No. 23-217

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

## RESPONDENTS' BRIEF IN OPPOSITION


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## QUESTION PRESENTED

Whether the Court should grant review to consider the evidentiary standard for proving that a Fair Labor Standards Act exemption applies, when the standard is rarely, if ever, outcome determinative and made no difference in this case.

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## INTRODUCTION

The Fair Labor Standards Act (FLSA) provides minimum-wage and overtime protections for employees, while specifying that certain categories of employees are exempt from those protections. When employees bring suit alleging that an employer failed to provide protections required by the FLSA, the employer may rely on an FLSA exemption as an affirmative defense to liability. When an employer raises such a defense, the question how the employees spent their working time is a question of fact, and the question whether that work exempts them from the FLSA is a question of law.

The question presented in the petition—whether an employer asserting an exemption as an affirmative defense must satisfy a "preponderance of the evidence" standard or a "clear and convincing evidence" standard—is implicated when there is a factual dispute about how the employees primarily spent their time. Cases where the standard of proof is outcome determinative are exceedingly rare: The Fourth Circuit has held that employers' evidence must meet a clear and convincing standard since 1993, and not once in thirty years has the Fourth Circuit identified a case where the standard of proof made a difference. E.M.D. Sales Inc.'s (EMD) contention notwithstanding, the evidentiary standard plainly did not make a difference in *Calderon* or *Morrison*—the only two Fourth Circuit cases that the petition identifies as implicating the standard.

The standard likewise did not make a difference in this case, where, after hearing nine days of trial testimony, including testimony from the company

Chief Executive Officer that she had no actual knowledge of the respondents' daily job duties, the district court determined that the employer established a mere "*possibility*" that the employees primarily performed sales tasks and so qualified as exempt. Pet. App. 49a. The employer's evidence therefore fell short of *any* standard of proof necessary to establish the affirmative defense.

In short, the answer to the question presented in the petition will not affect the outcome of this case—and if history is any guide, many, if any, future cases. The question presented therefore does not merit this Court's review.

## STATEMENT

### A. Statutory and Regulatory Background

The FLSA protects "covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). To that end, it requires employers to pay a minimum wage, 29 U.S.C. § 206, and overtime pay for "a workweek longer than forty hours" at a rate of at least 1.5 times the employees' regular rate, *id.* § 207(a).

The FLSA, however, does not cover all employees. Among those who are exempt from FLSA protections are employees who work in executive, administrative, or professional capacities, and, relevant here, those who work as an "outside salesman." *Id.* § 213(a)(1).

The term "outside salesman" encompasses employees whose "primary duty is … making sales" and who "customarily and regularly" work away from the employer's place of business in performing that

primary duty. *See* 29 C.F.R. § 541.500(a). The term "primary duty" means the "principal, main, major or most important duty that the employee performs." *Id*. § 541.700. "In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work," as well as other work that furthers the employee's sales efforts. *Id*. § 541.500(b).

**B. Factual and Procedural Background**

Plaintiff-Respondents Faustino Sanchez Carrera, Magdaleno Gervacio, and Jesus David Muro are current and former employees of EMD, a distributor of Latin American, Caribbean, and Asian food products to grocery stores in the Washington, D.C., metropolitan area. Pet. App. 7a. EMD delivers its products directly to grocers and provides inventory management services by sending employees, such as respondents, to perform daily tasks at their assigned stores, including restocking, removing damaged and expired items from store shelves, and issuing credits to clients for removed items. *Id*. at 7a–8a.

**1.** Respondents sued EMD, alleging that the company and its CEO had withheld overtime wages in violation of the FLSA. As an affirmative defense, EMD contended that respondents were outside salesmen and, therefore, exempt from the FLSA's overtime protections.

In litigation, the parties agreed that respondents established the three elements of an FLSA claim—namely, that they (1) were employed by the defendant, (2) worked overtime hours for which they were not compensated, and (3) were capable of proving the

amount and extent of their overtime work. *Id.* at 44a–45a (citing *Davis v. Food Lion*, 792 F.2d 1274, 1276 (4th Cir. 1986)). The parties also agreed that, although respondents could sometimes make sales to independent grocery stores on their route, they spent the majority of their time servicing chain grocery stores like Walmart, Safeway, and Giant Food, where sales agreements generally resulted from high-level negotiations between corporate buyers and EMD management. *Id.* at 8a, 38a.

