

IN THE
Supreme Court of the United States

JERRY MERRITT,

Petitioner,

v.

TEXAS FARM BUREAU, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant a petition for a writ of certiorari to review a unanimous decision of the U.S. Court of Appeals for the Fifth Circuit that does not conflict with the decisions of any other court of appeals, any state court of last resort, or any decision of this Court; but rather affirms a unanimous jury verdict determining that the plaintiff, Jerry Merritt, was not entitled to “overtime” under the Fair Labor Standards Act (the “FLSA”) because he failed to prove that the employer had actual or constructive knowledge of the overtime work, or he deliberately prevented his employer from acquiring knowledge of the overtime work.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Southern Farm Bureau Life Insurance Company states that it is not a publicly held corporation, and no publicly held corporation owns any of its stock. Neither Southern Farm Bureau Life Insurance Company nor any other Respondent in this proceeding has a stock ticker symbol.

Southern Farm Bureau Life Insurance Company is owned equally by the following ten investment corporations or holding companies of the Farm Bureau Federations in ten states, each of which owns a 10% share:

1. Arkansas Farm Bureau Investment Corporation;
2. Florida Farm Bureau Holding Corporation;
3. Georgia Farm Bureau Holding Corporation;
4. Kentucky Farm Bureau Investment Corporation;
5. Louisiana Farm Bureau Investment Corporation;
6. Mississippi Farm Bureau Investment Corporation;
7. North Carolina Farm Bureau Investment Corporation;

8. South Carolina Farm Bureau Investment Corporation;
9. Texas Farm Bureau Investment Corporation; and
10. Virginia Farm Bureau Holding Corporation.

Respondents Texas Farm Bureau; Texas Farm Bureau Business Corporation, Texas Farm Bureau Casualty Insurance Company, Texas Farm Bureau Mutual Insurance Company, Texas Farm Bureau Underwriters, and Farm Bureau County Mutual Insurance Company of Texas state that they are not publicly held corporations, and no publicly held corporation owns any of its stock. None of these Respondents has a stock ticker symbol.

Texas Farm Bureau Investment Corporation is the parent company of Texas Farm Bureau Casualty Insurance Company.

Texas Farm Bureau is the parent company of Texas Farm Bureau Business Corporation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4) is reported at 166 F.4th 490 (5th Cir. 2026). The opinion of the district court (Pet. App. 18) is unreported but available at 2024 WL 6996148 (W.D. Tex. Oct. 11, 2024). The order denying *en banc* rehearing is reproduced at App. 12.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 2026. On March 30, 2026, the Fifth Circuit denied plaintiff's petition for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

29 U.S.C. § 207(a)(1) (“[N]o employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”).

29 U.S.C. § 203(g) (“Employ” includes to suffer or permit to work.).

STATEMENT

Appellant Jerry Merritt (“Merritt”), the plaintiff below, contracted with the Texas Farm Bureau (“TFB”) insurance companies and Southern Farm Bureau Life Insurance Company (collectively,

the “Companies”) as an agency manager, supervising “a team of insurance agents in various TFB agencies.” *Merritt v. Texas Farm Bureau*, 166 F.4th 490, 491 (5th Cir. 2026); Pet. at 3. While under contract with the Companies, Merritt was classified as an independent contractor. *Merritt*, 166 F.4th at 491; Pet. at 3. As an independent contractor, he was granted broad independence to “set his own schedule” and determine the “hours he worked every day,” and he had “no obligation to track or disclose to TFB the hours he worked.” *Merritt*, 166 F.4th at 491-92; Pet. at 3. The Companies “did not supervise Merritt’s hours worked or his completion of daily tasks.” *Merritt*, 166 F.4th at 492; Pet. at 3. He received commissions on every policy sold or renewed in his agencies, including those sold by the many agents who worked under him. See Record on Appeal (“ROA.”), No. 24-50127, *Merritt v. Texas Farm Bureau, et al.*, (5th Cir. 2026), at 2683, 2692; *Merritt*, 166 F.4th at 492. During the relevant period, from 2016 to 2018, he earned between \$552,000 and \$627,000 annually. *Id.*

