No. _____

In the
Supreme Court of the United States

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

v.

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

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

PETITION FOR WRIT OF CERTIORARI

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February 2, 2021

QUESTION PRESENTED

The Fair Labor Standards Act (FLSA) exempts from its minimum wage and overtime requirements any employee who is employed "in the capacity of outside salesman." FLSA regulations define "outside salesman" as an employee "whose primary duty is making sales," and the FLSA itself defines "sale" broadly to "include[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." Petitioners employed Respondents to go door to door and persuade customers to buy natural gas and electricity. When customers agreed, they signed agreements, which were subject to certain regulatory checks and Petitioners' ultimate approval before the sales were consummated. In a divided decision, the Sixth Circuit held that Respondents are not exempt outside salespeople under the FLSA because their sales agreements were subject to those subsequent steps. That decision contradicts this Court's decision in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), and directly conflicts with a Second Circuit decision holding that, consistent with *Christopher*, Petitioners' door-to-door solicitors *are* exempt outside salespeople. The decision below thus creates a wholly untenable circuit split within Petitioners' own workforce. The question presented is:

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

PARTIES TO THE PROCEEDING

Petitioners are Just Energy Marketing Corp.; Just Energy Group, Inc.; and Commerce Energy, Inc. d/b/a Just Energy d/b/a Commerce Energy of Ohio, Inc. Petitioners were defendants in the district court and appellants in the Sixth Circuit.

Respondents are Davina Hurt and Dominic Hill, who were plaintiffs in the district court and appellees in the Sixth Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Just Energy Group, Inc., a publicly traded corporation, is the parent company of the two other Petitioners, Just Energy Marketing Corp. and Commerce Energy, Inc. (n/k/a Just Energy Solutions, Inc.). There are no other publicly traded entities with a financial interest in the outcome of this case.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Hurt v. Commerce Energy, Inc.*, No. 18-4058 (6th Cir.) (opinion affirming judgment of district court, issued August 31, 2020); and
- *Hurt v. Commerce Energy, Inc.*, No. 1:12-cv-00758-JG (N.D. Ohio) (order entering final judgment in favor of plaintiffs, filed September 28, 2018).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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This petition presents as clear a circuit split as this Court is likely to see. In light of the divided decision below, Petitioners' door-to-door solicitors are not exempt from the overtime and minimum wage requirements of the Fair Labor Standards Act (FLSA) in the Sixth Circuit, even though Petitioners' door-to-door solicitors were held to be covered by the FLSA's outside-salesperson exemption in an earlier precedential opinion of the Second Circuit. There is no meaningful basis for distinguishing the Sixth and Second Circuit cases because they involve the same category of employees performing the same sales functions for the same employer. The circuit split is thus stark and puts Petitioners in an impossible position. They cannot treat the same employees as both exempt and non-exempt, and the possibility of nationwide collective actions being filed in the Sixth Circuit threatens Petitioners' ability to follow the Second Circuit's decision even with respect to employees working within the Second Circuit.

The decision below not only creates a plain and untenable circuit split, but is wrong and clearly conflicts with the statutory and regulatory text, Department of Labor (DOL) guidance, and this Court's on-point precedents. Respondents have all the normal characteristics of outside salespeople, including working outside a traditional office, persuading customers to buy products by obtaining signed agreements, and receiving their compensation from commissions. The Sixth Circuit nevertheless held that the outside-salesperson exemption does not apply because Petitioners retain discretion to reject

customer agreements that Respondents obtained during their sales work, for reasons ranging from regulatory requirements to a customer's lack of creditworthiness to an agreement being filled out incorrectly or incompletely. But the outside-salesperson exemption does not require the salesperson to fully consummate a transaction or possess the authority to definitively bind an employer or customer to a contract. To the contrary, in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), this Court held that pharmaceutical detailers who obtain "nonbinding commitments" from physicians to prescribe a drug fall under the outside-salesperson exemption. Respondents come far closer to fully consummating a transaction (with the actual purchaser, no less) than the pharmaceutical representatives in *Christopher*, and any lingering doubt about Respondents' exempt status should have been laid to rest by *Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134 (2018), which clarified that FLSA exemptions are to be read fairly, not narrowly. The panel majority's contrary conclusion simply cannot be squared with this Court's recent on-point precedents, as both the Second Circuit and the dissenting judge below recognized.

This Court's review is critical not just for Petitioners, which now face a circuit split within their own workforce, but for all employers with an outside salesforce. As a matter of sound business practice, virtually every company retains some discretion to decline to proceed with an agreement that an outside salesperson may have obtained, whether to comply with regulatory obligations or simply to ensure that the customer is creditworthy. If such discretion is

enough to deprive outside salespeople of exempt status, then the longstanding exemption for outside salespeople is illusory. But even beyond the precise issue here, review is critical to ensure stability and consistency in the law. To allow employers and employees alike to order their affairs with predictability and certainty, this Court's decisions must be viewed as precedents to be applied, not obstacles to be circumvented. Faithful application of *Christopher* and *Encino Motorcars* should have made this an easy case, as it was in the Second Circuit. This Court should grant review.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 973 F.3d 509 and reproduced at App.1-54. The district court's decision denying judgment as a matter of law and a new trial is reported at 92 F.Supp.3d 683 and reproduced at App.57-93.

JURISDICTION

The Sixth Circuit issued its decision on August 31, 2020, and denied a timely petition for rehearing on September 30, 2020. On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the FLSA, 29 U.S.C. §§203(k), 213(a), 216, and DOL's regulations, 29 C.F.R. §§541.500 and 541.501, are reproduced at App.94-107.

STATEMENT OF THE CASE

A. Legal Background

The FLSA requires employers to pay minimum wage and overtime compensation for all hours an employee works over forty hours per week. 29 U.S.C. §207(a)(1). These requirements do not apply, however, to certain categories of employees. *See id.* §213(a)-(b). As relevant here, they do not apply to "any employee employed … in the capacity of outside salesman." *Id.* §213(a)(1).

The statute delegates authority to the Secretary of Labor to define the terms in the outside-salesperson exemption. *Id.* The Secretary has defined the statutory phrase "employee employed … in the capacity of outside salesman" to mean "any employee … whose primary duty is … making sales within the meaning of section 3(k) of the Act" and "[w]ho is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. §541.500(a). In the referenced "section 3(k)," the FLSA itself broadly defines the terms "sale" and "sell" to "include[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. §203(k); *accord* 29 C.F.R. §541.501(b).

