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

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONERS

John M. Masslon II
Counsel of Record
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

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QUESTION PRESENTED

Whether employers must prove the applicability of an FLSA exemption by a preponderance of the evidence or by clear and convincing evidence.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus urging proper interpretation of the Fair Labor Standards Act. *See, e.g., Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881 (2019); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). WLF's Legal Studies Division—its publishing arm—also produces important pieces about the FLSA. *See, e.g.,* Nathaniel M. Glasser et al., *Joint-Employment Liability: What Federal Agencies' Rule Revisions Mean for Employers*, WLF LEGAL BACKGROUNDER (Mar. 6, 2020); Anne Marie Sferra & Kara H. Herrnstein, *Sixth Circuit Should Follow Lead of* Tyson Foods *and Reject Representative Evidence Use in FLSA Collective Actions*, WLF LEGAL OPINION LETTER (June 16, 2017).

INTRODUCTION

"It is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018). The Fourth Circuit, however, continues to violate this well-settled principle. The Fourth Circuit views itself as a policymaking body, free to override Congress's policy judgments. *See Mountain Valley Pipeline, LLC v. Wilderness Soc'y*, 2023 WL

* No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission. All parties were timely notified of WLF's intent to file this brief.

4770018, *1 (U.S. July 27, 2023) (per curiam) (vacating without noted dissent a Fourth Circuit policymaking order). Congress serving as the policymaker is key to separation of powers.

America's political system rests on a majoritarian foundation. *See* Daniel O. Conkle, *Toward A General Theory of the Establishment Clause*, 82 Nw. U. L. Rev. 1113, 1122 (1988). Members of the House and Senate are generally elected by a majority—and sometimes only a plurality—of their constituents. It then takes only a majority of both the House and Senate to pass a law and present it to the President. *See* U.S. Const. art. I, § 7, cl. 2. The President, in turn, is elected by a majority of the Electoral College or a majority vote of state delegations in the House. *See id.* amend. XII.

Every two years, the House adopts a set of rules by a majority vote. And shortly after the Senate first obtained a quorum, it too adopted a set of rules by majority vote. *See* U.S. Senate Comm. on Rules & Admin., *History*, https://perma.cc/7MA5-5SUZ. This makes sense as general parliamentary law only requires a majority vote to pass standing rules.

True, the United States is not "a pure example of the majoritarian conception of democracy." Imer B. Flores, *Law, Liberty and the Rule of Law (in A Constitutional Democracy)*, *in* 18 Comp. Persp. on L. & Just. 97 (Imer B. Flores & Kenneth E. Himma eds. 2013). But those anti-majoritarian features are explicitly built into our Constitution or adopted by the political branches to protect minority rights.

The Constitution is antimajoritarian in several ways. For example, the Senate comprises two senators from each State. U.S. Const. art. I, § 3, cl. 1. This way, the large States cannot dominate the small States, as could happen if both chambers were based on population. And to amend the Constitution, at least three-fourths of the States must ratify an amendment. *Id.* art. V. This too ensures that a bare majority of States cannot ignore sister States through constitutional amendment.

Ratified amendments also generally protect minorities. From the Fourteenth Amendment's guarantees of due process of law and equal protection to the First Amendment's protection of freedom of speech and religion, Americans have long sought to protect minority rights—even if it took far too long in some cases.

What is key, however, is that the political process requires supermajorities only in rare circumstances. When a majority of both congressional chambers or three-fourths of the States decide to constrain the majority, the general rule of majoritarian rule yields to this more specific rule that our political branches have enacted.

The same goes for the burden of proof in court. "[T]he general rule" is "that proof by a reasonable preponderance of the evidence is sufficient." *United States v. Regan*, 232 U.S. 37, 49 (1914) (cleaned up). This makes sense. "Unlike other standards of proof such as reasonable doubt or clear and convincing evidence, the preponderance standard allows both parties to share the risk of error in roughly equal fashion, except that when the evidence is evenly

balanced, the [party with the burden of persuasion] must lose." *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997).

This is akin to majority rule. Under both majority rule and the preponderance of the evidence standard, whichever side commands a majority prevails. And under both systems, the tie goes to the status quo—either no change in law or the one with the burden of persuasion loses. This differs from clear and convincing evidence, which resembles the two-thirds vote required when a legislative body wants to suspend the rules. And this differs from beyond a reasonable doubt, which recalls the unanimous consent requirement that sometimes governs a legislative procedure.

