conclusion of the project, the inspector submits an invoice to Killick, which is then verified against the inspector's submitted timesheet, and paid. ROA. 648.

Veritas Inspectors, Inc.

Having spent over twenty years in the oil and gas industry, Guillermo Gray is an experienced and well-credentialed independent inspector. ROA.575. He holds numerous certifications that qualify him to perform an array of specialized inspection services, including welding, corrosion, pipelines, underwater inspections, and life support equipment. ROA.575-76. He is also educated in matters of business, having completed business coursework through Duke University and Yale. ROA.578-79.

In 2013, Gray formed Veritas Inspectors, Inc. to perform independent inspection services. ROA.579. After forming Veritas, Gray filed an assumed name certificate in Harris County (Houston), Texas, documenting himself as Veritas's sole owner. ROA.682. To market his company, Gray commissioned a friend to design professional business cards, which display his company's name, its logo ("Integrity Above All"), its phone number (281-698-0CWI[1] (0294)), a post office box number, Gray's cellphone number, and his e-mail address (guillermo@veritasinspectors.com). ROA.580, 634. Gray also established a LinkedIn page for Veritas. ROA.580. After forming and marketing his company, Gray began performing inspection services as an independent contractor. ROA.581.

In 2015, the State of Texas convicted Gray for driving while intoxicated, resulting in the temporary suspension of his drivers' license. ROA.628. The temporary suspension threatened his new business because it prevented him

1. C = Certified, W = Welding, I = Inspector

from traveling to fabrication sites. Worse, as a self-employed startup, Gray had no supervisors, employees, or co-workers on whom he could rely for transportation.

Thus, in the criminal court, Gray filed a verified Application for Essential Need License pursuant to § 521.2421(d)(1) of the Texas Transportation Code. In support of his application, Gray swore under oath that he is "self-employed" and that, without the use of his drivers' license, "his occupation is seriously jeopardized" because he "has no one to depend on but himself to transport him in his employment." ROA.629-30, 633. Consistently, on his Occupational License Case Information Sheet, Gray identified his business, Veritas Inspectors. ROA.628. Based on Gray's sworn representations that he is self-employed, the criminal court granted his application, allowing him to operate his vehicle despite the potential risk to the public. ROA.683.

With his drivers' license restored, Gray resumed his inspection business, performing work for Killick, as well as other companies, such as ACES Global Quality Services. ROA.583, 639-40. As for his dealings with Killick, Gray explained that Killick would reach out to him about a particular project and ask if he was available. ROA.582. At that point, Gray was free to accept or reject the project depending on his availability. ROA.583, 657, 665. In fact, on several occasions, Gray rejected projects. ROA.583, 667, 675. Still, Killick offered him new projects. ROA.583.

When Gray accepted a project for Killick, he would make his own arrangements to go to the equipment supplier's site for the inspection. ROA.583-84, 657, 661, 669, 674. He would then inspect the equipment, prepare a

detailed report about his findings, and submit his report to the customer. ROA.581-82, 584-86. Throughout the process, Gray used his own equipment, including his vehicle, his laptop computer, and his cellphone to take pictures of the equipment. ROA.587.

Killick did not supervise Gray's work or dictate the content of his reporting, which was always based on Gray's independent assessment of whether the equipment was consistent with the specifications. Nor did Killick supply tools or equipment. Moreover, Gray performed no work on Killick's premises. ROA.581-82.

At the conclusion of the projects, Gray submitted his company's invoice to Killick for payment based on an agreed hourly rate, which Gray was always free to negotiate. ROA. 587, 651, 654, 743. The invoices display "Veritas Inspectors" at the top, followed by its post office box address and phone numbers. ROA.651. Beneath that information is a listing of the date of the site visits, the number of hours involved, the total travel distance, and the applicable rates. ROA.651. The invoices instruct Veritas's customer to pay the total amount and to "direct all inquiries to" Gray, listing his cellphone number and his company e-mail address.

Upon receipt of a Veritas invoice, Killick wired payment into a bank account that identified the beneficiary as "Veritas Inspectors, Inc." ROA.653, 656. Gray did not draw a salary from Killick. Rather, Killick paid Veritas on a project-by-project basis. ROA.587. Moreover, Killick provided no benefits to Gray, such as a 401(k) account or medical insurance. ROA.590. As a non-employee, Gray was not required to sign a non-compete agreement or

anything else that would restrict his ability to market to and work for other inspection companies, which Gray, in fact, did. ROA.590.

Gray was able to run his business efficiently and derive a profit. As reflected in his 2019 tax returns, his sole proprietorship had gross sales of $75,155, which resulted in a profit after deducting $47,420 in business expenses for such things as vehicles, legal expenses, office expenses, taxes, licenses, meals, utilities, etc. ROA.588-89, 605. Gray stopped accepting projects from Killick in March of 2020 due to COVID. Yet, as reflected in his 2020 tax returns, he still had gross sales of $57,965 that year and made a profit after deducting $28,890 in business expenses. ROA.617. In both tax years, Veritas also performed inspection services for other companies, such as ACES Global Quality Services. ROA.595, 639.

