No. 14-___

In the Supreme Court of the United States

KEHE DISTRIBUTORS, LLC,
PETITIONER

v.

THOMAS E. KILLION, ET AL.,
RESPONDENTS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, provides that an action "may be maintained against any employer * * * by any one or more employees for and on behalf of himself or themselves and other employees similarly situated." 29 U.S.C. §216(b). The first question presented is:

> Whether an employee's right to join a collective action under the FLSA is waivable (as the Second, Third, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits have held) or non-waivable (as the Sixth Circuit held here).

2. Congress exempted from the FLSA's overtime requirements individuals "employed * * * in the capacity of outside salesman." 29 U.S.C. §213(a)(1). To qualify for this exemption, an employee must make "sales," which "include[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. §203(k). The second question presented is:

> Whether employees make "sales" within the meaning of the FLSA when they work entirely on commission based on orders that they "write and transmit" to replenish a customer's inventory, but do not *singlehandedly* cause sales volume to increase.

CORPORATE DISCLOSURE STATEMENT

KeHE Distributors, LLC is a wholly owned subsidiary of KeHE Distributors Holdings, LLC, which in turn is owned in part by KeHE Distributors, Inc., which in turn is owned by the KeHE Distributors, Inc. Employee Stock Ownership Plan. No publicly held company owns 10% or more of the stock of KeHE Distributors, LLC.

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INTRODUCTION

Petitioners seek review of a Sixth Circuit decision holding that (1) the Fair Labor Standards Act (FLSA) creates a non-waivable right to participate in collective actions and (2) the FLSA's "outside salesman" exemption excludes those who are paid entirely on commission and write and transmit orders to replenish customer inventory, but do not *singlehandedly* cause increased sales volume. Pet. 34a-35a, 19a. This decision raises important and recurring issues of employment law. It conflicts with the decisions of seven circuits and this Court. Moreover, it interprets "sales" in a manner wholly out of step with how modern sales forces work—and thus upsets the settled expectations of employers and employees alike.

First, the decision below creates a circuit split on whether employees may agree with their employers to pursue FLSA claims only on an individual, rather than class-wide, basis. The Sixth Circuit acknowledged that "'all of the circuits to address this issue have concluded that [the FLSA] does not provide for a non-waivable, substantive right to bring a collective action.'" Pet. 32a (quoting *Walthour* v. *Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1335 (11th Cir. 2014), *cert. denied*, 134 S. Ct. 2886 (2014), and citing *Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 296-297 & n.6 (2d Cir. 2013); *Owen* v. *Bristol Care, Inc.*, 702 F.3d 1050, 1052-1053 (8th Cir. 2013); *Carter* v. *Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins* v. *Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002)); accord *Vilches* v. *Travelers Companies, Inc.*, 413 F. App'x 487, 494 n.4 (3d Cir. 2011); *Horenstein* v. *Mortg. Mkt., Inc.*, 9 F. App'x 618, 619 (9th Cir. 2001). Yet the court declined to join this "consensus." Pet. 34a.

According to the court, "this line of precedents" was of "minimal relevance" because the collective-action waiver agreements in those cases "included provisions subjecting the employees to arbitration," whereas the waivers here are part of "a separation agreement" that "contained no arbitration clause." Pet. 32a. "[T]he foregoing authorities," the court held, do not apply "outside of the arbitration context," where a "countervailing federal policy * * * outweighs the policy articulated in the FLSA." Pet. 34a.

The Sixth Circuit thus deemed it irrelevant that the decisions of these other circuits rested *not* on the Federal Arbitration Act (FAA), but on the FLSA. Nor did the court attempt to reconcile its decision with this Court's repeated holdings that "courts must place arbitration agreements on an *equal* footing with other contracts"—not a *higher* footing. *E.g.*, *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1745 (2011) (emphasis added). But the many circuit decisions rejected by the court below do not turn on anything unique about arbitration agreements. Rather, they turn on the absence of any "suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a non-waivable right to a class action under that statute." *E.g.*, *Adkins*, 303 F.3d at 503. Thus, the Court should grant review and restore uniformity on this important and recurring FLSA issue.

Second, by cabining the meaning of "sales" under the FLSA, the decision below not only conflicts with the Act and this Court's precedent; it also upsets the settled expectations of businesses and the workforce.

Respondents are former KeHE "sales representatives" who allege that KeHE improperly classified them as "outside salesmen" who are exempt from the

FLSA's overtime requirements. 29 U.S.C. §213(a)(1). The district court disagreed, ruling as a matter of law that sales representatives who work entirely on commission and "write and transmit orders" make "sales" within the meaning of the FLSA—even if the employees do not personally sell directly to consumers, make marketing plans, or control the volume of inventory. "[T]here is no support for the argument that sales to replenish inventory are legally different than sales of entirely new products." Pet. 74a. According to the Sixth Circuit, however, it is not enough for an employee to make sales that "*replenish* inventory"; to be an outside salesman, one must personally and singlehandedly cause an "*increase*" in sales volume. Pet. 18a-19a (emphasis added).

This requirement conflicts with the FLSA, this Court's precedent, and federal labor policy. The Act broadly defines "'[s]ale' or 'sell'" to "include[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. §203(k). And in *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), the Court affirmed that this definition of "sale" (i) is "more expansive than the term's ordinary meaning," (ii) may not be narrowed, even though FLSA exemptions are ordinarily construed narrowly, and (iii) includes "transactions that might not be considered sales in a technical sense, including exchanges and consignments for sale." *Id.* at 2171 & n.21. In short, "sale" is an exceedingly broad term that covers *any* disposition of goods.

Yet the Sixth Circuit ruled that sales representatives must directly and personally—apart from the efforts of other employees or the impact of external forces such as advertising—*cause an increase in sales*. The decision thus grafts onto the FLSA an additional

requirement that Congress never intended. As the Department of Labor has explained, the "outside salesman" exemption applies if "the employee, *in some sense*, has made sales." 69 Fed. Reg. 22162 (preamble to Department of Labor 2004 regulations) (emphasis added).

