No. 23-217

In the Supreme Court of the United States

E.M.D. SALES, INC., ET AL., PETITIONERS

v.

FAUSTINO SANCHEZ CARRERA, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the standard of proof that employers must satisfy to demonstrate the applicability of a Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, exemption is a preponderance of the evidence or clear and convincing evidence.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should summarily reverse the court of appeals' decision.

STATEMENT

1. Congress enacted the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, to protect workers by establishing federal minimum-wage and overtime guarantees for any hours worked over 40 in a workweek. See *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 706-707 & n.18 (1945); see also 29 U.S.C. 206 (minimum wage) and 207 (overtime pay). The FLSA exempts several categories of employees from its minimum-wage and overtime requirements. See 29 U.S.C. 213(a). As relevant here, the FLSA exempts "any employee employed * * * in the capacity of outside salesman." 29 U.S.C. 213(a)(1).

The statute further authorizes the Secretary of Labor to "define[] and delimit[]" the terms of the statute by regulation. *Ibid.*

Under the applicable regulations, an employee qualifies as an "'outside salesman'" if he meets two requirements. 29 C.F.R. 541.500(a). First, the employee's "primary duty" must be "making sales" or "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." 29 C.F.R. 541.500(a)(1). Second, the employee must be "customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. 541.500(a)(2).

The regulations further define a "primary duty" as "the principal, main, major or most important duty that the employee performs," which requires an assessment of "all the facts in a particular case," including "the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." 29 C.F.R. 541.700(a); see 29 C.F.R. 541.500(b) (cross-referencing Section 541.700(a)). When assessing whether outside sales work is the employee's primary duty, the regulations instruct that "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 will "[o]ther work that furthers the employee's sales efforts," including "writing sales reports, updating or revising the employee's sales or dis-

play catalogue, planning itineraries and attending sales conferences." 29 C.F.R. 541.500(b).

2. Petitioner EMD Sales is a "distributor of Latin American, Caribbean, and Asian food products to chain and independent grocery stores, operating in the Washington, D.C., metropolitan area." Pet. App. 7a. Petitioner Elda Devarie is the Chief Executive Officer of the company. *Id.* at 8a. Respondents are individuals who worked for EMD Sales as sales representatives. *Id.* at 7a. In that role, respondents were assigned to a sales route that included both chain and independent grocery stores. *Ibid.* Respondents were responsible for managing inventory and submitting orders for additional products at the stores on their routes. *Id.* at 7a-8a.

In 2017, respondents filed suit in the United States District Court for the District of Maryland, alleging that petitioners violated the FLSA by failing to pay them overtime wages when they worked more than 40 hours per week. Pet. App. 8a. Petitioners did not dispute that respondents worked for more than 40 hours per week, but argued that respondents were not entitled to overtime wages because they fell within the outside-sales exemption in the FLSA. *Id.* at 8a-9a.

The parties filed cross-motions for summary judgment, in which they disputed (among other things) the standard of proof imposed on petitioners to demonstrate the applicability of the outside-sales exemption. Pet. App. 83a. The district court held that "longstanding Fourth Circuit precedent" requires petitioners to prove that the exemption applies by "'clear and convincing evidence.'" *Ibid.* (citing *Jones* v. *Virginia Oil Co.*, 69 Fed. Appx. 633, 636 (4th Cir. 2003) (per curiam)). The court thereafter denied both parties' motions for

summary judgment in relevant part, concluding that genuine disputes of material fact existed. *Id.* at 84a-96a.

Following a nine-day bench trial, the district court held that respondents did not qualify as outside sales representatives and that petitioners were liable for the failure to pay them overtime wages. Pet. App. 34a-55a. The court distinguished between respondents' activities at independent stores and chain stores and determined that while petitioners had "established by clear and convincing evidence that [respondents] make sales at independent stores," petitioners "d[id] not carry the same burden with respect to whether [respondents] make their own sales at chain stores." *Id.* at 48a.