According to Gray's Social Security records, by 2021, he was no longer self-employed. ROA.679. He began working for Stewart & Stevenson Manufacturing Technologies, LLC—a national equipment fabricator in the oil and gas industry. ROA.679.

The Lawsuit

In April 2021, Gray sued Killick, claiming he was entitled to overtime compensation under the Fair Labor Standards Act.[2] ROA.21. Contrary to his sworn statement

2. Gray also asserted causes of action for breach of contract, quantum meruit, and violations of the Texas Labor Code. Additionally, he named Killick's president, Jack Lawlor, as a defendant. Early in the proceeding, Killick filed a motion to dismiss Gray's claims under the Texas Labor Code, which the

to the criminal court that he was "self-employed" and had "no one to depend on but himself," Gray alleged that he worked for Killick, which he described as a "global company" with substantial revenue and "agents and employees throughout the United States." ROA.22. He also alleged that he worked under the control of Killick's president, who he claims supervised his work. ROA.23.

Killick removed the lawsuit to federal court, and the court entered a scheduling order, setting the case for trial on November 14, 2022. ROA.10, 88. Gray filed two motions to extend the court's deadlines to allow additional time for him to conduct discovery. ROA.133, 376. Then, after significant discovery ensued, Killick filed a motion for summary judgment on Gray's remaining claims. ROA.553.

With respect to Gray's FLSA claim, Killick established that judicial estoppel precludes him from claiming to be Killick's employee, having convinced the criminal court that he was self-employed and worked alone. ROA.560. Killick also established that Gray was an independent contractor under the "economic realities test," which the Fifth Circuit uses to assess employee versus independent contractor status in FLSA cases. *See* ROA.561-568 (analysis of the multi-factor test); *see also Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 379 (5th Cir. 2019).

In his response to Killick's motion, Gray argued that the judicial estoppel issue was a "red herring" because his

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court granted. ROA.106. Killick also moved to dismiss claims against Lawlor due to lack of service of process, which the court also granted. ROA.192, 989.

state court filing merely expressed his "objective opinion." ROA.711. With respect to the economic realities test, Gray fully briefed the various factors, emphasizing certain isolated examples of his interactions with Killick over the years, which Gray maintains is sufficient to render him an employee. *See* ROA.706-711.

After additional briefing, *see* ROA.830, the district court granted Killick's motion for summary judgment and dismissed all remaining claims with prejudice. With respect to Gray's FLSA claim, the court based its decision on Killick's first ground, judicial estoppel. ROA.958-59. Because of this ruling, the district court did not reach the economic realities test. Gray appealed.

The Appeal

In his Appellant's Brief, Gray only briefed whether judicial estoppel precluded his FLSA claim. He did not address Killick's alternative ground for summary judgment—that Gray was an independent contractor under the economic realities test. ECF No. 29. In Killick's Appellee's Brief, it argued that the court should affirm the judgment because judicial estoppel applies and, additionally, the economic realities test demonstrates that Gray was an independent contractor. ECF No. 39. Gray then had a second opportunity to address the economic realities test in his Reply Brief, but he did so only in passing. *See* ECF No. 40.[3]

3. *See also* https://www.ca5.uscourts.gov/OralArgRecordings/23/23-20295_6-3-2024.mp3 (argument recording at 6:50).

On August 28, 2024, the Fifth Circuit issued its opinion, affirming the judgment. *Gray v. Killick Group, L.L.C.*, 113 F.4th 543 (5th Cir. 2024). The court concluded "there is some doubt about the application of judicial estoppel here" but recognized that the court "may affirm the district court's grant of summary judgment on any ground supported by the record and presented to the district court." *Id.* at 549.

The court then addressed Killick's argument that Gray's FLSA claim fails because he was Killick's independent contractor. *Id.* After reviewing the pertinent factors under the economic realities test, the court agreed with Killick's argument. *Id.* at 549-552. The court affirmed the judgment, finding "Gray is an independent contractor outside the purview of the FLSA." *Id.* at 552.

Comment About Gray's Statement of the Case

In his statement of the case, Gray maintains that Killick treated him like an employee and controlled his work, citing certain limited interactions pertaining to such things as resumes, safety protocols, certifications, etc. Petition at 10-12. According to Gray, these examples prove that Killick "managed virtually every facet of an inspector's project." *Id.* at 10. However, the summary judgment record conclusively proves otherwise.

As noted, after forming Veritas Inspectors, Inc., Gray filed an assumed name certificate, ROA.682; he obtained customized business cards, displaying his company's name, logo, phone number, and e-mail address, ROC.634; and he advertised his company's services to the broad public on social media, including LinkedIn, ROA.580.

His marketing campaign was successful; he provided inspection services not only for Killick's customers, but also for other companies, such as ACES Global Quality Services. ROA.583, 639-40.