The parties dispute whether respondents' "primary duty" was to "make sales, and, specifically, whether sales representatives could make sales at the chain stores in which they spent most of their time." *Id.* at 9a–10a. Respondents argued that "the orders they took for EMD products at chain stores were controlled by sales terms already negotiated by management" and "their time was spent only on promotional and inventory-management activities—restocking and rearranging products, issuing credits, taking orders—that were incidental to sales made at higher levels." *Id.* at 10a. Therefore, they argued, they fall outside the scope of the exemption. Respondents supported their position through evidence showing that "EMD establishes its business relationships with chain stores at the highest levels of its organization" and that EMD management negotiated "quantity, price, and other terms" of product sales with chain store corporate buyers. *Id.* at 38a. Current and former chain store corporate buyers and chain store managers testified that store managers are given detailed maps called "planograms" by their corporate higher-ups that indicate where to place items on shelves, and that "[b]oth in policy and practice, store managers are not

permitted to deviate from the planogram or order additional displays" from EMD or other suppliers. *Id.*

EMD conceded that "chain store managers are never able to sell new types of products without first clearing them with their corporate offices." *Id.* at 48a (emphasis omitted). EMD argued, though, that employees could potentially make sales to chain store managers by "securing additional space" on chain store shelves for its products. *Id.* at 10a; *see id.* at 39a. And some EMD sales representatives testified that they had done so on occasion. *Id.* at 39a. But EMD's CEO disclaimed knowledge of "how sales representatives allocate their time across the various stores on their routes," *id.* at 37a, and the district court characterized EMD management's testimony that employees could make sales as "aspirational" rather than empirical, *id.* EMD also presented testimony that, although "chain stores' corporate offices afford store managers no leeway to stray from the planogram or to set up unsanctioned displays," store managers may sometimes violate that prohibition. *Id.* at 39a, 49a.

After a nine-day bench trial, the district court ruled for respondents on liability. In considering whether the "outside salesman" exemption applied, the court considered "(1) whether [they] make sales in their roles as sales representatives, and (2) whether making sales is [their] primary duty." *Id.* at 46a.

On the first question, whether respondents make sales under the meaning of the FLSA, the court found that "a Plaintiff would make his own sale if he placed an order for EMD products beyond the scope of … high-level negotiations" between EMD's man-

agement and chain stores' corporate representatives, "either by selling a new *type* of product or by selling products *outside* of the spaces already negotiated by EMD's management." *Id.* at 48a. At trial, the court reasoned, respondents "'presented substantial evidence'" that, with respect to chain stores, they were "generally not able to order [and sell] products beyond what had already been arranged." *Id.* at 47a (quoting *Killion v. KeHE Distribs., LLC*, 761 F.3d 574 (6th Cir. 2014)). Consequently, while respondents could sometimes make sales at independent stores, EMD demonstrated only "a *possibility*—but not clear and convincing evidence—that sales representatives can make their own sales at chain stores." *Id.* at 49a.

Turning to the question whether making sales was the primary duty of respondents, the district court determined that EMD had failed to demonstrate even that making sales was the primary duty of sales representatives at independent grocery stores, let alone at the chain stores where respondents spent the bulk of their time. *Id.* at 50a. Instead, the court concluded, "sales representatives are tasked primarily with executing the terms of sales that were previously made by EMD's management and key account managers" at both independent and chain stores. *Id.* at 49a. "[A]lthough EMD would undoubtedly welcome the efforts of its sales representatives to sell products beyond the planogrammed spaces in chain stores," the court observed, "such efforts are ancillary to [their] primary responsibility: ensuring that EMD receives the full benefit of the bargain obtained by EMD's key account managers and management." *Id.* at 49a–50a. In short, EMD failed to demonstrate that

respondents' "primary duty" was the making of sales. *Id.* at 50a.

In addition, the court held that, because EMD lacked objectively reasonable grounds for believing that respondents were exempt, an award of liquidated damages was appropriate. *Id.* at 52a, 56a. As to the issue of willfulness, however, the court agreed with EMD, finding that the violations were not willful and thereby limiting the damages award to a two-year period. *Id.* at 53a. Applying these findings, the court calculated $303,876.57 in damages. *Id.* at 32a–33a.