The district court explained that at independent stores, "[s]ales representatives are encouraged to open new accounts and to increase both the type and quantity of EMD products sold by existing accounts." Pet. App. 40a. At chain stores, by contrast, the court found that respondents' role was more limited, as the chain stores' managers are given "detailed diagrams indicating where to place items on shelves, and plans for * * * movable displays." *Id.* at 38a. The evidence showed that the type and quantity of products for the diagrammed shelves and planned displays were negotiated by EMD's management and the chain stores' corporate representatives—not the individual sales representatives. *Ibid.* And the court heard testimony from corporate buyers that "store managers are not permitted to deviate" from the plan. *Ibid.*; see *id.* at 48a. Although there was also testimony that sales representatives were regularly able to sell additional quantities of products at chain stores beyond those that management had negotiated, the court found that such testimony "demonstrated that there is a *possibility*—but not clear

and convincing evidence—that sales representatives can make their own sales at chain stores." *Id.* at 49a; see *id.* at 48a-49a.

The district court then determined that petitioners had "failed to demonstrate by clear and convincing evidence that [respondents'] *primary duty* as sales representatives is making sales at either chain stores or independent stores." Pet. App. 49a. The court credited evidence showing that respondents' primary duties at chain stores included "executing the terms of sales that were previously made by EMD's management and key account managers," as well as "keeping shelves full, keeping shelves clean, and placing orders promptly." *Ibid.* The court viewed those responsibilities as "incidental to sales that were already negotiated and executed" by EMD management. *Id.* at 50a. With respect to independent stores, the court concluded that "although making sales could theoretically be the primary duty of some sales representatives, [petitioners] did not demonstrate by clear and convincing evidence that this is [respondents'] primary duty." *Ibid.* In addition, the court credited respondents' testimony that they "spent the bulk of their time at chain stores." *Ibid.*

The district court therefore held that respondents were entitled to unpaid overtime wages and liquidated damages. Pet. App. 50a-52a, 54a.

3. The court of appeals affirmed. Pet. App. 3a-19a. Petitioners challenged the district court's liability holding solely on the ground that the court had applied the incorrect standard of proof. *Id.* at 12a. The court rejected that challenge based on its prior precedent. See *id.* at 12a-13a (citing *Shockley* v. *City of Newport News*, 997 F.2d 18, 21 (4th Cir. 1993)). Despite petitioners' arguments that the court had never "adequately ex-

plained" the adoption of the heightened clear-and-convincing-evidence standard of proof, the court considered itself bound by the existing precedent. *Id.* at 13a. The court also rejected petitioners' argument that this Court's decision in *Encino Motorcars, LLC* v. *Navarro*, 584 U.S. 79 (2018), should be read to supersede the court of appeals' precedent. Pet. App. 4a-15a. The court explained that *Encino Motorcars* rejected the principle that exemptions to the FLSA should be construed narrowly, which is a question of statutory interpretation that is "distinct" from the question of the applicable standard of proof on factual issues relevant to this case. *Id.* at 15a. Because it was possible to read *Encino Motorcars* harmoniously with its own precedent, the court declined to conclude that its precedent had been overturned. *Ibid.*

4. The court of appeals denied en banc review. Pet. App. 1a-2a.

DISCUSSION

This Court should summarily reverse the judgment below. The court of appeals' adoption of the clear-and-convincing-evidence standard of proof for FLSA exemptions is unreasoned and inconsistent with this Court's precedent, which has long recognized that such a heightened standard of proof should not be applied to ordinary civil cases seeking monetary remedies. Tracing the roots of the court of appeals' error reveals that it is based on a misreading of out-of-circuit precedent that the court has never explained, and that other circuits have expressly rejected. And respondents have failed to defend the merits of the standard of proof the Fourth Circuit adopted, underscoring the lack of any valid rationale for it. In light of the obviousness of the error, the Court need not expend the resources re-

quired for plenary review. It can instead restore consistency among the circuits by summarily reversing the decision below.

A. The Decision Below Is Incorrect

1. a. "The function of a standard of proof * * * is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington* v. *Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). The particular level of proof required "allocate[s] the risk of error between the litigants" and "indicate[s] the relative importance attached to the ultimate decision." *Ibid.* Absent applicable statutory text or a constitutional requirement mandating a certain standard, the Court determines the appropriate standard by looking to the interests and rights at stake. See *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 389 (1983).

In criminal cases, when the interests in avoiding an erroneous judgment are at their peak, "our society imposes almost the entire risk of error upon itself" and requires that the government prove the defendant's guilt beyond a reasonable doubt. *Addington*, 441 U.S. at 424; see *id.* at 423-424. On the other "end of the spectrum is the typical civil case involving a monetary dispute between private parties." *Id.* at 423. In such cases, the preponderance-of-the-evidence standard applies, allowing the litigants to "share the risk of error in roughly equal fashion." *Ibid.* This Court "presume[s] that [the preponderance-of-the-evidence] standard is applicable in civil actions between private litigants unless 'particularly important individual interests or rights are at stake.'" *Grogan* v. *Garner*, 498 U.S. 279,

286 (1991) (citation omitted). See 2 Kenneth S. Broun et al., *McCormick on Evidence* § 339, at 707-708 (Robert P. Mosteller ed., 8th ed. 2020) (*McCormick*).