As a self-employed independent inspector, Gray worked project-by-project and was always free to accept or reject projects without retaliation. ROA.582, 583, 657, 665. In fact, on several occasions, Gray rejected projects due to conflicts. ROA.583, 667, 675. Still, Killick offered him new projects going forward. ROA.583.

When Gray accepted a project, he worked without supervision. Indeed, as Gray explained, Killick would reach out to him for specialized inspections because he "had the necessary skills and qualifications." ROA.582. If he chose to perform the inspection, he would go to the equipment supplier's site and perform the inspection. ROA.582-84, 648, 657, 661, 669, 674. Thereafter, Gray prepared detailed reports to document his findings. ROA.584-87. As Gray admitted, as the certified inspector, he decided what information to include in the reports, bringing to light any concerns he had with the equipment specifications. ROA.584-87.

Throughout the process, Gray used his own equipment, including his vehicle, his laptop computer, and his cellphone to take pictures of the equipment. ROA.587. Killick did not supervise Gray's work or dictate the content of his reporting, which was based on Gray's independent assessment of whether the equipment was consistent with the required specifications. *See* ROA.584-87. Once he completed his report and provided it to the customer, the customer then decided whether it wanted to accept the fabricator's parts or equipment. ROA.587.

Yet, in response to Killick's motion, Gray argued, as he argues to this Court, that he should be labeled and employee because Killick (i) helped him prepare a resume that included the company's name; (ii) encouraged him to obtain a certification; and (iii) provided him with guidelines for the inspection report and submitting invoices. *See* ROA.706-9; *see also* Petition at 10-12. Gray cites no authority that any of these isolated events establishes employee status.

With respect to Gray's resume, as the record makes clear, when Killick's customers request an inspection, they reach out, not just to Killick, but to many other agencies to secure a competitive bid and the most qualified inspector. ROA.648. When a contractor Killick uses is interested in a job, the contractor's resume includes a reference to Killick so that, if selected, the customer will know the contractor has been referred by Killick. ROA.648. This logical business practice does not establish that Killick controlled the methods or details of the work.

As for certifications, Gray cites no evidence, and there is none, that Killick *required* him or any other independent contractor to obtain a certification. At best, on one occasion, Killick notified its preferred independent contractors about an opportunity to obtain an additional certification that might assist the independent contractors in obtaining more business for themselves. ROA.789. To say that Killick made the certification mandatory is to ignore the plain language of the e-mail: "We have developed the attached Corporate Memorandum in the hopes to further explain the reasons why there are advantages for you as a qualified individual to invest in this and hope that you are able to do so." ROA.789. There is no mandatory language.

Likewise, Killick supplying its independent contractors with guidelines for reporting and invoicing does not demonstrate control. As the Fifth Circuit explained in *Parrish*: "Nor are we persuaded by the mandated format of reports. At the very least, turning in reports in the way a client wants them is good-client service." *Parrish*, 917 F.3d 369, 382. Notably, it is commonplace for professionals to have to comply with customer invoicing and reporting requirements; attorneys, physicians, accountants, among other professions, all come to mind. An independent contractor complying with his or her customer's preferred reporting and invoicing requirements does not morph the contractor into the customer's employee, as Gray appears to argue.

Gray also maintains that Killick controlled his rate of pay. Petition at 11-12. This, too, is unsupported by the record. In fact, Gray could and did negotiate the rates that he charged Killick for his inspection services. ROA.587. Additionally, Gray was responsible for managing his own business expenses. ROA.589. Gray identified himself as a self-employed inspector on his federal income taxes and in court filings. ROA.605, 629. As a self-employed person, Gray deducted over $76,000 in business expenses in his 2019-2020 tax filings. ROA.588-89, 605, 617.

REASONS FOR DENYING THE PETITION

I. It is settled law that appellate courts can affirm summary judgment rulings on any ground supported by the record, including grounds not reached by the district court.

Gray argues that the court of appeals erred by affirming the summary judgment based on its determination that

the economic realities test shows that Gray was not Killick's employee—an issue both parties fully briefed in the district court. Petition at 14. According to Gray, there was no "final decision" for purposes of 12 U.S.C. § 1291, thereby depriving the court of appeals of jurisdiction. *Id.* Gray misapprehends the meaning of "final decision."

"A 'final decision' within the meaning of § 1291 is normally limited to an order that resolves the entire case." *Ritzen Group, Inc. v. Jackson Mansonry*, LLC, 589 U.S. 35, 38 (2020). Here, there is no dispute that the summary judgment order disposed of all of Gray's claims, including his FLSA claim, thus constituting a "final decision." It is why Gray could appeal the decision to the Fifth Circuit. It is also why jurisdiction was uncontested in that court.

