No. _____

IN THE
Supreme Court of the United States

UBER TECHNOLOGIES, INC. AND GEGEN LLC,

Petitioners,

v.

ALI RAZAK, KENAN SABANI, AND KHALDOUN CHERDOUD,
individually and on behalf of all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT W. PRITCHARD
JOSHUA C. VAUGHN
LITTLER MENDELSON, P.C.
625 Liberty Avenue
26th Floor
Pittsburgh, PA 15222
(412) 201-7628

THEANE D. EVANGELIS
Counsel of Record
BLAINE H. EVANSON
SAMUEL ECKMAN
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tevangelis@gibsondunn.com

Counsel for Petitioners

QUESTION PRESENTED

This Court has long held that whether a worker is an employee for purposes of the Fair Labor Standards Act ("FLSA") turns on the "economic reality" of his relationship with the putative employer. That determination requires (1) factual findings concerning the nature of the parties' relationship (e.g., who sets the worker's schedule), (2) applying a variety of "economic reality" guideposts (e.g., the putative employer's "right to control" the worker) to those factual findings, and (3) an ultimate conclusion as to whether the worker is an employee. Courts broadly agree that the first determination is for the fact-finder and that the ultimate conclusion is a question of law for the court. But courts are divided on whether the second determination is a question of fact or of law.

Respondents, owners and operators of limousine companies that use Uber Technologies, Inc.'s platform to generate business, filed this action under the FLSA. The district court entered summary judgment for Uber on the ground that respondents are independent contractors as a matter of law, but the Third Circuit vacated that decision. Although the Third Circuit did not identify any meaningful factual disputes concerning the nature of the parties' relationship, it held that summary judgment was improper in light of disputes over how to *apply* the "economic reality" factors to those undisputed facts.

The question presented is:

Whether application of the FLSA's "economic reality" factors to undisputed facts is a question of *fact* that can preclude summary judgment, as the Third, Sixth, and Seventh Circuits have held, or a question of *law* for the court to decide, as the Fifth Circuit has held.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceedings below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Gegen LLC is a wholly owned subsidiary of Uber Technologies, Inc.; and Uber is a publicly held corporation and not a subsidiary of any entity. Based solely on SEC filings regarding beneficial ownership of the stock of Uber, Uber is unaware of any shareholder who beneficially owns more than 10% of Uber's outstanding stock.

RULE 14.1(B)(III) STATEMENT

United States District Court (E.D. Pa.):

Razak v. Uber Technologies, Inc.,
No. 16-cv-573 (Apr. 11, 2018)

United States Court of Appeals (3d Cir.):

Razak v. Uber Technologies, Inc.,
No. 18-1944 (Mar. 3, 2020)

Razak v. Uber Technologies, Inc.,
No. 18-1944 (Nov. 5, 2020) (order amending opinion and denying petition for rehearing or rehearing en banc)

TABLE OF CONTENTS

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Treatises

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners Uber Technologies, Inc. and Gegen LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit is published at 951 F.3d 137. App. 1–24. The Third Circuit's order amending its opinion is available at 979 F.3d 192. *Id.* at 25–26. The district court's order is unpublished but available at 2018 WL 1744467. *Id.* at 27–79.

JURISDICTION

The Third Circuit issued its opinion on March 3, 2020, and issued an amended opinion and order denying rehearing or rehearing en banc on November 5, 2020. On March 19, 2020, this Court issued an order extending the filing deadline for all petitions for certiorari to 150 days from the date of the lower court's order denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 203(e)(1) provides that "Except as provided in paragraphs (2), (3), and (4), the term 'employee' means any individual employed by an employer."

29 U.S.C. § 203(d) provides that "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an

employer) or anyone acting in the capacity of officer or agent of such labor organization."

STATEMENT OF THE CASE

Over the past 20 years, worker classification has become one of the most litigated issues in America. During that time, the number of worker misclassification actions filed in federal court has grown by nearly *400 percent*, compared to a growth of 7 percent in total filings. According to data from the Federal Judicial Center, more than 6,500 new misclassification cases were filed in federal court last year alone.

This trend has only accelerated in the last decade, as the growth of the so-called "gig economy" has offered workers the freedom and flexibility to work as independent contractors when, where, and for whom they choose. While this development has allowed people who were previously excluded from the labor force to achieve financial independence, some have insisted that these workers should be treated as traditional employees—a classification that would strip them of the flexibility they value so highly.

Respondents own and operate successful limousine companies, with fleets of up to 16 vehicles and more than a dozen drivers. Although they generate business in a variety of ways—including online advertising, bookings through 24-hour service numbers, and referrals from local hotels—they brought this action against Uber Technologies, Inc., alleging that they are employees of Uber under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 *et seq.*, and therefore entitled to minimum wage and overtime pay, because they use the Uber mobile

smartphone application as one tool for connecting with riders.

For nearly 75 years, this Court has held that whether a worker is an employee under the FLSA turns on the "economic reality" of her relationship with her putative employer. The court has identified a number of factors to guide this inquiry, including the putative employer's right to control the worker and the worker's opportunity for profit or loss based on her managerial skill. And although there are certainly factual findings relevant to each of these "economic reality" factors, the worker's ultimate classification is a question of law for the court to decide.