Prior to Merritt filing his action, a similar FLSA misclassification and overtime lawsuit had been filed by another agency manager (the *Ferguson* lawsuit). During a group meeting about the *Ferguson* lawsuit, which included top agency managers and the Companies’ senior management, Merritt “adamantly disagreed that [agency managers] were misclassified”; stated that “everybody knew [the agency managers] were independent contractors” and “You do not want to be an employee”; and characterized the notion that agency managers were entitled to overtime as “hogwash.” ROA.11716, 11516, 11532, 15253-54. Following his retirement, Merritt flip-flopped and

sued the Companies, mimicking the claims in *Ferguson* with which he had previously vehemently disagreed. *Id.*; Pet. at 4.

Merritt moved for partial summary judgment, and over the Companies' opposition, the district court ruled that he was an employee and not an independent contractor.¹ The district court also concluded as a matter of law that Merritt worked an average of 12 hours of overtime for 61 weeks, for a total of 816 overtime hours. *Merritt*, 166 F.4th at 492; Pet. at 3-4.² The sole issue for trial was whether the Companies had actual or constructive knowledge of the overtime, an issue on which Merritt bore the burden of proof. *Merritt*, 166 F.4th at 492.

At trial, the evidence established that Merritt never provided the Companies with actual knowledge that he worked overtime. *See* ROA.11541-42, 11810-12. He conceded: "I never told anybody I was working overtime." ROA.11674, 11667-68, 11672-73, 11854-64, 11791, 11810, 11815-16, 11483. Merritt never informed the Companies that fulfilling his contract obligations required more than 40 hours a week; he

¹ The district court's finding that Merritt was an "employee" and not an independent contractor was the subject of a conditional cross-appeal. The Companies also raised conditional cross-appeal points regarding multiple overtime exemptions under the FLSA. The Fifth Circuit did not need to reach this issue because it affirmed the jury's verdict that Merritt was not entitled to overtime even if he was an employee.

² Contrary to Merritt's petition (Pet. at 3), the Companies disputed that Merritt worked the 816 hours of overtime the district court's summary judgment order ultimately determined. ROA.3858-81.

never asked the Companies to track his hours; and prior to filing suit, he never disputed his classification as an independent contractor. ROA.11533-37, 11538-42, 11682, 11971-72, 11796-97, 11854, 11858-61, 11863-64. Merritt had long-standing relationships with the Companies' senior management and countless opportunities to provide knowledge. ROA.11530-31, 11817-18, 11864. But he never did.

The Companies had no knowledge of Merritt's overtime hours. Without contradiction, the Companies' witnesses confirmed they did not track Merritt's time or know how many hours he worked at any time. ROA.11482-83, 11488-89, 11498-99, 11504 ("[W]e have no idea how many hours a week they are working").

As to constructive knowledge, the evidence showed Merritt's daily tasks and work hours were not supervised. ROA.11495, 11497-500, 11480-82, 11823, 11846-47. The Companies' employees were in Waco, Texas, other parts of the state, and Jackson, Mississippi. They did not monitor Merritt's daily activities or observe him managing the Brazos and Grimes County agencies, far from the Companies' home offices. ROA.11512, 11543-44, 11846 ("I was not there to see how many hours he worked ..."). There was no reason for the Companies to know Merritt's hours. In addition, Merritt's prior conduct with respect to the *Ferguson* lawsuit prevented the Companies from even suspecting that Merritt would assert a claim for overtime.

After the close of evidence, Merritt moved for judgment as a matter of law, which the district court

denied. *Merritt*, 166 F.4th at 492. The court used the Fifth Circuit’s Pattern Jury Instructions and charged the jury in relevant part:

[A]n employee has a duty to notify his employer when he is working extra hours. If the employee fails to notify the employer of the overtime work or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer’s failure to pay for the overtime hours is not a violation of the FLSA. If the employer neither knew nor had reason to believe that overtime work was being performed, that time does not constitute hours worked.

ROA.6609-10, 11962-63; *Merritt*, 166 F.4th at 492.