In addition, that decision threatens havoc for the settled expectations of employers and employees. If a "sale" requires that the employee actually cause an increase in the employer's total sales, then no sales representative can safely be classified as exempt. To begin with, many bona fide sales efforts are unsuccessful. And even where those efforts succeed, what "causes" a sale—like other issues of causation—is an inherently fact-bound inquiry that often varies from month to month or even day to day. Plaintiffs can always raise a fact question as to whether sales were stimulated by forces other than the employee's in-person efforts—such as changes in the market, a strong advertising campaign, or the efforts or decisions of middlemen, as in *Christopher*. As a practical matter, therefore, the decision below throws the lion's share of classification decisions into doubt.

Further, the only workers who *might* be exempt under the Sixth Circuit's rule are those who single-handedly solicit the business, negotiate the contracts, implement the contracts, and consummate the sales —the door-to-door salesmen of yore. But such persons are rare indeed in today's corporate sales departments, where efficiency demands specialization. Modern sales representatives rarely function autonomously, but rather as part of a broader team of regional account managers, merchandisers, service specialists, and business development teams that likewise take part in the distribution effort. Under the

decision below, however, companies that seek to maximize efficiency by structuring their sales forces in this manner run the risk of losing their "outside salesman" exemption—or at least of having to defend costly FLSA litigation, the outcome of which is uncertain under the Sixth Circuit's fact-intensive rule.

Certiorari should be granted.

OPINIONS BELOW

The Sixth Circuit's decision (Pet. 1a-38a) is reported at 761 F.3d 574. Its order denying rehearing (Pet. 83a) is unreported. The district court's decision dismissing respondent (plaintiff) Basnec from the collective action (Pet. 39a-60a) is reported at 885 F. Supp. 2d 874. The district court's decision granting summary judgment to KeHE (Pet. 61a-82a) is unreported, but available at 2013 WL 5566615.

JURISDICTION

The Sixth Circuit entered judgment on July 30, 2014 (Pet. 1a), and denied a timely petition for rehearing on September 11, 2014 (Pet. 83a-84a). On November 21, 2014, Justice Kagan extended the time for seeking certiorari to February 6, 2015 (Pet. 85a). Accordingly, this Court's jurisdiction is timely invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 16(b) of the FLSA provides in relevant part: "An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer * * * by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. §216(b).

Section 3(k) of the FLSA provides: "'Sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. §203(k).

Section 13(a)(1) of the FLSA, as codified, provides in relevant part: "The provisions of sections 206 * * * and section 207 of this title shall not apply with respect to—(1) any employee employed * * * in the capacity of outside salesman." 29 U.S.C. §213(a)(1).

STATEMENT

A. KeHE's sales force

Petitioner KeHE distributes specialty foods to retailers. Pet. 3a. Respondents, plaintiffs below, are former "sales representatives" of KeHE who claim that they were entitled to overtime pay but were misclassified by KeHE as "exempt" under the FLSA. See 29 U.S.C. §213(a)(1).

It is undisputed that KeHE selects its sales representatives based on sales experience—and that respondents started their job expecting that they would be making sales. Pet. 4a-5a.

They were correct. KeHE's sales representatives are responsible for visiting retailers, examining the shelves, and "writ[ing] and transmit[ting] orders" for new KeHE product. Pet. 18a. The sales representatives identify inventory that has been depleted, and then enter the orders on their electronic devices. Pet. 19a. Sales representatives such as those here perform these tasks at retail stores. They typically leave "their homes in the morning and dr[i]ve to the stores they [are] scheduled to visit that day," where they "walk the relevant store aisles and evaluate how many items had sold since their last visit or order."

Pet. 65a. Based on this assessment, the sales representatives order an appropriate amount of new product.

In addition to these duties, sales representatives "meet KeHE's delivery trucks several times per week, oversee the unloading of products into the store's backroom, and then return to the store several times during the week to stock KeHE's products on the shelves from the inventory in the backroom." Pet. 4a. Sales representatives also "transport any damaged products back to KeHE's storage areas in their personal vehicles." Pet. 4a. Finally, sales representatives are "permitted to cold-call on smaller independent retailers and solicit them to purchase KeHE products." Pet. 5a.

Although KeHE sales representatives thus have a range of duties, ordering is listed first among their "Goals and Objectives" (Pet. 63a), and their pay depends on the volume of orders that they place at their stores (Pet. 5a, 63a). Indeed, KeHE's "[s]ales representatives are paid *entirely* on commission"; if a sales representative places no orders, he or she is paid nothing. Pet. 5a (emphasis added).

KeHE's sales representatives do not function autonomously, but rather as part of a team—especially for larger stores. In particular, sales representatives work to carry out the marketing plans ("plan-o-grams") set by KeHE account managers. These plan-o-grams "designate[] shelf space[], identif[y] which products are to be placed on the shelves, and lay[] out any in-store advertising plans." Pet. 4a. KeHE's customer development and business development teams are likewise involved in KeHE's distribution efforts. See *ibid.* And, of course, the store employees them-

selves actually serve and ring up purchases of KeHE products by end consumers.

Nevertheless, it is the sales representatives who "place orders for more products based on depleted inventory." Pet. 4a. As the district court noted: "If KeHE's relationship with these large chains was limited to its account management team, it generally would not make any product sales to these chain stores." Pet. 63a.

B. KeHE's restructuring and the severance agreements

In March 2012, a number of KeHE sales representatives lost their jobs in a restructuring. Sixty-nine of these employees signed agreements "not to consent to become[] a member of any class or collective action in a case in which claims are asserted against the Company that are related in any way to [their] employment or the termination of [their] employment with the Company." Pet. 6a. Notably, several others "modified their agreements by excising the waiver portion." Pet. 7a. The outgoing sales representatives who did sign the waiver, however, received bonuses of $1,500 to $2,000 in exchange for this and certain other commitments. Pet. 6a.

Respondents are among these former sales representatives. They brought this collective action under the FLSA, alleging that they had been misclassified as "exempt" and were entitled to overtime pay. One of these former employees, Basnec, purported to opt into the collective action even though he had signed the collective-action waiver. Pet. 7a. (In addition, another 22 employees who signed the waiver have joined the action since the Sixth Circuit's decision, discussed below.)