Adjudicating whether a particular worker is an employee therefore involves three distinct steps. First, there must be factual findings about the nature of the parties' relationship (e.g., who sets the worker's schedule). Second, the court must apply the "economic reality" factors (e.g., whether the putative employer exercises a "right to control" similar to that exercised by employers) to the facts. Finally, the court must—weighing each of the factors—draw an ultimate conclusion as to whether the worker is an employee based on the "economic reality" of the parties' relationship.

After the close of discovery in this case, the district court entered summary judgment for Uber, finding that there were no genuine disputes of material fact regarding the nature of the parties' relationship, and concluding as a matter of law that those undisputed facts support independent contractor classification. But the Third Circuit reversed. It did not disrupt the district court's conclusion that the facts regarding the parties' relationship were undisputed. Rather, the court of appeals determined that applying the

"economic reality" factors to those undisputed facts was itself a factual question, and that there were genuine disputes between the parties regarding how the factors should be applied.

In so holding, the Third Circuit deepened a conflict regarding whether the application of the FLSA's "economic reality" factors to undisputed facts is a question of *fact* that can preclude summary judgment, or a question of *law* that must be decided by a court. The Third Circuit joined the Sixth and Seventh Circuits in concluding that it is a question of fact, whereas the Fifth Circuit has held that it is a question of law that a court may resolve on summary judgment.

The view adopted below is irreconcilable with this Court's precedent. Because the economic reality of the parties' relationship is a question of law, and because the "economic realty" factors serve only to guide the court in answering that question of law, the court—not a finder of fact—must determine whether each relevant factor favors the worker or the putative employer. Indeed, a contrary holding would effectively preclude the use of summary judgment in *all* FLSA misclassification actions, as such actions almost always involve reasonable disagreements as to whether, for example, a putative employer has a right to control the worker, or whether the worker has an opportunity for profit or loss similar to that of an independent contractor.

This question is important because FLSA litigation has become an increasingly sizable portion of the federal docket in recent years. This rising number of FLSA misclassification cases will only accelerate as the economy continues to evolve away from the industrial model that dominated at the time of the FLSA's passage, and toward a service-based

model that depends on a flexible, dynamic, and often remote workforce. With a rising tide of misclassification actions, it is all the more important that the parties and the courts be able to decide those actions quickly and cost-effectively when there are no genuine disputes as to any material fact.

The Court should grant certiorari and reverse the judgment below.

A. Legal Background

Congress enacted the Fair Labor Standards Act in 1938 to ensure "the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202. The statute "sought to accomplish this purpose by [its] minimum pay and maximum hour provisions and the requirement that records of employees' services be kept by the employer." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947).

Crucially, however, the FLSA's protections apply only to employees. *See* 29 U.S.C. § 206(a) ("Every *employer* shall pay to each of his *employees* … wages at the following rates ….") (emphases added); *id.* § 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 specified at a rate not less than one and one-half times the regular rate at which he is employed.") (emphases added). Courts have therefore declined to extend the FLSA's coverage to workers who are deemed to be independent contractors. *See*, *e.g.*, *Faludi v. U.S. Shale Sols., L.L.C.*, 950 F.3d 269, 271 (5th Cir. 2020) ("Because Faludi is an independent contractor, though, the FLSA does not apply."); *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1531 (7th Cir. 1987) ("The issue is

whether the migrant workers who harvest the pickle crop of defendant Lauritzen Farms … are employees for purposes of the Fair Labor Standards Act of 1938 ('FLSA'), or are instead independent contractors not subject to the requirements of the Act.").

This Court noted nearly 75 years ago that "there is in the Fair Labor Standards Act no definition that solves the problem as to the limits of the employer-employee relationship under the Act." *Rutherford Food*, 331 U.S. at 728. While the statute provides that "the term 'employee' means any individual employed by an employer" (29 U.S.C. § 203(e)(1)), courts have found that this "'circular' definition ... is unhelpful." *Ndambi v. CoreCivic, Inc.*, 990 F.3d 369, 372 (4th Cir. 2021); *see also* 29 U.S.C. § 203(d) ("'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee ….").

This Court thus has looked to the statute's underlying purposes to hold that a worker's classification under the FLSA turns on the "economic reality" of her relationship to the hiring entity. Over the course of three seminal decisions, the Court has made clear that this "economic reality" test is a holistic one in which no single factor is dispositive.

In *United States v. Silk*, 331 U.S. 704 (1947), the Court considered whether a company was required to pay employment taxes for certain of its workers under the Social Security Act, the answer to which turned on "whether the workers involved were employees under that Act or whether they were independent contractors." *Id.* at 705. In answering this question, the Court drew on caselaw interpreting the National Labor Relations Act to hold that "'employees' included workers who were such as a matter of economic

reality." *Id.* at 713 (citing *NLRB v. Hearst Publ'ns*, 322 U.S. 111 (1944)). While the Court identified several factors that may be important to this determination, including "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation," it emphasized that "[n]o one [factor] is controlling nor is the list complete." *Id.* at 716. On the contrary, "[i]t is the total situation" that marks workers as employees or independent contractors. *Id.* at 719.

