No.

In the Supreme Court of the United States

E.M.D. SALES, INC.; ELDA M. DEVARIE;
PETITIONERS,

v.

FAUSTINO SANCHEZ CARRERA; JESUS DAVID MURO;
MAGDALENO GERVACIO, RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

EDUARDO S. GARCIA
JEFFREY M. SCHWABER
STEIN SPERLING BENNETT
DE JONG DRISCOLL PC
1101 Wootton Parkway, Suite 700
Rockville, MD 20852

LISA S. BLATT
Counsel of Record
SARAH M. HARRIS
AARON Z. ROPER
IAN M. SWENSON
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

QUESTION PRESENTED

The Fair Labor Standards Act (FLSA) covers more than 140 million workers and guarantees eligible workers a minimum wage and overtime pay. But the FLSA also contains 34 exemptions from those requirements. Employers do not have to pay overtime to, *e.g.*, bona fide executives, agricultural workers, and outside salesmen. *See* 29 U.S.C. § 213(a)-(b).

The question presented is:

Whether the burden of proof that employers must satisfy to demonstrate the applicability of an FLSA exemption is a mere preponderance of the evidence—as six circuits hold—or clear and convincing evidence, as the Fourth Circuit alone holds.

CORPORATE DISCLOSURE STATEMENT

Petitioner E.M.D. Sales, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Carrera v. E.M.D. Sales Inc.*, No. 21-1897 (4th Cir. July 27, 2023) (affirming judgment for plaintiffs)
- *Carrera v. E.M.D. Sales Inc.*, No. 1:17-cv-3066 (D. Md. May 13, 2021) (entering judgment for plaintiffs)

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Page

Cases—continued:

Statutes:

Page

Other Authorities:

Page

Other Authorities—continued:

In the Supreme Court of the United States

E.M.D. SALES, INC.; ELDA M. DEVARIE;
PETITIONERS,

v.

FAUSTINO SANCHEZ CARRERA; JESUS DAVID MURO;
MAGDALENO GERVACIO, RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

Petitioners E.M.D. Sales, Inc. and Elda M. Devarie respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion is reported at 75 F.4th 345. Pet.App.3a-19a. The district court's post-trial liability opinion is unreported but available at 2021 WL 1060258. Pet.App.34a-55a.

JURISDICTION

The court of appeals entered judgment on July 27, 2023 and denied rehearing en banc on August 22, 2023.

Pet.App.1a-3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

29 U.S.C. § 213(a)(1) provides in relevant part:

The provisions of sections 206 … and 207 of this title shall not apply with respect to … any employee employed … in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5 …).

STATEMENT

This case offers an ideal vehicle to resolve an acknowledged 6-1 circuit split on a recurring issue that requires a national rule: the burden of proof to establish any of the 34 exemptions from the Fair Labor Standards Act's (FLSA) minimum-wage and overtime requirements. The FLSA establishes sweeping minimum-wage and overtime requirements for most of the American workforce. 29 U.S.C. §§ 206-207. But the FLSA also contains 34 exemptions from those requirements for all sorts of job categories. *Id.* § 213(a)-(b).

In the Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, courts resolve whether those exemptions apply under the familiar preponderance of the evidence standard generally applied in civil cases. In open conflict, the Fourth Circuit applies a clear and convincing evidence standard—an unusually heavy burden reserved for such weighty matters as civil commitment, termination of parental rights, and deportation. Commentators and courts, including the Fourth Circuit, recognize that obvious split. And because the Fourth Circuit denied rehearing en banc despite the panel's suggestion that en banc review might

be warranted, the split is not going away absent this Court's intervention. *See* Pet.App.2a, 15a.

The question presented cries out for this Court's review. What burden of proof governs FLSA exemptions is a question of national importance. The FLSA's exemptions are one of the most frequently litigated issues in federal employment law. And the burden of proof obviously matters. In the six circuits that apply the preponderance standard, courts and juries tote up the evidence. If 50.1% favors the employer; the exemption applies and the employer wins. But in the Fourth Circuit alone, the clear and convincing standard makes it extraordinarily difficult for the employers to prevail. This case illustrates the point. Petitioners—a small-business employer—argued that respondents—current and former sales employees—were "outside salesm[e]n" exempt from the FLSA's overtime requirements. *See* 29 U.S.C. § 213(a)(1). But, repeatedly stressing the significance of the clear and convincing evidence standard, the district court rejected the defense.

