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

REPLY BRIEF FOR PETITIONERS

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Respondents do not dispute that this case squarely presents an entrenched circuit split over the burden of proof for employers to establish any of the 34 exemptions from minimum-wage and overtime requirements under the Fair Labor Standards Act (FLSA). The Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits all apply the default standard for civil litigation: a preponderance of the evidence. Pet. 10-12. The Fourth Circuit requires clear and convincing evidence, Pet. 12-13—a rule respondents notably do not defend on the merits. This stark, undeniable split will not resolve without this Court's intervention.

Respondents have just one objection to certiorari: the question presented purportedly does not affect outcomes.

But the entire point of a burden of proof is to affect outcomes. Respondents do not dispute that clear and convincing evidence is a markedly higher standard than a preponderance. Courts and juries resolve the applicability of the 34 FLSA exemptions thousands of times every year, meaning that courts within the Fourth Circuit routinely hold employers to a higher standard that applies nowhere else. That recurring disuniformity on a massively litigated federal statute obviously alters outcomes and amply warrants this Court's review.

Unsurprisingly, amici representing hundreds of thousands of businesses employing millions of Americans confirm the issue's "profound impact on the business community." Chamber Br. 15. The burden of proof "is particularly important in FLSA cases," which are highly "fact-intensive" with frequent "close calls." Chamber Br. 17; WLF Br. 13. The Fourth Circuit's erroneously high burden of proof affects litigation strategies and employers' odds from start to finish, by skewing settlement incentives and letting meritless claims linger to trial. Indeed, empirical studies confirm that the difference in these burdens of proofs routinely affects outcomes. Chamber Br. 4-5, 16.

This case is the perfect vehicle to resolve this important split. The district court repeatedly applied an erroneous clear and convincing standard that has been front and center at every stage of this case. But under the FLSA, EMD should have to prove the application of an exemption by only a preponderance, not clear and convincing evidence. Whether EMD can meet the preponderance standard is a question for remand. While respondents now insist they would prevail under that standard, the dis-

trict court dispelled that hypothesis by repeatedly emphasizing the heavy clear and convincing burden in ruling for respondents.

ARGUMENT

Respondents do not deny the circuit split, identify any vehicle problems, or defend the Fourth Circuit's reasoning. Instead, respondents exclusively argue that the question presented is rarely outcome determinative. But burdens of proof *exist* to alter outcomes, and this Court frequently grants certiorari in burden-of-proof cases.[1]

1. What burden of proof applies in FLSA cases is a question of exceptional national importance. The question presented applies in thousands of cases each year that implicate any of the FLSA's 34 exemptions. Pet. 15; *see* Chamber Br. 7-8 (collecting recent cases).

As amici representing businesses of all sizes and diverse industries note, the burden of proof "has a profound real-world impact" on the 1.1 million businesses in the Fourth Circuit. Chamber Br. 5; Pet. 15. FLSA awards can be massive, with "potentially crushing" judgments in the millions for even small businesses. Chamber Br. 8-9. The Fourth Circuit's heightened standard "impose[s] significant costs on employers," "create[s] competitive imbalances," and threatens job losses and "outsourcing." Chamber Br. 5, 20.

Those harms arise because the preponderance and clear and convincing standards are vastly different. The

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[1] *E.g.*, *Murray v. UBS Sec., LLC*, No. 22-660 (argued Oct. 10, 2023); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93 (2016); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014); *Medtronic, Inc. v. Mirowski Fam. Ventures, LLC*, 571 U.S. 191 (2014); *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91 (2011); *see* Pet. 18-19.

preponderance standard allocates "the risk of error in roughly equal fashion." *Octane Fitness*, 572 U.S. at 558 (citation omitted). Clear and convincing of evidence, by contrast, is "a high standard of proof," *id.* at 557, which requires persuading the fact-finder to "a firm belief or conviction, without hesitancy, as to the truth," *United States v. Watson*, 793 F.3d 416, 420 (4th Cir. 2015) (citation omitted). As empirical evidence confirms, those dramatically different standards produce different results. Chamber Br. 16. Accordingly, courts deem the burden of proof in FLSA cases "almost always crucial to the outcome." *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1155 (10th Cir. 2012) (citation omitted). Ample cases demonstrate how the burden affects outcomes. Pet. 16-17; Chamber Br. 18-20.