EMD moved to alter or amend the portion of the judgment awarding liquidated damages, arguing that it acted in good faith and had reasonable grounds for believing that respondents were outside salespeople for purposes of the FLSA. *Id.* at 21a. The district court reviewed its findings, rejected EMD's arguments, and denied the motion. *Id.* at 21a–29a.

**2.** On appeal to the Fourth Circuit, EMD challenged the district court's liability finding and the award of liquidated damages. Respondents cross-appealed the court's willfulness finding and attendant application of the two-year statute of limitations. The court of appeals affirmed in full, and only the liability finding is at issue here.

On liability, EMD argued only that the district court erred in holding that the employer must show "clear and convincing evidence" to satisfy its burden of proving that the exemption for outside salesmen applied. Pet. App. 12a. Finding no error, the Fourth Circuit agreed that its precedent compelled application of the "clear and convincing" standard. *Id.* at 13a. The court also rejected EMD's argument that

application of the standard was foreclosed by this Court's decision in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1142 (2018). *Encino Motorcars*, the court explained, "is 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. That question is "distinct from the question of what burden of proof an employer bears in proving the facts of its case—here, what EMD's employees actually *do* on the job." *Id.* at 15a. These precedents could therefore be read "'harmoniously'" by "giving a fair, not narrow, legal construction to the FLSA's exemptions while also requiring employers to prove the facts that would put their employees within those exemptions by clear and convincing evidence." *Id.* (quoting *Taylor v. Grubbs*, 930 F.3d 611, 619 (4th Cir. 2019) (internal citation omitted)).

EMD filed a petition for rehearing en banc. No member of the court called for a vote, and the petition was denied. *Id.* at 2a.

## REASONS FOR DENYING THE WRIT

EMD asks this Court to address whether an employer asserting that an FLSA exemption applies must prove that affirmative defense by a preponderance of the evidence or by clear and convincing evidence. The standard of proof arises with respect to the factual determination of the employee's primary duty, and the difference between these standards almost never makes a difference to the outcome of a case. Indeed, the Fourth Circuit has never identified a case where the standard was dispositive, and the standard made no difference in this case. Moreover, in the thirty years since the Fourth Circuit first

stated the standard, no evidence has emerged to support EMD's half-hearted suggestion that it invites forum shopping.

## I. The answer to the question presented is seldom—if ever—dispositive.

When an employer asserts an exemption as an affirmative defense to liability in an FLSA case, the question how workers "spent their working time" is a "question of fact," and the question whether "their particular activities excluded them from the overtime benefits of the FLSA" is a question of law. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). Accordingly, the evidentiary standard of proof for an employer to demonstrate the applicability of an FLSA exemption is relevant only when there is a factual dispute as to how employees spend their time. Edge cases where the standard of proof determines the outcome of an FLSA case are exceedingly rare.

**A.** Although EMD declares that "employers frequently lose" in the Fourth Circuit, Pet. 16, the petition does not identify a single case where an employer lost as a result of the standard of proof. It cites only two cases in service of its proposition, *Calderon v. GEICO General Insurance Co.*, 809 F.3d 111 (4th Cir. 2015), and *Morrison v. County of Fairfax, VA*, 826 F.3d 758 (4th Cir. 2016)—neither of which turned on the evidentiary standard. *See* Pet. 16–17.

With regard to *Calderon*, the petition states that the Fourth Circuit wrote that it was a "'very close' call whether the employees were 'plainly and unmistakably' covered by an FLSA exemption." *Id.* at 16. That statement is true, but *Calderon* has nothing

to do with EMD's question presented. The full quotation makes clear that *Calderon* was not suggesting that the case involved a "very close" *factual* question that would implicate the standard of proof. Rather, *Calderon* was describing "a very close *legal* question"—namely, whether the employees' primary duty fell within an FLSA exemption. *Calderon*, 809 F.3d at 130 (emphasis added).