So, the question is not whether there was a "final decision;" there plainly was one. Instead, the question is whether appellate courts have jurisdiction to affirm a final summary judgment on grounds not reached by the district court if such grounds are supported by the record. Gray argues courts can only do so if the issue is "purely legal or jurisdictional." Petition at 17. However, as this Court and every circuit court of appeals recognizes, appellate courts can affirm a judgment on *any ground* supported by the record. *See:*

- *Smith v. Philips*, 455 US. 209, 215 n.9 (1982) ("Respondent may, of course, defend the judgment below on ***any ground*** which the law and the record permit, provided the asserted ground would not expand the relief which has been granted.") (emphasis added).

- *Walsh v. TelTech Systems, Inc.*, 821 F.3d 155, 161 (1st Cir. 2016) ("We may affirm the District Court's grant of summary judgment . . . ***on any ground*** made manifest by the record, including one not reached by the District Court.") (emphasis added).

- *Shumway v. United Parcel Services*, 118 F.3d 60, 63 (2d Cir. 1997) ("It is beyond cavil that an appellate court may affirm the judgment of the district court on ***any ground*** appearing in the record . . . Thus, we may affirm the grant of summary judgment on grounds different from those relied on by the court below.").

- *Blunt v. Lower Merion School District*, 767 F.3d 247, 265 (3rd Cir. 2014) ("Inasmuch as our review is plenary, '[w]e may affirm the District Court on ***any ground*** supported by the record,' even if the court did not rely on those grounds.") (quoting *Nicini v. Morra,* 212 F.3d 798, 805 (3d Cir.2000)) (emphasis added).

- *See Jackson v. Kimel*, 992 F.2d 1318, 1322 (4th Cir. 1993) ("In reviewing the grant of summary judgment, we can affirm on ***any legal ground*** supported by the record and are not limited to the grounds relied on by the district court.") (emphasis added).

- *Killick*, 113 F.4th at 549 ("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.") (quoting *Mahmoud v. De Moss Owners Ass'n*, 865 F.3d 322, 328 (5th Cir. 2017)) (emphasis added).

- *Kennedy v. Superior Printing Co.*, 215 F.3d 650, 655 (6th Cir. 2000) ("[B]ecause a grant of summary judgment is reviewed *de novo,* this court may affirm the judgment of the district court on ***any ground*** supported by the record, even if they are different from those relied upon by the district court.") (emphasis added).

- *Peretz v. Sims*, 662 F.3d 478, 480 (7th Cir. 2011) ("Although the district court granted summary judgment on the basis that Peretz suffered no constitutional deprivation, we may affirm on ***any ground*** supported in the record, 'so long as that ground was adequately addressed in the district court and the nonmoving party had an opportunity to contest the issue.'") (quoting *Cardoso v. Robert Bosch Corp.,* 427 F.3d 429, 432 (7th Cir.2005)) (emphasis added).

- *Wages v. Stuart Mgmt. Corp.*, 798 F.3d 675, 679 (8th Cir. 2015) ("Even if not discussed by the district court, we may affirm on ***any ground*** supported by the record.") (emphasis added).

- *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'r*, 384 F.3d 1163, 1170 (9th Cir. 2004) (Circuit Courts "'may affirm on ***any ground*** supported by the record even if it differs from the rationale of the district court.") (quoting *Martinez–Villareal v. Lewis*, 80 F.3d 1301, 1305 (9th Cir. 1996)) (emphasis added).

- *Alpine Bank v. Hubbell*, 555 F.3d 1097, 1108 (10th Cir. 2009) ("[W]e we can affirm on ***any ground*** supported by the record, so long as the appellant has had a fair opportunity to address that ground.") (emphasis added).

- *Kernel Recs. Oy v. Mosley*, 694 F.3d 1294, 1309 (11th Cir. 2012) (Courts "may affirm the judgment of the district court on ***any ground*** supported by the record, regardless of whether that ground was relied upon or even considered by the district court.") (emphasis added).

- *Clock Spring, L.P. v. WrapMaster, Inc.*, 60 F.3d 1317, 1324 (Fed. Cir. 2009) ("We may affirm a grant of summary judgment on ***a ground supported in the record*** but not adopted by the district court if we conclude that there was no genuine issue as to any material fact and the movant was entitled to a judgment as a matter of law.") (cleaned up).

Disregarding this universally accepted rule, Gray claims that courts of appeals can only affirm a summary

judgment on a ground not reached by the district court if that ground relates to a purely legal issue or pertains to jurisdiction. However, none of the cases he cites support that proposition.

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 1528 (1949), the issue was whether the district court's decision to not apply a state fee shifting statute was reviewable even though the ruling did not dispose of all issues in the case. The Court held that the ruling was reviewable because it was not the type of decision that would merge into the final judgment once the case was tried. *See id.* at 546. Here, the court of appeals did not review an interlocutory ruling. It reviewed a final summary judgment decision after the parties fully briefed their respective positions in the district court.