The DOL has long provided additional guidance regarding the scope of the outside-salesperson exemption. First, "[e]xempt status should not depend" on technicalities like whether "it is the sales employee or the customer who types the order into a computer system and hits the return button," 69 Fed. Reg. 22122, 22163 (Apr. 23, 2004), or whether "the order is filled by [a] jobber rather than directly by [the

employee's] own employer," Dep't of Labor, Wage and Hour and Public Contracts Divs., *Report and Recommendations on Proposed Revisions of Regulations, Part 541*, at 83 (1949). Second, the exemption is satisfied whenever an employee "in some sense make[s] a sale." Dep't of Labor, Wage and Hour Div., *Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition* 46 (1940); *see also* 69 Fed. Reg. at 22122-63 (reiterating that exemption applies to employee who "in some sense, has made sales"). Third, employees "have a primary duty of making sales" if "they obtain a commitment to buy from the customer and are credited with the sale." 69 Fed. Reg. at 22162-63.

In *Christopher v. SmithKline Beecham Corp.*, this Court thoroughly reviewed the foregoing statutory and regulatory framework and held that pharmaceutical detailers whose "primary duty is to obtain nonbinding commitments from physicians to prescribe their employer's prescription drugs" qualify as "outside salesmen" under the FLSA. 567 U.S. at 147 (brackets omitted). In so holding, the Court emphasized the "broad statutory definition of 'sale.'" *Id.* at 157; *see also id.* at 164 (noting the "broad statutory definition of 'sale'"); *id.* at 167 (noting the "broad language of the regulations and the statutory definition of 'sale'"). The Court identified three "important textual clues" underscoring that the FLSA's definition of "sale" is "more expansive than the term's ordinary meaning": first, the statutory definition is introduced with the verb "includes" rather than "means"; second, the list of transactions included in the definition is modified by the word "any"; and third, the definition includes a "broad

catchall phrase: 'other disposition.'" *Id.* at 162-63 & n.18. The Court rejected the proposition that a "sale" requires a "transfer of title," a "contract[] for the exchange of goods or services in return for value," or a "'firm agreement' or 'firm commitment' to buy," all of which interpretations "would defeat Congress' intent to define 'sale' in a broad manner." *Id.* at 159, 163.

The Court also emphasized that the FLSA exempts anyone employed "in the capacity of" an outside salesperson. Congress' use of "capacity," the Court explained, "counsels in favor of a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works." *Id.* at 161; *see also id.* at 167 (noting the "realistic approach that the outside salesman exemption is meant to reflect"). That view is bolstered by the expansive statutory definition of "sale," which "represent[s] an attempt to accommodate industry-by-industry variations in methods of selling commodities." *Id.* at 164. As the Court explained, "an outside salesman should not be excluded from that category based on technicalities." *Id.* at 165 n.23. Thus, the Court concluded, employees who merely obtain "nonbinding commitment[s]" from would-be purchasers—commitments that might only "eventually result" in an actual exchange of goods—qualify for the outside-salesperson exemption. *Id.* at 160.

More recently, in *Encino Motorcars, LLC v. Navarro*, the Court rejected the proposition that the FLSA exemptions should be narrowly construed against employers who assert them. The Court

explained that "[b]ecause the FLSA gives no 'textual indication' that its exemptions should be construed narrowly, there is no reason to give them anything other than a fair (rather than a 'narrow') interpretation." 138 S.Ct. at 1142 (brackets omitted). The FLSA exemptions "are as much a part of the FLSA's purpose as the overtime-pay requirement," and thus courts "have no license to give the exemption[s] anything but a fair reading." *Id.*

B. Factual and Procedural Background

1. Petitioners provide electric power and natural gas supply and services to millions of residential and commercial customers in the United States and Canada. App.58. Respondents Davina Hurt and Dominic Hill were employed by Petitioner Just Energy Marketing Corp. (JEMC), a subsidiary of Petitioner Just Energy Group., Inc. (JEG), as representatives who went door to door soliciting customers to purchase natural gas and electricity from Petitioner Commerce Energy (the entity that actually provided the energy commodities to customers).[1]

Respondents "spent most of their working hours in the field seeking to convince customers to buy electricity and natural gas products." App.2. Respondents would visit a home, and if an individual wanted to buy Petitioners' products, Respondents would fill out a "customer agreement" and obtain the customer's signature. App.3-4. Petitioners paid Respondents exclusively on a commission basis, without paying overtime or minimum wage. App.2-3.

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[1] All parties agree that natural gas and electricity are "tangible property." App.76.

A signed customer agreement was "non-binding" and "did not finalize the transaction." App.4. To prevent fraud, the Public Utilities Commission of Ohio ("PUCO") requires a supplier who engages in door-to-door solicitations to obtain independent third-party verification of a customer agreement. App.4; *see also* App.31 (Murphy, J., dissenting). Accordingly, after obtaining the signed customer agreement to purchase Petitioners' products, Respondents would initiate a verification call from the customer's telephone to a third-party verifier. The third-party verifier was completely independent of Petitioners, read the customer a series of "yes" or "no" questions to confirm that the customer "entered into the agreement voluntarily and with full understanding of its terms," and was not permitted to answer any other questions about the contract or Petitioners' products. App.4. To ensure complete noninterference with this verification process, Respondents were required to leave the premises after having obtained the signed customer agreement and initiated the verification call, and they could not return or speak to the customer afterwards. App.4.

Not only could the verification process prevent a customer's purchase from moving forward, Petitioners retained the discretion to decline to proceed with a transaction even after the verification process was successfully completed. App.4-5. For example, the PUCO requires that energy suppliers like Petitioners establish reasonable and non-discriminatory creditworthiness standards of customers as a condition of providing services. App.31 (Murphy, J., dissenting); Ohio Admin. Code 4901:1-21-07; Ohio Admin. Code 4901:1-29-07. Petitioners not only

established such standards but, pursuant to those standards, ran credit checks on individuals who had signed customer agreements and occasionally rejected customers "for failed credit checks." App.4-5.

2. In 2012, Respondents filed suit. Their operative (second amended) complaint alleged that Petitioners misclassified them as exempt outside salespeople in violation of both the FLSA and the Ohio Minimum Fair Wage Standards Act (OMFWSA).[2] Respondents moved to certify the FLSA claim as a collective action covering employees in Ohio, Illinois, Pennsylvania, Maryland, California, and New York, *see* 29 U.S.C. §216(b), and to certify the OMFWSA claim as an Ohio class action; the district court granted the motions. App.6.