The jury found that the Companies did not have actual or constructive knowledge of Merritt’s overtime, and issued a verdict in the Companies’ favor. *Id.* Merritt renewed his Rule 50(b) motion and sought a new trial under Rule 59 in the alternative. Neither of Merritt’s motions argued that there was insufficient evidence to support the jury’s verdict. The trial court denied both motions. *Merritt*, 166 F.4th 492.

On appeal, the Fifth Circuit reviewed the three arguments Merritt raised in challenging the denial of his Rule 50 and 59 motions and found that “[e]ach fails.” *Id.* First, the court of appeals rejected Merritt’s semantics-based argument that if an employer “suffer[s] or permits[s]” an employee to work

unlimited hours, the employer necessarily has constructive knowledge of the overtime, an argument at odds with an unbroken line of circuit precedent. *Id.* at 493 (citing *Newton v. City of Henderson*, 47 F.3d 746, 748 (5th Cir. 1995); *Loy v. Rehab Synergies, L.L.C.*, 71 F.4th 329, 337 (5th Cir. 2023); *White v. Patriot Erectors, L.L.C.*, No. 23-50524, 2024 WL 3181455, at *4 (5th Cir. June 26, 2024)).

Next, the court of appeals rejected the argument that the Companies' failure to record Merritt's hours (because they had classified him as an independent contractor) meant they had constructive knowledge of Merritt's overtime as a matter of law, correctly recognizing that the result of Merritt's argument would be to wrongly shift the burden of proof on the "hours worked" element from the plaintiff/employee to the employer. *Merritt*, 166 F.4th at 493.

Finally, the court of appeals rejected Merritt's contention that the section of the jury instructions regarding employer knowledge was deficient. *Id.* at 494. The instruction was based on the Fifth Circuit's Pattern Instruction on employer knowledge, and correctly stated the law. *Id.*

Merritt's Petition for Certiorari followed.

ARGUMENT

A. The Petition Does Not Present An Issue Worthy Of This Court's Attention

None of the considerations governing review of petitions for certiorari are present here. *See* Sup. Ct. R. 10, 14.1(a).

1. There is no division among the circuit courts of appeal regarding the overtime rule's knowledge requirement, and Merritt does not suggest otherwise. The panel was unanimous, and no eligible Fifth Circuit judge voted in favor of rehearing the case.

Every other circuit to have considered the issue applies virtually the same standard as the Fifth Circuit. *See, e.g., Manning v. Boston Medical Center Corp.*, 725 F.3d 34, 44 (1st Cir. 2013) (recognizing employer knowledge as necessary to show that overtime work was "suffered or permitted" under the FLSA); *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 365 (2d Cir. 2011) (requiring proof that the employer had actual or constructive knowledge that the plaintiff was performing uncompensated overtime work); *Davis v. Food Lion*, 792 F.2d 1274, 1276-78 (4th Cir. 1986) (affirming judgment for employer where employee failed to carry his burden of proving actual or constructive knowledge of alleged off-the-clock overtime); *Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 391-92 (6th Cir. 2016) (framing the dispositive question as whether the employer had actual or constructive knowledge of overtime hours); *Kellar v. Summit Seating, Inc.*, 664 F.3d 169, 177 (7th Cir. 2011) (affirming summary judgment because the

employer did not know or have reason to know the employee was performing pre-shift work); *Hertz v. Woodbury County*, 566 F.3d 775, 781-82 (8th Cir. 2009) (holding that to prevail on their overtime claims, plaintiffs were required to present evidence that the employer knew or should have known they were working uncompensated overtime); *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414-15 (9th Cir. 1981) (finding that no FLSA violation occurs where the employer lacks knowledge and the employee fails to notify the employer or deliberately prevents it from learning of the work); *Pabst v. Oklahoma Gas & Electric Co.*, 228 F.3d 1128, 1133-34 (10th Cir. 2000) (applying the actual-or-constructive-knowledge standard); *Allen v. Board of Public Education for Bibb County*, 495 F.3d 1306, 1314-15 (11th Cir. 2007) (requiring evidence that the employer knew or should have known employees worked unpaid overtime); *see also Alers v. City of Philadelphia*, 919 F. Supp. 2d 528, 558 (E.D. Pa. 2013) (“[C]ourts in the Third Circuit have adopted [the Second Circuit’s] approach for determining whether the overtime claimed by a plaintiff is compensable based on an employer’s knowledge of the performed work.”).