Moreover, the burden of proof drives cases from the start. Knowing they will face a much harder battle at trial, employers in the Fourth Circuit face significant pressure to settle weak cases. Chamber Br. 17. And the burden of proof often pushes fact-intensive FLSA cases to trial, preventing courts from weeding out meritless claims on motions to dismiss or summary judgment. Chamber Br. 17.

Disuniformity on the burden of proof also invites forum-shopping given the FLSA's expansive venue and collective-action provisions. Pet. 17; Chamber Br. 21; WLF Br. 16. Respondents (at 18-19) note that the Fourth Circuit's FLSA caseload is not yet an outlier, but do not deny that the temptation for forum-shopping exists.

2. Respondents (at i, 1) dismiss the question presented as "rarely, if ever, outcome determinative" because the Fourth Circuit has never expressly said that a case would come out differently under the preponderance standard. Were magic words necessary, the Tenth Circuit

has said them: The burden of proof in FLSA cases is "almost always crucial to the outcome." *Lederman*, 685 F.3d at 1159 (citation omitted). In any event, this Court has never demanded such magic words to grant review, perhaps because courts rarely add dicta about how cases would fare in a but-for world of different legal rules.

Respondents' efforts to pick apart the importance of the standard of proof in individual cases are unpersuasive, and ignore all the broader reasons why the burden matters. Start with cases from the six circuits applying the preponderance standard, where close calls went employers' way. Respondents' refrain is that courts did not expressly say employers would have lost close cases under a clear and convincing standard. BIO 14-15 (discussing *Lutz v. Huntington Bancshares, Inc.*, 815 F.3d 988 (6th Cir. 2016), and *Lederman*, 685 F.3d 1151). But courts do not need to gratuitously invoke legally incorrect alternative universes to make the obvious point that a close win under a lesser standard becomes a likely loss under a much higher standard.

As for *Faludi v. U.S. Shale Solutions, L.L.C.*, 950 F.3d 269 (5th Cir. 2020), respondents (at 14) object that the case turned on the antecedent question of whether the plaintiff was an employee covered by the FLSA, or an independent contractor. But the Fifth Circuit analyzes that question under the same preponderance standard applicable here, *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 379 (5th Cir. 2019), and, on a divided record, ruled for the employer. *Faludi*, 950 F.3d at 275-76. Again: a close call that could easily have gone the other way under the much harder to satisfy clear and convincing standard.

Respondents (at 9-13) similarly insist that because no Fourth Circuit case specifically says the burden of proof was dispositive, edge cases must be "exceedingly rare."

But close calls are common in the Fourth Circuit, Pet. 16-17; Chamber Br. 18-19, as they are in civil litigation generally.

Take *Calderon v. GEICO General Insurance Co.*, where the Fourth Circuit deemed "very close" whether GEICO investigators are FLSA-exempt administrative employees. 809 F.3d 111, 130 (4th Cir. 2015). Respondents (at 10) note that the court described that inquiry as a "legal question" about whether the investigators met the exemption test, not a factual one about the investigators' duties. But the "ultimate" legal question of whether employees are exempt involves subsidiary factual questions about how the "employees spend their working time" and how "significan[t]" those duties are. *Id.* at 120 (cleaned up). When the bottom-line legal question is "very close," the burden on antecedent factual questions is critical.

Similarly, in *Morrison v. County of Fairfax*, the Fourth Circuit granted summary judgment for employees where the employer could not "meet its heavy burden of showing, by clear and convincing evidence, that an exemption applies." 826 F.3d 758, 773 (4th Cir. 2016). Respondents (at 10-11) claim the employer would have lost under any standard. But the Fourth Circuit's invocation of the clear and convincing standard eleven times in holding that the employer could not meet its "heavy," "substantial burden" after "holistic," "fact-intensive" review strongly signals that the burden mattered. *Id.* at 768, 772-73.

Other close cases within the Fourth Circuit where employers lost include a district court case expressly acknowledging that "the high burden of proof … tips the balance." *Yuen v. U.S. Asia Com. Dev. Corp.*, 974 F. Supp. 515, 527 n.15 (E.D. Va. 1997); *see* Chamber Br. 18-19. Even respondents (at 13) agree the burden mattered

there. But respondents (at 12-13) dismiss equally compelling examples simply because district courts avoided similar magic words. When a court rejects summary judgment by invoking the "formidable evidentiary burden" posed by the "'clear and convincing evidence' standard" that is a strong indication the burden shaped the result. *See Chaplin v. SSA Cooper, LLC*, 2017 WL 2618819, at *7 (D.S.C. June 16, 2017).