Petitioners sought summary judgment on the ground that Respondents fell within the outside-salesperson exemption. App.6. The district court denied summary judgment. It agreed that Respondents "obtained contracts," but it distinguished *Christopher* because, "[u]nlike the pharmaceutical representatives" in that case, Respondents "are not prohibited from completing a contract by state or federal regulations"; instead, Petitioners have "unlimited discretion to accept and reject" the commitments obtained by Respondents. *Hurt v. Commerce Energy, Inc.*, 2013 WL 4427257, at *5 (N.D. Ohio Aug. 15, 2013).

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[2] The OMFWSA "incorporates the FLSA's exemptions," and Ohio law construing the OMFWSA "parallels the FLSA"; accordingly, courts address both laws "in a unitary fashion." App.9.

The case proceeded to a bifurcated jury trial that first addressed Petitioners' liability, *i.e.*, whether Petitioners properly classified Respondents as exempt outside salespeople. App.6. The district court denied Petitioners' repeated motions for directed verdict that Respondents were "making sales" within the meaning of the FLSA and thus exempt outside salespeople. App.59-60. It instructed the jury, *inter alia*, that the jury had to "determin[e] whether a particular transaction qualifies as a sale" under the FLSA. App.76. It further instructed the jury that in making this determination, the jury must "consider the extent to which the employee has the authority to bind the company to the transaction at issue," and "if the employer [has] discretion to accept or reject any transactions for reasons that are unrelated to regulatory requirements applicable to the industry, the transaction should not be considered a sale" under the FLSA. App.24; App.32 (Murphy, J., dissenting).

The jury returned a verdict for Respondents, and the district court denied Petitioners' motion for judgment as a matter of law that Respondents "were exempt outside salespeople." App.59-60. The court pointed to evidence that Respondents "obtained only non-binding applications from customers," which "suggests that [Respondents] were not actually making sales," App.70-71, as well as evidence that Respondents did not bear the "'external indicia' of outside salespeople." App.64. The court also rejected Petitioners' challenge to the jury instructions. It cited its earlier summary judgment opinion describing "the non-binding nature of" the customer agreements obtained by Respondents, it again distinguished *Christopher* because no laws "require[d] [Petitioners]

to retain unlimited rejection authority," and it concluded that the jury instructions were consistent with those determinations. App.82-83.

After a damages phase, the court entered judgment against Petitioners for over $4.8 million, more than $2.9 million of which comprised attorneys' fees and costs. *See Hurt v. Commerce Energy, Inc.*, 2018 WL 4658734, at *5 (N.D. Ohio Sept. 28, 2018); App.33 (Murphy, J., dissenting).

3. Just nine days before the district court's judgment, the Second Circuit issued its decision in *Flood v. Just Energy Marketing Corp.*, 904 F.3d 219 (2d Cir. 2018). In *Flood*, the Second Circuit unanimously held that the FLSA did not apply to Petitioner JEMC's sales representatives—the same category of employees at issue in this case—because they were "undoubtedly 'making sales' within the scope of the outside salesman exemption." *Id.* at 229; *see also id.* at 236 (noting that the *Flood* and *Hurt* cases "involve[] similar facts involving door-to-door solicitation and the same Just Energy parties (or their privies)"). Affirming the district court's grant of summary judgment, the Second Circuit rejected the argument that "the outside salesman exemption may not be applied because of the fact that Just Energy retained discretion to reject commitment contracts that plaintiffs secured from their door-to-door customers." *Id.* at 224. The court explained that in *Christopher*, this Court "declined to interpret the 'making sales' requirement to mandate a showing that an employee has fully consummated a sales transaction or the transfer of title to property." *Id.* at 229. After *Christopher*, the "proper focus for the

'making sales' inquiry is whether the employee has obtained a commitment to buy the employer's product, not whether the employer retains some after-the-fact discretion to decline to go through [with] a transaction to which the buyer has otherwise committed." *Id.* at 232. The Second Circuit also rejected the proposition that "external indicia" could remove an employee who is "making sales" from the exemption, noting that "no such listing of indicia appears in the relevant regulation defining what it means for an employee to be 'making sales.'" *Id.* at 233.

4. Notwithstanding *Flood*, the Sixth Circuit, in a divided decision, affirmed the district court's judgment in this case. Writing for the panel majority, Judge Stranch (joined by Judge Clay) held that Respondents were not "making sales" for purposes of the outside-salesperson exemption. App.11-19. The majority emphasized that Petitioners "retained, and frequently exercised, ultimate discretion on whether to finalize or refuse" a customer agreement. App.12. And because this discretion was a "choice" by Petitioners, and not entirely a product of legal or regulatory prohibitions, *Christopher* was inapposite. App.14-15. In the majority's view, the "unique regulatory environment of the pharmaceutical industry," in which "drug companies and their detailers are prohibited from selling prescription drugs directly to patients," meant that "*Christopher*'s holding does not readily transfer to other industries." App.13-14; *see also* App.14 ("[N]o regulations prohibited direct sales or required [Petitioners] to retain full discretion to finalize a sale.").

While admitting that both cases "share defendants," including "the same ultimate parent corporation," the majority purported to distinguish the employees at issue in *Flood*. Specifically, once a customer agreement was obtained and the verification call was placed, the *Flood* plaintiffs could "wait[] outside the customer's immediate presence" and "reengage[]" with the customer after the call, whereas Respondents' "contact with the customers ended upon initiating the verification call." App.17-18. Furthermore, the panel majority emphasized that the lead *Flood* plaintiff "earned more than $70,000 in commissions per year," while Respondents and some members of the collective action made substantially less, and then re-emphasized that point in concluding that Respondents lacked the "external indicia" of outside salespeople. App.18, 22-23.

Finally, the majority approved the district court's jury instructions, which informed the jury, *inter alia*, that "if the employer retains and/or exercises discretion to accept or reject any transactions for reasons that are unrelated to regulatory requirements … the transaction should not be considered a sale for purposes of" the FLSA, and that an employee's "authority to bind the company to the transaction at issue" is relevant to whether he is "making sales." App.24. In the majority's view, these instructions "are an accurate statement of the outside sales exemption as instructed by *Christopher*." App.25.[3]

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[3] At no point did the Sixth Circuit majority acknowledge this Court's conclusion in *Encino Motorcars* that FLSA exemptions must be construed fairly, not narrowly. *Cf.* App.39 (Murphy, J., dissenting) (citing this proposition).