Only this Court's intervention can correct this arbitrary geographical disparity in federal employment law, which constantly recurs in FLSA litigation. The 1.1 million businesses across the Fourth Circuit should not lose cases they might win in the rest of the country. This case cleanly presents the burden-of-proof issue on which the circuits are divided. This Court should grant certiorari now to resolve this intolerable conflict.

A. Statutory Background

Enacted in 1938, the FLSA "covers more than 143 million workers at more than 9.8 million establishments nationwide." U.S. Dep't of Lab., *Small Entity Compli-*

ance Guide to the Fair Labor Standards Act's Exemptions 2, https://tinyurl.com/yer2cxz7. The FLSA's central provisions "guarantee[] a minimum wage" and "requir[e] time-and-a-half pay for work over 40 hours a week." *Helix Energy Sols. Grp., Inc. v. Hewitt*, 143 S. Ct. 677, 682 (2023); *see* 29 U.S.C. §§ 206-207.

But the FLSA also reflects Congress' judgment—refined over decades of amendments—that dozens of circumstances warrant exemptions from the FLSA's minimum-wage and overtime requirements. *See* 29 U.S.C. § 213(a)-(b). The FLSA exempts "bona fide executive[s]"—high-salary employees with managerial responsibilities. *See Helix*, 143 S. Ct. at 682-83; 29 U.S.C. § 213(a)(1). The FLSA exempts car salesmen and mechanics. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1138 (2018); 29 U.S.C. § 213(b)(10)(A). The FLSA exempts baseball players, border-patrol agents, fishermen, farmers, switchboard operators, criminal investigators, taxi drivers, maple-syrup producers, and part-time babysitters. 29 U.S.C. § 213(a)(5), (6), (10), (15), (16), (18), (19), (b)(15), (17). And, relevant here, the FLSA exempts "outside salesm[e]n"—workers whose primary duty is making sales and who regularly work outside the employer's place of business. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 148 (2012); 29 U.S.C. § 213(a)(1). Each of these exemptions is "as much a part of the FLSA[]" as the minimum-wage and overtime requirements, and must receive a "fair reading" just like other FLSA provisions. *See Encino*, 138 S. Ct. at 1142.

B. Factual and Procedural Background

1. Petitioner EMD is a Maryland employer solely owned by petitioner Elda Devarie. In 1989, Devarie was

a single mother struggling to support herself and her infant son, Roberto. Lorraine Mirabella, *Baltimore-Based Food Vendor Benefits from Ethnic Food Trends*, Balt. Sun (Oct. 12, 2015), https://tinyurl.com/3267jtpy. Devarie had moved to the U.S. mainland from Puerto Rico after her then-husband, a U.S. Coast Guard officer, was stationed here. *Id.* As a military spouse, Devarie moved around frequently and struggled to find permanent work. *Id.*

Devarie decided to become her own boss. In Puerto Rico, she had helped out at her parents' gas station and worked her way up from price checker to marketing assistant at a supermarket chain. *Id.* Devarie thus started EMD, distributing international food to Hispanic convenience stores. *Id.*

EMD began small. Devarie drove a yellow Ryder truck up and down I-95, buying food wholesale in New York and delivering it herself to small stores around the Washington suburbs. *Id.* Four years in, Devarie got her big break, winning a deal to sell international food to Giant grocery stores. *Id.*

Today, EMD employs over 150 people and distributes thousands of products to independent and chain stores across the Washington metropolitan area. *See id.* Devarie has been recognized for her entrepreneurial success by the U.S. Small Business Administration, Maryland Governor Larry Hogan, and the Maryland Chamber of Commerce. Devarie's son Roberto is now EMD's marketing manager. Pet.App.36a.

2. Respondents are three Maryland-based current and former EMD sales representatives. Pet.App.7a. All agree that respondents worked more than 40 hours a week

for EMD, and that EMD paid them on a commission basis. Respondents allege that the FLSA obligated EMD to pay them overtime wages. EMD contends that respondents are "outside salesm[e]n" exempt from the FLSA's overtime requirements. *See* 29 U.S.C. § 213(a)(1).