When a civil action involves interests that "are deemed to be more substantial than mere loss of money," the Court applies an intermediate standard of proof, requiring clear and convincing evidence. *Addington*, 441 U.S. at 424. This Court has found such interests present in cases involving involuntary commitment, *id.* at 425-427, the termination of parental rights, *Santosky* v. *Kramer*, 455 U.S. 745, 758 (1982), deportation, *Woodby* v. *INS*, 385 U.S. 276, 285-286 (1966), and denaturalization, *Chaunt* v. *United States*, 364 U.S. 350, 353 (1960). See *McCormick* § 340, at 712-713. By contrast, the Court has rejected the use of the clear-and-convincing-evidence standard and has instead affirmed the applicability of the preponderance-of-the-evidence standard in cases involving "imposition of even severe civil sanctions." *Herman & MacLean*, 459 U.S. at 389-390 (securities fraud); see *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 579 U.S. 93, 107 (2016) (enhanced patent damages); *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U.S. 545, 557-558 (2014) (patent fee shifting); *Grogan*, 498 U.S. at 286-287 (bankruptcy discharges); *United States* v. *Regan*, 232 U.S. 37, 48-49 (1914) (civil suits for acts exposing a party to criminal prosecution).

b. Applying those principles, the appropriate evidentiary standard for an employer to establish that an employee falls within an FLSA exemption is the preponderance-of-the-evidence standard.

Nothing in the FLSA's text itself prescribes the relevant standard of proof. In light of that silence, the presumption is that the preponderance-of-the-evidence standard applies unless there is a showing that the

rights at issue are of particular importance. See *Grogan*, 498 U.S. at 286. No such showing is possible here. A private suit seeking overtime pay fits comfortably within the category of "typical civil case[s] involving a monetary dispute between private parties" to which the preponderance-of-the-evidence standard applies. *Addington*, 441 U.S. at 423. Although the FLSA vindicates important economic rights, there is no comparison between such a suit and those in which the Court has recognized the need for a heightened standard of proof. See p. 8, *supra*. Indeed, this Court has described the cases in which the clear-and-convincing-evidence standard applies as those in which "the government seeks to take unusually coercive action—action more dramatic than entering an award of money damages or other conventional relief—against an individual." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 253 (1989) (plurality opinion). The damages that can be imposed for failure to pay overtime wages cannot be characterized as "unusually coercive" or "dramatic." *Ibid.* This is the ordinary case, not the "uncommon" case requiring an "[e]xception[]" to the general standard for civil actions. *Ibid.*

c. Respondents and the court of appeals have not offered any justification for including FLSA exemptions in the narrow category of issues in civil cases to which a heightened standard of proof applies. Respondents fail to address the merits of the question presented at all, which only highlights the lack of any reasoned basis for the court of appeals' decision. And indeed, in the thirty years since the Fourth Circuit first adopted the clear-and-convincing-evidence standard for proof of the applicability of an FLSA exemption, it has never articulated a basis for the application of that standard.

The Fourth Circuit first identified the clear-and-convincing-evidence standard as applicable to FLSA exemption cases in *Shockley* v. *City of Newport News*, 997 F.2d 18 (1993). In that case, the court set out the FLSA's requirements and stated that "[e]mployers must prove by clear and convincing evidence that an employee qualifies for exemption." *Id.* at 21. The court did not elaborate and provided no further reasoning in support of that statement, aside from a citation to an earlier decision—*Clark* v. *J.M. Benson Co.*, 789 F.2d 282, 286 (4th Cir. 1986). But *Clark* addressed the *burden* of proof, not the standard of proof. As this Court has explained, those two concepts are distinct: The burden of proof "identif[ies] the party who must persuade the jury in its favor to prevail," whereas the standard of proof "refer[s] to the degree of certainty by which the factfinder must be persuaded of a factual conclusion to find in favor of the party bearing the burden of persuasion." *Microsoft Corp.* v. *i4i Ltd. P'ship*, 564 U.S. 91, 100 n.4 (2011).

