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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the standard of proof that employers must satisfy to demonstrate the applicability of an exemption to the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, is a preponderance of the evidence or clear and convincing evidence.

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INTEREST OF THE UNITED STATES

This case concerns the standard of proof that an employer must meet to establish that its employees fall within an exemption to the federal minimum-wage and overtime guarantees provided by the Fair Labor Standards Act of 1938 (FLSA), ch. 676, 52 Stat. 1060 (29 U.S.C. 201 *et seq.*). The Department of Labor administers and enforces the FLSA. 29 U.S.C. 204, 211(a), 216(c), 217. The United States accordingly has a substantial interest in this Court's resolution of the question presented. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. Congress enacted the FLSA 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); 29 U.S.C. 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 this exemption 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).

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. *Id.* at 7a-8a. Each respondent was responsible

for managing inventory and submitting orders for additional products at the stores on his route. *Ibid.*

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 of 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 bur-

den 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 were 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, keep-

ing 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 of appeals rejected that challenge based on circuit 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 explained" 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. 9a-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.

SUMMARY OF ARGUMENT

To show that employees are exempt from the FLSA's minimum-wage and overtime requirements, an employer must prove the applicability of one of the statute's enumerated exemptions by a preponderance of the evidence. That standard of proof presumptively applies to civil litigation involving conventional remedies and there is no basis to apply a heightened standard here.

A. Where Congress has not expressly addressed the applicable standard of proof in the statutory text and the Constitution does not dictate a particular standard, this Court decides on the appropriate standard by assessing the interests and rights at stake. This Court has long held that the preponderance-of-the-evidence standard is the default standard of proof in civil litigation. A heightened standard requiring proof by clear and convincing evidence applies only when the individual interests at stake in a proceeding are particularly important, such as when the government attempts to take coercive action resulting in relief more substantial than mere loss of money.

B. Neither the text of the FLSA nor the rights it protects suggests that employers must meet a heightened standard to prove the applicability of an exemption. Because Congress did not address the standard of proof, the presumption is that the preponderance-of-the-evidence standard applies. And while the economic rights protected by the FLSA are important, they in-

volve the type of workplace protections and conventional remedies to which the preponderance-of-the-evidence standard commonly applies.

Indeed, the statutory history indicates that Congress viewed the preponderance-of-the-evidence standard as appropriately protective of the rights at issue. As originally enacted, the FLSA provided for an administrative process for authorizing industry-specific minimum wages. In that context, Congress specifically provided that an exemption from the generally applicable minimum wage was permissible only if the relevant agency official found by a preponderance of the evidence that the exemption was necessary under the circumstances. There is no reason to think that Congress would have wanted a higher standard to apply in civil litigation regarding the applicability of statutory exemptions to the same minimum-wage requirement or the related overtime requirement.

C. The Fourth Circuit is an outlier in adopting the clear-and-convincing-evidence standard for FLSA exemptions, yet it has never articulated a reasoned basis for doing so. The standard's application to proof of FLSA exemptions originated from the Fourth Circuit's misreading of out-of-circuit precedent that other circuits have expressly rejected. And despite multiple opportunities, respondents have chosen not to offer any merits-based arguments in support of a heightened standard. The lack of any substantive defense of the court of appeals' rule over the past 30 years underscores its dubious foundation. This Court need only engage in a straightforward application of its precedent to hold that the preponderance-of-the-evidence standard applies.

ARGUMENT

THE STANDARD OF PROOF FOR FLSA EXEMPTIONS IS A PREPONDERANCE OF THE EVIDENCE

In typical civil litigation involving conventional relief, the appropriate standard of proof is a preponderance of the evidence. Absent express statutory text, a heightened clear-and-convincing standard applies only where particularly important interests are at stake, such as when the government attempts to take coercive action that results in relief more significant than money damages. The economic interests protected by the FLSA do not rise to that level.