Judge Murphy dissented. He first explained that, under this Court's precedent, the question of whether Respondents' activities qualify as "making sales" for purposes of the FLSA is "a legal question." App.27-28 (Murphy, J., dissenting) (citing *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) ("The question whether [plaintiffs'] particular activities excluded them from the overtime benefits of the FLSA is a question of law[.]")). He noted that the facts underlying whether Respondents' solicitations "rise to the level of 'making sales'" are "largely undisputed," rendering the question appropriate for disposition by a court just as in *Christopher* and *Flood*. App.37-38.

Even assuming the case were one for the jury, however, Judge Murphy would have held that "no reasonable jury could return a verdict for [Respondents] under a correct view of the law." App.39. Judge Murphy first explained that the "text's plain meaning" showed that Respondents were "making sales." Citing *Christopher*, he noted that the phrase has a "broad meaning," and he concluded that Respondents' "duty to persuade customers to buy energy from [Petitioners] fits within" this meaning, because Respondents "convinced a customer to sign an agreement." App.40-41. Indeed, "[u]nlike *Christopher*," Judge Murphy continued, "we need not even concern ourselves with the catchall 'other disposition,'" because "[t]he arrangement here falls within a specific [term]—'contract to sell.'" App.41.

Turning to precedent, Judge Murphy explained that "the reasoning of all nine Justices in *Christopher* shows that [Respondents] made sales." App.46. The *Christopher* majority had held that a "nonbinding

commitment" to prescribe a drug qualified as a "sale," and "[a] nonbinding agreement to buy energy looks even more like a 'sale' than a nonbinding commitment to prescribe a drug." App.46. The *Christopher* dissent, furthermore, "believed that the exemption covered those who 'obtain a firm commitment to buy the product,'" and in Judge Murphy's view, "[t]he signed customer agreements" were "a firm commitment to buy energy from [Petitioners]." App.46-47.

Judge Murphy next rejected the majority's view that Petitioners' discretion to "stop a deal after a customer signed an agreement"—*i.e.*, Respondents' inability to "bind [Petitioners] to the contracts"—removed Respondents from the exemption. App.47. As a textual matter, he explained, Respondents "'make' the 'contracts to sell' … even if the contracts do not get finalized until later and even if some fall apart." App.47. And *Christopher*, where the employees "did not have the ability to bind their companies to sell prescription drugs" to patients, "rebuts any argument that employees must have on-the-spot authority to bind their employers." App.49.

Judge Murphy emphasized that the majority was opening a clear circuit split and repudiated the majority's attempts to distinguish *Christopher* and *Flood*. *Christopher* "does not … suggest that its reasoning … lack[s] general applicability to other cases." App.49. And while the majority distinguished *Flood* because, in its view, "the plaintiff was less controlled and made more money" than Respondents, those differences "do not matter," Judge Murphy explained. App.51. Just as in this case, he noted, the *Flood* plaintiffs were exempt because they "obtain[ed]

commitments to buy"; indeed, the customer agreements in both cases "gave [Petitioners] the same discretion to reject agreements." App.51. Judge Murphy also rejected the majority's reliance on "external indicia," explaining that, based on text and precedent, the indicia "might *qualify* employees for this exemption even if [their] duties fall outside the ordinary meaning of 'sales' work," but "they cannot *disqualify* employees … who have duties falling squarely within that ordinary meaning." App.52.

At bottom, Judge Murphy concluded, the majority's erroneous decision "creates a clear circuit conflict." App.27. Even worse, "two circuit courts are now holding the same company to conflicting legal mandates," a state of affairs he described as "unsustainable." App.28.

REASONS FOR GRANTING THE PETITION

This case presents a clean circuit split on an important question of federal law that has broad ramifications for the many employers and employees across the country who engage in outside sales. In the decision below, a divided Sixth Circuit held that even though Respondents concededly go door to door persuading potential customers to sign agreements to buy Petitioners' products, they are not "outside salesmen" within the meaning of the FLSA because Petitioners retain discretion to subsequently decline to proceed with a transaction. By contrast, the Second Circuit held that Petitioners' door-to-door solicitors *are* "outside salesmen" under the FLSA and that Petitioners' discretion to subsequently decline a transaction is immaterial to the outside-salesperson analysis. The Second Circuit supported its decision by

citing this Court's decisions in *Christopher* and *Encino Motorcars*, while the Sixth Circuit confined *Christopher* to the pharmaceutical industry and did not even acknowledge *Encino Motorcars*. Although the Sixth Circuit disclaimed a circuit split, the cases involve employees of the same company discharging the same outside sales functions, with the only distinctions among employees turning on irrelevant factors such as their locations during verification calls and their relative success in earning commissions.

The Sixth Circuit's decision is plainly wrong. As Judge Murphy thoroughly explained in his dissenting opinion, and as the Second Circuit just as thoroughly explained in its unanimous decision, Petitioners' door-to-door solicitors undoubtedly fall within the outside-salesperson exemption. Respondents' primary duty was to go door to door and obtain commitments from customers to purchase Petitioners' products. That plainly constitutes "making sales" under the statutory and regulatory text and relevant DOL guidance. The fact that Petitioners could ultimately decline to go through with a transaction, or that Respondents lacked the authority to bind Petitioners or customers to the agreements they obtained, is immaterial. Nothing in the statutory or regulatory text requires an outside salesperson to consummate or complete a transaction, and *Christopher* should have settled once and for all that a binding commitment is unnecessary under the FLSA's purposefully broad definition of a sale.

The circuit split puts Petitioners in a wholly untenable position and implicates a question of national importance. Petitioners are currently subject

to conflicting legal mandates from two courts of appeals, and the availability of nationwide collective actions under the FLSA means that plaintiffs will flock to the Sixth Circuit to essentially nullify the Second Circuit's correct decision. The uncertainties engendered by the decision below will be felt by all employers with an outside salesforce. It is the rare business that does not retain some discretion to ultimately decline to proceed with a contract that an outside salesperson may have obtained—either for regulatory reasons, or merely for prudent business reasons such as confirming that a customer is creditworthy. If such discretion were sufficient to eliminate an outside salesperson's exempt status, then the longstanding outside-salesperson exemption would be largely illusory.

Finally, review is imperative to ensure predictability and consistency in the law. Under this Court's decisions in *Christopher* and *Encino Motorcars*, this should have been a straightforward case. *Christopher* should have removed all doubt about whether a sale must be finally consummated, and *Encino Motorcars* should have removed any temptation to construe exemptions narrowly. The Sixth Circuit majority, however, went out of its way to artificially cabin *Christopher* and did not so much as acknowledge *Encino Motorcars*. The Sixth Circuit's decision thereby unsettles issues that this Court had settled and creates instability for employers and employees alike. This Court should grant review to resettle these questions and to save Petitioners from an untenable conflict between the Second and Sixth Circuits over the exempt status of Petitioners' workforce.