After a nine-day bench trial, the U.S. District Court for the District of Maryland found that respondents were not outside salesmen under the FLSA and granted judgment for respondents. Pet.App.34a-35a. Critically, the district court, over EMD's objection, required EMD to prove the applicability of the outside-salesman exemption by "clear and convincing evidence." Pet.App.46a, 83a. The district court described that burden as "very substantial." 3/11/2021 Tr. 56:15-18, D. Ct. Dkt. 213. And during closing argument, the court suggested that respondents would "barely" prevail, "largely as a result of how the law assigns burdens of proof." *Id.* at 40:5-6.

The district court used a two-part test to determine whether the outside-salesman exemption applied. Pet.App.46a. The court asked (1) whether respondents "ma[d]e sales in their roles as sales representatives," and (2) whether making sales was their "primary duty." Pet.App.46a. At both steps, the court held that EMD had not offered the requisite "clear and convincing evidence." Pet.App.48a-49a.

First, as to whether respondents made sales, the district court distinguished between respondents' tasks at independent and chain grocery stores. Pet.App.48a. At independent stores, the district court found that EMD sales representatives work "to open new accounts and to increase both the type and quantity of EMD products sold by existing accounts." Pet.App.40a. Thus, the district

court found "clear and convincing evidence that [respondents] ma[d]e sales at independent stores." Pet.App.48a.

But the court found the evidence of respondents' sales at chain stores mixed, such that EMD had not established "clear and convincing evidence[] that sales representatives can make their own sales at chain stores." Pet.App.49a. EMD elicited testimony from other sales representatives and EMD management "that sales representatives regularly sell" products at chain stores. Pet.App.48a. The court also "accredit[ed]" testimony from chain stores' buyers that sales representatives sometimes make sales. Pet.App.39a. But "other chain store corporate representatives" testified that their store managers had "no leeway to stray" from purchases already negotiated by corporate management and thus could not buy products from respondents. Pet.App.48a-49a. Given the conflicting testimony, the court found that EMD had not carried its "clear and convincing evidence" burden. Pet.App.49a.

Second, the court found that EMD "failed to demonstrate by clear and convincing evidence" that making sales was respondents' "primary duty." Pet.App.49a. The court credited respondents' testimony that they "spent the bulk of their time at chain stores," not independent stores where the court found that respondents made their own sales. Pet.App.50a. And again, the court leaned heavily on the burden of proof. Pet.App.50a. While the district court concluded that respondents did "some selling," "[t]he problem" for EMD was proving by "clear and convincing evidence" that making sales was respondents' "primary duty." 3/11/2021 Tr. 55:25-56:8, D. Ct. Dkt. 213.

In short, because EMD had not adduced clear and convincing evidence that respondents made sales at the

stores where respondents spent most of their time, the court found that EMD had not carried its burden. Pet.App.50a. The court thus held that respondents were not exempt from the FLSA's overtime requirement and ordered EMD to pay respondents both unpaid wages and $151,938.29 in liquidated damages. Pet.App.32a, 56a; D. Ct. Dkt. 237, at 2.

3. The Fourth Circuit affirmed. Pet.App.19a. EMD challenged the district court's liability finding "on one ground only": that "the lower 'preponderance of the evidence' standard," not "clear and convincing evidence," governs the application of FLSA exemptions. Pet.App.12a-13a.

The Fourth Circuit, however, held that "it is well established in our circuit that … an employer … bears the burden" to demonstrate that an FLSA exemption applies "under the 'clear and convincing evidence' standard." Pet.App.12a-13a (citing *Shockley v. City of Newport News*, 997 F.2d 18, 21 (4th Cir. 1993); *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688, 691 (4th Cir. 2009)). The panel thus rejected EMD's argument that earlier cases were inconclusive and stated that the Fourth Circuit has "unequivocally held that the proper standard is clear and convincing evidence." Pet.App.13a (quoting *Desmond*, 564 F.3d at 691 n.3).