Specifically, in *Calderon*, the employer, GEICO, asserted as an affirmative defense the FLSA's exemption for "any employee employed in a bona fide … administrative … capacity." 29 U.S.C. § 213(a)(1). To determine whether the exemption applied, the court started with step one: identifying the employees' primary duty. On this step, "the summary judgment record clearly showed that the [plaintiffs'] primary duty was the investigation of suspected fraud." *Calderon*, 809 F.3d at 122. Although the employer pointed to additional duties, the court noted that "nothing in the record … would support a conclusion that [those] responsibilities were any more than a minor part" of the employees' jobs. *Id.* at 122 n.10. Having answered the factual question based on the unambiguous record, the court turned to the legal question: whether "the primary duty qualifie[d] as 'exempt work'" under the FLSA's administrative exemption. *Id.* at 122. That the court found that *legal* question to be "close" does not implicate an evidentiary standard of proof. It is thus irrelevant to the question presented by EMD and irrelevant to this case.

Likewise, the decision in *Morrison* had nothing to do with the evidentiary standard of proof. Although the Fourth Circuit in *Morrison* stated that the standard was whether "a reasonable jury could find

that the [employer] has met its burden of showing, by clear and convincing evidence," that the asserted exemption applies, 826 F.3d at 768, the opinion cannot reasonably be read to turn on the evidentiary standard. As the court of appeals explained, the employer "produced *no* evidence" of how much time the plaintiffs spent performing exempt work, and the employees produced "unrebutted" evidence that they spent "very little" time on exempt work. *Id.* at 770 (emphasis added); *see also id.* at 772 ("[T]he County has produced no evidence showing that the [plaintiffs] perform the kind of specific high-level management tasks ordinarily associated with executives or administrators: planning and controlling a budget, selecting new employees, setting rates of pay and hours of work, and the like.").

*Morrison* and *Calderon* are not anomalies. Of the FLSA exemption cases decided by the Fourth Circuit where the clear and convincing standard is mentioned, the standard was not dispositive of the outcome in a single one. In many of the cases, the outcome turned on the legal question whether an exemption applies to a set of tasks that were not meaningfully factually contested.[1] In one case, the Fourth Circuit found an exemption applicable to one set of employees and no exemption applicable to another, where the record offered "no basis" to

[1] *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688 (4th Cir. 2009); *Jones v. Virginia Oil Co.*, 69 F. App'x 633 (4th Cir. 2003); *Vogel v. Am. Home Prods. Corp. Severance Pay Plan*, 122 F.3d 1065 (4th Cir. 1997).

conclude that second set was exempt.[2] In the remaining cases, the court resolved a factual dispute as to how an employee spent his time in favor of the employer.[3]

The dearth of authority is particularly noteworthy given the longevity of the standard: Three decades of Fourth Circuit precedent do not offer a single example of a case rising or falling on the standard.

**B.** Tellingly, the petition does not cite a single district court case where it believes the standard made a difference to the outcome. And while the amicus brief of the Chamber of Commerce attempts to do so, it falls short. Chamber Br. at 18–20.

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[2] In *Shockley v. City of Newport News*, 997 F.2d 18 (4th Cir. 1993), the court stated in its introduction that employers must prove the applicability of an exemption by "clear and convincing evidence." *Id.* at 21. Without referring to the standard again, it found that "the evidence was sufficient to support [the district court's] findings" that the executive exemption applied to some of the employees. *Id.* at 26. As to another set of employees, the court found "no basis in the record for concluding" that the administrative exemption applied. *Id.* at 29. As to a third set of employees, the court stated briefly that the district court had "made no factual findings regarding how much time [they] spent on non-exempt work," and accordingly remanded for further consideration. *Id.*

[3] *Williams v. Genex Servs., LLC*, 809 F.3d 103 (4th Cir. 2015) (resolving factual questions in favor of the employer and finding the professional exemption applicable); *Altemus v. Fed. Realty Inv. Tr.*, 490 F. App'x 532 (4th Cir. 2012) (resolving factual questions in favor of the employer and finding the administrative exemption applicable); *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (4th Cir. 2004) (resolving factual questions in favor of the employer and finding the ministerial exemption applicable).