C. The district court's decisions

The district court found Basnec's waiver valid and enforceable, and thus dismissed him from the collective action. Examining the text of the FLSA, the court ruled that the "statute *permits* a collective action, but it does not *require* one." Pet. 53a. The court also highlighted that respondents "have done nothing to demonstrate financial burden in an individual pursuit of their claims and, aside from bare assertions, made no showing individual actions will impede enforcement of the FLSA." *Ibid.* Finally, citing this Court's holding "that individual proceedings are necessary to arbitration and trump any underlying policy considerations," the court queried: If "the right to a collective action may be waived in an arbitration agreement, then what prevents that right from being waived in other agreements?" The court correctly answered: Nothing. Pet. 55a (citing *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1750-1752 (2011)).

Following discovery, the district court granted summary judgment to KeHE, holding that the FLSA's "outside salesman" exemption applied to respondents as a matter of law. Pet. 61a-82a. To come within that exemption, an employee must have "made outside sales" and "engaged in promotional work that was incidental to and in conjunction with their own sales rather than someone else's," and these acts together must have "represented their primary or 'most important' duty." Pet. 72a (emphasis removed). Notably, the employees here "admit[ted] they spent the vast majority of their time performing promotional work," making such work their "primary duty." *Ibid.* It thus was "undisputed that if [respondents] made sales, they made outside sales because, among other

reasons, they worked almost exclusively outside the office." Pet. 73a.

The district court went on to hold that respondents did indeed make "sales." They "wrote orders as part of their job duties," and the court found "no support for the argument that sales to replenish inventory are legally different than sales of entirely new products." Pet. 74a.

D. The Sixth Circuit's decision

The Sixth Circuit reversed on both issues, breaking from seven circuits and ignoring several decisions of this Court.

First, the court held that collective-action waivers are unenforceable under the FLSA. The court acknowledged that "'all of the circuits to address this issue have concluded that [the FLSA] does not provide for a non-waivable, substantive right to bring a collective action.'" Pet. 32a (quoting *Walthour*, 745 F.3d at 1335, and citing decisions of the Second, Fourth, Fifth, and Eighth Circuits). The court also noted that these other circuits enforced such waivers based "on the Supreme Court's decisions" in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991), which involved identical language in the Age Discrimination in Employment Act (ADEA), and *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013). But it read these circuit decisions to be "of only minimal relevance here because [respondents'] collective-action waivers in this case contained no arbitration clause." Pet. 32a.

Having cast off this "line of precedents," the court found "no countervailing federal policy that outweighs the policy articulated in the FLSA." Pet. 34a. Expansively reading its own prior decision in *Boaz* v.

FedEx Customer Information Services, Inc., 725 F.3d 603 (6th Cir. 2013), the court purported to follow "the general principle of striking down restrictions on the employees' FLSA rights that would have the effect of granting their employer an unfair advantage over its competitors." Pet. 35a. The court perceived this advantage in the fact that "where each individual claim is small," individual litigation "would likely discourage the employee from bringing a claim for overtime wages." *Ibid.* Because "arbitration [was] not part of the waiver provision," the court ruled the parties' agreement unenforceable. *Ibid.*

The Sixth Circuit also reversed the district court's grant of summary judgment on the merits, holding that a jury must decide whether the sales representatives fell within the "outside sales" exemption. The court acknowledged the undisputed facts that KeHE's sales representatives "are paid entirely on commission" and "write and transmit orders for subsequent delivery in order to maintain proper inventory levels" for KeHE's customers. But it drew a sharp distinction between new or "increase[d]" sales and the "replenishing" sales made here. Pet. 18a-19a, 22a.

The court described this Court's decision in *Christopher* as providing "relevant legal background," but viewed the decision as "of limited import to the questions that this case poses," principally because this case "does not involve a 'unique regulatory environment'" such as pharmaceutical sales. Pet. 17a-18a.

Although the court quoted *Christopher*'s summary of the statute and regulations (Pet. 10a-12a), its analysis was based on a 45-year-old decision of its own, *Hodgson* v. *Klages Coal & Ice Co.*, 435 F.2d 377 (6th Cir. 1970). The court there considered whether a

cola-bottling company's "routemen" qualified as outside salesmen. Pet. 15a-16a. Applying *Hodgson* here, the court highlighted that other KeHE employees (account managers) "actually control the volume through 'plan-o-grams' and restrictions on reordering" (Pet. 18a) while the sales representatives themselves (1) do not "participate in or influence the initial decision to buy or the volume of purchases," and (2) had not been definitively shown to have "ever affected [sic] a significant increase in sales to a store independently of significant increases in consumer demand for [KeHE's] products or the presence of an advertising promotion authorized by the chain which required additional stock." (Pet. 15a, 18a-19a (quoting *Hodgson*, 435 F.2d at 383)).

This erroneous conclusion led the court to make other errors. For instance, the Sixth Circuit held that the district court should have "considered evidence relevant to the factors identified" in the "Drivers who sell" regulation (29 C.F.R. §541.504) to determine whether the sales representatives' primary duty was making sales. Pet. 22a. But KeHE's sales representatives are not drivers.

In short, without analyzing whether its *Hodgson* standard remains good law after *Christopher*, the Sixth Circuit vacated the district court's order that KeHE's sales representatives make "sales" as a matter of law.

REASONS TO GRANT THE PETITION

I.A. The circuits are split 7-1 over whether employees may agree to pursue FLSA claims only on an individual basis. The Second, Third, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits have all enforced such agreements. The Sixth Circuit refuses.

As the Eleventh Circuit explained when it joined the chorus, "all of the circuits to address this issue have concluded that § 16(b) [of the FLSA] does not provide for a non-waivable, substantive right to bring a collective action." *Walthour*, 745 F.3d at 1335. Yet the Sixth Circuit reached a different conclusion concerning "the policy articulated in the FLSA," thereby creating a circuit split.