Merritt cites no authority to the contrary. No circuit has agreed with Merritt that an employee’s ability “to work as much (or as little) as he pleases,” *Merritt*, 166 F.4th at 493, dispenses with the actual-or-constructive-knowledge requirement altogether. Merritt’s complaint is about the application of a jury’s factual findings to the settled knowledge requirement, not about any unresolved split in the law or among the circuits. Such a challenge does not warrant this Court’s review.

Merritt’s assertion that “[t]he Fifth Circuit invented” the actual-or-constructive-knowledge requirement is incorrect. Pet. at 8. This requirement flows from the FLSA’s own definition of “employ” as “to suffer or permit to work.” 29 U.S.C. § 203(g). Indeed, an employer cannot “suffer or permit work” of which it is unaware—a principle that courts recognized decades before the Fifth Circuit’s decisions in *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 827 (5th Cir. 1973), and *Newton*, 47 F.3d at 750. For example, six years after the FLSA’s enactment, the Ninth Circuit held that “the words ‘suffer’ and ‘permit’ as used in statute means ‘with the knowledge of the employer.’” *Fox v. Summit King Mines, Ltd.*, 143 F.2d 926, 932 (9th Cir. 1944); *see also*, e.g., *Burry v. Nat’l Trailer Convoy, Inc.*, 338 F.2d 422, 426 (6th Cir. 1964); *Wirtz v. Bledsoe*, 365 F.2d 277, 278 (10th Cir. 1966).

2. The petition does not present an important issue of federal law that arises frequently or broadly applies in other cases. Rather, “[t]he question here,” per Merritt, “is whether an employer who permits an employee to work as much as the employee wishes ‘employs’ the worker under the FLSA for overtime worked, or must the worker also show the employer knew about the overtime work.” Pet. at (i).

Merritt’s unique factual circumstances involve an insurance agency manager who agreed to operate as an independent contractor, who was highly compensated, paid by commission, and responsible for managerial, executive and administrative duties; whose schedule was not dictated, controlled, or monitored by his employer; and whose post-

retirement claim that he was misclassified and worked overtime was based solely on his own overtime estimates, without any contemporaneous time records. Other unique circumstances include that the employers also did not keep time records (because they classified Merritt as an independent contractor), and the employers lacked actual or constructive knowledge of Merritt's work, both regular time and overtime (because it was never reported and there was no supervision or business reason for the Companies to monitor it).

As a general matter, the issue of an employer's actual or constructive knowledge of overtime in FLSA cases is not frequently raised or litigated relative to other aspects of FLSA practice, and the issue Merritt asks the Court to recognize would essentially apply to him alone. *See* Pet. at 3 (describing facts giving rise to need for the Court to recognize Merritt's new rule). Merritt does not contend that failure to grant the petition will impact a significant number of parties, now or in the future. Merritt has not shown that reaching down to review this particular jury verdict, which has already been reviewed and affirmed by the trial court and a unanimous Fifth Circuit without controversy, would be worth the investment of the Court's limited resources.

3. In addition, the petition does not concern any issue of national importance. Because the underlying facts are idiosyncratic to Merritt, the Fifth Circuit's ruling cannot have a broad impact by its very nature, as the ruling requested would functionally impact one American citizen, Merritt himself. Merritt has not shown that the ruling will have any wider

impact even in the Fifth Circuit, let alone in other circuits, or nationally.

Substantively, Merritt's case is not especially important, either. As the Fifth Circuit noted, Merritt was an extremely well-paid manager, compensated for all of his work via commissions based on his sales and the sales of all agents who worked in his agencies. *Merritt*, 166 F.4th at 492. Merritt worked for decades with the Companies, never objecting to his classification as an independent contractor, and never telling anyone he was working overtime. *See, e.g.*, ROA.11541-42, 11667-68, 11672-74, 11791, 11810-12, 11815-16, 11854-64.