The Fourth Circuit also rejected EMD's "more substantial argument: that there is indeed contrary Supreme Court law superseding our precedent, in the form of the Supreme Court's 2018 decision in *Encino*," 138 S. Ct. at 1142. Pet.App.14a. EMD argued that *Encino* displaced Fourth Circuit precedent by "reject[ing] the principle that exemptions to the FLSA should be construed narrowly." Pet.App.14a. But the panel disagreed, describing *Encino*

as "a case about statutory interpretation, and a canon of construction—now rejected—that mandated a narrow reading of the scope of the FLSA's exemptions." Pet.App.14a. The panel viewed that statutory-interpretation principle as "distinct from the question of what burden of proof an employer bears in proving the facts of its case." Pet.App.15a.

The panel also stated: "Perhaps this court will want to revisit the appropriate evidentiary standard for FLSA exemptions," but that "choice that belongs to the en banc Court rather than this panel." Pet.App.15a (citation omitted). In the meantime, the panel held, "we are bound to conclude that the district court properly applied the law of this circuit in requiring the defendants to prove their entitlement to the outside sales exemption by clear and convincing evidence." Pet.App.15a.

EMD sought rehearing en banc, asking the Fourth Circuit to resolve the circuit split by adopting the preponderance standard. The Fourth Circuit denied rehearing en banc. Pet.App.1a-2a.

REASONS FOR GRANTING THE PETITION

This petition is the ideal vehicle for resolving an intractable, acknowledged 6-1 split over the burden of proof in FLSA cases. Six circuits hold that the ordinary civil preponderance of the evidence standard applies when employers invoke an exemption from the FLSA's minimum-wage and overtime requirements. The Fourth Circuit alone applies the far more onerous clear and convincing standard. Only this Court's intervention can resolve this clear split, which courts and commentators have long recognized.

This Court's intervention is imperative. The burden-of-proof issue recurs prolifically, in every one of the thousands of cases applying the FLSA's 34 exemptions. The burden can frequently decide the outcome, as this case shows: The district court repeatedly rested its decision on the clear and convincing standard. As it stands, 1.1 million employers in the Fourth Circuit face an unjustifiably stringent legal burden that applies in no other circuit and governs no other remotely analogous area of the law. This Court should grant certiorari to restore uniformity to a critical federal statute that gets litigated constantly.

I. The Circuits Are Divided 6-1 Over the Burden of Proof for FLSA Exemptions

Six circuits require employers to demonstrate the applicability of FLSA exemptions by a mere preponderance of the evidence. The Fourth Circuit alone demands clear and convincing evidence. Only this Court can correct that outcome-determinative disparity.

1. The Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits hold that employers must prove the applicability of an FLSA exemption by a preponderance of the evidence.

In the Fifth Circuit, "the employer has the burden of establishing that an exemption applies by a preponderance of the evidence." *Faludi v. U.S. Shale Sols., L.L.C.*, 950 F.3d 269, 273 (5th Cir. 2020); *accord Adams v. All Coast, L.L.C.*, 15 F.4th 365, 368 (5th Cir. 2021); *Hobbs v. EVO Inc.*, 7 F.4th 241, 248 (5th Cir. 2021). Applying the preponderance standard, the Fifth Circuit has found an FLSA exemption applicable and granted summary judgment to an employer even when "facts point[ed] in both directions." *Faludi*, 950 F.3d at 275.

In the Sixth Circuit too, "the applicability of an FLSA exemption" must be established "by a preponderance of the evidence." *Renfro v. Ind. Mich. Power Co.*, 497 F.3d 573, 576 (6th Cir. 2007); *accord Lutz v. Huntington Bancshares, Inc.*, 815 F.3d 988, 992 (6th Cir. 2016); *Foster v. Nationwide Mut. Ins. Co.*, 710 F.3d 640, 642 (6th Cir. 2013); *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 501-02 (6th Cir. 2007). While that court previously described the standard as "a preponderance of the clear and affirmative evidence," *Renfro* clarified that employers do not face a "heighten[ed] … evidentiary burden" under the FLSA. 497 F.3d at 576 (citation omitted). "[C]lear" just means that district court fact findings at a bench trial are reviewed for "clear[] error[]" (as they always are)—not that the FLSA subjects employers to a uniquely stringent burden of proof. *Id.*

The Seventh Circuit also applies "the preponderance-of-the-evidence standard" to "exemption[s] from the FLSA's overtime provision." *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 507 (7th Cir. 2007) (citation omitted). As that court has explained, the presumptive "burden of proof in federal civil cases is proof by a preponderance of the evidence." *Id.* Nothing about FLSA cases justifies a higher standard like "clear and convincing evidence." *Id.* at 508. While some older cases mention "clear and affirmative evidence," that is "merely a clumsy invocation of the familiar principle of statutory interpretation that exemptions from a statute that creates remedies should be construed narrowly." *Id.*