In *Singleton v. Wulff*, 428 U.S. 106, 120 (1941), the issue was whether the court of appeals properly disposed of a lawsuit based on an argument that was not raised in the district court and thus not supported in the record. The Court held that the court of appeal erred because it is "'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . (and) in order that litigants may not be surprised on appeal by final decision there of issues upon when they have had no opportunity to introduce evidence.'" *Id.* at 120 (quoting *Hormel v. Helverling*, 312 U.S. 552, 556 (1941)). In the district court, Gray fully briefed whether he was an employee versus an independent contractor under the economic realities test. Thus, *Singleton* further underscores that the court of appeals properly considered that issue.

In *Ford v. Bernard Fineson Development Center*, 81 F.3d 304 2d. Cir. 19996), the issue was whether the appellant waived an argument by not raising it below. The court held that the appellant did not waive the argument because the issue to which the argument related was "already considered at some length by the district court." *Id.* at 307. Similarly, in *Washington Gas Light Co. v. Virginia Electric and Power Co.*, 438 F.2d 248 (4th Cir. 1971), the court considered a matter not reached by the district court because "the record provides an adequate basis for consideration of the merits." *Id.* at 250. Similarly, here, the issue of whether Gray was an employee or independent contractor was fully briefed in the district court and thus properly reviewed by the court of appeals.

In *Nuelsen v. Sorensen,* 293 F.2d 454 (9th Cir. 1961), the court declined to reach an issue because "none of these theories were advanced in appellant's pleadings, stated as issues in the pretrial order, presented in the trial court, or dealt with in the briefs on appeal." *Id.* at 462. Here, in contrast, the issue of Gray's employment state was the subject of the parties' pleadings and summary judgment briefing.

In *Porter v. Zook*, 803 F.3d 694, (4th Cir. 2015), the district court dismissed a habeas corpus petition filed by a capital murder defendant but failed to address one of his many grounds for seeking relief. Because there was an unresolved claim, the order was not "final," depriving the court of appeals of jurisdiction. Here, in contrast, the district court granted Killick's motion for summary judgment and dismissed all of Gray's claims in a final and appealable order.

In *Dupree v. Younger*, 598 U.S. 729 (2023), the question was whether, to preserve error, the defendant had to re-urge, in a post-trial motion a purely legal argument he first presented in a pre-trial motion for summary judgment. The Court held, "Because a district court's purely legal conclusions at summary judgment are not superseded by later developments in the litigation, these rulings follow the general rule and merge into the final judgment, at which point they are reviewable on appeal." *Id*. at 735 (cleaned up). Gray fails to explain how *Dupree* applies in this case, which does not involve a trial or error preservation.

In *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), a concurring opinion observed that appellate courts have the responsibility to examine whether the court has jurisdiction regardless of whether a party raises a jurisdictional defect. *Id*. at 896-97. That, of course, is accurate, but it does not change the rule that courts of appeals may affirm a summary judgment on any ground supported by the record, including a ground not reached by the district court.

Next, Gray criticizes *Mahmoud v. De Moss Owners Association*, 865 F.3d 322, 328 (5th Cir. 2017), the case the court of appeals cited for justifying its merits review, because the case "does not provide guidance on *when* an issue presented to, but not addressed by a lower court may be reviewed." Petition at 17 (emphasis added). However, in that case, the court held, consistent with the rule in all other circuits, that "[t]his court may affirm the district court's grant of summary judgment on any ground supported by the record and presented to the district court." *Mahmoud*, 865 F.3d at 328. The answer to the

question of "when" is simple. If the issue was presented to the district court, the court of appeals may properly review whether it supports the summary judgment.

Lastly, Gray highlights *Gilbert v. Donahoe*, 751 F.3d 303 (5th Cir. 2014), which analyzed whether the court had subject matter jurisdiction over the plaintiff's claim. According to Gray, "In *Gilbert*, the only issues the Fifth Circuit addressed, that were not first decided by the lower court, pertained to . . . jurisdictional issues." Petition at 17. Grays misreads *Gilbert*.

In that case, the defendant filed a motion to dismiss, challenging subject matter jurisdiction. *Gilbert*, 751 F.3d at 306. Later, he filed a second motion to dismiss, challenging subject matter jurisdiction and whether the plaintiff failed to state a claim. *Id*. Then, after conducting discovery, he filed a third motion to dismiss or, alternatively, for summary judgment, which raised various issues, *but not* the subject matter jurisdiction issue. *Id*.

The district court ultimately dismissed the lawsuit for lack of subject matter jurisdiction—indicating that it ruled on the first or second motion—and the plaintiff appealed. *Id*. The Fifth Circuit reversed the jurisdictional ruling, but opted against weighing in on the separately filed motions on which the court did not rule. *See id*. at 313. Because those arguments were included in a separately filed motion that the district court did not reach, it deferred to the district court in that case. Here, the court of appeals affirmed the summary judgment based on the arguments the parties fully briefed in the summary judgment proceeding. It did not affirm based on arguments presented in some other motion on which the district court did not rule.