Only after he retired did Merritt jump on the bandwagon of the *Ferguson* lawsuit and file suit himself. With earnings of well over \$500,000 annually, Merritt is hardly the kind of employee Congress had in mind when it passed the FLSA, with the goal of "protect[ing] all covered workers from substandard wages and oppressive working hours." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012).

4. The petition does not raise an issue worthy of further review because it has been filed for error-correction purposes alone, a point it essentially concedes. *See* Pet. at 8 ("The Fifth Circuit's decision is wrong, and this Court should say so."). At most, the Court is asked to set aside the jury verdict, review the underlying facts, and decide for itself whether the evidence showed as a matter of law that the Companies "permitted" Merritt to work overtime under Merritt's reimagined definition of "permit." Pet.

at 4 (asking the Court to answer whether an employer who “expressly authorizes an employee to work as many hours as the employee wishes, never prohibits or restricts overtime, and collects the full benefit of that work” has “permit[ted]” the work). The petition does not encompass any principle broader than Merritt’s desire for an exception to the application of settled precedent, where the contours of the exception requested are specific to Merritt’s personal work history (*e.g.*, misclassification, a lack of actual knowledge, the lack of a written overtime policy or time cards, etc.) and not broadly applicable characteristics likely to be found in a significant number of future cases.

B. The Petition Is A Poor Vehicle For This Court’s Review

Even if the petition contained a certworthy issue, this case is not the right case to resolve it.

1. Merritt has waived the question presented by not preserving it at the district court. His JMOL motion was limited to the argument that the Companies had constructive knowledge of Merritt’s alleged overtime hours based on the Companies’ supposed record-keeping violation and failure to cap Merritt’s hours. *See* ROA.8728-38. His argument had two parts. Section A asserted in its heading: “The record establishes that Farm Bureau had *knowledge* of Merritt’s overtime.” ROA.8729. Section B said: “Because Merritt had no duty to notify Farm Bureau he was working overtime, Farm Bureau has zero evidence to dispute it had *knowledge* of his overtime.” ROA.8741. Section B claimed: “Farm Bureau had

constructive knowledge under the correct standards that apply in cases where the employer permits overtime work but violates ... recordkeeping duties” *Id.*

But Merritt did not argue to the district court, as he did for the first time before the Fifth Circuit, that the knowledge requirement does not apply in all overtime cases, and in particular not to Merritt’s. This argument, consequently, was waived under the Fifth Circuit’s and this Court’s settled case law. *See, e.g., Celanese Corp. v. Martin K. Eby Constr. Co.*, 620 F.3d 529, 531 (5th Cir. 2010); *Singleton v. Wulff*, 428 U.S. 106, 120, (1976) (“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”). Merritt’s waiver provides an alternative ground on which to affirm the Fifth Circuit, not addressed in the petition. And it counsels in favor of declining to exercise the Court’s discretion on prudential grounds where jurisdictional questions may arise depending on whether and how the Court disposes of the waiver question.

2. The case comes to the Court following a full trial on the merits, a unanimous jury verdict, and affirmation of the jury’s verdict by (i) the district court following post-trial briefing and oral argument, and (ii) a unanimous panel of the Fifth Circuit following briefing and oral argument. It relies on a laundry list of specific, idiosyncratic facts and asks this Court to re-review those facts favorably to *Merritt* (rather than the *prevailing parties*), and reinterpret the FLSA in a manner no court has done before. While the substantive flaws in Merritt’s argument are sufficient to deny the petition, the standard of review also

renders it, procedurally, unworthy of this Court's resources.