I. The Sixth Circuit's Decision Squarely Conflicts with the Second Circuit's Decision and Subjects Petitioners to Conflicting Mandates.

The Sixth Circuit's decision "creates a clear circuit conflict" with the Second Circuit's decision in *Flood*, App.27 (Murphy, J., dissenting), and subjects Petitioners to diametrically opposing obligations under the FLSA. For "two circuit courts" to "hold[] the same company to conflicting legal mandates" is plainly "unsustainable" and warrants this Court's review. App.28.

In *Flood*, the Second Circuit unanimously held that the door-to-door solicitors employed by Petitioner JEMC qualified for the outside-salesperson exemption under the FLSA. In the court's view, the solicitors were "undoubtedly 'making sales' within the scope of the outside salesman exemption." 904 F.3d at 229. They "spent most of every day going from door to door in an effort to persuade people to buy Just Energy's products," and were paid only if they "successfully persuaded a customer to sign a contract to buy from Just Energy." *Id.* Indeed, the solicitors' duties were even "more in the nature of 'making sales' than the primary duties of the representatives at issue in *Christopher*," because the solicitors "dealt directly with the party … who would actually purchase Just Energy's product." *Id.* at 231.

The Second Circuit acknowledged that some customers "did not ultimately receive Just Energy's product," and "completion of the transaction depended on technical contingencies" such as anti-fraud verification, credit checks, and the like. *Id.* at 229,

231. These facts were irrelevant, however, because the solicitors "received a 'commitment to buy from the person to whom [they were] selling,'" which "suffices to constitute the making of a sale for purposes of the outside salesman exemption." *Id.* at 231. Citing *Christopher*, the Second Circuit firmly rejected the proposition that the outside-salesperson exemption requires showing that "a selling employee has an unconditional authority to bind the buyer or his employer to complete the sale." *Id.* at 229. The fact that Petitioners might "occasionally decline to go through with a transaction … does not alter the character of [the solicitors'] own activities to retroactively transform them into something other than 'making sales' as the regulations provide." *Id.* at 231. In short, "the proper focus for the 'making sales' inquiry is whether the employee has obtained a commitment to buy the employer's product, not whether the employer retains some after-the-fact discretion to decline to go through [with] a transaction to which the buyer has otherwise committed." *Id.* at 232.

Likewise, the Second Circuit expressly refused the plaintiffs' invitation to "confine[]" *Christopher* to "the peculiarities of the pharmaceutical sales market." *Id.* at 230. It noted that *Christopher* emphasized "a functional, rather than formal, inquiry" that "views an employee's responsibilities in the context of the particular industry in which the employee works." *Id.* at 230-31. And it "doubt[ed]" that "unwritten 'external indicia'" that the solicitors were not outside salespeople could exclude them from the exemption if

they were "making sales" within the meaning of the regulation. *Id.* at 234.[4]

The Sixth Circuit's decision departs from this reasoning at every turn. Whereas the Second Circuit held that an employer's discretion to ultimately reject a customer agreement was immaterial to whether an employee is an outside salesperson, the Sixth Circuit emphasized Petitioners' discretion and approved as an "accurate statement of the outside sales exemption" the propositions that (1) if an employer retains or exercises such unfettered discretion, there is no "sale" and thus the employee is not "making sales," and (2) an employee's "authority to bind the company to the transaction at issue" is relevant to whether he is "making sales." App.11-13, 24-25. Whereas the Second Circuit held that *Christopher* was not confined to the pharmaceutical industry, the Sixth Circuit held that *Christopher* concerned the "unique regulatory environment of the pharmaceutical industry" and does not "readily transfer to other industries." App.13-14. And whereas the Second Circuit doubted that "external indicia" could transform an employee who "makes sales" into one who does not, the Sixth Circuit supported its holding by invoking those factors. App.21-23.[5]

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[4] In *Vasto v. Credico (USA) LLC*, 767 F.App'x 54 (2d Cir. 2019), the Second Circuit, citing *Flood*, reaffirmed that the outside-salesperson exemption applies even if the "the applications [the employees] solicited were not necessarily binding," and that considerations of supervision and compensation do not transform an exempt outside salesperson into a non-exempt one. *Id.* at *56-57.

[5] In addition, the Sixth Circuit held that its holding was "supported by" *Clements v. Serco, Inc.*, 530 F.3d 1224 (10th Cir.

In light of the foregoing, the Sixth Circuit's assertion that "no circuit split exists" is astonishing. App.17. The majority's purported distinctions between the employees in the two cases are entirely irrelevant. The majority attempted to distinguish *Flood* because, in its view, Respondents "had significantly less control over their work, sale methods, and compensation than the [*Flood*] solicitors," which affected "whether [Respondents] were in fact authorized or allowed to make sales." App.18. But as Judge Murphy explained, "[t]hese differences do not matter." App.51 (Murphy, J., dissenting). First, the minor differences in whether employees have an opportunity to reconnect with the customer after the regulatory verification process simply reflect differences in state regulatory regimes, not any material difference in the employees' basic sales function. Second, differences in compensation reflect nothing more than the employees' relative success in selling under the kind of commission system typical of outside salespeople. "[T]he outside-sales exemption contains no salary requirement," App.51, and "[t]he regulations … do not include any reference

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2008), where the Tenth Circuit "held that mere soliciting or inducing applications is not making sales, especially if the employer retains discretion and implements other requirements to complete the transaction." App.15 (citing 530 F.3d at 1229). By contrast, the Second Circuit distinguished *Clements* because the employees were "not obtaining a commitment" and because the case was decided before *Encino Motorcars*, when FLSA "exemptions were to be construed narrowly." 904 F.3d at 231-32 & n.7; *see also* App.50-51 (Murphy, J., dissenting) (noting that *Clements* preceded both *Christopher* and *Encino Motorcars*).

… to an employee's prior sales experience ... or degree of supervision." *Flood*, 904 F.3d at 233.