In the end, Gray fails to present this Court with *any* authority—or even rationale—casting doubt on the established rule that appellate courts can affirm a summary judgment on any ground supported by the record, including a ground not reached by the district court. There is no "split" among the circuits, as Gray maintains. Petition at 18.

II. The Fifth Circuit applied the correct standard of review.

Gray argues that the Fifth Circuit misapplied the standard of review in its analysis of the economic realities test because it "omitted facts" Gray claims tips the scales in favor of employee status. Petition at 20. Gray's arguments still ring hollow.

A. The Economic Reality Test

To determine employment status under the FLSA, courts examine whether the individual, as a matter of economic reality, is in business for himself. *Carrell v. Sunland Constr., Inc.*, 998 F.2d 330, 332 (5th Cir. 1993). The Fifth Circuit adopted the following factors to guide the analysis: (i) the degree of control exercised by the alleged employer; (ii) the worker's investment in his business; (iii) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer; (iv) the skill and initiative required to perform the job; and (v) the permanency of the relationship. *See Herman v. Express Sixty-Minutes Delivery Service, Inc.*, 161 F.3d 299, 303 (5th Cir. 1998). These factors are factual, but the conclusion of employee versus independent contractor status is a question of law. *Id.* at 303.

B. The degree of control factor favors independent contractor status.

In assessing the degree of control exercised by the alleged employer, courts inquire whether the worker has a "viable economic status that can be traded to other companies." *Parrish*, 917 F.3d at 381. Other considerations include whether the worker can work for other companies and decline a work assignment without retaliation. *See Herman*, 161 F.3d at 303. Additionally, courts consider the extent to which the alleged employer controlled the methods or details of the work and the worker's skill level; whether they work project-by-project; and whether the worker supplied his or her own equipment. *See Carell*, 998 F.2d at 334. Overwhelmingly, each of these considerations weighs in favor of independent contractor status.

Gray's viable economic status and ability to market or trade to other companies is clear. With over twenty years in the oil and gas industry, Gray is an experienced and well-credentialed independent inspector, holding numerous certifications that qualify him to perform technical inspection services on specialized oil and gas equipment, including welding inspections, corrosion inspections, pipeline inspections, underwater inspections, and life support equipment inspections. ROA.575-76. Moreover, having completed business training at Duke and Yale, Gray is uniquely poised to market and sell his skilled services to other companies, which is precisely what Gray did. ROA.578-79.

After forming Veritas, Gray filed an assumed name certificate, ROA.682; he obtained customized business cards, displaying his company's name, logo, phone number,

and e-mail address, ROC.634; and he advertised his company's services to the broad public on social media, including LinkedIn, ROA.580. His marketing campaign was successful; he provided inspection services not only for Killick's customers, but also for other companies, such as ACES Global Quality Services. ROA.583, 639-40.

As a self-employed independent inspector, Gray worked project-by-project and was always free to accept or reject projects without retaliation. ROA.582, 583, 657, 665. In fact, on several occasions, Gray rejected projects due to conflicts. ROA.583, 667, 675. Still, Killick offered him new projects going forward. ROA.583.

When Gray accepted a project, he worked without supervision. Indeed, as Gray explained, Killick would reach out to him for specialized inspections because he "had the necessary skills and qualifications." ROA.582. If he chose to perform the inspection, he would go to the equipment supplier's site and perform the inspection. ROA.582-84, 648, 657, 661, 669, 674. Thereafter, Gray prepared detailed reports to document his findings. ROA.584-87. As Gray described, as the certified inspector, he decided what information to include in the reports, bringing to light any concerns he had with the equipment specifications. ROA.584-87.

Throughout the process, Gray used his own equipment, including his vehicle, his laptop computer, and his cellphone to take pictures of the equipment. ROA.587. Killick did not supervise Gray's work or dictate the content of his reporting, which was based on Gray's independent assessment of whether the equipment was consistent with the required specifications. *See* ROA.584-87. Once

he completed his report and provided it to the customer, the customer then decided whether it wanted to accept the fabricator's parts or equipment. ROA.587. As the Fifth Circuit properly determined, the control factor demonstrates that Gray was an independent contractor.

In his petition filed in this Court, Gray argues the Fifth Circuit omitted certain facts that Gray maintains weigh in favor of employee status, such as Killick providing such things as (i) project details and safety protocols, (ii) assistance with resumes, (iii) assistance with certifications. None of these things demonstrate control under binding Fifth Circuit authority.

Supplying an independent contractor with guidelines for reporting and invoicing does not demonstrate control. As the Fifth Circuit explained in *Parrish*, "Nor are we persuaded by the mandated format of reports. At the very least, turning in reports in the way a client wants them is good-client service." *Parrish*, 917 F.3d 369, 382. Notably, it is commonplace for professionals to have to comply with customer invoicing and reporting requirements; attorneys, physicians, accountants, among other professions, all come to mind. An independent contractor complying with his or her customer's preferred reporting and invoicing requirements does not morph the contractor into the customer's employee, as Gray appears to argue.