The Fifth Circuit's standard of review for a JMOL motion is not challenged by Merritt's petition. That standard provides that a JMOL motion should be denied by the district court unless "a reasonable jury would not have a legally sufficient evidentiary basis to find for the [non-moving] party on that issue." *Seibert v. Jackson Cnty.*, 851 F.3d 430, 434 (5th Cir. 2017). Review of a "jury's verdict is highly deferential." *Young v. Bd. of Supervisors of Humphreys Cnty., Miss.*, 927 F.3d 898, 903 (5th Cir. 2019). Reviewing courts should "draw all reasonable inferences and resolve all credibility determinations in the light most favorable to the nonmoving party," and "uphold the verdict unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did." *Cowart v. Erwin*, 837 F.3d 444, 450 (5th Cir. 2016) (internal quotations and footnote omitted). Especially where, as here, "the movant is the party having the burden of proof" at trial, a JMOL motion should be granted "cautiously and sparingly." *Ward v. Reeled Tubing, Inc.*, 637 F. Supp. 33, 34 (E.D. La. 1986), *aff'd*, 811 F.2d 600 (5th Cir. 1987).

The petition does not try to satisfy the governing legal standard; it avoids it. Merritt does not contest the district court's findings, affirmed on appeal, that sufficient evidence supported the jury's verdict. It asserts that the jury should not have gotten the case in the first place on the grounds that Merritt proved his case as a matter of law. But to get there, this Court is asked to apply a novel interpretation of the FLSA, heretofore unrecognized by any federal

court, and to apply it to a set of facts that neither the jury nor district court actually found.

Should the issue of employer knowledge in FLSA cases someday become far more pressing than it is today, there will invariably be better vehicles for the Court's review than one arising from a jury verdict against the movant and depending on a novel legal theory summarily rejected by the only courts that have considered it.

3. The decision can be sustained on alternative grounds not addressed by the petition.

Under settled Fifth Circuit precedent, not addressed or challenged by the petition, an employee who “deliberately prevents the employer from acquiring knowledge of the overtime work” cannot satisfy the knowledge element of his claim. *Newton*, 47 F.3d at 748. That standard was provided in the jury instructions as a reason to find for the Companies. ROA.6609-10, 11962-63; *Merritt*, 166 F.4th at 492. The petition does not challenge the instruction.

The district court was charged with “draw[ing] all reasonable inferences and resolv[ing] all credibility determinations in the light most favorable to the nonmoving party,” the Companies here, and was directed to “uphold the verdict unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did.” *Cowart*, 837 F.3d at 450. Under that deferential (and unchallenged) standard, the trial court was required to affirm the verdict on any valid theory presented to the jury and supported by sufficient evidence. *Id.*; see also *Calloway v.*

Manion, 572 F.2d 1033, 1038 (5th Cir. 1978) (courts must “indulge in all permissible inferences for a prevailing party”); *Muth v. Ford Motor Co.*, 461 F.3d 557, 564–65 (5th Cir. 2006) (where multiple theories put to the jury and one is called into question, court will presume jury found facts necessary to support valid theory); *Prestenbach v. Rains*, 4 F.3d 358, 361 n.2 (5th Cir.1993) (“[A] jury verdict may be sustained even though not all the theories on which it was submitted had sufficient evidentiary support.”).

Given Merritt’s conduct in connection with the *Ferguson* case, a finding that Merritt deliberately interfered with the Companies’ ability to obtain knowledge of his claim was squarely within the verdict’s scope and the record presented, and provided the district court an alternative ground to uphold the verdict regardless of the resolution of the legal issue presented in the petition.

As noted, Merritt never provided the Companies with actual knowledge that he worked overtime.³ Nor did he inform the Companies that fulfilling his contractual obligations required more than 40 hours a week; he never asked the Companies to track his hours; and prior to filing suit, he never disputed his classification.⁴ He had many opportunities to provide such knowledge.⁵ Those opportunities included discussions with personnel in

³ See ROA.11541-42, 11810-12.

⁴ ROA.11533-37, 11538-42, 11682, 11971-72, 11796-97, 11854, 11858-61, 11863-64.

⁵ ROA.11530-31, 11817-18, 11864.

