

No. 14-959

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**In the Supreme Court of the United States**

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KEHE DISTRIBUTORS, LLC,  
PETITIONER

*v.*

THOMAS E. KILLION, ET AL.,  
RESPONDENTS

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

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**REPLY TO BRIEF IN OPPOSITION**

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## REPLY TO THE BRIEF IN OPPOSITION

The decision below warrants review on two important and recurring issues of employment law—and respondents' opposition fails to show otherwise.

First, as respondents concede, the Sixth Circuit ruled that “a plaintiff's right to participate in a collective action cannot normally be waived” (Opp. 9 (quoting Pet. 31a)), whereas “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, 1336 (11th Cir. 2014)). That 7-1 split is express, ripe, and worthy of review.

Respondents insist that the seven other circuits to address this issue “relie[d] heavily on the FAA” and “weighed federal policy favoring arbitration \* \* \* against the collective action provision in the FLSA.” Opp. 1, 7. But this is demonstrably false. As shown in the petition (at 18-19), again below (at 4-5), and in the quotations on the face of the decision below (Pet. 32a-34a), the Second, Third, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits each assessed whether *the FLSA* provides a non-waivable right. That is the same question answered by the decision below.

Moreover, in providing a different answer to that question, the Sixth Circuit not only created a circuit split; it ran afoul of 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). Thus, if the right to join a collective action can be waived in an agreement that provides for arbitration—as this

Court held in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991), and *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013)—then it can also be waived in an agreement that doesn’t. This Court should confirm that. Just as arbitration agreements may not be treated *worse* than other contracts, neither may they be treated *better*. Indeed, in holding that one must sign an arbitration agreement to waive the right to bring collective FLSA claims, the Sixth Circuit created a perverse incentive to waive one’s right to a judicial forum.

Second, review is warranted to address the Sixth Circuit’s destabilizing test for evaluating the FLSA’s “outside salesman” exemption. Under the decision below, it is not enough that employees are paid entirely on commission based on orders that they write to replenish customer inventory; rather, to “make sales,” employees must *singlehandedly cause sales to increase*. Pet. 18a-19a. This standard conflicts with the FLSA, DOL guidance, and *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012). Indeed, it is worthy of summary reversal.

Respondents’ principal response is that, under the legal standard imposed below, there are factual questions that a jury must decide. But the validity of that standard is the very question presented. Respondents do not dispute that, under the Sixth Circuit’s holding, employees do not “make sales” unless they personally *cause* those sales. Nor do respondents dispute that the decision below draws a sharp distinction between *new or increased* sales and *replenishing* sales. KeHE is not asking this Court to “examine respondents’ ‘primary duties’” or “weigh the summary judgment record.” Opp. 2, 14. It is asking

the Court to reject this flawed legal standard, so there is *no need for* costly and fact-intensive resolution of these issues by juries.

Further, because this case was remanded for trial only because of fact issues raised by this standard, there is no reason to delay review. Even where litigation remains in the courts below, this Court will review federal questions “fundamental to the further conduct of the case.” *E.g.*, *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947). Here, both questions present fundamental issues that will drive the remaining proceedings. The first question goes to whose claim may be litigated; the second concerns an erroneous legal standard. Both questions, moreover, are recurring and of national importance. The Court should grant review.

**I. Review is warranted to resolve the split over the enforceability of agreements to pursue FLSA claims only on an individual basis.**

A. The Sixth Circuit’s refusal to enforce a collective action waiver conflicts with decisions of the Second, Third, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits. Pet. 17-19. As the court below acknowledged, “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 (quotation omitted).

Hoping to wash away this division, respondents assert that these other circuits “weighed the federal policy favoring arbitration” against “the collective action provision in the FLSA.” Opp. 7. Tellingly, however, respondents never quote these cases—or even, with one exception, provide pin cites to the relevant

analysis. Opp. 7-8 n.3. Nor could they, because they are misreading the cases:

- The Second Circuit held that “the text of the FLSA does not ‘envinc[e] an intention to preclude a waiver’ of class-action procedure.” *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296 (2d Cir. 2013).
- The Third and Fourth Circuits found “no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute.” *Vilches v. Travelers Cos., Inc.*, 413 Fed App’x 487, 494 n.4 (3d Cir. 2011) (quoting *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002)).
- The Fifth Circuit rejected the argument that appellants’ “inability to proceed collectively deprives them of substantive rights available under the FLSA.” *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004).
- The Eighth Circuit explained that, “[e]ven assuming Congress intended to create some ‘right’ to 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 v. Bristol Care, Inc.*, 702 F.3d 1050, 1052-1053 (8th Cir. 2013).
- The Ninth Circuit enforced a waiver, ruling that plaintiffs who agree to arbitration “none-theless retain all substantive rights under the statute.” *Horenstein v. Mortg. Mktg., Inc.*, 9 Fed. App’x 618, 619 (9th Cir. 2001).