Taking another tack, respondents (at 1) downplay the significance of the question presented by reducing FLSA cases to the simple question of "how the employees primarily spen[d] their time." But FLSA cases are "fact-intensive" because they also implicate questions like the nature of employees' duties, how employees are paid, and what level of discretion or authority they enjoy. Chamber Br. 15; WLF Br. 13-15. Those factual complexities are particularly acute for small businesses where employees routinely exercise varied job responsibilities. Chamber Br. 21. Here, for example, the district court heard nine days of testimony about respondents' day-to-day tasks and authority at different kinds of grocery stores. Pet. 6-7. The burden of proof shapes all of those factual issues, as the district court's analysis confirms. Pet.App.48a-50a.

3. Respondents (at 15-18) insist that the burden of proof would not change the outcome here. But this Court grants certiorari to resolve the "correct legal standard," routinely leaving the application of that standard for remand. *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 757 (2023); *accord Slack Techs., LLC v. Pirani*, 598 U.S. 759, 770 (2023); *Younger v. Dupree*, 598 U.S. 729, 738 (2023). Indeed, this Court has twice granted certiorari to reject a clear and convincing burden of proof and remand for lower courts to apply a preponderance test—

EMD's exact ask here. *See Halo Elecs.*, 579 U.S. at 97, 110; *Octane Fitness*, 572 U.S. at 557-58.

Regardless, respondents are incorrect that the burden made no difference here. Respondents (at 15-16) offer a one-sided account of the evidence to assert an easy victory under any standard. But if the clear and convincing standard was irrelevant, the district court surely would not have invoked that standard *six* times in its opinion, or repeatedly questioned respondents' counsel under the premise that this case was "close." Pet. 17. Respondents (at 17) present the court's questioning as "hypothetical[]" and directed at willfulness, but their block quotation (at 18) omits the district court's unqualified remark that "there's a lot to be said" for EMD "on the liab[ility] question." 3/11/21 Tr. 41:2-3, D. Ct. Dkt. 213. In any event, the district court's close attention to the burden of proof after a nine-day trial, both at argument and in its opinion, underscores the pivotal role the burden played.

Respondents (at 17) note that the district court analogized to *Killion v. KeHE Distributors, LLC*, 761 F.3d 574 (6th Cir. 2014), a case from a circuit applying the preponderance standard. That citation does not suggest that petitioners would lose under a preponderance standard. For one, *Killion* never even mentions the burden of proof. Further, the district court looked to *Killion* to identify what facts would, "as a matter of law," satisfy the outside-salesman exception. Pet.App.47a. To determine what the facts *were*, the district court applied the Fourth Circuit's clear and convincing standard. Pet.App.46a.

Respondents (at 17) also invoke the district court's finding that EMD lacked "objectively reasonable grounds" to believe the outside-salesman exemption applied—part of the court's ruling on liquidated damages—as supposed proof that respondents' case was clear-cut.

Pet.App.52a. But the district court deemed EMD's actions "unreasonable" only insofar as the court concluded that EMD failed to adequately investigate the FLSA. Pet.App.51a. The court never suggested that the liability question was clear, and rejected respondents' claim that any violation was "willful." Pet.App.53a.

At trial, some testimony suggested "that sales representatives regularly sell" products at chain stores, consistent with respondents being exempt outside salesmen. Pet.App.48a. Other testimony suggested that sales representatives had "no leeway" to do so. Pet.App.48a-49a. Left with competing evidence in both directions, the district court six times invoked the skewed burden of proof in ruling for respondents. This is a paradigmatic case for why the question presented matters.

4. Neither respondents nor the Fourth Circuit itself has ever offered any defense of the clear and convincing standard on the merits. Under this Court's precedent, a preponderance of the evidence is the normal rule absent contrary statutory evidence or particularly weighty circumstances like the loss of parental rights. The FLSA puts no special thumb on the scale against employers and withholding overtime pay is plainly not analogous to taking away someone's child. Pet. 18-21; Chamber Br. 11-15; WLF Br. 8-12; *see Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). The ordinary preponderance standard should apply to the thousands of cases every year involving the FLSA's 34 exemptions, just as it does across civil litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 13, 2023