Thus, as Judge Murphy aptly summarized, there is no denying that had Respondents brought their suit in the Second Circuit, they would have lost—just as their New York counterparts did. "Under *Flood*'s test, [Respondents] are exempt because they obtain commitments to buy," regardless of whether they were "authorized" to bind Petitioners. App.51 (Murphy, J., dissenting). Moreover, the customer agreements in *Flood* gave Petitioners the same "'discretion' to reject agreements" as in the Sixth Circuit's case. App.51. There is simply no material difference between the employees and the extent to which they make sales under the FLSA.[6]

While the contradictory reasoning of the Second and Sixth Circuits on an important question of federal law is reason enough to grant certiorari, this Court's review is particularly important because the circuit split puts Petitioners in a wholly untenable position.

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[6] Like the Second Circuit (and the district court it affirmed), numerous district courts have held, as a matter of law, that Petitioners' solicitors are outside salespeople exempt from the FLSA or identically-construed state law. *See Evangelista v. Just Energy Mktg. Corp.*, 2018 WL 4849670, at *2-3 (C.D. Cal. May 30, 2018); *Dailey v. Just Energy Mktg. Corp.*, 2015 WL 4498430, at *3 (N.D. Cal. July 23, 2015) ("Just Energy's retention of the right to cancel a contract based on the third-party verification call or a credit check—or any other reason—does not change the fact that Plaintiff's job duties involved … 'selling.'"); *see also Modeski v. Summit Retail Sols., Inc.*, 470 F.Supp.3d 93, 105 (D. Mass. 2020) (applying exemption although "the customers of plaintiffs made only a tentative commitment to buy the product," because "a binding commitment is not always necessary to make a sale within the meaning of 29 U.S.C. §203(k)").

The *same entities* are now directly subject to "conflicting legal mandates" from two different courts of appeals. App.28. In the Second Circuit, Petitioners' door-to-door solicitors are exempt from the FLSA's requirements; in the Sixth Circuit, they are not. Compounding the confusion, some (but not all) of Petitioners' solicitors who work within the Second Circuit are part of the collective action in the Sixth Circuit, meaning that even in the circuit where it prevailed, Petitioners are still required to treat some outside-salesperson employees as non-exempt. This "state of affairs" is not just "unsustainable," App.28, but intolerable, and plainly warrants the Court's review.[7]

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[7] While acknowledging that both cases "share defendants," the Sixth Circuit appeared to believe that the cases are distinguishable because one of the parties in this case is Commerce Energy, and one of the parties in *Flood* is Just Energy New York, and "how the New York subsidiary chooses to operate its worksite does not tell us how the Ohio subsidiary must necessarily operate its worksite." App.17. This assertion does not resolve the clear circuit split (and indeed appears to concede it), but in all events, it is misguided. Commerce Energy and Just Energy New York are the actual *suppliers* of the natural gas and electricity commodities. But the entity that *employed* the solicitors to *sell* those commodities on behalf of those suppliers, and which established the relevant sales practices for the solicitors, is Just Energy Marketing Corp., a subsidiary of Just Energy Group—both of which are defendants in both cases. There is no "New York subsidiary" or "Ohio subsidiary" of the sales arm of Just Energy Group—there is only Just Energy Marketing Corp., which (like its parent) is now subject to conflicting legal mandates.

II. The Sixth Circuit's Decision Is Incorrect.

A. For the reasons explained by Judge Murphy in his thorough dissent and by the Second Circuit in *Flood*, the Sixth Circuit's decision holding that Petitioners' door-to-door solicitors do not qualify for the outside-salesperson exemption under the FLSA is clearly wrong. Respondents were "undoubtedly 'making sales' within the scope of the outside salesman exemption." *Flood*, 904 F.3d at 229. Indeed, any room for doubt on this score should have been eliminated by this Court's decisions in *Christopher* and *Encino Motorcars*.

The FLSA exempts "any employee employed … in the capacity of outside salesman." 29 U.S.C. §213(a). As relevant here, the term "employee employed … in the capacity of outside salesman" means "any employee … whose primary duty is … making sales within the meaning of section 3(k) of the Act." 29 C.F.R. §541.500(a).[8]

In Section 3(k) of the FLSA, Congress gave an intentionally "broad statutory definition" to the word "sale"—one "more expansive than the term's ordinary meaning." *Christopher*, 567 U.S. at 157, 164, 162 n.18. The word is defined to "include[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. §203(k); 29 C.F.R. §541.501(b). Under that broad definition, a "sale" does not require a "transfer of title," a

[8] The regulation also requires that the employee "is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. §541.500(a). It is undisputed that Respondents satisfy this requirement.

"contract[] for the exchange of goods or services in return for value," or a "'firm agreement' or 'firm commitment' to buy." *Christopher*, 567 U.S. at 159, 163.

On the undisputed facts here, Respondents were unquestionably "making sales" within the meaning of the FLSA. As the majority acknowledged, Respondents "worked as door-to-door solicitors and spent most of their working hours in the field seeking to convince customers to buy electricity and natural gas products." App.2. If Respondents convinced a customer to buy a product, Respondents completed a "customer agreement," obtained the customer's signature, and initiated the third-party verification call before leaving the premises. App.4; *see also* App.15 ("[Respondents] communicated with potential customers, convinced them to try Just Energy products, and inputted their information onto the agreement."). Respondents were thus "making sales"—specifically, they were "making" a "contract to sell" energy products to interested customers. *See* App.40 (Murphy, J., dissenting) (citing contemporaneous dictionaries defining "make" as "cause" or "bring[] … about"). Respondents were not "just promoting these products or advertising them" but "trying to persuade … customers to sign up then-and-there for" the products, and nobody else was "selling to [Respondents'] customers or taking any kind of sales-oriented step toward completing the transaction." *Flood*, 904 F.3d at 229; *see* App.44 (Murphy, J., dissenting) ("[Respondents] have identified no other Just Energy employees who 'made' these sales.").

It has long been settled that employees "have a primary duty of making sales" if "they obtain a commitment to buy from the customer and are credited with the sale." 69 Fed. Reg. at 22162-63. That is "precisely what [Respondents] did." *Flood*, 904 F.3d at 229. They "obtained commitments to buy from customers" by securing a signed customer agreement, and they were "credited by commission for the customers that [they] persuaded to buy and who received Just Energy's products." *Id.*

This Court's decision in *Christopher* removes any doubt that Respondents qualify for the outside-salesperson exemption. There, the Court held that pharmaceutical detailers "make sales" by obtaining non-binding commitments from doctors to prescribe drugs. 567 U.S. at 161-69. If efforts to persuade doctors to *prescribe* (not buy) drugs qualify as "making sales," then Respondents' efforts to persuade customers to *buy* products qualify *a fortiori*. After all, "[a] nonbinding agreement to buy energy looks even more like a 'sale' than a nonbinding commitment to prescribe a drug." App.46 (Murphy, J., dissenting); *see also Flood*, 904 F.3d at 231 ("Unlike the sales representatives in *Christopher* who did not deal with any party who would actually engage in a sales transaction … , [plaintiffs] dealt directly with the party—face-to-face with the customer at the door—who would actually purchase Just Energy's product."). Indeed, even the *Christopher* dissent believed that the exemption covered those who "obtain a firm commitment to buy the product." *Christopher*, 567 U.S. at 178 (Breyer, J., dissenting). That readily describes the circumstances here: Respondents' duty was to "obtain a firm commitment" from customers to

buy Just Energy products, which Respondents obtained by securing a signed customer agreement to purchase the products. *See* App.46-47 (Murphy, J., dissenting).