A. Preponderance Of The Evidence Is The Default Standard For Civil Actions

"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.* If an examination of a federal statute reveals that "Congress has not prescribed the appropriate standard of proof[,] and the Constitution does not dictate a particular standard, [the Court] must prescribe one." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 389 (1983). The Court selects among the three available standards of proof by looking to the interests and rights at stake. *Ibid.*

In criminal cases, when the interests in avoiding an erroneous judgment are at their peak, "our society im-

poses 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. Although there were early efforts to employ that standard in certain civil cases (*e.g.*, those involving criminal conduct), such efforts were "generally repudiated." 4 John Henry Wigmore, *Treatise on the System of Evidence in Trials at Common Law* § 2498, at 3546 (1905) (Wigmore); see *id.* at 3547.

On the other "end of the spectrum" is the preponderance-of-the-evidence standard, which does not "express[] a preference for one side's interests," but instead "allows both parties to 'share the risk of error in roughly equal fashion.'" *Herman & MacLean,* 459 U.S. at 390 (quoting *Addington*, 441 U.S. at 423). That standard has long been the default standard of proof in civil litigation. See, *e.g.*, Wigmore § 2498, at 3545-3546; *Lilienthal's Tobacco* v. *United States*, 97 U.S. 237, 266 (1878) ("In civil cases [the jury's] duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates."). And this Court has repeatedly reaffirmed that the preponderance-of-the-evidence standard generally applies to the mine-run of civil cases. See, *e.g.*, *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U.S. 545, 557-558 (2014); *Grogan* v. *Garner*, 498 U.S. 279, 286 (1991); *Herman & MacLean*, 459 U.S. at 387; *Addington*, 441 U.S. at 423; *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 355 (1943); *United States* v. *Regan*, 232 U.S. 37, 48 (1914).

Between those two standards lies the intermediate standard requiring proof by clear and convincing evidence. That standard "apparently arose in courts of equity when the chancellor faced claims that were unen-

forceable at law because of the Statute of Wills, the Statute of Frauds, or the parole evidence rule." *Herman & MacLean*, 459 U.S. at 388 n.27. Because the chancery courts were "[c]oncerned that claims would be fabricated" by parties attempting to overcome written instruments, they imposed a heightened standard of proof. *Ibid.* This Court later adopted that standard "in equity proceedings to set aside presumptively valid written instruments on account of fraud." *Ibid.* See, *e.g.*, *Maxwell Land-Grant Case*, 121 U.S. 325, 381 (1887).[1]

This Court has occasionally held that the clear-and-convincing-evidence standard applies "to protect particularly important individual interests in various civil cases." *Addington*, 441 U.S. at 424. The 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). Each time, the Court has emphasized the unusual significance of the interests at stake. See, *e.g.*, *Addington*, 441 U.S. at 425-427 (recognizing that "civil commitment for any purpose constitutes a significant deprivation of liberty" such that "due process requires the state to justify confinement by proof more substantial than a mere preponderance of

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[1] Although this Court has acknowledged the historical use of the clear-and-convincing standard in equitable fraud actions, it has cautioned against extending that standard to fraud-based statutory actions, reasoning that "[r]eference to common-law practices can be misleading" and the "historical considerations" do not necessarily apply in the statutory context. *Herman & MacLean*, 459 U.S. at 388.

the evidence"); *Santosky*, 455 U.S. at 758-759 (observing that "a natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right," and termination of parental rights is a "unique kind of deprivation") (citation and internal quotation marks omitted); *Woodby*, 385 U.S. at 286 (noting the "immediate hardship of deportation," which "result[s] in expulsion from our shores"); *Chaunt*, 364 U.S. at 353 (recognizing "the grave consequences to the citizen" of denaturalization).

As the nature and number of those recognized interests indicates, "[e]xceptions" to the preponderance-of-the-evidence standard in civil litigation remain "uncommon." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 253 (1989) (plurality opinion). The Court "presume[s]" that the preponderance-of-the-evidence standard is applicable in civil actions absent a showing that "'particularly important individual interests or rights are at stake.'" *Grogan*, 498 U.S. at 286 (citation omitted). See 2 Kenneth S. Broun et al., *McCormick on Evidence* § 339, at 707-708 (Robert P. Mosteller ed., 8th ed. 2020). Those interests must be "more substantial than mere loss of money," *Santosky*, 455 U.S. at 756 (citation omitted); they "ordinarily" involve "the government seek[ing] to take unusual coercive action—action more dramatic than entering an award of money damages or conventional relief—against an individual," *Price Waterhouse*, 490 U.S. at 253 (plurality opinion).