In *Rutherford Food*, decided the same day as *Silk*, the Court considered "whether [workers] were employees of [an] operator of [a] Kansas plant under the Fair Labor Standards Act." 331 U.S. at 727–28. Beginning from the premise that "[d]ecisions that define the coverage of the employer-Employee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act" (*id.* at 723 (citing *Hearst Publ'ns*, 322 U.S. 111; *Silk*, 331 U.S. 704)), the Court held that the workers were employees (*id.* at 730). While the Court conceded that the workers were compensated in a manner suggesting they were independent contractors, it emphasized that "the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity." *Id.*

Finally, *Goldberg v. Whitaker House Co-op, Inc.*, 366 U.S. 28 (1961), considered whether workers who provided knitting and embroidering services to a cooperative in which they held an ownership interest were employees under the FLSA. *Id.* at 29–30. The Court answered in the affirmative, reasoning that

"[t]he members are not self-employed," but rather "are regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates." *Id.* at 32. Although the Court acknowledged the "formal differences" occasioned by the workers' ownership interest in the cooperative, it concluded that "the 'economic reality' rather than 'technical concepts' is to be the test of employment." *Id.* at 32–33.

While this Court has endorsed a holistic and open-ended "economic reality" test, it has not decisively articulated the factors a court may consider in applying that test. As a result, the lower courts have adopted a variety of frameworks for evaluating classification under the FLSA.

In the Fifth Circuit, courts consider "'five non-exhaustive factors,'" including "'(1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship.'" *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 379 (5th Cir. 2019). The Sixth Circuit, by contrast, "ha[s] identified six factors to consider"—the five applied by the Fifth Circuit, plus "whether the service rendered is an integral part of the alleged employer's business." *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015). The Second Circuit, meanwhile, has looked to as few as four factors: "(1) the manner and extent of [workers'] affiliation with [the company]; (2) whether [they] work exclusively for [the company] or provide [work] for [its] rivals' clients and/or develop

business of their own; (3) the degree to which they would invest in their [own] businesses; and (4) when, where, and how regularly [they] provide [work] for [the company]." *Saleem v. Corporate Transp. Grp., Ltd.*, 854 F.3d 131, 140 (2d Cir. 2017).

There is broad agreement among the courts of appeals on two basic principles.

First, no one factor has independent significance in determining classification; rather, each is a mere guidepost in determining whether a worker is an employee as a matter of "economic reality." *See*, *e.g.*, *Parrish*, 917 F.3d at 380 ("As noted, '[n]o single factor is determinative.' And, obviously, the factors should not 'be applied mechanically.'") (citation omitted); *Keller*, 781 F.3d at 807 ("No one factor is determinative …. Accordingly, we address each factor in turn with an eye toward the ultimate question—Keller's economic dependence on or independence from Miri."); *Saleem*, 854 F.3d at 139–40 ("'[T]hese factors are merely aids to analysis,' and are helpful only insofar as they elucidate the 'economic reality' of the arrangement at issue.") (citation omitted).

Second, while the nature of the relationship between a worker and a company is a question of *fact* (e.g., whether the worker can set her own schedule or work for the company's rivals), whether that relationship is ultimately one of employment under the "economic reality" test is a question of *law* for the court to decide. *See*, *e.g.*, *Parrish*, 917 F.3d at 377 ("[W]hether a worker is an employee for FLSA purposes is a question of law."); *Saleem*, 854 F.3d at 139 n.19 ("'[T]he legal conclusion to be drawn from those facts—whether workers are employees or independent contractors—is a question of law.'").

But courts have diverged on an intermediate step of the classification inquiry. After making findings about the nature of the parties' relationship (e.g., who sets the worker's schedule), but before concluding whether the worker is an employee under the "economic reality" test, a court uses the "economic reality" factors (e.g., whether the putative employer exercises a "right to control" similar to that exercised by employers) as guideposts in deciding the worker's status as a matter of law. *See Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1044–45 (5th Cir. 1987). How these factors apply to the parties' relationship may be disputed even where the facts of that relationship are not. For example, where it is uncontested that a worker chooses whether and when to work, and that the putative employer sets the rate of pay, reasonable minds may still disagree as to which way the "right to control" factor points—in favor of employee status or independent contractor status. Some courts have treated the application of these factors as a legal question for the court, while others have treated it as a factual question for trial. *See*, *e.g.*, 3 Employment Coordinator § 1:41 (Supp. 2021) (noting disagreement among the federal courts of appeals).

B. Factual And Procedural History

1. Uber is a technology company that develops mobile smartphone platforms that connect service providers and customers of those services. The Uber platform at issue here operates as a digital marketplace that connects riders looking for transportation to independent transportation providers looking for riders. App. 33–34. Uber offers multiple products on this platform—including uberX,

UberSUV, and UberBLACK—based on the vehicle in which a rider would like to travel. *See id.* at 58 n.15.

The UberBLACK product, which is at issue in this case, connects riders with licensed limousine drivers. App. 34 n.3. Independent transportation companies ("ITCs") that wish to use the UberBLACK product to generate leads must first enter into a license with Uber setting forth the terms for using the Uber App (the "Services Agreement"). *Id.* at 5. Then, individual drivers engaged by these ITCs may use the Uber App by executing a separate agreement with Uber (the "Driver Addendum"). *Id.* at 5–6.