The Ninth Circuit has long applied the preponderance standard as well. Employers have "the burden of establishing, by a preponderance of the evidence," whether an employee falls "within [an] exemption." *Coast Van Lines*

v. Armstrong, 167 F.2d 705, 707 (9th Cir. 1948); *accord Ogden v. CDI Corp.*, 474 F. App'x 662, 663 (9th Cir. 2012). Accordingly, it is "settled" in that circuit that "the defendant employer must prove by a preponderance of the evidence that he … m[et] the … test[] for exemption." *Dickenson v. United States*, 353 F.2d 389, 392 (9th Cir. 1965).

The Tenth Circuit too "endorse[s]" the "conclusion that a preponderance is the proper evidentiary standard for FLSA exemptions." *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1158 (10th Cir. 2012). The FLSA does not impose "a heightened evidentiary standard" like "'clear and convincing evidence.'" *Id.* (quoting *Fowler v. Incor*, 279 F. App'x 590, 592 (10th Cir. 2008)). "Instead, the ordinary burden of proof—preponderance of the evidence—controls." *Id.* While older Tenth Circuit cases used the phrase "plainly and unmistakably," they rested on "a misquote" of the proposition that FLSA exemptions should be "narrowly construed," which cannot justify a heightened "evidentiary burden" for FLSA exemptions. *Id.* at 1156-57 (citations omitted).

Finally, in the Eleventh Circuit, an "employer has the burden of establishing by a preponderance of the evidence that it is entitled to the benefit of an exemption" from the FLSA. *Dybach v. State of Fla. Dep't of Corr.*, 942 F.2d 1562, 1566 n.5 (11th Cir. 1991). That court has thus affirmed district court decisions instructing juries to find the applicability of an FLSA exemption "by a preponderance of the evidence." *E.g.*, *Elliott v. Flying J., Inc.*, 243 F. App'x 509, 510-11 (11th Cir. 2007).

2. In stark contrast, the Fourth Circuit has "unequivocally held that the proper standard is clear and convincing evidence." *Desmond*, 564 F.3d at 691 n.3. The Fourth

Circuit has applied that standard repeatedly. *E.g.*, *Morrison v. County of Fairfax*, 826 F.3d 758, 765 (4th Cir. 2016); *Calderon v. GEICO Gen. Ins. Co.*, 809 F.3d 111, 121 (4th Cir. 2015); *Williams v. Genex Servs., LLC*, 809 F.3d 103, 109 (4th Cir. 2015); *Shockley*, 997 F.2d at 21. In the decision below, the Fourth Circuit doubled down, declaring its precedent "well established" and denying rehearing en banc to redress the circuit split on the FLSA burden-of-proof question. Pet.App.1a-2a, 12a.

3. Courts and commentators recognize the split. The Fourth Circuit below acknowledged "critiques from other circuits," Pet.App.13a, and previously recognized the split "from other jurisdictions, including the Court of Appeals for the Seventh Circuit," *Desmond*, 564 F.3d at 691 n.3. The D.C. Circuit, without taking a side, has noted that "sister circuits variously state" the burden for proving FLSA exemptions. *Smith v. Gov't Emps. Ins. Co.*, 590 F.3d 886, 891 n.5 (D.C. Cir. 2010). Other state and federal courts highlight the split too.[1]

Law-review articles likewise recognize that the Fourth Circuit's position is "contrary" to "[t]he overwhelming majority of courts[']." Gregory S. Fisher, *An Evaluation of Alaska's Standard for Wage and Hour Exemptions*, 28 Alaska L. Rev. 97, 107 (2011). Other commentators note the "dispute in the Circuits regarding the

---

[1] *E.g.*, *Resurrection Bay Auto Parts, Inc. v. Alder*, 338 P.3d 305, 308 n.14 (Alaska 2014) ("[O]ther than the Fourth, the circuits that have explicitly adopted a standard of proof for applicability of FLSA exemptions require proof by a preponderance of the evidence."); *Abouel-Seoud v. United States*, 136 Fed. Cl. 537, 563-64 (2018) (collecting cases); *Rose v. Chem. Lime, Ltd.*, 2012 WL 13136337, at *2 (W.D. Tex. Feb. 29, 2012) (same).