According to the Sixth Circuit, "this line of precedents is of only minimal relevance" because the decisions of its sister circuits all involved agreements to *arbitrate* FLSA claims on an individual basis, whereas the waivers here preserve the judicial forum. Pet. 32a. But the decisions of these circuits turned on the FLSA—not the FAA—and in particular on the absence of any "suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a non-waivable right to a class action under that statute." *E.g.*, *Adkins*, 303 F.3d at 503. Nor is there anything magical about an arbitration agreement, let alone for purposes of waiving an FLSA claim. Indeed, "the overarching principle" of the FAA is simply "that arbitration is a matter of contract." *Italian Colors*, 133 S. Ct. at 2311. Thus, there is no principled basis for distinguishing between arbitration agreements and agreements like the one at issue here, nor did any of the other circuits do so. Review

is warranted to restore harmony on this important issue of federal employment law.

I.B. Review is also warranted because the Sixth Circuit's ruling conflicts with this Court's precedent, *both* under the Federal Arbitration Act *and* with respect to whether a collective-action right may be waived. For instance, in interpreting ADEA language *identical* to the FLSA language at issue here, this Court held that "the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Gilmer*, 500 U.S. at 32. And in *Italian Colors*, the Court reached the same result under the Sherman Act. 133 S. Ct. at 2311.

Nor can these decisions be dismissed on the basis that they too involved arbitration provisions. The Court's analysis turned on whether the ADEA (*Gilmer*) or the Sherman Act (*Italian Colors*) prohibited waiving the right to invoke the class-action device. The decisions were not based on any unique policy favoring arbitration agreements over other contracts. To the contrary, as the Court put it in *Gilmer*, the FAA's "purpose was to reverse the longstanding judicial hostility to arbitration, * * * and to place arbitration agreements upon *the same footing as other contracts*." 500 U.S. at 24 (emphasis added).

I.C. Left unreviewed, the decision below will improperly skew the incentives of employers and employees. Under the Sixth Circuit decision, if the parties wish to agree to a collective-action waiver, they must waive their right to a judicial forum entirely. As a practical matter, this creates a strong incentive for employers to choose arbitration just to avoid class

actions. But pressuring private decisionmaking in this way is neither necessary nor desirable.

II.A. The Sixth Circuit's interpretation of the FLSA's definition of "sales" also warrants review. The court held that a jury must decide whether KeHE's sales representatives made "sales" within the meaning of the FLSA, even though the sales representatives work "entirely on commission" based on orders they "write and transmit" to replenish inventory of KeHE products at the stores of KeHE's customers. Pet. 5a, 18a. In so holding, the court injected a new requirement into the definition of "sale"—one that lacks any basis in law. By the Sixth Circuit's lights, employees do not make "sales" unless they not only "*replenish*" orders, but actually cause an "*increase*" in sales volume that is independent of market forces, advertising, and the efforts of other employees who set up the initial customer relationship. Pet. 18a-19a, 22a (emphasis added).

This causation requirement, however, conflicts with the FLSA, federal labor policy, and this Court's jurisprudence, which show that employees can *make* sales even if they do not singlehandedly *cause* them. As the Court held in *Christopher*, the FLSA's definition of "sales" is "more expansive than the term's ordinary meaning" and includes "transactions that might not be considered sales in a technical sense, including exchanges and consignments for sale." 132 S. Ct. at 2171 & n.18. And as the Department of Labor has explained, the "outside salesman" exemption applies if "the employee, *in some sense*, has made sales." 69 Fed. Reg. 22162 (preamble to Department of Labor 2004 regulations) (emphasis added).

II.B. The Sixth Circuit's causation requirement also threatens harmful practical consequences. It injects an inherently subjective and fact-intensive element into classification decisions that should be simple and predictable. If making a "sale" means the employee must personally cause an uptick in total sales, then the availability of the "outside salesman" exemption will vary from paycheck to paycheck and employee to employee depending on the employee's most recent *success* rather than his *efforts*. Put simply, the exemption will become indeterminate.

What is more, the only employees who can qualify for the "outside salesman" exemption under the Sixth Circuit's standard are lone wolves—those who singlehandedly solicit the business, negotiate the contract, implement the contract, and consummate the sale. This understanding of "sales," however, hearkens back to the bygone era of door-to-door salesmen; it is not how modern corporate sales departments are structured. And if countless employers must restructure their operations to avail themselves of the "outside salesman" exemption, that decision should come from this Court. Indeed, we respectfully submit that this aspect of the Sixth Circuit's decision warrants summary reversal.

II.C. Finally, this case is an excellent vehicle for this Court to review the Sixth Circuit's departure from the FLSA, federal labor policy, and *Christopher*. Were it not for the court's new causation requirement —its unwarranted distinction between replenishing sales and new sales—the employees here would be exempt as a matter of law.

The court raised several issues that, in its view, are for the jury to decide. The question presented,

however, cuts through all of them. If it is sufficient that an employee *make* sales, even if he does not *cause* them, then the sales representatives here are engaged in sales activity when they "determin[e] the quantities of KeHE products to be ordered" and "write and transmit orders for subsequent delivery in order to maintain proper inventory levels." Pet. 18a. And that being so, then their *non-sales* activity—such as "stocking and cleaning shelves" (Pet. 19a)—is exempt promotional work, because it is "incidental to and in conjunction with an employee's own outside sales." 29 C.F.R. §541.503(a). In other words, if the question presented is answered in the affirmative, as it should be, then KeHE's classification of these employees was correct as a matter of law.

Certiorari should be granted.

I. Review is warranted to resolve the circuit split over the enforceability of agreements to pursue FLSA claims only on an individual, rather than class-wide, basis.

A. The decision below conflicts with the decisions of seven other circuits.

The Sixth Circuit's refusal to enforce a bargained-for agreement to pursue any FLSA claims only on an individual basis conflicts with decisions of the Second, Third, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits. *Sutherland*, 726 F.3d at 296-297 & n.6 (2d Cir.); *Vilches*, 413 F. App'x at 494 n.4 (3d Cir.); *Adkins*, 303 F.3d at 503 (4th Cir.); *Carter*, 362 F.3d at 298 (5th Cir.); *Owen*, 702 F.3d at 1052-1053 (8th Cir.); *Horenstein*, 9 F. App'x at 619 (9th Cir.); *Walthour*, 745 F.3d at 1335 (11th Cir.). Indeed, as the court below recognized, "all of the circuits to address this issue have concluded that [the FLSA] does

not provide for a non-waivable, substantive right to bring a collective action." Pet. 32a (quoting *Walthour*, 745 F.3d at 1335).