As to the Eleventh Circuit, respondents say it ultimately enforced the collective-action waiver “only” because of the arbitration context. Opp. 9. Not so. *Walthour* assessed whether *the FLSA* “evinces an intention to preclude a waiver of [collective]-action procedure.” 745 F.3d at 1331. The court ultimately concluded that (1) “the text of FLSA §16(b) does not set forth a non-waivable substantive right to a collective action,” and (2) the FLSA’s legislative history does not “show that Congress intended the collective action provision to be essential to the effective vindication of the FLSA’s rights.” *Id.* at 1335. Neither conclusion depended on the arbitration context. *Id.* at 1334-1336.

Respondents ignore the FLSA analysis in *all* these decisions. But as the foregoing excerpts show, each turned on the FLSA and, in conflict with the decision below, held that nothing in that statute renders the collective-action right non-waivable.

B. The court below parted company not only with seven other circuits, but also with this Court’s holdings that the FAA 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); accord *Concepcion*, 131 S. Ct. at 1745. Respondents offer no answer to this principle or the Sixth Circuit’s departure from it.

Nor have respondents succeeded in distinguishing this Court’s decisions in *Gilmer* and *Italian Colors*. Those cases permit agreements to arbitrate on an individual basis—and they apply equally to agreements to litigate on an individual basis. Pet. 20-21. Indeed, in considering the ADEA’s identical collective-action provision, the Court in *Gilmer* concluded: “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.<sup>1</sup>

C. Finally, the Sixth Circuit’s rule creates a troubling incentive for parties to waive their right to a judicial forum. Respondents say employers already have incentives to arbitrate. But arbitration clauses are not universal features of severance agreements, and some parties disfavor them. Nor does respondents’ preexisting-incentives argument answer the fact that, under the decision below, employers and employees now have an *undue* incentive to arbitrate—an incentive that has nothing to do with arbitration’s benefits, but rather derives from a false distinction between arbitration agreements and other contracts.

In sum, the decision below created a 7-1 circuit split on an important and recurring issue under the FLSA, and will leave employers and employees who wish to agree to class waivers with little choice but to forgo the judicial forum. Review is warranted.

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<sup>1</sup> Respondents cite *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532 (2013), for the proposition that “class actions and collective actions differ in the enforceability of their procedural remedies.” Opp. 11. But *Symczyk* merely held that once an FLSA plaintiff’s individual “claim became moot,” she “ha[d] no personal interest in representing putative, unnamed claimants.” 133 S. Ct. at 1532.

**II. Review is also warranted to address whether the FLSA’s “outside salesman” exemption is limited to employees who singlehandedly cause an increase in sales.**

Certiorari is also needed to address whether the FLSA’s overtime exemption for “outside salesmen” is limited to employees who singlehandedly cause increased sales.

A. As respondents concede, *Christopher* gave a “broad interpretation” to the statutory term “sale.” Opp. 14. Citing its own 45-year-old precedent, however, the Sixth Circuit imposed a much more restrictive legal standard. The court required a jury to decide whether respondents “influence the initial decision to buy or the volume of purchases” or “ever affect[] [sic] a significant increase in sales to a store independently of significant increases in consumer demand” or “advertising.” Pet. 15a-16a.

Respondents never attempt to square this holding with *Christopher*. They do not dispute that, under the Sixth Circuit’s standard, *Christopher* itself would have come out the other way—or at least gone to a jury. Nor do they contend that the rationale of the “outside salesman” exemption has anything to do with a causal link between solicitations and increased sales volume. Pet. 26-27.

Instead, announcing that the “construction of the outside sales exemption” is “not the issue” in this case (Opp. 14), respondents attempt to show that there are factual questions for the jury *under the Sixth Circuit’s standard*. For example, respondents submit that prices and sales volumes were negotiated by account managers, and that respondents had to comply with plan-o-grams. Opp. 4. According to respond-

ents, this shows that that they lacked the “ability to increase sales.” Opp. 5. But that is precisely the problem: the Sixth Circuit’s standard requires a jury trial on factual issues that should be immaterial.

Respondents make just one attempt to defend the Sixth Circuit’s standard. They say the Department of Labor rejected “the ‘team’ concept for sales urged by KeHE” when it declined to “eliminate the emphasis upon an employee’s ‘own’ sales in the proposed regulations.” Opp. 6 & App. 8. But we are not championing a “team” approach to who *made* a sale. Based on the statute, *Christopher*, and the very DOL guidance submitted by respondents, KeHE opposes treating sales representatives as non-exempt simply because their sales were *caused* by a team. In other words, the problem with the Sixth Circuit’s rule is that it refuses to recognize when an employee—in the words of DOL—“in some sense, has made sales” (Opp. App. 10) merely because other employees or advertising may, in some sense, have *caused* those sales.

B. Respondents do not seriously dispute that today’s sales people rarely act singlehandedly, or that the decision below flies in the face of how modern corporate sales departments work. They say KeHE “has offered no support to describe how other distributors in the food industry classify their sales forces.” Opp. 16. But the implications of the Sixth Circuit’s decision extend well beyond the food industry. Citing actual cases, the petition described several examples of sales forces that divide responsibilities among a team. Pet. 28-29. And the point of these examples is not that these particular employees were held to be exempt (Opp. 15-16), but rather that KeHE is far from alone in structuring its sales force in a manner that will be affected by the decision below.