level of proof required" to prove FLSA exemptions. 7 N. Peter Lareau et al., *Labor and Employment Law* § 180.05 n.18 (Sept. 2023 update).[2]

Only this Court can resolve this clear, entrenched split. Three circuits—the Sixth, Seventh, and Tenth—have expressly considered and rejected heightened evidentiary standards for FLSA exemptions. *Lederman*, 685 F.3d at 1158; *Renfro*, 497 F.3d at 576; *Yi*, 480 F.3d at 507-08. For its part, the Fourth Circuit has hewed to its outlier position since 1993, despite multiple calls to revisit the issue. Indeed, the Fourth Circuit refused to rehear this case en banc notwithstanding the panel's indication below that the en banc court might want "to revisit" its FLSA burden-of-proof precedents. Pet.App.15a. Only this Court can correct this glaring disparity on a critical, frequently litigated question of federal law.

II. The Question Presented Is Recurring, Important, and Squarely Presented

1. The burden of proof for FLSA exemptions is a question of exceptional and recurring importance. The FLSA has a massive reach, covering over 140 million workers—most of the U.S. workforce. U.S. Dep't of Lab.,

---

[2] *Accord* Justin R. Barnes & Jeffrey W. Brecher, *Fourth Circuit Panel Questions Validity of Court's Burden of Proof for FLSA Overtime Exceptions*, JacksonLewis (Aug. 7, 2023), https://tinyurl.com/btukd9ua (noting "circuit court split" including decision below); C. Lance Gould, *The FLSA's Executive Exemption: A Circuit-by-Circuit Survey*, https://tinyurl.com/ybefxhmb (discussing "disagreement" on question presented); Parks, Chesin & Walbert, *FLSA Exemptions and the Burden of Proof in a Federal Unpaid Overtime Case in Georgia* (Aug. 11, 2023), https://tinyurl.com/4rffzbn2 (describing "disagreement among the federal appeals courts" including decision below).

Wage & Hour Div., *Fact Sheet #14: Coverage Under the Fair Labor Standards Act* (July 2009), https://tinyurl.com/yc598cpy. There are 1.1 million businesses in the Fourth Circuit, employing 14.8 million people. U.S. Bureau of Lab. Stat., *Percent Change in Number of Business Establishments by State* (Dec. 2022), https://tinyurl.com/289ertd2; U.S. Bureau of Lab. Stat., *Employment by State* (July 2023), https://tinyurl.com/mtdrcwxm.

Unsurprisingly, the FLSA is litigated extremely frequently: In 2022, FLSA cases accounted for 45% of all new federal labor cases. *See* Admin. Off. of the U.S. Cts., *U.S. District Courts—Civil Cases Filed, by Nature of Suit* tbl. 4.4 (Sept. 30, 2022), https://tinyurl.com/wvvvmjcc (6,133 of 13,529 labor cases involved the FLSA).

The FLSA's 34 exemptions from its minimum-wage and overtime requirements are "the usual means by which employers" defend FLSA lawsuits. Laurie E. Leader, *Wages & Hours: Law and Practice* § 3:01 (Sept. 2023 update); *see* 29 U.S.C. § 213(a)-(b). Accordingly, the lion's share of this Court's recent FLSA cases arose from disputes over the application of an FLSA exemption. *E.g.*, *Helix*, 143 S. Ct. 677; *Encino*, 138 S. Ct. 1134; *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016); *Christopher*, 567 U.S. 142. The burden of proof impacts all of those cases under all 34 exemptions.

2. What burden of proof applies in FLSA cases is "almost always crucial to the outcome." *Lederman*, 685 F.3d at 1155. As the Fourth Circuit recognizes, erroneously applying a heightened burden of proof is a "serious" error. *Verisign, Inc. v. XYZ.COM LLC*, 891 F.3d 481, 486 (4th Cir. 2018) (citation omitted). Clear and convincing evidence is a "heavy burden." *Morrison*, 826 F.3d at 773.