The Fourth Circuit in *Clark* held that the FLSA places on the employer the burden of proving the application of an exemption. 789 F.2d at 286. In so holding, the court rejected the district court's conclusion that the employer bore only the burden of "producing some evidence demonstrating the exemption's applicability," and quoted Tenth Circuit precedent stating that "'[t]he employer who asserts the * * * exemption has the burden of establishing * * * [the] requirements by clear and affirmative evidence.'" *Ibid.* (quoting *Donovan* v. *United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984) (first set of brackets in original)). The Fourth Circuit in *Clark* viewed that quotation as supporting its conclusion that "the defendant bears the full burden of per-

suasion for the facts requisite to an exemption," but the court did not adopt or endorse any particular standard of proof. *Ibid.*

Nor did the Tenth Circuit precedent on which the Fourth Circuit relied adopt a heightened standard of proof. The Fourth Circuit's quotation from the Tenth Circuit's decision in *Donovan* originated from a prior opinion's recognition that an employer "has the burden of showing affirmatively that [the employees] come clearly within an exemption provision." *McComb* v. *Farmers Reservoir & Irrigation Co.*, 167 F.2d 911, 915 (10th Cir. 1948).[1] That context illustrates that the statement was only meant to reflect the allocation of the burden of proof on the employer, and was not equivalent to the imposition of the clear-and-convincing-evidence standard of proof as a heightened evidentiary requirement that the employer must meet.

Consistent with that history, the Tenth Circuit itself has expressly rejected a reading of its precedent that would "establish a heightened evidentiary requirement on employers seeking to prove an FLSA exemption." *Lederman* v. *Frontier Fire Prot. Inc.*, 685 F.3d 1151, 1158 (2012). In doing so, the court recognized that its reference to "'clear and affirmative evidence'" had led to "confusion"—within and outside the circuit—regarding whether the standard of proof is clear-and-convincing evidence rather than the "preponderance of evidence standard traditionally applied in civil cases." *Ibid.* (citations omitted). The court then clarified that the reference to "clear and affirmative evidence" simply reflected "'that the burden of proof is on the [employer],

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[1] See *Donovan*, 725 F.2d at 581 (citing *J.O. Legg* v. *Rock Prods. Mfg. Corp.*, 309 F.2d 172, 174 (10th Cir. 1962)); *Legg*, 309 F.2d at 174 (citing *McComb*, 167 F.2d at 915).

since entitlement to an exemption is an affirmative defense,'" while invoking the "'principle of statutory interpretation that exemptions from a statute that creates remedies * * * should be construed narrowly.'" *Ibid.* (citations omitted; brackets in original).[2] Thus, when "read as a whole," the Tenth Circuit found no basis in its precedent for a clear-and-convincing-evidence standard. *Ibid.*

The Sixth and Seventh Circuits have provided a similar explanation in rejecting parties' attempts to invoke the clear-and-convincing-evidence standard. See *Yi* v. *Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 506-507 (7th Cir. 2007); *Renfro* v. *Indiana Michigan Power Co.*, 497 F.3d 573, 576 (6th Cir. 2007). As the Seventh Circuit explained, the language in various opinions referring to the obligation to provide "clear" and "affirmative" evidence was meant to reflect the now-abrogated principle "that exemptions are to be construed narrowly," rather than adopt a heightened standard of proof. *Yi*, 480 F.3d at 507. That language was then "garbled" by later opinions, "the garbled form repeated, and the original meaning forgotten." *Ibid.* But nowhere within this muddled history has any court of appeals articulated a reasoned basis for applying the clear-and-convincing-evidence standard to FLSA exemptions.

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[2] Subsequently, in *Encino Motorcars, LLC* v. *Navarro*, 584 U.S. 79, 88-89 (2018), this Court rejected the canon of construction mandating a narrow reading of the scope of the FLSA's exemptions. Contrary to petitioners' argument below, see Pet. App. 14a, that holding has no bearing on the question presented in this case. Suggesting otherwise would conflate the standard of proof and the question of the scope of the statutory exemptions, repeating the error that led to the confusion regarding the applicability of the clear-and-convincing-evidence standard in the first place.

B. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

In addition to being incorrect and unreasoned, the Fourth Circuit's application of the clear-and-convincing-evidence standard to proof of an exemption under the FLSA is an outlier view that has not been adopted by any other court of appeals.