The Sixth Circuit expressly rejected this "line of precedents," concluding that it was "of only minimal relevance" because this case involves "no arbitration agreement." Pet. 32a, 34a. Declaring that "having to litigate on an individual basis would likely discourage the employee from bringing a claim for overtime wages," the court invoked its "general principle of striking down restrictions on the employees' FLSA rights that would have the effect of granting their employer an unfair advantage over its competitors." Pet. 34a-35a. Without exception, however, the other circuits' rulings are based on the *FLSA*—not the FAA. Moreover, none of the rejected decisions turns on anything unique about arbitration agreements.

To be sure, as the Sixth Circuit observed (Pet. 34a), several of the rejected decisions relied on this Court's decision in *Gilmer*, which upheld an arbitral class-action waiver under the ADEA—the relevant provisions of which are identical to the FLSA. But as *Gilmer* recognized, "the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." 500 U.S. at 32. To the contrary, the FAA's "purpose was to reverse the longstanding judicial hostility to arbitration, * * * and to place arbitration agreements upon the same footing as other contracts." *Id.* at 24. Thus, *Gilmer* does not turn on the arbitration context.

Nor do the FLSA decisions that cite it. Rather, all of these decisions are about the collective action right itself—and, more precisely, whether it can be waived.

In *Adkins*, for example, the Fourth Circuit rested its decision on the absence of any "suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a non-waivable right to a class action under that statute." 303 F.3d at 503. This analysis was quoted and followed by the Third, Fifth, and Eleventh Circuits. *Vilches*, 413 F. App'x at 494 n.4; *Carter*, 362 F.3d at 298; *Walthour*, 745 F.3d at 1335. Similarly, the Second Circuit in *Sutherland* relied on the fact that the FLSA does not contain a "contrary congressional command" that would prevent an employee from waiving his or her ability to proceed collectively. 726 F.3d at 296-297 & n.6. The Eighth Circuit's reasoning is to the same effect: "Even assuming Congress intended to create some 'right' to [FLSA] class actions, if an employee must affirmatively opt in to any such class action, surely the employee has the power to waive participation in a class action as well." *Owen*, 702 F.3d at 1052-1053.

In short, in holding that an FLSA "plaintiff's right to participate in a collective action cannot normally be waived" (Pet. 31a), the court below created a circuit split on an important and recurring issue, warranting this Court's review. See, *e.g.*, *Dean* v. *United States*, 556 U.S. 568, 571 (2009) (granting certiorari where a decision "created a conflict among the Circuits"); *Mitchell* v. *United States*, 526 U.S. 314, 320 (1999) ("We granted certiorari to resolve the apparent Circuit conflict created by the Court of Appeals' decision.").

B. The decision below conflicts with this Court's precedent.

Review is also warranted because the decision below conflicts with this Court's precedent. The Sixth

Circuit ruled that a collective-action waiver is not enforceable, except in the context of an agreement to arbitrate. But this is a distinction without a difference. The FAA does not elevate arbitration agreements *above* other contracts. Rather, it places arbitration agreements "upon the same footing as other contracts." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-220 (1985) (citation omitted); see also *Concepcion*, 131 S. Ct. at 1745 (under the FAA, "courts must place arbitration agreements on an equal footing with other contracts, * * * and enforce them according to their terms").

Put another way, the purpose of the FAA "was to ensure judicial enforcement of privately made agreements to arbitrate" and "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds*, 470 U.S. at 219-220. In keeping with this purpose, the FAA provides that arbitration agreements may be invalidated only "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. As the Court put it in *Italian Colors*, the FAA's "overarching principle" is simply "that arbitration is a matter of contract." 133 S. Ct. at 2311. Contrary to the Sixth Circuit's reasoning, therefore, arbitration agreements are not special. They are like any other contract.

It follows that *Gilmer* and *Italian Colors*—which upheld agreements to arbitrate on an individual basis—apply equally to an agreement to litigate on an individual basis. The Court in those cases found nothing in the ADEA (*Gilmer*) or antitrust laws (*Italian Colors*) that required the availability of collective or class litigation. Further, this Court held that individualized arbitration did not preclude effective vindication of a plaintiff's statutory rights under the

ADEA or antitrust laws. *Gilmer*, 500 U.S. at 32; *Italian Colors*, 133 S. Ct. at 2309-2310.

The same is true here. Nothing in the FLSA requires that class litigation be available. *First*, "the FLSA contains no explicit provision precluding * * * a waiver of the right to a collective action." *Walthour*, 745 F.3d at 1334. *Second*, as this Court reaffirmed in *Italian Colors*, waiver is not precluded merely because a statute expressly *permits* collective actions. 133 S. Ct. at 2311 (reaffirming that "statutory permission did 'not mean that individual attempts at conciliation were intended to be barred'") (quoting *Gilmer*). *Third*, "if an employee must affirmatively opt in to any such class action, surely the employee has the power to waive participation in a class action as well." *Owen*, 702 F.3d at 1053; *Sutherland*, 726 F.3d at 297.

Individualized litigation will not preclude effective vindication of an FLSA plaintiff's statutory rights. As the district court noted, respondents "have done nothing to demonstrate financial burden in an individual pursuit of their claims and, aside from bare assertions, made no showing individual actions will impede enforcement of the FLSA." Pet. 54a. But even setting this aside, "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy." *Italian Colors*, 133 S. Ct. at 2311; see also *Sutherland*, 726 F.3d at 298 (a "class-action waiver is not rendered invalid by virtue of the fact that [a] claim is not economically worth pursuing individually").[1]

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[1] Whether litigation of FLSA claims would be as expeditious as arbitration is irrelevant. The FAA's "underlying

In short, the Sixth Circuit's departure from this Court's precedents confirms the need for review.

C. The decision below threatens to destabilize employer-employee relations.

Yet a third reason to grant review is that the decision below is otherwise likely to have an immediate, negative impact on employer-employee relations.