B. In concluding that Respondents are not exempt outside salespeople, the Sixth Circuit majority (and district court) principally relied on the fact that a signed customer agreement did not guarantee that there would be a fully consummated sale. Instead, the majority repeatedly emphasized, Petitioners "retain[ed] full discretion to finalize a sale," and such discretion was driven only in part by regulatory obligations. App.14; *see also* App.15 ("[Respondents] could not finalize customer agreements and complete sales due to [Petitioners'] choice to retain ultimate discretion and to require certain solicitation procedures[.]"); App.15 ("Just Energy retained discretion over completion of sales."). In the majority's view, such "discretion" is "not merely a technicality immaterial to the analysis." App.14.

But as Judge Murphy and the Second Circuit explained, "[n]either text nor precedent" supports a rule that an otherwise exempt outside salesperson is not exempt if the employer retains discretion to later reject a signed contract. App.47 (Murphy, J., dissenting); *Flood*, 904 F.3d at 229 (repudiating proposition that "the outside salesman exemption requires a showing that a selling employee has … unconditional authority to bind the buyer or his employer to complete the sale"). As to text, neither the statute nor regulations "require the employee to *consummate* or *complete* the sale"; they require the employee "to *make* the sale," and "[Respondents]

'make' the 'contracts to sell' that [Petitioners] enter [into] with consumers even if the contracts do not get finalized until later and even if some fall apart," and "even if the actual exchange occurs later in coordination with others." App.47 (Murphy, J., dissenting). Although "completion of the transaction depended on" various contingencies like third-party verification and passing a credit check, "there is no mistaking that [Respondents] received a 'commitment to buy from the person to whom [they were] selling," which "suffices to constitute the making of a sale for purposes of the outside salesman exemption." *Flood*, 904 F.3d at 231 (quoting 69 Fed. Reg. at 22163).

As to precedent, *Christopher* again eliminates all doubt that an employer's discretion to reject a customer's commitment to buy does not remove an employee from the outside-salesperson exemption. There, the Court held that pharmaceutical detailers' efforts to obtain physicians' "*nonbinding* commitment[s]" to prescribe drugs nevertheless constituted "making sales" for purposes of the exemption. 567 U.S. at 165 (emphasis added). Furthermore, the detailers lacked the ability to bind their employers to sell prescription drugs to patients; instead, the patients bought the drugs from different entities (pharmacies). *Id.* at 167 & n.24. It necessarily follows that the "nonbinding" nature of the signed customer agreements obtained by Respondents, as well as Respondents' inability to bind Petitioners (or their customers) to the signed customer agreements, have no bearing on whether Respondents are exempt outside salespeople.

The Sixth Circuit majority did not explain how Petitioners' discretion is relevant under the statutory or regulatory text. And its answer to *Christopher* was to limit that decision to its facts. Invoking the supposedly "unique factual setting" of that case and the "unique regulatory environment of the pharmaceutical industry," it stated that "*Christopher*'s holding does not readily transfer to other industries," rendering it "of limited import." App.13-14. That is neither a fair reading of *Christopher* nor the way lower courts should treat this Court's precedents. As both Judge Murphy and the Second Circuit correctly observed, *Christopher* does not "suggest that its reasoning and interpretation of the statute and regulations lack general applicability to other cases" arising under the FLSA. App.49 (Murphy, J., dissenting) (quoting *Flood*, 904 F.3d at 231). To the contrary, *Christopher* noted that the broad definition of "sale" in the FLSA "represent[s] an attempt to accommodate industry-by-industry variations in methods of selling commodities." 567 U.S. at 164. Furthermore, *Christopher* does not "state any baseline rule or presumption that a salesman is not 'making sales' unless the salesman persuades customers to engage in binding purchase commitments not subject to any discretionary review or intervention by the employer or any third party." *Flood*, 904 F.3d at 231. And, Judge Murphy added, "nothing in the text" of the statute or regulations "draws this regulated-nonregulated line"; "[e]ither nonbinding commitments count or they do not." App.49 (Murphy, J., dissenting).

In emphasizing the "unique factual setting and the limitations of *Christopher*," the Sixth Circuit

majority cited only two cases: its earlier decision in *Killion v. KeHE Distributors, LLC*, 761 F.3d 574 (6th Cir. 2014), and the Fifth Circuit's decision in *Meza v. Intelligent Mexican Marketing*, 720 F.3d 577 (5th Cir. 2013). App.13. But in *Killion*, the court simply asserted, without further explanation, that the case before it did not "involve a 'unique regulatory environment.'" 761 F.3d at 584. Furthermore, that case concededly did not "involve … a 'nonbinding commitment,'" as here. *Id.* And in *Meza*, the Fifth Circuit did not cabin *Christopher* to its "unique factual setting" or suggest that it has no applicability to other industries. There, the plaintiff argued that he was a "deliveryman" under 29 C.F.R. §541.504, not an outside salesperson, and thus was not exempt from the FLSA. The Fifth Circuit merely observed (correctly) that *Christopher* did not address "how a court determines if a driver is a deliveryman or a salesman for FLSA purposes." 720 F.3d at 586. And it proceeded to hold that the plaintiff *was* an exempt outside salesperson. *Meza* thus provides no support whatsoever for the Sixth Circuit's restrictive reading of *Christopher*.[9]

In short, the outside-salesperson exemption "does not require that the employee have the ultimate

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[9] As noted, *see* n.5, *supra*, the Sixth Circuit later cited as support the Tenth Circuit's decision in *Clements*. But that decision predates *Christopher*, and to the extent it "relied on the *nonbinding* nature of any commitment"—as the majority appeared to indicate—"its logic does not survive *Christopher*'s holding that a 'nonbinding commitment' counts." App.50 (Murphy, J., dissenting). *Clements* "also relied on the overruled principle that the exemption should be narrowly construed." App.51 (citing *Encino Motorcars*, 138 S. Ct. at 1142).

authority to bind the customer or close the deal," and it does not depend on "whether the employer retains some after-the-fact discretion to decline to go through [with] a transaction to which the buyer has otherwise committed." *Flood*, 904 F.3d at 232-33. It is "enough that the employee secures a customer's commitment to engage in a sales transaction as the term 'sale' is broadly defined by the law," *id.* at 233—which is precisely what Respondents did.