As explained, see pp. 11-12, *supra*, the Sixth, Seventh, and Tenth Circuits have expressly rejected the applicability of the clear-and-convincing-evidence standard in this context. See *Renfro*, 497 F.3d at 576; *Yi*, 480 F.3d at 507; *Lederman*, 685 F.3d at 1158. In so doing, those courts appropriately recognized that the language from which the Fourth Circuit drew its heightened standard had originated in discussions of the allocation of the burden of proof and construction of statutory exemptions, and should not be understood to address the separate question of the standard of proof.

In addition to those courts, the Fifth, Eighth, Ninth, and Eleventh Circuits have likewise applied the preponderance-of-the-evidence standard to FLSA exemptions. See *Faludi* v. *U.S. Shale Solutions, L.L.C.*, 950 F.3d 269, 273 (5th Cir. 2020); *Smith* v. *Porter*, 143 F.2d 292, 294 (8th Cir. 1944); *Coast Van Lines, Inc.* v. *Armstrong*, 167 F.2d 705, 707 (9th Cir. 1948); *Dybach* v. *State of Fla. Dep't of Corr.*, 942 F.2d 1562, 1566 n.5 (11th Cir. 1991).

Although the remaining circuits do not appear to have directly addressed the issue, district courts within those circuits apply the preponderance-of-the-evidence standard as well. See, *e.g.*, *Radtke* v. *Lifecare Mgmt. Partners*, 795 F.3d 159, 167-168 (D.C. Cir. 2015) (declining to address the appropriate standard of proof, but noting that the jury instructions required the employer

to prove the applicability of an FLSA exemption by a preponderance of the evidence); *Costello* v. *Home Depot USA, Inc.*, 928 F. Supp. 2d 473, 487 (D. Conn. 2013) (noting that the employer bears the burden of proving the applicability of an FLSA exemption by a preponderance of the evidence); *Marshall* v. *Burger King Corp.*, 516 F. Supp. 722, 725 (D. Mass. 1981) (same); *Brennan* v. *Parnham*, 366 F. Supp. 1014, 1025 (W.D. Penn. 1973) (same).

The Fourth Circuit thus stands alone in requiring employers to meet the heightened clear-and-convincing-evidence standard in proving the applicability of FLSA exemptions.

C. Summary Reversal Is Appropriate

The court of appeals' adoption of a heightened standard of proof for FLSA exemptions is plainly at odds with this Court's recognition that an award of money damages in civil cases does not require proof by clear and convincing evidence. See pp. 7-8, *supra*. That error warrants summary reversal. Little would be gained from plenary review of the court of appeals' outlier decision. That decision reflects a mistaken reading of out-of-circuit precedent that other courts have expressly rejected and a failure to adhere to—or even acknowledge—the long-settled principles that apply to determine the appropriate standard of proof. The court of appeals has never attempted to justify the clear-and-convincing-evidence standard of proof under the principles this Court has articulated for applying that higher standard, and respondents do not do so here or even defend that standard. Respondents' failure to offer a defense underscores that there is no basis for imposing that heightened standard.

In asserting that this Court's review is not warranted, respondents argue that the standard of proof is rarely dispositive, that it was not dispositive here, and that the court of appeals' standard has not led to forum shopping. See Br. in Opp. 9-19. The United States agrees that such arguments might suggest that the question presented is of insufficient importance to merit expending the resources necessary for plenary review. Indeed, this Court has noted that "the particular standard-of-proof catchwords do not always make a great difference in a particular case," though they can serve an important role in "'reflect[ing] the value society places on'" a particular right. *Addington*, 441 U.S. at 425 (citation omitted). And because the Fourth Circuit is the only court of appeals to have adopted the incorrect standard of proof, that court could resolve the split on its own by granting rehearing en banc in the event a case arises in which the standard appears to have made a difference in the outcome. For those reasons, if the Court does not summarily reverse, it should deny the petition for a writ of certiorari.

Respondents' arguments do not, however, undermine the case for summary reversal. The Fourth Circuit has already denied en banc review in this case. And the Court can and should briefly dispose of this case by simply reiterating the presumption that the preponderance-of-the-evidence standard applies to civil cases involving a dispute over monetary issues and explaining that there is no basis for departing from that standard in the context of FLSA exemptions.

CONCLUSION

The Court should grant the petition for a writ of certiorari, summarily reverse the judgment below, and remand for further proceedings consistent with its decision.

Respectfully submitted.

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