Accordingly, 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 *Regan*, 232 U.S. at 48-49 (civil suits for acts exposing a party to criminal prosecution); see also *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 579 U.S. 93, 107 (2016) (enhanced patent damages); *Octane Fitness.*, 572 U.S. at 557-558 (patent fee shifting); *Grogan*, 498 U.S. at 286-287 (bankruptcy discharges). And the Court likewise has held that the preponderance-of-the-evidence standard applies to defenses against claims involving "vitally important" interests involving the protection of employees in the workplace. *Price Waterhouse*, 490 U.S. at 254 (plurality opinion); see *id.* at 260 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment); *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977).

In *Price Waterhouse*, for example, the Court addressed a claim that an employer had engaged in sex discrimination. The lower courts had held that once an employee had shown that the employer "allowed a discriminatory impulse to play a motivating part in an employment decision," the employer "must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination." *Price Waterhouse*, 490 U.S. at 252-253 (plurality opinion). In requiring that heightened burden, the lower courts emphasized the "broad and insistent purposes" of Title VII to "'eradicat[e] discrimination throughout the economy and [to make] persons whole for injuries suffered through past discrimination.'" *Day* v. *Mathews*, 530 F.2d 1083, 1086 (D.C. Cir. 1976) (per curiam) (citation omitted). This Court rejected that reasoning, however, and confirmed that "[c]onventional rules of civil litigation generally apply in Title VII cases," including the rule "that parties to civil litigation need only prove their

case by a preponderance of the evidence." *Price Waterhouse*, 490 U.S. at 253; see *id.* at 260 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment). The Court recognized that the interest in protecting employees from discrimination is significant. *Id.* at 254 (plurality opinion). But the Court nonetheless determined that, as in numerous other cases involving important interests, the interest protected by Title VII's antidiscrimination provision "is adequately served by requiring proof by a preponderance of the evidence." *Ibid.*

B. There Is No Basis For Departing From The Preponderance-Of-The-Evidence Standard In Deciding The Applicability Of FLSA Exemptions

Because the text of the FLSA does not include a standard of proof for civil actions brought to enforce its requirements, there is a presumption that Congress intended for the preponderance-of-the-evidence standard to apply. See *Grogan*, 498 U.S. at 286. That presumption controls unless there is a showing that "particularly important individual interests or rights are at stake." *Ibid.* (citation omitted). Such a showing cannot be made here. The interests at stake and the statutory history indicate that preponderance of the evidence is the appropriate standard of proof for FLSA exemptions.

1. 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, the rights at stake are not comparable to those for which the Court has determined that a heightened standard of proof is required. See pp. 10-11, *supra*. Instead, the policies

promoted by the FLSA are more akin to other workplace protections that this Court has held to be "adequately served by requiring proof by a preponderance of the evidence." *Price Waterhouse*, 490 U.S. at 254 (plurality opinion) (discussing discrimination, union affiliation, and employee speech). Nor can the damages that may be imposed for failure to pay overtime wages—the unpaid overtime wages plus an equal amount in liquidated damages—be characterized as "unusual[ly] coercive" or "dramatic." *Id.* at 253. This is the ordinary case involving "mere loss of money," *Santosky*, 455 U.S. at 756 (citation omitted), not the "uncommon" case requiring an "[e]xception[]" to the general rule for civil actions, *Price Waterhouse*, 490 U.S. at 253.

2. The statutory history provides further indication that Congress saw no need for a heightened standard of proof for exemptions to the FLSA's requirements.