The evidence must "produce[] in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations." *United States v. Watson*, 793 F.3d 416, 420 (4th Cir. 2015) (citation omitted). Other circuits' preponderance standard, by contrast, merely requires "that the existence of a fact [be] more probable than its nonexistence." *United States v. Watkins*, 10 F.4th 1179, 1184 (11th Cir. 2021) (citation omitted).

That vast gulf will frequently change outcomes. The Fifth Circuit, for example, has granted summary judgment to an employer under the preponderance standard even when evidence "point[ed] in both directions." *Faludi*, 960 F.3d at 275. The Sixth Circuit has granted summary judgment under the preponderance standard over a dissent claiming "genuine issues of fact" on the employees' duties. *Lutz*, 815 F.3d at 998 (White, J., dissenting). And the Tenth Circuit has found a jury instruction putting a heightened burden of proof on the employer "prejudicial." *Lederman*, 685 F.3d at 1160. Because of "conflicting evidence" on "many disputed issues of fact," there was at least a "possibility" "the jury might have based its verdict on the erroneously given instruction." *Id.* at 1159 (citation omitted). With the preponderance standard's level playing field, employers routinely prevail—even when employees put points on the board.

By contrast, when the evidence is remotely close, employers frequently lose under the Fourth Circuit's far more exacting burden of proof. The Fourth Circuit has affirmed the grant of summary judgment to employees even when it was a "very close" call whether the employees were "plainly and unmistakably" covered by an FLSA exemption. *Calderon*, 809 F.3d at 130. And the Fourth Circuit has affirmed summary judgment for employees

when, despite "holistic," "fact-intensive inquiry," the employer did not "meet its heavy burden of showing, by clear and convincing evidence, that an exemption applies." *Morrison*, 826 F.3d at 772-73.

This case sharply illustrates the outcome-determinative nature of the question presented. The district court repeatedly fell back on the burden of proof in ruling for respondents, mentioning the "clear and convincing evidence" standard six times in its opinion. Pet.App.46a, 48a-50a. And, during closing argument, the court questioned respondents' counsel under the premise that "the Court is of the view that it's actually a close question" on whether the FLSA outside-salesman exemption applies, with the result "largely" driven by "how the law assigns burdens of proofs." 3/11/21 Tr. 40:3-6, D. Ct. Dkt. 213. All indications are that petitioners would have won under other circuits' preponderance standard.

Conflicting burdens of proof are intolerable, especially in the FLSA context. The Act permits nationwide collective actions in any district where the employer can be served, even when no member of the collective action works in the district. 29 U.S.C. § 216(b). The Fourth Circuit's outlier precedent thus invites forum-shopping against employers with *any* presence in Maryland, North Carolina, South Carolina, Virginia, or West Virginia.

3. This case is the ideal vehicle to resolve the circuit split. The Fourth Circuit was squarely presented with the correct burden of proof for FLSA exemptions. While acknowledging other circuits' "critiques," the Fourth Circuit hewed to its precedent and denied rehearing en banc. Pet.App.2a, 13a.

As noted, the district court's opinion and comments at trial indicate that the burden of proof almost certainly directed the outcome. *Supra* pp. 6-8, 17. At minimum, because the trial court "applie[d] the incorrect burden of proof in a civil case," the Fourth Circuit would need to follow its "general practice" and "remand the case for a determination under the appropriate standard." *Verisign*, 891 F.3d at 486-87 (citation omitted). The district court made no alternative finding that respondents would prevail under the preponderance standard, so there would be no alternative basis for affirmance on remand.

III. The Decision Below Is Wrong

1. The Fourth Circuit's clear and convincing standard is clearly incorrect. This Court "presume[s]" that "the preponderance-of-the-evidence standard" applies in civil actions. *Grogan v. Garner*, 498 U.S. 279, 286 (1991). That standard "share[s] the risk of error in roughly equal fashion" without "express[ing] a preference for one side's interests." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (citation omitted). Unless some special "basis" exists for "a clear and convincing standard of proof," the ordinary preponderance burden applies. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 107 (2016).

Accordingly, this Court has applied the preponderance standard to treble damages actions and attorneys' fees under the Patent Act. *Id.*; *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 557-58 (2014). This Court has applied the preponderance standard to proving exceptions to discharge under the Bankruptcy Code. *Grogan*, 498 U.S. at 286. And this Court has applied the preponderance standard to securities-fraud cases.