The Services Agreement states, among other things, that the ITC "shall provide all necessary equipment, tools and other materials … necessary to perform Transportation Services"; that the ITC "and its Drivers retain the sole right to determine when, where, and for how long each of them will utilize the Driver App or the Uber Services"; and that, "[w]ith the exception of any signage required by local law or permit/license requirements, Uber shall have no right to require [the ITC] or any Driver to: (a) display Uber's or any of its Affiliates' names, logos or colors on any Vehicle(s); or (b) wear a uniform or any other clothing displaying Uber's or any of its Affiliates' names, logos or colors." App. 39–40.

The Driver Addendum contains similar terms. For example, the Driver Addendum specifies that "Uber does not, and shall not be deemed to, direct or control Driver generally or in Driver's performance of Transportation Services or maintenance of any Vehicles," and that "Uber does not control, or purport to control: (a) when, where or for how long Driver will utilize the Driver App or the Uber Services; or (b) Driver's decision, via the Driver App, to attempt to

accept or to decline or ignore a User's request for Transportation Services, or to cancel an accepted request for Transportation Services, or to cancel an accepted request for Transportation Services, via the Driver App, subject to Uber's then-current cancellation policies." App. 41–42.

Respondents own and operate ITCs that executed the Services Agreement with Uber in order to generate business in Pennsylvania through the UberBLACK product. App. 5.

Respondent Ali Razak incorporated Luxe Limousine Services, Inc. in 2012, obtaining a certificate from the Pennsylvania Public Utility Commission to provide black-car transportation services in Bucks, Chester, Delaware, and Montgomery Counties. *Razak v. Uber Techs., Inc.*, No. 16-cv-573, Dkt. 114-3 ¶¶ 4, 7 (E.D. Pa.). Two years later, on July 8, 2014, Mr. Razak signed up to use the UberBLACK product to connect with potential customers. *Id.* ¶ 9. By 2016, Luxe operated a fleet of 16 vehicles, driven by a roster of between 14 and 17 drivers. *Id.* ¶¶ 53, 60. Luxe engaged in substantial independent advertising, and even hired a search engine optimization company to improve its internet presence. *Id.* ¶¶ 89–91. In addition to the UberBLACK product, Luxe generated business through Blacklane (a chauffeur portal), private referrals, and bookings through its website (www.luxelimousineservices.com) and by email. *Id.* ¶¶ 63, 87–88.

Respondent Kenan Sabani began using the UberBLACK product in November 2013, at which time he was providing transportation services through a separate limousine company. *Razak*, No. 16-cv-573, Dkt. 114-3 ¶¶ 10–11, 14. Two years

later, Mr. Sabani struck out on his own, forming Freemo Limo, LLC, of which he is the sole owner. *Id.* ¶¶ 12–15. Over the ensuing years, Freemo hired four drivers, one of whom provided transportation services only for Freemo's private trips. *Id.* ¶¶ 104, 110. It also established a website, a Yelp profile, and a Facebook page to advertise its services, and it accepted bookings through email and a 24-hour phone number. *Id.* ¶¶ 111–15.

Respondent Khaldoun Cherdoud owns and operates Milano Limo, Inc. *Razak*, No. 16-cv-573, Dkt. 114-3 ¶ 16. Although Milano began using the UberBLACK product in December 2013 (*id.* ¶ 18), a few years later it was generating nearly half of its income by providing pre-arranged trips contracted to it by Freemo (*id.* ¶ 139). Mr. Cherdoud also generated business for Milano by negotiating with hotel doormen to direct hotel guests to him, resulting in rides independent of the UberBLACK product. *Id.* ¶ 140.

2. Respondents filed this putative class and collective action in Pennsylvania state court on January 6, 2016, alleging that Uber misclassified them and similarly situated users of the UberBLACK product as independent contractors and, in doing so, denied them statutory benefits afforded to employees under the FLSA and state law. App. 28. They asserted their class claims on behalf of "[a]ll persons who provided limousine services, now known as UberBLACK, through Defendants' App in Philadelphia, Pennsylvania." *Id.* at 33.

Uber removed the action to the District Court for the Eastern District of Pennsylvania on February 4, 2016. App. 28–29. After the district court granted Uber's motion for judgment on the pleadings in part,

respondents filed their operative First Amended Complaint on October 13, 2016. *Id.* at 29–30. The FAC asserts five causes of action: (1) failure to pay minimum wages under the FLSA; (2) failure to pay overtime wages under the FLSA; (3) failure to pay free and clear wages under the FLSA; (4) failure to pay minimum wages and overtime wages under the Pennsylvania Minimum Wage Act; and (5) failure to designate regular paydays under the Pennsylvania Wage Payment and Collection Law. *See Razak*, No. 16-cv-573, Dkt. 47.

3. After the close of discovery, Uber moved for summary judgment on the ground that respondents are independent contractors as a matter of law and therefore are not entitled to the protections of the FLSA or Pennsylvania's wage-and-hour laws, which track the FLSA's approach to worker classification. App. 32. The district court granted Uber's motion on April 11, 2018, and dismissed the action. *Id.* at 79.