For a collective-action waiver to survive the Sixth Circuit's decision, employers and employees must entirely waive their right to a judicial forum—that is, they must agree to arbitration. But while some employers have chosen to implement arbitration programs, others—for reasons such as avoiding costly arbitrator fees and retaining full appellate rights—still prefer to have disputes resolved in court. Likewise, many employees prefer a judicial forum. And whichever choice they make, employers and employees have a strong interest in having their choice of forum respected and enforced.

Yet that is unlikely to happen under the Sixth Circuit's rule—which provides a direct, powerful, and unwarranted incentive to turn to arbitration. Faced with a regime in which their employees' FLSA collective-action waivers are enforceable only when paired with an arbitration clause, thousands of businesses in the Sixth Circuit will immediately feel the pressure

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motivation" was "to enforce agreements into which parties had entered." *Dean Witter Reynolds*, 470 U.S. at 220. The FAA's impact "on efficient dispute resolution" is merely "fortuitous." *Ibid.* That is why this Court has enforced arbitration agreements even when they result in bifurcated proceedings. *Moses H. Cone Mem. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983).

to take a harder line on the availability of *any* judicial forum for employees.

For these reasons too, this Court should grant certiorari and restore uniformity on this important and recurring FLSA issue.

II. Review is also warranted to address whether the FLSA's "outside salesman" exemption is limited to employees who singlehandedly cause increased sales.

Certiorari is also needed to address whether the FLSA's overtime exemption for "outside salesmen" excludes those who are paid entirely on commission and write and transmit orders to *replenish* customer inventory, but do not singlehandedly cause *increased* sales. In ruling that such employees are excluded, the Sixth Circuit's decision conflicts with the FLSA, federal labor policy, and this Court's precedent. Further, the decision creates uncertainty and threatens harmful practical consequences for today's employers—whose sales representatives typically function not as lone rangers, but as part of a team.

A. The decision below conflicts with the FLSA, this Court's decision in *Christopher*, and the policy of the "outside salesman" exemption.

Allowing a jury to conclude that KeHE's sales representatives do not make sales even though they "write and transmit orders," make "cold-calls," and "are paid entirely on commission" (Pet. 18a, 5a) is contrary to this Court's decision in *Christopher*, DOL guidance, and the FLSA itself.

Starting with the statute, the term "sale" is broadly defined to "include[] any sale, exchange, contract to

sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. §203(k). In *Christopher*, this Court examined this definition—which "includes," but is not limited to, the enumerated examples—explaining that it (i) is "more expansive than the term's ordinary meaning," (ii) may not be narrowed even though exemptions to the FLSA are ordinarily construed narrowly,[2] and (iii) includes "transactions that might not be considered sales in a technical sense, including exchanges and consignments for sale." 132 S. Ct. at 2171 & n.21. The Department of Labor agrees, stating in the Preamble to the "outside salesman" regulation that the exemption applies if "the employee, *in some sense*, has made sales." 69 Fed. Reg. 22162 (emphasis added).

The Court in *Christopher* also identified several "external indicia of salesmen" (132 S. Ct. at 2172-2173), which apply with equal force here. Like the pharmaceutical sales representatives in *Christopher*, KeHE's sales representatives "were hired for their sales experience," "worked away from the office, with minimal supervision," and "were rewarded for their efforts with incentive compensation." *Ibid.*; Pet. 4a-5a. KeHE's sales representatives also identified the need for new product "in order to maintain proper inventory levels" and then ordered it. Pet. 18a. And they made money *only* if and insofar as they made sales; they "were paid entirely on commission." Pet. 5a.

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[2] While exemptions are to be "narrowly construed against employers seeking to assert them," this proposition is inapposite where, as here, a court is "interpreting a general definition that applies throughout the FLSA." *Christopher*, 132 S. Ct. at 2172 n.21.

Nevertheless, the Sixth Circuit dismissed *Christopher* as "of limited import to the questions" here, on the sole ground that *Christopher* involved the "unique regulatory environment" of "pharmaceutical sales representatives." Pet. 17a-18a. That decision calls out for review. *Christopher* cannot be cabined to a single group of employees in a single industry. Nor was the Court's decision so narrow as to provide no guidance for other cases, like this one, that turn on whether an employee made "sales."

In lieu of *Christopher*, however, the Sixth Circuit applied a 45-year-old decision of its own that focused on whether employees "participate in or influence the initial decision to buy or the volume of purchases" or "ever affected [sic] a significant increase in sales to a store independently of significant increases in consumer demand for [KeHE's] products or the presence of an advertising promotion." Pet. 15a-16a (quoting *Hodgson* v. *Klages Coal & Ice Co.*, 435 F.2d 377, 383 (6th Cir. 1970)). On this authority, the court held that the "sales" issue turns on (1) whether the sales representatives, as opposed to other KeHE employees, "control[led] the volume [of sales] through 'plano-grams' and restrictions on reordering," and (2) whether the sales representatives, as opposed to external market forces, caused an "increase" in sales. Pet. 18a-19a. The Sixth Circuit's decision to graft these additional requirements onto the "outside salesman" exemption conflicts with the FLSA, *Christopher*, and DOL's guidance.

Indeed, the decision below does not just unreasonably cabin *Christopher*; it prescribes a standard under which *the very employees* held to be exempt in that case—pharmaceutical sales representatives—could actually be *non*-exempt. If, as the Sixth Circuit

held, an employee must have caused "a significant increase in sales * * * independently of significant increases in consumer demand" or "an advertising promotion" (Pet. 19a (quoting *Hodgson*)), then *Christopher* should have come out the other way—or at least gone to trial, given the heavy commercial marketing of prescription drugs.

In addition, the Sixth Circuit here was distracted by the role of other KeHE employees, such as the account managers who create sales plans. See Pet. 18a. With respect to the pharmaceutical sales representatives in *Christopher*, however, this Court was not *at all* troubled by the fact that the record did not reflect whether those employees alone were responsible for growing sales or whether others also played a role—the more plausible scenario. *Christopher*, 132 S. Ct. at 2173-2174. Quite the contrary, the Court *rejected* the employees' arguments that they were "more naturally classified as nonexempt promotional employees who merely stimulate sales made by others." *Ibid*. The Court also rejected the notion that "an employee is properly classified as a nonexempt promotional employee whenever there is another employee who actually makes the sale in a technical sense," calling that view "formalistic," "difficult to reconcile with the broad language of the regulations and the statutory definition of 'sale,'" and "in significant tension with the DOL's past practice." *Ibid*. (citation omitted).