With respect to Gray's resume, as the record makes clear, when Killick's customers request an inspection, they reach out, not just to Killick, but to many other agencies to secure a competitive bid and the most qualified inspector. ROA.648. When a contractor Killick uses is interested in a job, the contractor's resume includes a reference to

Killick so that, if selected, the customer will know the contractor has been referred by Killick. ROA.648. This logical business practice does not establish that Killick controlled the methods or details of the work or any other relevant control factor courts consider.

As for certifications, Gray cites no evidence, and there is none, that Killick required him or any other independent contractor to obtain a certification. At best, on one occasion, Killick notified its preferred independent contractors about an opportunity to obtain an additional certification that might assist their own independent contractor businesses. ROA.789. To say that Killick made the certification mandatory is to ignore the plain language of the e-mail: "We have developed the attached Corporate Memorandum in the hopes to further explain the reasons why there are advantages for you as a qualified individual to invest in this and hope that you are able to do so." ROA.789. There is no mandatory language.

C. The investment in the business factor favors independent contractor status.

Under this factor, courts generally compare the individual worker's investment in the business to that of the alleged employer. *Parrish*, 917 F.3d at 383. As the Fifth Circuit properly determined, this factor weighs in favor of independent contractor status because Gray invested substantial time and money into his inspection business relative to Killick's contribution in relation to Gray's inspections.

After forming his business in 2013, Gray filed an assumed name certificate in Harris County, ROA.682;

he commissioned a friend to design professional business cards that display a business address, a business phone number, and a business e-mail address, ROC.634; and he established a LinkedIn page to advertise to the public. ROA.580. Additionally, Gray invested in multiple certifications and business courses. ROA.575-79. He also invested in his own tools and equipment, vehicle, legal services, office supplies, meals, and utilities, all of which he listed as business expenses on his tax returns. As discussed earlier, in his 2019 tax returns, he deducted $47,420 in business expenses, and in 2020, he deducted $28,890. ROA.588-89, 605, 617

Killick suggests the Fifth Circuit erred on this factor because Killick employs "dozens" of actual employees. He cites no case suggesting that, just because a company has full time employees, its independent contractors gain employee status. Moreover, such a proposition would be nonsensical. The relevant inquiry is the relative investment in relation to the work at hand. It is undisputed that Killick supplied no tools, no material, no computer, no workspace, no office supplies, nor anything else in connection with Gray's independent inspection business. At best, Killick provided the name and contact information for the customer in need of an inspection. Any expense in relation to those activities pales in comparison to Gray's investment.

D. The control over the opportunity for profit or loss factor favors independent contractor status.

In examining this factor, courts "determine how the workers' profits depend on their ability to control their own

costs." *Parrish*, 917 F.3d at 384. More specifically, courts examine whether the worker was able to make decisions affecting his expenses. *Id*. at 384. The Fifth Circuit properly determined this factor favors independent contractor status because Gray had extensive autonomy to make decisions that affected his ability to be profitable.

It is undisputed that Gray could and did negotiate the rates that he charged Killick for his inspection services. ROA.587. Additionally, Gray was responsible for managing his own business expenses. ROA.589. Gray identified himself as a self-employed inspector on his federal income taxes and in court filings. ROA.605, 629. As a self-employed person, Gray deducted over $76,000 in business expenses in his 2019-2020 tax filings. ROA.588-89, 605, 617.

Moreover, as a self-employed inspector who worked on a project-by-project basis, Gray admitted that he could make more money by accepting more projects. ROA.587. Because Gray did not have a non-compete agreement with Killick, ROA.590, he was free to market himself to other companies and accept additional projects, which Gray, in fact, did. ROA.583. He also had the freedom to develop his three other businesses. ROA.595

Despite this, Gray maintains that this factor weighs in favor of employee status because most of his projects were for Killick. ROA.709. Even if that was the case, Gray ignores the fact that he was not bound by a non-compete agreement, and he was free to perform services for any other company. That he chose to perform projects for Killick does not morph him into an employee.

Gray also argues that Killick "controlled" his rate of pay. This disregards the fact that Gray could and did negotiate his rates. ROA.587. Next, Gray argues that Killick forced him to obtain certifications. ROA.710. However, as discussed previously, Gray has no evidence to support this charge. Killick, at best, alerted its preferred independent contractors of opportunities to obtain additional certifications. ROA.789. Gray, like any independent contractor, was free to decide whether to incur the expense, which may result in more business opportunities.

E. The skills and initiative factor favors independent contractor status.

In evaluating the skill and initiative factor, courts examine whether the worker has specialized skills that distinguish him from a common worker and whether the worker demonstrated initiative. *Parrish*, 917 F.3d at 385. Where the worker is highly skilled, this factor weighs in favor of independent contractor status. *See id.* at 386 ("Plaintiffs' high-skill level, understood in light of their complicated work, weighs heavily in favor of IC status."). Once again, the Fifth Circuit properly determined that this factor weighs in favor of independent contractor status.