Finally, the Sixth Circuit majority reasoned that Respondents lacked the "external indicia" of outside salespeople and that their jobs "did not comport with the apparent purpose of the outside sales exemption," given Petitioners' supervision over Respondents' activities, Respondents' lack of sales experience, and Respondents' low compensation. App.22-23. But as Judge Murphy explained, whatever role atextual "external indicia" and "purpose" can properly play,[10] "they cannot *disqualify* employees like [Respondents] who have duties falling squarely within that ordinary meaning." App.52 (Murphy, J., dissenting). "[N]o such listing of indicia appears in the relevant regulation defining what it means for an employee to be 'making sales.'" App.52 (quoting *Flood*, 904 F.3d at 233). "There is no way to eliminate the possibility that [the plaintiff's] relatively low compensation was due solely to poor salesmanship; in any event (and perhaps

[10] While *Christopher* referred in passing to "external indicia," it was "to confirm that the pharmaceutical sales representatives were exempt" under the "'other disposition' catchall." App.53-54 (Murphy, J., dissenting). Here, however, "there is no need to rely on the external indicia because [Respondents'] work falls squarely within 'making sales,'" rending any external indicia "irrelevant in this case." App.54.

for that very reason), the regulations do not indicate that a court should consider a salesman's effective compensation in determining whether the exemption applies." *Meza*, 720 F.3d at 586.[11]

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

The Court's review is critical. As a result of the decision below, Petitioners immediately face "conflicting legal mandates" from two courts of appeals. App.28 (Murphy, J., dissenting). Even worse, because the FLSA provides for nationwide collective actions, *see* 29 U.S.C. §216(b), and the district court certified this case as a collective action covering employees in Ohio, Illinois, Pennsylvania, Maryland, California, and New York, Petitioners must

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[11] As this Court has explained, although "[t]he question of how" employees "spen[d] their working time" is a "question of fact," "[t]he question whether" employees' "particular activities exclude[] them from the overtime benefits of the FLSA is a question of law." *Icicle Seafoods*, 475 U.S. at 714; *see also Christopher*, 567 U.S. at 152 (addressing, in summary-judgment posture, whether FLSA exemption applied); *Flood*, 904 F.3d at 227-28 (same). Thus, as Judge Murphy explained below, because the "historical facts" regarding how Respondents spent their working time are "largely undisputed," the question here is a legal question that should have been resolved on summary judgment. App.36-37 (Murphy, J., dissenting). Regardless, as Judge Murphy further explained, "the proper meaning of the outside-sales exemption raises a pure legal question," and "no reasonable jury could return a verdict for [Respondents] under a correct view of the law." App.39. Accordingly, the fact that the district court incorrectly permitted the case to go to trial is no barrier to this Court's review of the legal question, and the fact the case involves a final judgment makes this a particularly good vehicle for review.

treat some (but not all) of their employees in New York as non-exempt, even while the Second Circuit has unanimously held that Petitioners' employees are exempt. That "state of affairs" is "unsustainable." App.28.

But the ramifications of the Sixth Circuit's erroneous decision sweep far more broadly and will affect all employers with an outside salesforce. It is the rare business that does not retain some modicum of discretion to ultimately decline to proceed with a customer agreement that an outside salesperson may have obtained. Sometimes this discretion may follow from regulatory requirements, like third-party verification calls to combat fraud; sometimes it may not, like a determination that a customer lacks sufficient credit, has provided false information, or other "prudent" business reasons. *Flood*, 904 F.3d at 231. If an employer's ability to engage in such everyday, commonsense exercises of discretion is enough to eliminate an outside salesperson's exempt status, then the longstanding outside-salesperson exemption is largely illusory, and the broad array of companies that have been employing millions of outside salespeople have been misclassifying them for years. While it "may be possible for" these companies to have been "in violation of the FLSA for a long time" without anybody (including the DOL) noticing, the "more plausible hypothesis" is that nobody thought that an employer's discretion to later reject an agreement or contract meant that the outside-salesperson exemption does not apply. *Christopher*, 567 U.S. at 158 (brackets omitted).

Review is also imperative to ensure stability and consistency in the law. To allow employers and employees alike to order their affairs with predictability and certainty, this Court's decisions must be viewed as precedents that must be applied, not obstacles to be circumvented. Under this Court's decisions in *Christopher* and *Encino Motorcars*, this should have been an easy case, just as it was in the Second Circuit. Yet the Sixth Circuit casually cast aside *Christopher*, stating that its "holding does not readily transfer to other industries" and is of "limited import" outside the pharmaceutical context. App.13-14. But to the extent there are peculiarities about the pharmaceutical industry and the role of detailers, they are peculiarities that made the application of the outside-salesperson exemption less obvious. Thus, far from providing a basis to distinguish other industries, *Christopher* makes the application of the exemption to Respondents and other more typical sales arrangements clear *a fortiori*. And the Sixth Circuit's utter failure to acknowledge this Court's recent pronouncement in *Encino Motorcars* that the FLSA exemptions are to be construed fairly, not narrowly, *see* n.3, *supra*, reflects, at best, a casual disregard for this Court's precedents, and, at worst, a latent hostility toward them. In either case, this Court should not countenance such intransigence.

Finally, this case is an excellent vehicle. The question whether Respondents are exempt outside salespeople is the only issue left in the case. The question is cleanly presented, for the relevant facts are undisputed. And the question is outcome-determinative: if Respondents are not exempt, Petitioners must write Respondents and their lawyers

a substantial check, but if Respondents are exempt, Petitioners owe nothing. Finally, the Second and Sixth Circuits issued lengthy opinions, and Judge Murphy authored a thorough dissent below; accordingly, further percolation is unnecessary. The Court should grant certiorari to resolve the circuit split, eliminate the conflicting mandates to which Petitioners are now subject, and reaffirm the primacy of its precedents while restoring certainty and stability for millions of employers and employees.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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February 2, 2021