The district court began by identifying *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376 (3d Cir. 1985), as the governing Circuit precedent interpreting the FLSA's "economic reality" test. That case set forth six factors as guiding a court's determination of whether a worker is an employee or an independent contractor:

> (1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
>
> (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
>
> (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;

> (4) whether the service rendered requires a special skill;
>
> (5) the degree of permanence of the working relationship; and
>
> (6) whether the service rendered is an integral part of the alleged employer's business.

App. 46. The district court noted that although "[t]he determination of 'employee' status under the FLSA is a question of law, … it depends on subsidiary factual determinations." *Id.* at 60 n.16 (quotation marks omitted).

The district court first reviewed the evidence to determine whether there were any genuine disputes of material fact that might preclude summary judgment. The court answered in the negative, noting that although the parties vigorously disputed whether their relationship supported employee or independent contractor status under each of the *DialAmerica* factors, the factual details of that relationship were not contested.

The court then proceeded to evaluate and weigh the *DialAmerica* factors. For example, the district court balanced the facts pertaining to Uber's deactivation policy against the "significant indications … that Uber does not exercise substantial control" to conclude that the "right to control" factor weighed in favor of independent contractor status. App. 66; *see also id.* at 63–69. Similarly, the district rejected respondents' argument that, "because [they] have driven for Uber for years, and for 'many hours per week,' there is 'relationship permanence,'" concluding that because drivers have the choice whether and when to work, "this factor weighs heavily in favor of

[respondents'] independent contractor status." *Id.* at 76, 78.

In sum, the district court concluded that four of the *DialAmerica* factors supported independent contractor classification, whereas two supported employee classification. *See* App. 78. And while the district court "[a]ccept[ed] that there are some disputes of fact," it concluded that, "given the 'totality of the circumstances' and the fact 'that no single factor in the economic reality test is dispositive,' [respondents] have not brought to the record sufficient proof to meet their burden of showing that they are employees." *Id.* at 79.

4. The Third Circuit vacated the district court's decision. The court of appeals did not identify any disputed facts regarding the relationship between Uber and respondents. But the court identified disputes in *applying* the *DialAmerica* factors to those facts, and held that disputes in the application of law to fact precluded summary judgment.

The court first addressed the "right to control" factor. App. 19–21. Although it acknowledged that "both parties argue that there are no genuine disputes regarding control," the Third Circuit concluded that "the facts adduced show otherwise." *Id.* at 21. Crucially, however, the court did not identify any disputed facts concerning the amount or type of control Uber exercised over respondents. Rather, it identified only disputes concerning whether this factor supported employee or independent contractor status:

> Although both parties argue that there are no genuine disputes regarding control, the facts adduced show otherwise. While Uber determines what drivers are paid and directs

> drivers where to drop off passengers, it lacks the right to control when drivers must drive. UberBLACK drivers exercise a high level of control, as they can drive as little or as much as they desire, without losing their ability to drive for UberBLACK. However, Uber deactivates drivers who fall short of the 4.7-star UberBLACK driver rating and limits the number of consecutive hours that a driver may work.

Id.

The Third Circuit then considered the "opportunity for profit or loss" *DialAmerica* factor. App. 21–23. The court did not contest the district court's conclusion that "drivers could be strategic in determining when, where, and how to utilize the Driver App to obtain more lucrative trip requests and to generate profits," or that they "could also work for competitors and transport private clients." *Id.* at 22. Instead, it reasoned that "other material facts reveal that there was and still is a genuine dispute." *Id.* Again, however, the Third Circuit did not identify any disputes concerning the *facts* it discussed:

> For example, Uber decides (1) the fare; (2) which driver receives a trip request; (3) whether to refund or cancel a passenger's fare; and (4) a driver's territory, which is subject to change without notice. Moreover, Plaintiffs can drive for competitors, but Uber may attempt to frustrate those who try, and most of the factors that determine an UberBLACK driver's Uber-profit, like advertising and price setting, are also controlled by Uber.

Id. at 22–23. Rather, the Third Circuit made clear that the real dispute was over how the "opportunity for profit or loss" factor applied to those facts when it concluded that, "[u]nder these circumstances, we believe that a reasonable fact-finder could rule in favor of Plaintiffs." *Id.* at 23.

Finally, the court considered in summary fashion two of the remaining three *DialAmerica* factors, concluding that one of those factors involved disputed facts. App. 23–24. But again, the dispute was not over the facts themselves, but whether the application of that factor to the facts supported employee or independent contractor classification. *See id.* at 23 ("The fifth factor, degree of permanence of the working relationship, has genuine disputes of material fact. On the one hand, Uber can take drivers offline, and on the other hand, Plaintiffs can drive whenever they choose to turn on the Driver App, with no minimum amount of driving time required.").

Based on this analysis, the Third Circuit remanded because "these material factual disputes must be resolved" by a factfinder before judgment can be entered. App. 24.