The Sixth Circuit's holding also conflicts with the rationale for the "outside salesman" exemption, which has nothing to do with a causal link between sales efforts and increased sales volume. Rather, Congress exempted outside salesmen from overtime pay requirements for two reasons. First, outside salesmen work many hours away from the office,

making it difficult to track their time, monitor their working conditions, and comply with overtime provisions. *Christopher*, 132 S. Ct. at 2173. Second, outside salesmen "typically earn[] salaries well above the minimum wage and enjoy[] other benefits that set them apart from the nonexempt workers entitled to overtime pay." *Ibid.*

Both rationales apply here. KeHE's sales representatives write and process orders, work entirely outside the office, were hired for their sales experiences, and work entirely on commission, earning an annual salary of $30,000–$55,000 (Pet. 4a-5a, 80a)—well above the minimum wage. Whether or not these representatives independently *cause* sales, they *make* sales by placing orders to maintain and replenish customer inventory. The Sixth Circuit's contrary ruling conflicts with the FLSA, DOL guidance, and *Christopher*, warranting review. Indeed, we respectfully submit that the decision below so clearly departs from the law as to warrant summary reversal.

B. The decision below destroys predictability and threatens the typical corporate sales department.

The Sixth Circuit's holding that an employee does not make a "sale" unless the employee singlehandedly causes an increase in sales volume (Pet. 19a) also flies in the face of how real-world sales departments work. Left unreviewed, that decision will inject *tremendous* uncertainty into exempt classifications.

In the Sixth Circuit's view, if market forces, marketing efforts, or the efforts of other employees cause the customer to make a purchase, there has been no "sale." The court drew a sharp distinction between those who make "replenishing" sales and those who

"influence the initial decision to buy or the volume of purchases." Pet. 15a, 22a. Moreover, the court made the availability of the "outside salesman" exception dependent on a definitive showing that the representative effected "a significant increase in sales to a store independently of significant increases in consumer demand for [KeHE's] products or the presence of an advertising promotion authorized by the chain." Pet. 19a.

The Sixth Circuit's subjective approach virtually guarantees that the availability of the outside salesman exception will be subject to change from invoice to invoice. Causation inquiries are inherently subjective and "intensely factual." *Pac. Shores Props., LLC* v. *City of Newport Beach*, 730 F.3d 1142, 1168 (9th Cir. 2013). Something as simple and commonplace as a marketing campaign or an outbreak of illness could now throw a classification decision in doubt. Pet. 19a. Thus, classification decisions that should be clear-cut must now, under the ruling below, be decided by juries.

The decision below will also effectively exclude many employees previously assumed to be exempt. In the modern age, corporate sales department typically divide responsibilities among separate groups of employees. There is no shortage of examples:

- A sales representative supported by a technical sales specialist, who "assists sales representatives in servicing accounts and clinics, and providing follow ups." *Jones* v. *St. Jude Med. S.C., Inc.*, 504 F. App'x 473, 475 n.2 (6th Cir. 2012).
- Independent sales representatives reporting to a national sales manager, who "maintained

* * * customer accounts, and * * * develop[ed] customer relationships." See *Tatarian* v. *ALUF Plastics*, 2002 WL 1065880, at *2 (D.N.J. May 13, 2002).

- Sales representatives reporting to district sales managers responsible for "assisting sales representatives with their skills development, monitoring and evaluating the representatives performance, identifying potential customers, assisting sales representatives with sales strategies and closings, monitoring costs, and responding to customer inquiries and complaints." *Lott* v. *Eastman Kodak Co.*, 1999 WL 412824, at *1 (N.D. Tex. June 15, 1999).

- A sales department consisting of merchandisers, who "build[] and arrang[e] product displays," and a district sales manager, who, "like [the company's] advance sales representative," also sells defendant's product to retail outlets within his territory, secures display space in those outlets, and ensures that defendant's merchandising standards are met," in addition to "increasing sales in his assigned area and overseeing the performance of other employees within his territory, including advance sales representatives, merchandisers, and truck drivers." *Kulha* v. *Johnston Coca-Cola Bottling Grp., Inc.*, 1995 WL 875461, at *1 (E.D. Mich. Sept. 26, 1995).

KeHE itself structures its sales force to work as a team. Specifically, the "customer-development team establishes the initial relationship with * * * a store. The business-development team then negotiates the broad parameters of any overarching distribution

contract. In turn, KeHE's account-management team negotiates with the chain store the list of products from KeHE's 40,000-plus product catalog that are authorized for sale at each of the customers' stores," and performs other high-level strategic tasks. Pet. 4a. And the "sales representative is the on-the-ground contact for each individual store" and, among other things, "place[s] orders for more products based on depleted inventory." *Ibid.* This organization is typical in relying on various units to perform tasks within their own training and expertise. The units work together to maximize sales—but that does not change the fact that the sales representatives make sales.

Under the decision below, however, the only employees eligible for exempt treatment would be those who function as a one-man show—autonomously and singlehandedly soliciting the business, negotiating the contract, implementing the contract, and consummating the sale. For anyone else, there would *always* be a question whether she or her teammates "influence[d] the initial decision to buy or the volume of purchases." Pet. 15a (citation omitted). Such a standard makes it impossible for employers to classify employees ex ante with any confidence—creating the very litigation and uncertainty that Congress meant the definition of "sales" to foreclose.

Indeed, even lone wolves cannot safely be classified as exempt unless the employer is certain that the sales representative *alone* caused increased sales. But surely sales representatives in a booming industry are not beyond the FLSA's "outside salesman" exemption simply because they may be riding the coattails of advertising or external market forces. In other words, even assuming a company's memorable and effective marketing campaign drove its increase in

revenue, that cannot mean that its sales representatives are not making "sales."