Just as in the current version, the FLSA as originally enacted established minimum-wage and overtime pay requirements and provided for statutory exemptions for certain categories of employees, including "outside salesm[e]n." § 13(a)(1), 52 Stat. 1067; see §§ 6, 7, 13, 52 Stat. 1062-1064, 1067-1068. To implement the minimum-wage requirement, the FLSA established an escalating scale that would eventually achieve Congress's "objective of a universal minimum wage of 40 cents an hour" by gradually increasing the minimum wage, beginning with 25 cents per hour in the first year, 30 cents per hour for the next six years, and 40 cents per hour after that. § 8(a), 52 Stat. 1064; see § 6(a)(1)-(3), 52 Stat. 1062-1063.

In addition to the general minimum wage, however, the FLSA as originally enacted also provided for the creation of industry committees that could recommend

industry-specific minimum wages greater than the initial statutory minimums, but "not in excess of 40 cents an hour," subject to approval by the Administrator of the Wage and Hour Division. § 8(c) and (d), 52 Stat. 1064-1065; see § 6(a)(4), 52 Stat. 1063; see also *Opp Cotton Mills* v. *Administrator of Wage & Hour Div. of Dep't of Labor*, 312 U.S. 126, 134 (1941). But importantly, following the seven-year phase-in period, any industry-specific minimum wage less than 40 cents an hour could remain in effect or be adopted only if the industry committee and the Administrator found "by a preponderance of the evidence" that an exemption "is necessary in order to prevent substantial curtailment of employment in the industry." § 8(e), 52 Stat. 1065. See H.R. Conf. Rep. No. 2738, 75th Cong., 3d Sess. 29 (1938) (describing the exemption); 83 Cong. Rec. 9256 (1938) (statement of Sen. Norton) (same). That provision was in effect until October 26, 1949. See FLSA § 8, 63 Stat. 915 (repealing § 8).

Congress's specification that the Administrator should apply the preponderance-of-the-evidence standard in granting industry exemptions to the FLSA's minimum-wage requirements indicates that Congress viewed such a standard as appropriately protective of the interests embodied in the statute's economic safeguards for workers. There is no reason to think that Congress would have viewed a heightened standard as necessary when determining the applicability of statutory exemptions from the same minimum-wage requirements or from the overtime requirements during the course of civil litigation.[2]

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[2] The express adoption of the preponderance-of-the-evidence standard for the Administrator's determination does not create a negative implication with respect to the standard for the applicabil-

C. Neither The Fourth Circuit Nor Respondents Have Offered Any Basis For Applying The Clear-And-Convincing-Evidence Standard

In the thirty years since the Fourth Circuit first adopted the clear-and-convincing-evidence standard for FLSA exemptions, that court has never attempted to ground the standard in this Court's precedent. Instead, the standard developed through a misreading of out-of-circuit decisions that the Fourth Circuit has failed to correct. And despite multiple opportunities to defend the standard, respondents have thus far been silent on the merits of the court of appeals' decision. That silence underscores the lack of a reasoned basis for the court of appeals' decision.

1. The Fourth Circuit first identified the clear-and-convincing-evidence standard as applicable to FLSA

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ity of FLSA exemptions during civil litigation. The background principle that the preponderance-of-the-evidence standard applies to civil litigation was well established, see *e.g.*, *Lilienthal's Tobacco*, 97 U.S. at 266, rendering unnecessary the articulation of the standard for that forum, see *Grogan*, 498 U.S. at 286 (explaining that statutory "silence is inconsistent with the view that Congress intended to require a special, heightened standard of proof"). That background principle would not necessarily apply to proceedings before the Administrator. The FLSA was enacted before the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, which this Court interpreted to adopt the preponderance-of-the-evidence standard for agency adjudications. See *Steadman* v. *SEC*, 450 U.S. 91, 98-102 (1981). Congress thus sensibly specified the standard applicable to the Administrator's orders. And, as this Court has noted, "'Congress has been unequivocal when imposing heightened proof requirements' in other statutory contexts, including in other subsections within Title 29, when it has seen fit.'" *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 178 n.4 (2009) (citation omitted); see 25 U.S.C. 2504(b)(2)(B) (imposing "clear and convincing evidence" standard); 29 U.S.C. 722(a)(3)(A)(ii) (same); see also Pet. Br. 16-18.