5. On November 5, 2020, the Third Circuit issued an order amending two sentences in its opinion. App. 25–26. On the same day, it denied Uber's petition for panel rehearing or rehearing en banc. *Id.* at 80–81.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision deepens a circuit split on whether application of the factors considered under the FLSA's "economic reality" test presents a question of fact that can preclude summary judgment. The Fifth Circuit has answered in the negative, whereas the Third Circuit has now joined the Sixth and

Seventh Circuits by answering in the affirmative. The latter view is irreconcilable with this Court's precedent, which clearly holds that a worker's ultimate classification as either an employee or an independent contractor is a question of law that must be based on the totality of the circumstances, and that the factors considered by the courts in conducting this holistic analysis are merely guideposts that assist the court in making that legal determination. The Court should grant certiorari on this important and recurring question.

A. The Third Circuit's Decision Deepens A Circuit Conflict Regarding Whether Application Of The "Economic Reality" Factors Is A Question Of Fact Or A Question Of Law.

In the seminal case of *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042 (5th Cir. 1987), the Fifth Circuit held that "[t]here are … three types of findings involved in determining whether one is an employee within the meaning of the" FLSA. *Id.* at 1044. First, "there are historical findings of fact that underlie a finding as to" the respective "economic reality" factors—"for example, whether [the defendant] control[s] the number of hours that a[worker] must be" at work. *Id.* Second, "there are those findings as to the ["economic reality"] factors themselves"—for example, whether the defendant's control over the number of hours worked supports a conclusion that the "right to control" factor supports employee or independent contractor status. *Id.* Third, there is the "ultimate conclusion that the workers at issue are 'employees' or 'independent contractors.'" *Id.* at 1045. In *Brock*, which involved a bench trial, the Fifth Circuit held that a lower court's findings on the first

two questions are reviewed for clear error, whereas its finding on the third question is reviewed de novo. *Id.* at 1044–45.

Many other courts of appeals have followed the taxonomy outlined in *Brock*. *See*, *e.g.*, *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1988); *Henderson v. Inter-Chem Coal Co.*, 41 F.3d 567, 571 (10th Cir. 1994); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 76 (2d Cir. 2003). While these courts uniformly agree that the first type of finding (i.e., "historical facts") involves a question of fact that may foreclose summary judgment if there are genuine disputes, they disagree as to whether the second type of finding (i.e., how the "economic reality" factors apply to those historical facts) is a question of fact or of law for purposes of summary judgment. *See* 3 Employment Coordinator § 1:41 (Supp. 2021) (noting that "some courts will find summary judgment improper where there is a dispute on the facts used for determining whether or not an employment relationship exists," whereas "the Fifth Circuit has held that the issue of independent contractor status is not necessarily a question of fact").

1. The Fifth Circuit has held that only genuine disputes as to "historical facts" may preclude summary judgment on a worker's classification under the FLSA.

In *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369 (5th Cir. 2019), the court reviewed an order granting summary judgment to a worker on the ground that he was an employee as a matter of law. *Id.* at 377. At the outset, the court categorically rejected the proposition that disputes concerning how the "economic reality" factors apply to the parties' relationship could preclude summary judgment,

noting that "[t]his step, of course, is not used in deciding whether a party is entitled to summary judgment." *Id.* at 378. Then, after concluding that there was no historical "fact that is both genuinely disputed and could change the outcome of this proceeding," the court proceeded to determine how those factors applied as a matter of law—emphasizing that, "consistent with the requisite *de novo* review for summary judgment, and, in the process, only issues of law being decided, no clear-error analysis is made in evaluating the factors." *Id.* at 381.

The Fifth Circuit acknowledged the parties' disagreement as to whether each factor supported classification as an employee or an independent contractor. But the court did not remand for resolution of that question by a factfinder. On the contrary, the Fifth Circuit evaluated for itself whether each factor supported employee or independent contractor status, in many instances overturning the lower court's determination. *See*, *e.g.*, 917 F.3d at 381 ("The district court concluded this [control] factor was neutral. Based on our *de novo* review, the control factor favors IC status."); *id.* at 384 ("The third determination is 'the degree to which the worker's opportunity for profit or loss is determined by the alleged employer.' The district court concluded 'this factor weighs in favor of employee status.' We hold otherwise.") (citation omitted).

The court ultimately not only reversed summary judgment for the plaintiff, but ordered summary judgment *for the defendant*. *See* 917 F.3d at 388.

2. Three other courts of appeals, by contrast, have held that the application of the "economic reality" factors is a question of fact, such that summary

judgment may be improper even where there is no dispute concerning the parties' relationship.

a. In *Keller v. Miri Microsystems L.L.C.*, 781 F.3d 799 (6th Cir. 2015), the Sixth Circuit reversed the entry of summary judgment in favor of a putative employer, holding that "there are many genuine disputes of fact and reasonable inferences from which a jury could find that Keller was an employee." *Id.* at 816. Many of those purported factual disputes did not concern facts pertaining to the parties' underlying relationship, however, but rather how those facts bore upon the "economic reality" factors.