Merritt's agencies or at the Companies' home offices in Waco, Texas and Jackson, Mississippi; with TFB personnel at social events;⁶ when Merritt signed new contracts;⁷ when he announced his retirement;⁸ when discussing his post-termination payments;⁹ and before he filed suit.¹⁰

During a meeting about the *Ferguson* lawsuit, Merritt told the Companies' management that he "adamantly disagreed that [agency managers] were misclassified" as independent contractors, stating that "everybody knew they were independent contractors," and he characterized the notion that agency managers were entitled to overtime as "hogwash." See ROA.11716, 11516, 11532, 15253-54. The evidence presented easily sufficed to raise a conflict in substantial evidence as to the Companies' knowledge of Merritt's overtime work and provided an alternative ground for the district court to deny Merritt's post-trial motion JMOL and affirm the verdict.

The presence of at least one alternative ground to affirm the judgment below means that the eventual judgment will not necessarily depend on the Court's disposition of the issue Merritt presents. That raises the risk that the Court's opinion would be advisory,

⁶ ROA.11728-30, 11854, 11864-65.

⁷ ROA.11695-705, 11735-37, 11854, 11538-39.

⁸ ROA.11533-34.

⁹ ROA.11863-64.

¹⁰ ROA.11814-16.

and its resources wasted, counseling further in favor of denying the petition.

C. The Court Below Was Correct

Merritt also argues (Pet. 6-8) that the Court’s review is warranted because the court of appeals erred on the merits. Merritt is incorrect.

The court of appeals’ determination was premised on a straightforward and well-reasoned application of circuit court precedent interpreting the FLSA’s term “employ.” An employer, in other words, can only “employ” a worker for FLSA overtime purposes if it has knowledge that he is working overtime hours. *See, e.g., Newton*, 47 F.3d at 748 (plaintiff “was employed ... if the City had knowledge, actual or constructive, that he was working”); *Von Friewalde v. Boeing Aerospace Operations, Inc.*, 339 F. App’x 448, 455 (5th Cir. 2009) (“[A]n employee must prove that he was ‘employed’ during the time for which he seeks overtime compensation, which requires a showing that the employer had either actual or constructive knowledge that he was working overtime.”); 5th Cir. Pattern Civ. Jury Instr. §11.24 (2020) at 284 (work counts as “hours worked” *only* if the employer knew or had reason to believe that the employee was doing the work”). Contrary to Merritt’s argument, *e.g.*, Pet. at 6, this knowledge requirement is not unique to cases in which the employer had a policy prohibiting overtime work or to “off-the-clock” cases. Instead, it is derived from the FLSA’s “prerequisite” for liability that the defendant employ the plaintiff.” *Alston v. DirecTV, Inc.*, 254 F. Supp. 3d 765, 775 (D.S.C. 2017) (citing *Davis*, 792 F.2d at 1276-

77). Merritt does not articulate a workable basis for applying his sought-after exception to the general rule.

The court of appeals correctly rejected Merritt's argument, reiterated in the petition, that "[n]o additional showing of employer knowledge is required" when "an employer gives an employee permission to work without limit." Pet. at 8. The court determined that its "precedents foreclose Merritt's argument," explaining: "[W]e have consistently required employees claiming an entitlement to overtime pay to prove their employer's 'knowledge, actual or constructive, that [the employees] w[ere] working' overtime." *Merritt*, 166 F.4th at 493 (citing Fifth Circuit cases).

An employer's knowledge that it has employed the employee, permitted the employee to set their schedule, and authorized the employee to complete assigned work does not, without more, equate to knowledge of overtime work under any FLSA precedent. As the Fifth Circuit further explained: "We have never held that an employer's knowledge of overtime work is irrelevant merely because it permits an employee to work as much (or as little) as he pleases." *Id.* Aside from his own interpretation of what the law should be, Merritt cites no contrary legal authority that would justify this Court's review of the court of appeals' application of its own precedents.

The precedent for actual or constructive knowledge under the FLSA is reasonable, consistent with the statute, and has been consistently enforced by all courts of appeals. There is no merit to Merritt's

request that this Court overturn decades of uncontroversial case law simply to reverse a jury verdict that rightfully denied him overtime to which he was never entitled. Acceptance of Merritt's argument would also erroneously shift the employee's burden of showing he was "employed" during the time for which he is seeking overtime compensation to the employer, *Merritt*, 166 F.4th at 493-94, and would engender uncertainty and inconsistency in an area of the law that has been established and unambiguous.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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August 31, 2026