Thousands of companies doing business in the Sixth Circuit must now follow the decision below. The stakes are huge, not just in unpaid wage awards, but also in liquidated damages. 29 U.S.C. §216(b). This Court's review is urgently needed, to prevent sales departments from having to reorganize or incur overtime costs that Congress never intended to impose.

C. This case presents an excellent vehicle to clarify the meaning of "sales."

This case also presents an excellent vehicle to address the meaning of "sales." But for the Sixth Circuit's causation requirement, the undisputed facts confirm that KeHE's employees would be exempt as a matter of law—just as the district court held.

To qualify as "exempt," "an employee's 'primary duty' must be the performance of exempt work." 29 C.F.R. §541.700(a). It does not matter whether *sales alone*, as opposed to promotional work such as stocking shelves, was the employee's primary duty. Rather, the question is whether *exempt work*—sales and promotional work as a whole—is the employee's primary duty.

As respondents concede, "the majority of [their] working hours were spent stocking and maintaining an inventory of KeHE products on their customer's shelves." Dkt. 25 at 8, No. 13-4340 (6th Cir.). Respondents also dusted the product, faced the products to the front, and ensured that the products were spaced evenly and neatly. Pet. 20a. If this work is exempt, KeHE properly classified its sales representatives as exempt. And there is no doubt that, if re-

spondents made "sales," then this work is indeed exempt promotional work because it is "incidental to and in conjunction with an employee's own outside sales." 29 C.F.R. §541.503(a).

An example from the regulation will illustrate. The regulation describes "a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, *but does not obtain a commitment for additional purchases*." *Id.* §541.503(c) (emphasis added). The regulation goes on to explain that the "arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales." *Ibid.* And here, unlike the hypothetical representatives in the regulation, KeHE's sales representatives *do* "obtain a commitment for additional purchases." *Ibid.*[3]

In concluding that a jury must decide whether the sales representatives' primary duty was exempt work, the Sixth Circuit made three subsidiary er-

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[3] As the regulation confirms, shelf-stocking and inventory-maintenance activities further sales. Clean products and neat shelves sell better. And as the district court noted, "[i]t is axiomatic that grocery stores do not buy products for the sake of buying them—they buy products to sell them, and will buy more of those products that sell well. To argue otherwise is to ignore reality." Pet. 78a; see also *Christopher*, 132 S. Ct. at 2170 ("The statute's emphasis on the 'capacity' of the employee 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.").

rors—each of which would become irrelevant if the Court takes up the question presented and reverses.

First, framing the key distinction as between *sales* work and *non-sales* work, the Sixth Circuit said that because "the vast majority of [respondents'] time is spent stocking and cleaning shelves," and because "[respondents'] compensation is primarily based on stocking shelves," the sales representatives were less likely to be exempt. Pet. 19a, 20a.[4] But as this Court has explained: "The promotion-work regulation does not distinguish between promotion work and sales; rather, it distinguishes between exempt promotion work and nonexempt promotion work." *Christopher*, 132 S. Ct. at 2170. In other words, if the time "stocking and cleaning shelves" is exempt promotion work—whether or not it is *sales* work—then the sales representatives are exempt employees.

Second, based on its cramped view of a "sale," the Sixth Circuit assumed that it was account managers, not sales representatives, that made sales. Pet. 21a ("KeHE's own internal documents offer evidence that the sales representatives' promotional activities are actually directed at increasing sales by the account managers."). As we have explained, however, KeHE's sales representatives made sales when they "wr[ote] and transmit[ted] orders." Pet. 18a. And the prod-

[4] It makes no difference for present purposes, but the Sixth Circuit was incorrect that "the plaintiffs' compensation is primarily based on stocking shelves." Pet. 20a. Although the rate is broken down by activities, the representative's commission always remained a percentage of his or her sales. As the district court noted, plaintiffs admit their earnings "were based on a percentage of the dollar volume of their processed orders." Pet. 79a.

ucts that respondents "promoted" are the very products that respondents themselves ordered and on which they were paid commissions.

Third, the Sixth Circuit relied, in part, on the legally irrelevant "Drivers who sell" regulation, 29 C.F.R. §541.504. That regulation provides nine factors that "should be considered in determining if a driver has a primary duty of making sales." 29 C.F.R. §541.504(b). Plainly it applies to employees who serve as *both* drivers and sellers, see, *e.g.*, § 541.504(a)—and thus, just as plainly, it has no place in this case because *KeHE's sales representatives are not drivers*. Rather, they "*meet* KeHE's delivery trucks several times per week." Pet. 4a (emphasis added). Of the sales representatives' six broad responsibilities, *none* involves driving or delivery of goods. Pet. 19a-20a. Accordingly, the "Drivers who sell" regulation is simply inapplicable here.[5]

In sum, if the sales representatives made "sales," their primary duty is exempt work, and KeHE is entitled to judgment as a matter of law. Because the Sixth Circuit decision adopted a definition of "sales" that conflicts with the FLSA, this Court's precedent, DOL guidance, and the normal operation of countless corporate sales departments, certiorari should be granted and the decision reversed.

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[5] Confirming the unfairness of the decision below and need for this Court's intervention, the Sixth Circuit stated KeHE "appears to agree" that the drivers who sell regulation applies (Pet. 22a), when in fact KeHE stated in its brief that *the regulation is* "*not at all applicable here*." Dkt. 27 at 33, No. 13-4340 (6th Cir.) (emphasis added).

CONCLUSION

This case presents two important and recurring issues under the FLSA. First, may an employee agree not to join an FLSA collective action? On this issue, the Sixth Circuit broke from seven other circuits in holding that the FLSA grants a non-waivable right to proceed collectively. Second, may an employee make "sales," as defined in the FLSA, by placing orders to maintain or replenish a customer's inventory, regardless of whether the employee's own personal efforts actually caused sales to "increase"? On this issue, the Sixth Circuit's decision conflicts with the FLSA itself, DOL regulations, and this Court's decision in *Christopher*—and thus imposes a destabilizing new requirement that has no basis in law and, indeed, should be summarily reversed.

Both issues threaten to alter the practices of employers throughout the nation. Further, neither will go away without this Court's intervention.

The petition should be granted.

Respectfully submitted.

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