Herman & MacLean, 459 U.S. at 390. The preponderance standard is the norm across civil contexts.

By contrast, the "clear and convincing standard" is "less common[]." *Addington v. Texas*, 441 U.S. 418, 424 (1979). This Court imposes that standard only when "particularly important" "individual interests" are "at stake"—interests "more substantial than the mere loss of money." *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (citation omitted). For example, this Court has applied the clear and convincing standard in civil commitment proceedings, proceedings to terminate parental rights, and deportation cases. *Herman & MacLean*, 459 U.S. at 389 (collecting examples). Those cases remain the "uncommon" "[e]xception[]" to the "rule[] … that parties to civil litigation need only prove their case by a preponderance of the evidence." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989) (plurality op.).

Nothing in the FLSA indicates "that Congress intended to require a special, heightened standard of proof." *See Grogan*, 498 U.S. at 286. The FLSA nowhere mentions a burden of proof, much less a uniquely onerous one. And nothing about minimum-wage and overtime disputes—classic civil fights about the "mere loss of money," *see Santosky*, 455 U.S. at 756—justifies a policy-based exception to the usual preponderance rule.

To the contrary, this Court has "reject[ed] th[e] principle" that FLSA exemptions "should be construed narrowly" against employers as based "on the flawed premise that the FLSA pursues its remedial purposes at all costs." *Encino*, 138 S. Ct. at 1142 (citation omitted). The FLSA's "exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement" and must receive "a fair

reading." *Id.* The FLSA does not load the dice against employers—on statutory interpretation or the burden of proof. The default preponderance standard should apply.

2. The Fourth Circuit has never explained *why* it requires clear and convincing evidence. That language first appeared in a single sentence in *Shockley*, 997 F.2d at 21. *Shockley* cited *Clark v. J.M. Benson Co.*, which in turn quoted the Tenth Circuit's assertion that employers must establish FLSA exemptions "by clear and affirmative evidence." 789 F.2d 282, 286 (4th Cir. 1986) (quoting *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984)).

As the Seventh Circuit has explained, that "clear and affirmative evidence" language traces to the notion that FLSA exemptions must be construed against employers. *See Yi*, 480 F.3d at 506-07. Courts took that statutory-interpretation principle, "garbled" it, and "repeated" it until "the original meaning [was] forgotten," and the language became a burden of proof. *Id.* at 507. The Tenth Circuit has since "endorsed" the Seventh Circuit's view that treating "'clear and affirmative evidence' as a heightened evidentiary standard" was simply a "mistake[]." *Lederman*, 685 F.3d at 1158. Accordingly, the Tenth Circuit applies the preponderance standard "notwithstanding the language employed in *Donovan*"—the case at the bottom of the Fourth Circuit's citation chain. *Id.*

Moreover, this Court has since repudiated the narrow-construction principle on which these old cases rest. Now, FLSA exemptions receive "a fair reading," just like any other statute. *Encino*, 138 S. Ct. at 1142. Whatever basis existed for the clear and convincing standard is gone. The Fourth Circuit sought to "reconcile" *Encino* with its

holding by distinguishing between burdens of proof and principles of "statutory interpretation." Pet.App.14a. On the Fourth Circuit's view, *Encino* only addressed the latter, leaving open the possibility of a heightened burden of proof.

But that reasoning still leaves the Fourth Circuit's inexplicably heightened clear-and-convincing standard without any justification. The Fourth Circuit's earlier cases solely invoked the now-discarded narrow-construction principle. Without that confusion stemming from old cases, "nothing in the statute, the regulations under it, or the law of evidence justifies" a heightened burden of proof in FLSA cases. *Yi*, 480 F.3d at 506. The ordinary preponderance of the evidence standard should apply to establishing FLSA exemptions, just as that standard applies to countless comparable issues across civil matters.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDUARDO S. GARCIA
JEFFREY M. SCHWABER
STEIN SPERLING BENNETT
DE JONG DRISCOLL PC
1101 Wootton Parkway,
Suite. 700
Rockville, MD 20852

LISA S. BLATT
Counsel of Record
SARAH M. HARRIS
AARON Z. ROPER
IAN M. SWENSON
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

SEPTEMBER 5, 2023