Further, respondents do not dispute that the Sixth Circuit’s causation-based approach virtually guarantees that the availability of the outside salesman exemption will be subject to change from one pay period to the next. Pet. 28. Something as commonplace as a marketing campaign or an outbreak of illness could now throw a classification decision into doubt. Pet. 19a. Thus, classification decisions that should be clear-cut for employers *ex ante* must now be decided by juries *ex post*.

C. This case illustrates the problem all too well. The undisputed facts entitle KeHE to judgment as a matter of law. 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.” See *Christopher*, 132 S. Ct. at 2161 (identifying these “external indicia of salesmen”); 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. Accordingly, this Court need not “weigh the summary judgment record” (Opp. 14) because, regardless of whether respondents singlehandedly caused sales to increase, they “made sales” under the proper standard.

Respondents’ three attempts to blunt these dispositive facts miss the mark. *First*, respondents suggest that, because they did *other* activities as well, this may affect respondents’ exempt status. Opp. 14. Not so. As respondents concede, they spent most of their time “performing promotional work.” Opp. 13. And there is no dispute that *if respondents made sales*, the promotional work was incidental to those sales—and thus exempt. Pet. 31-32.

*Second*, respondents contend that “[t]he issue here is *who* made the sale,” and that “the summary judgment record is disputed on that question.” Opp. 14. But again, this assumes the Sixth Circuit was correct, which is the very question presented. The only reason a jury need decide “*who*” made sales is because, by the Sixth Circuit’s lights, employees “make sales” only when they cause increased sales volume. Pet. 18a-19a. If the Court grants certiorari and rejects the causation requirement, there is no “*who*” question to submit to a jury.

*Third*, respondents minimize KeHE’s commission structure, arguing that “[n]othing in this compensation scheme concerned sales or rewarded respondents for increased sales.” Opp. 5. But this is plainly false. Respondents’ own description of the compensation scheme belies it (*ibid.*), as do the descriptions of both courts below (Pet. 20a-21a, 63a-64a, 79a).

Respondents concede that they worked “*entirely* on commission” (Pet. 5a) based on the services they provided to KeHE’s customers, including ordering products, stocking shelves, maintaining shelves, cleaning products, and checking inventory. Opp. 5, 14, 15. Respondents characterize some of these tasks as “services.” Opp. 5. But as DOL’s regulations themselves confirm, these stocking and maintenance activities are “incidental to and in conjunction with an employee’s own outside sales” (29 C.F.R. §541.503(a))—and are therefore properly treated as exempt promotional work. Pet. 31-33 & n.3.

All told, 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 decision below adopted a legal standard that conflicts

with the FLSA, this Court’s precedent, DOL guidance, and the normal operation of countless corporate sales departments, certiorari should be granted.

### III. There is no reason to delay review.

Finally, respondents say the Court should wait and see how trial turns out, suggesting that review of interlocutory judgments is inevitably denied. Opp. 17-19. In reality, the Court “has unquestioned jurisdiction to review interlocutory judgments of federal courts,” and exercises that “express power” with some frequency. SHAPIRO *ET AL.*, SUPREME COURT PRACTICE 282-285, 83 (10th ed. 2013) (collecting cases).

In particular, it is well settled that this Court will grant interlocutory review of important federal issues whose resolution could materially advance the case or drive its resolution—*i.e.*, where an issue is “fundamental to the further conduct of the case.” *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); see also *Cent. Bank of Denver, N.A. v. First-Interstate Bank of Denver*, 511 U.S. 164 (1994) (reviewing denial of summary judgment); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (same); *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (reviewing denial of motion to dismiss); accord *Land*, 330 U.S. at 734 n.2; *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Estelle v. Gamble*, 429 U.S. 97, 98 (1976). Unlike *VMI*—where the Court declined immediate review of a *merits* question pending further proceedings on *remedy* (Opp. 18-19)—the court below here “decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation.” SUPREME COURT PRACTICE 285 (collecting cases).

The first question goes to *whose claim* may be litigated. Under the decision below, plaintiffs may have their claims tried collectively even though they expressly waived their right to do so. Review and reversal would require that such claims be brought in separate, individual actions—directly affecting the further conduct of this case. Further, this Court has not hesitated to review circuit decisions “remand[ing] [a case] for trial” where the petition “presents a question on which the decisions of federal courts are in conflict.” *General Motors*, 323 U.S. at 374, 377.

Likewise, the second question concerns an erroneous legal standard at the center of the entire trial. It is difficult to imagine an issue *more* “fundamental to the further conduct of the case” than this, and the question involves an “important and clear-cut issue of law” that “would otherwise qualify as a basis for certiorari.” SUPREME COURT PRACTICE 283.

### CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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