As discussed, Gray was a highly skilled inspector, having accumulated over a decade of experience in the oil and gas sector, as well as numerous complex inspection certifications, not to mention an education in business. Killick proposed Gray as an inspector to its customers because Gray had unique skills to examine high-end oil and gas equipment and determine whether the equipment met the customer's specifications for quality and safety.

In performing his inspections, Gray carefully examined the equipment, noting any potential flaw. Thereafter, he prepared a detailed report, complete with photos, to educate the customer about the status of the equipment at various stages of fabrication. *See* ROA.584-87 (Gray describing his detailed welding inspection and reporting process).

Additionally, Gray demonstrated initiative. Among other things, he acquired certifications, formed his business, developed marketing materials, including business cards and his LinkedIn social media presence, worked project-by-project, negotiated an increased rate of pay, used his own tools and equipment, controlled profit by taking business deductions on his tax filings, and worked for other inspection companies. Gray's initiative in running his business coupled with his skillfulness demonstrate that he was an independent contractor.

In addressing this factor in the district court, Gray conceded that he was "very skilled and proficient at this job." ROA.710. He claimed, however, that he did not show initiative because Killick "required" him to obtain a certification. As already noted, Killick did no such thing. Encouraging its preferred independent contractors to consider additional certifications is not the same as a mandate. Gray also claims to have lacked initiative because Killick provided guidelines for reporting and invoicing. ROA.710. If anything, that Gray abided by his customer's guidelines underscores his initiative.

F. The permanency factor favors independent contractor status.

In evaluating the permanency factor, the Fifth Circuit has noted that important considerations include whether the worker worked on a project-by-project basis, which "counsel heavily in favor off IC status," and whether the worker was highly skilled, which "shows how the permanency of the relationship may, in reality, be not all that permanent." *Parrish*, 917 F.3d at 387. The Fifth Circuit properly determined that this factor weighs in favor of independent contractor status because Gray worked project-by-project and was highly skilled, as he concedes.

In sum, the Fifth Circuit carefully examined all of the economic realities factors and properly determined that the material and relevant evidence put into the summary judgment record establishes that Gray was Killick's independent contractor. As such, the court properly affirmed the summary judgment in Killick's favor.

G. *Hopkins v. Cornerstone America*, 545 F.3d 338 (5th Cir. 2008)

In several places in his petition, Gray suggests that the Fifth Circuit's opinion in this case conflicts with its analysis in *Hopkins*. Petition at 21-26. The cases, however, are starkly different. In *Hopkins*, the court considered whether Cornerstone's Sales Leaders were employees or independent contractors. *Id*. at 341. Cornerstone was the sales division of an insurance company. *Id*. at 341. Sales Leaders are management level employees of Cornerstone, each of whom has a team of salespersons working under

them. *Id.* By and large, the Sales Leaders' salaries are driven by the level of commissions of the salesperson who work under them. *Id.* Importantly, the Sales Leaders have no say in who comprises their sales team; Cornerstone makes that determination. *See id.* ("Cornerstone alone controls the hiring, firing, assignment, and promotion of the agents in each leader's team."). Cornerstone also unilaterally determines the Sales Leaders' permissible territories. *Id.* Cornerstone also prevents its Sales Leaders from selling any other insurance company's products "or operating other businesses." *Id.* Cornerstone likewise controls sales leads and prohibits is Sales Leaders from gathering leads from other sources. *Id.*

In contrast, Gray had the freedom to assemble any team of employees for his Veritas business; he could decide when and where he chose to market and perform his services; he could choose what inspection services he offered; and he could gather leads independent from Killick. In short, these two cases have nothing in common and the divergent outcome is to be expected.

III. The Fifth Circuit was not required to address any other factor.

In his third and final issue, Gray argues that the Fifth Circuit erred because, in analyzing the economic realities test, it did not address the extent to which the worker's job is an integral part of the employer's business. According to Gray, in *Hobbs v. Petroplex Pipe and Construction*, 946 F.3d 824 (5th Cir. 2020), the Fifth Circuit added this consideration as a sixth factor of the economic realities test. Gray is incorrect. The court in that case only addressed this factor because both parties asked

the court to review and apply this other consideration. *See id.* at 836. Moreover, the court's opinion made it clear that the governing test in the Fifth Circuit is the five factors set forth in *United States v. Silk*, 331 U.S. 704 (1947). *Hobbs*, 946 F.3d at 829 (listing the five "economic realities" or "Silk" factors). To say that the Fifth Circuit "added" a sixth factor is simply incorrect, which explains why, to Respondent's knowledge, no other Fifth Circuit FLSA case decided since 2020 discusses a sixth factor. Further, even if this factor were to apply, and even if it weighed in Gray's favor, the result would not change since no one factor is determinative and all other factors point to independent contractor status.

CONCLUSION

For these reasons, Killick Group, L.L.C. requests the Court to deny Gray's petition for writ of certiorari.

Respectfully submitted,

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