The brief first cites *Jackson v. Reliasource, Inc.*, Civil Action No. WMN-16-358, 2017 WL 193294 (D. Md. Jan. 18, 2017), arguing that the district court "suggest[ed] that the employer would have prevailed under the preponderance standard, [and] denied summary judgment because it could not say that the evidence was clear and convincing." Chamber Br. at 18. The court did no such thing. After stating the "clear and convincing" standard at the outset, *Jackson*, 2017 WL 193294, at *3, the court found that "the record [was] abounding with genuine disputes of material fact" that precluded summary judgment and noted that the employer "might ultimately be able to establish Plaintiff's exempt status." *Id.* at *4–*5. Similarly, in *Chaplin v. SSA Cooper, LLC*, No. 2:15-CV-01076-DCN, 2017 WL 2618819 (D.S.C. June 16, 2017), although the court stated the standard, it was "unconvinced" that the relevant Department of Labor regulation concerning the exemption was satisfied and stated that, "at the very least, there are genuine issues of material fact," as well as "competing testimony" on the employees' level of responsibility. *Id.* at *7.

Last, the Chamber points to *Yuen v. U.S. Asia*, 974 F. Supp. 515 (E.D. Va. 1997). Chamber Br. at 19. There, the district court identified a factual dispute with respect to how the employee spent her time and declined to grant summary judgment to the employer "in light of" the standard of proof. 974 F. Supp. at 527. But a single "close" case from 1997 is hardly evidence of an important issue worthy of this Court's review. *Id.* at 527 n.15.

**C.** Seeking to make the standard meaningful, EMD very briefly cites three cases from outside the Fourth Circuit to argue that other circuits are

friendlier to employers. *See* Pet. 16. None of the cases, however, support EMD's point.

To begin with, EMD cites *Faludi v. U.S. Shale Solutions, L.L.C.*, 950 F.3d 269 (5th Cir. 2020). That case, however, does not remotely implicate the standard of proof for establishing an employee's primary duty. Rather, the issue addressed by the court was whether the plaintiff had made a prima facie case establishing that he was an "employee" within the meaning of the FLSA. *Id.* at 276.

EMD also relies on *Lutz v. Huntington Bancshares, Inc.*, 815 F.3d 988 (6th Cir. 2016), stating that it is relevant because the Sixth Circuit affirmed summary judgment "under the preponderance standard over a dissent claiming 'genuine issues of fact' on the employees' duties." Pet. 16 (quoting *Lutz*, 815 F.3d at 998 (White, J. dissenting)). EMD is correct that the dissenting judge believed that factual disputes should have precluded summary judgment for the employer, but that disagreement does not demonstrate that the standard of proof was dispositive. To the contrary, the dissent shows that, under a preponderance of the evidence standard, just as under a clear and convincing standard, factual disputes can preclude summary judgment. In any event, the panel majority did not believe that the case involved disputed issues of fact, so the evidentiary standard did not affect its consideration.

Finally, *Lederman v. Frontier Fire Protection, Inc.*, 685 F.3d 1151 (10th Cir. 2012), reversed and remanded where a jury instruction stated that the employer bore the burden of proving that an exemption "plainly and unmistakably" applied. The court held that the instruction incorrectly stated the

standard and that the error only "might have" been prejudicial. *Id.* at 1159 (explaining that "the 'might have' threshold, as its language suggests, requires reversal 'even if that possibility is very unlikely.'" (citations omitted)).

## II. The evidentiary standard did not affect the outcome of this case.

This case falls into the same category as the overwhelming majority of FLSA cases in the Fourth Circuit: The standard of proof was immaterial to the outcome. Here, under either a preponderance of the evidence standard or a clear and convincing evidence standard, EMD would not prevail.

**A.** The evidence presented at trial included respondents' testimony that their primary responsibility is "inventory management," including "restocking, replenishing depleted products, removing damaged and expired items from the shelves, and issuing credits to the serviced stores for removed items." Pet. App. 36a–37a. The court also heard testimony of current and former chain store buyers and store managers that "store managers are not permitted to deviate" from inventory plans established at the corporate level or to "order additional displays." *Id.* at 38a–39a; *see id.* at 48a–49a (noting the testimony of three chain store corporate representatives "that chain stores' corporate offices afford store managers no leeway to stray from the planogram or to set up unsanctioned displays").