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 to support the use of that standard, 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).

In *Clark*, the Fourth Circuit 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." *Ibid.* (emphasis added). Rather, the court invoked Tenth Circuit precedent and stated 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; emphasis added)). The Fourth Circuit in *Clark* viewed that quotation as supporting its conclusion that "the defendant bears the full burden of persuasion for the facts requisite to an exemption" ra-

ther than a more limited burden of production. *Ibid.* But the court did not specifically adopt any particular standard of proof.

Nor did the Tenth Circuit decision 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, which recognized 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), aff'd, 337 U.S. 755 (1949).[3] That context illustrates that the statement was only meant to reflect the allocation of the burden of proof on the employer, not to impose the clear-and-convincing-evidence standard of proof as a heightened evidentiary requirement that the employer must meet.

The Tenth Circuit itself has recognized as much and has expressly rejected a reading of its decisions 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). The court acknowledged that its decisions' use of the phrase "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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[3] See *Donovan*, 725 F.2d at 581 (citing *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).[4] Thus, when "read as a whole," the Tenth Circuit found no basis in its precedent for a clear-and-convincing-evidence standard. *Ibid.* Notwithstanding the Tenth Circuit's clarification, the Fourth Circuit has continued to apply the clear-and-convincing-evidence standard to FLSA exemptions, citing its decisions invoking Tenth Circuit decisions. See Pet. App. 13a-15a.

The Sixth and Seventh Circuits have provided an explanation similar to that of the Tenth Circuit in rejecting plaintiffs' attempts to invoke the clear-and-convincing-evidence standard. See *Renfro* v. *Indiana Mich. Power Co.*, 497 F.3d 573, 576 (6th Cir. 2007); *Yi* v. *Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 506-507 (7th 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 507-508. That language was then "garbled" in later opinions, "the garbled form

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[4] 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 on questions of fact 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.

repeated, and the original meaning forgotten." *Ibid.* Nowhere within that muddled history has any court of appeals, including the Fourth Circuit, articulated a reasoned basis for applying the clear-and-convincing-evidence standard to FLSA exemptions. And every other court of appeals to have considered the issue applies the preponderance-of-the-evidence standard to FLSA exemptions. See *Faludi* v. *U.S. Shale Solutions, L.L.C.*, 950 F.3d 269, 278 (5th Cir. 2020); *Renfro*, 497 F.3d at 576 (6th Cir.); *Yi*, 480 F.3d at 506-507 (7th Cir.); *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); *Lederman*, 685 F.3d at 1158 (10th Cir.); *Dybach* v. *State of Fla. Dep't of Corr.*, 942 F.2d 1562, 1566 n.5 (11th Cir. 1991).

2. Respondents have likewise failed to even attempt to defend the court of appeals' rule, let alone ground it in this Court's precedent. In briefing at the certiorari stage, both petitioners (see Pet. 18-21) and the government (U.S. Cert. Br. 9-12) explained the origin of the court of appeals' adoption of the clear-and-convincing-evidence standard for FLSA exemptions and the failure of that standard to align with this Court's precedent. Yet respondents offered no merits-based defense of the court of appeals' rule, even after the government highlighted (*id.* at 9, 14) their failure to do so. See Resp. Br. in Opp. 8-19; Resp. Supp. Br. 1-3. Instead, respondents focused only on their contention that the standard of proof in FLSA cases is rarely outcome determinative and was not the deciding factor here. See Resp. Br. in Opp. 9-18; Resp. Supp. Br. 1-3. A party need not provide a full argument on the merits in certiorari-stage briefing, but it is difficult to imagine that a right could be of sufficient importance to warrant a clear-and-

convincing standard of proof where no party or court has even attempted to justify that standard based on first principles prior to the merits stage in this Court.

CONCLUSION

The Court should reverse the judgment below and remand for further proceedings consistent with its decision.

Respectfully submitted.

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