For example, the Sixth Circuit did not identify any disputes regarding the degree of skill exercised by the plaintiff in installing satellite dishes for the defendant, yet concluded that "there is a genuine issue of material fact regarding whether the degree of skill required of Keller *shows that he was an employee or an independent contractor*." *Id.* at 810 (emphasis added). Similarly, the court acknowledged that "[t]he undisputed facts demonstrate that Keller made some capital investment in his work," including by purchasing a van, tools, and payment-processing software, while the defendant "made significant capital investments in its business," including by renting office space and operating phones and computers. *Id.* at 811. Yet the court concluded that, "[b]ecause this question arises in the context of a motion for summary judgment, we believe the trier of fact should decide how Keller's capital investments compared to Miri's, and *whether Keller's capital investments demonstrate that Keller was economically independent*." *Id.* (emphasis added).

b. The Seventh Circuit adopted the same approach in *Simpkins v. DuPage Housing Authority*,

893 F.3d 962 (7th Cir. 2018). As in *Keller*, the district court in *Simpkins* granted summary judgment in a misclassification action brought under the FLSA. *Id.* at 963. And as in *Keller*, the Seventh Circuit reversed, concluding that there were genuine factual disputes that must be resolved by a factfinder—disputes that went only to the application of the "economic reality" factors. *Id.* at 967.

Among other things, the court highlighted disputes concerning "the nature and degree of control the putative employer exercised over the manner in which the putative employee performed his work." 893 F3d at 966. But crucially, the actual facts were not disputed. For example, the court noted that "DHA assigned Simpkins specific projects and dictated the order in which he was to complete them," while "DHA argue[d] that Simpkins had the autonomy to determine the manner in which those tasks were completed after they were assigned." *Id.* Nevertheless, the court concluded that summary judgment was improper because, "[c]onsidering th[e] competing inferences in the light most favorable to Simpkins, a reasonable trier of fact could find that DHA's control over Simpkins *weighs in favor of a typical employer-employee relationship*." *Id.* (emphasis added).

c. The Third Circuit in this case joined the Sixth and Seventh Circuits in holding that the application of the "economic reality" factors is a question of fact that can preclude summary judgment. For example, in concluding that "material facts reveal that there was and still is a genuine dispute" concerning the "opportunity for profit or loss" factor, the court cited only *undisputed* features of the parties' relationship—e.g., that "Uber decides (1) the fare; (2) which driver

receives a trip request; (3) whether to refund or cancel a passenger's fare; and (4) a driver's territory," while "Plaintiffs can drive for competitors"—before concluding that "a reasonable fact-finder could *rule in favor of Plaintiffs*" on this factor. App. 22–23 (emphasis added). Similarly, the court noted that "[t]he fifth factor, degree of permanence of the working relationship, has genuine disputes of material fact" because, "[o]n the one hand, Uber can take drivers offline, and on the other hand, Plaintiffs can drive whenever they choose to turn on the Driver App, with no minimum amount of driving time required." *Id.* at 23. But as the court's own recitation makes clear, these aspects of the parties' relationship were *not* disputed—only their relevance to the factor concerning the permanence of the parties' relationship was at issue.

B. The Third Circuit's Decision Conflicts With This Court's Precedent.

The Third Circuit's holding that the application of the "economic reality" factors is a question of fact, disputes over which can preclude summary judgment, is irreconcilable with this Court's FLSA caselaw.

This Court has already indicated that the ultimate question whether a worker is an employee or an independent contractor under the FLSA is one of law. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713 (1986) ("[T]he facts necessary to a proper determination of the *legal* question whether an exemption to the FLSA applies in a particular case should be reviewed by the courts of appeals pursuant to Rule 52(a), like the facts in other civil bench-tried litigation in federal courts.") (emphasis added). As noted above, the courts of appeals are in agreement on this basic point. *See supra* at 9 (citing cases).

Because this ultimate question is one of law, it stands to reason that subordinate questions regarding application of each of the "economic reality" factors are also questions of law for the court to decide. After all, these factors do not describe objective facts about the parties' relationship (such as who sets the worker's schedule and whether the worker can work for the company's competitors), but rather serve only to *elucidate* the economic reality of that relationship. For this reason, the Court has repeatedly emphasized that the "economic reality" factors are neither dispositive nor exhaustive. *See*, *e.g.*, *Silk*, 331 U.S. at 716, 719 (cautioning that "[n]o one [factor] is controlling nor is the list complete," and "[i]t is the total situation ... that marks these [workers] as independent contractors"); *Rutherford Food*, 331 U.S. at 730 ("[T]he determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity."); *Goldberg*, 366 U.S. at 33 ("[T]he 'economic reality' rather than 'technical concepts' is to be the test of employment.").

This is consistent with how courts approach similar questions in other areas of the law. For example, courts evaluate likelihood of confusion under the trademark law under a variety of multifactor tests, but agree that disputes concerning the application of the relevant factors is a question of law for the court to decide. *See*, *e.g.*, *J.B. Williams Co. v. Le Conte Cosmetics, Inc.*, 523 F.2d 187, 190 (9th Cir. 1975) ("Whether likelihood of confusion is more a question of law or one of fact depends on the circumstances of each particular case. To the extent that the conclusion is based solely upon disputed findings of fact, the appellate court must follow the conclusion of the trial court unless it finds the underlying facts to be clearly erroneous…. However,

if the facts are not in dispute, the appellate court is 'in as good a position as the trial judge to determine the probability of confusion.'").