EMD management, by contrast, "framed their testimony in aspirational terms—emphasizing that the main limitation on sales representatives' ability to sell is their own initiative" but acknowledging a lack of knowledge as to "how sales representatives

allocate their time across the various stores on their routes." *Id.* at 37a. In addition, some EMD sales representatives testified that they had, on occasion, "been successful in negotiating additional shelf space" for products. *Id.* at 39a. And one former Walmart buyer acknowledged the difficulty of monitoring the compliance of every store manager nationwide. *Id.*

As the district court concluded, the most that could be said is that EMD "demonstrated that there is a *possibility*" that employees were able to make sales at chain stores. *Id.* at 49a. After "consideration of all the evidence," the court found that the primary duty of sales representatives is not sales, but rather "executing the terms of sales that were previously made by EMD's management and key account managers." *Id.*[4]

In sum, the record in this case easily negates any suggestion that the determination of respondents' primary duty was a close case, such that the evidentiary standard altered the outcome.

**B.** The petition does not directly argue that EMD would prevail under a preponderance standard. To

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[4] The court further found: "[S]ales representatives are primarily occupied with keeping shelves full, keeping shelves clean, and placing orders promptly. The fact that sales representatives are subject to suspension for failure to carry out these duties further illustrates that EMD regards servicing stores as a key responsibility of sales representatives. Indeed, EMD's commission scheme for sales representatives does not differentiate between orders placed to fill chain store space previously negotiated by EMD's management and orders for space beyond what was negotiated by EMD's management." Pet. App. 49a.

the extent that the petition suggests that it might, however, that suggestion finds no support in the district court's opinion. In fact, although EMD identifies the Sixth Circuit as in conflict with the Fourth Circuit, *see* Pet. 16, the district court relies on and describes at length *Killion v. KeHE Distributors, LLC*, 761 F.3d 574 (6th Cir. 2014), which applied the preponderance standard to similar facts yet likewise held that the employees' primary duty was making sales. *See* Pet. App. 46a–48a. Further, the court found that EMD lacked "objectively reasonable grounds for believing" that respondents fell within the FLSA's outside sales exemption. *Id.* at 52a.

In this regard, EMD's characterization of the district court's treatment of the standard of proof is misleading. Suggesting that the district court believed the factual question to be close, EMD states that, "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." Pet. 17 (quoting 3/11/21 Tr. 40:3–6, D. Ct. Dkt. 213). And EMD maintains that the court "suggested that [the employees] would 'barely' prevail, 'largely as a result of how the law assigns burdens of proof.'" Pet. 6 (quoting 3/11/21 Tr. 40:5–6, D. Ct. Dkt. 213). The record belies these characterizations.

In reality, the district court posited that the case was close only *hypothetically*, to probe respondents' argument that—for the purposes of establishing willfulness—the existence of the litigation should have put the employer on notice that its compensation practices violated the FLSA:

> Let's assume that it goes your way, but it's really a close question. … [I]f the evidence isn't exactly on all fours with the clarity with which you and co-counsel present the argument, then that doesn't mean that the lawsuit by itself puts [the CEO] in a position of, you know, enlightenment such that … her continuing to pay according to the commission model is per se willful.

3/11/21 Tr. at 41:6–16. Indeed, the transcript suggests that the district court, after hearing nine days of trial testimony, did *not* think that the burden of proof made a difference because it posited the circumstance of a "close question" where the standard of proof was dispositive as a counterfactual scenario. *Id.* at 40:3–9 ("Suppose … [t]hat the picture as to what they actually do is pretty muddled, such that if Congress had placed the burden on you, you would have lost on liability. Let's suppose that that's the circumstance that emerges.").

In short, if this Court were to grant the petition, its answer to the question presented would not only have little—if any—impact on future cases, it would have no impact on the outcome of this case.

## III. EMD's claim that the Fourth Circuit's standard encourages forum-shopping is belied by the historical record.

The petition asserts that the Fourth Circuit's standard "invites forum-shopping." Pet. 17. But although the Fourth Circuit has applied the clear-and-convincing standard for at least *thirty years*, *see Shockley v. City of Newport News*, 997 F.2d 18, 21 (4th Cir. 1993), the petition cites no evidence that such a phenomenon has occurred. Nor does it appear

that businesses in the Fourth Circuit have borne an onslaught of FLSA cases. In the most recent year for which data is available, 6.8 percent of all civil cases were filed in the district courts of the Fourth Circuit, but just 6.4 percent of all labor cases were filed there. Table C-3—U.S. District Courts—Civil Federal Judicial Caseload Statistics (Mar. 31, 2023).[5]

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 2023

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[5] https://www.uscourts.gov/statistics/table/c-3/federal-judicial-caseload-statistics/2023/03/31.