And because the application of the "economic reality" factors is a question of law, disputes concerning their resolution cannot preclude summary judgment. *See* Fed. R. Civ. P. 56 ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material *fact* and the movant is entitled to judgment as a matter of law.") (emphasis added). A contrary holding would produce the nonsensical result that summary judgment may be barred based on disputes concerning individual factors even where those factors, taken in the aggregate, indisputably admit of only one conclusion regarding the worker's classification. Here, for example, the Third Circuit held that summary judgment was improper because there were material disputes regarding the "right to control" and "opportunity for profit or loss" factors—without ever considering whether or how those disputed factors interact with the *other* "economic reality" factors (not to mention other facts bearing on the economic reality of the parties' relationship) so as to affect the ultimate conclusion whether respondents are employees or independent contractors.

The economic reality of a worker's relationship with a putative employer is a question of law, and the factors that inform the answer are merely helpful guideposts. The contrary conclusion adopted by the Third, Sixth, and Seventh Circuits effectively precludes summary judgment in any case in which a worker's classification under the FLSA is disputed—a result that could have far-reaching and deleterious impacts on FLSA litigation.

C. The Question Presented Is Important And Recurring.

FLSA litigation has become an increasingly sizable portion of the federal docket in recent years. Between 2000 and 2015, the number of wage-and-hour claims filed in federal court under the FLSA increased by 358 percent, compared to a 7 percent increase in the judiciary's overall intake volume during the same period. Lydia DePillis, *Why Wage and Hour Litigation Is Skyrocketing*, Washington Post (Nov. 25, 2015), https://tinyurl.com/463z6ymb. In fact, "[t]he number of cases filed in federal district court under the Fair Labor Standards Act is growing faster than almost any other category." *Id.*; *see also Fair Labor Standards Act: The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance* 6, U.S. Government Accountability Office (Dec. 2013), https://tinyurl.com/db8696ky ("In 1991, FLSA lawsuits made up less than 1 percent (.6 percent) of all civil lawsuits, but by 2012, FLSA lawsuits accounted for almost 3 percent of all civil lawsuits, an increase of 383 percent."). In 2020 alone, 6,532 new FLSA actions were filed. *See* Federal Judicial Center, *IDB Civil 1998-Present*, https://tinyurl.com/7eamv9w3.

In light of this surge in FLSA litigation, summary judgment is a critical tool to quickly and efficiently resolve disputes. As this Court has explained, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). "In this way, dilatory tactics

resulting from the assertion of unfounded claims or the interposition of specious denials or sham defenses can be defeated, parties may be accorded expeditious justice, and some of the pressure on court dockets may be alleviated." 10A Wright & Miller, *Federal Practice & Procedure Civil* § 2712 (4th ed.).

By treating the "economic reality" factors as questions of fact for which reasonable disputes can preclude summary judgment, the Third Circuit has effectively deprived litigants and courts alike of this important tool in the context of FLSA misclassification actions. Given the holistic nature of the "economic reality" test, reasonable minds can often disagree as to the direction in which each factor points, even where the underlying facts concerning the parties' relationship are undisputed. *See Parrish*, 917 F.3d at 380 ("Like every FLSA action in a similar posture, the instant cross-motions for summary judgment are 'very fact dependent.'"). The unavoidable result of deeming the application of the "economic reality" factors questions of fact that can preclude summary judgment will be more litigation and more uncertainty in an area of law where clarity is paramount.

The effects are especially pernicious in emerging and dynamic areas of the labor market—including, as here, the so-called "gig economy." *See* DePillis, *Why Wage and Hour Litigation Is Skyrocketing* ("[T]he Fair Labor Standards Act, originally enacted in 1938, has failed to adapt from an industrial to a service-based economy, creating ambiguities that often have to be litigated to resolve (witness the lawsuits over the employment status of Uber drivers and other 'gig workers')."). As the district court acknowledged, the two classifications at issue in this litigation "are not

the only two types of business relationship that exist under the law." App. 60. On the contrary, "[t]ransportation network companies ('TNCs'), such as Uber and its most frequent U.S. competitor, Lyft, present a novel form of business that did not exist at all ten years ago," and "[w]ith time, these businesses may give rise to new conceptions of employment status." *Id.*

Where the nature of the parties' underlying relationship is undisputed, it makes no sense to require a factfinder to evaluate and resolve each of the "economic reality" factors—especially where the ultimate question whether the workers are employees for purposes of the FLSA is one of law. Indeed, requiring such superfluous proceedings will make litigation more costly for workers and businesses alike.

CONCLUSION

The Court should grant the petition for certiorari and, after briefing and argument, reverse the Third Circuit.

Respectfully submitted.

ROBERT W. PRITCHARD
JOSHUA C. VAUGHN
LITTLER MENDELSON, P.C.
625 Liberty Avenue
26th Floor
Pittsburgh, PA 15222
(412) 201-7628

THEANE D. EVANGELIS
Counsel of Record
BLAINE H. EVANSON
SAMUEL ECKMAN
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tevangelis@gibsondunn.com

Counsel for Petitioners

April 5, 2021