Our justice system deviates from the default rule sometimes. But again, it does so when either the Constitution requires it or a legislative body has decided that a different burden of proof should apply. For example, "the 'fundamental value determination of our society' [is] that 'it is far worse to convict an innocent man than to let a guilty man go free.'" *Francis v. Franklin*, 471 U.S. 307, 313 (1985) (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)). The Fifth and Fourteenth Amendments' Due Process Clauses therefore allow for criminal convictions only on proof beyond a reasonable doubt. *See United States v. O'Brien*, 560 U.S. 218, 237 n.4 (2010) (citation omitted). Some legislatures have also abrogated the preponderance of the evidence default in certain cases. *See, e.g.*, Ky. Rev. Stat. § 411.184(2) (changing the burden of proof required for punitive damages).

The Constitution does not require a specific burden of proof for proving an FLSA exemption. (If anything, there is an argument that the Fourteenth Amendment's Equal Protection Clause requires use of the preponderance of the evidence standard.) Nor has Congress changed the default rule in FLSA cases. Thus, just as the default rule of majoritarian rule applies in most government institutions, the default burden of preponderance of the evidence applies to proving FLSA exemptions.

STATEMENT

I. STATUTORY BACKGROUND

The FLSA "guarantee[s] a minimum wage" and "requir[es] time-and-a-half pay for work over 40 hours [per] week." *Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 44 (2023); *see* 29 U.S.C. §§ 206, 207. But Congress recognized that it makes no sense for the minimum-wage and overtime requirements to cover all workers. So the FLSA exempts summer-camp employees, community newspaper employees, and seamen from its reach. 29 U.S.C. §§ 213(a)(3), (8), (12). And, relevant here, the FLSA exempts "outside salesm[e]n"—workers whose primary duty is making sales and who regularly work outside employers' places of business. *Id.* § 213(a)(1); *see Christopher*, 567 U.S. at 148.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Elda Devarie owns EMD, which employs over 150 people and distributes products to stores in the District of Columbia, Maryland, and Virginia. Three

Maryland-based EMD sales representatives sued Petitioners for alleged FLSA violations. Plaintiffs, who were paid on commission, worked more than 40 hours per week for EMD. Plaintiffs claimed that they were therefore entitled to overtime pay, while Petitioners contended that they need not pay overtime because Plaintiffs were "outside salesm[e]n." 29 U.S.C. § 213(a)(1).

The District Court found that Petitioners were required to pay Plaintiffs overtime because they did not satisfy the FLSA's definition of outside salesmen. Pet. App. 34a-35a. In reaching this finding, the District Court held that Petitioners had to prove that Plaintiffs were outside salesmen by "clear and convincing evidence." Pet. App. 46a.

Petitioners appealed and challenged the liability finding on the sole ground that the District Court erred by applying the clear and convincing evidence standard. The Fourth Circuit rejected this argument. It held that, under Fourth Circuit law, the "employer" must show that an FLSA exemption applies by "clear and convincing evidence." Pet. App. 12a-13a (cleaned up). This outlier position conflicts with decisions of six other courts of appeals, which all hold that employers must prove FLSA exemptions by a preponderance of the evidence.

In reaching its decision, the Fourth Circuit said that no intervening precedent from this Court cast doubt on applying the clear and convincing burden. Pet. App. 14a. The panel, however, acknowledged that the circuit precedent may be wrong. It said that the en banc Fourth Circuit might want to reconsider

the burden in line with this Court's precedent. *See* Pet. App. 15a (citation omitted).

Petitioners sought rehearing, which the Fourth Circuit denied. Pet. App. 1a-2a. This petition now cleanly presents the outcome-determinative question presented.

SUMMARY OF ARGUMENT

I.A. The Fourth Circuit has never explained why it requires employers to prove FLSA exemptions by clear and convincing evidence. But its citations suggest that it requires that heightened burden based on the principle that FLSA exemptions must be construed narrowly. Five years ago, in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), this Court soundly rejected that principle. Rather than being construed narrowly, FLSA exemptions must be given their ordinary meaning.

Now, the Fourth Circuit refuses to faithfully apply this Court's precedent. Rather than recognize that this Court's decision undercut the entire rationale for using the clear and convincing evidence standard, the Fourth Circuit dismissed this Court's decision in *Encino Motorcars* as one of statutory interpretation. But the burden of proof an employer must satisfy to prove an exemption is also a matter of statutory interpretation. Because nothing in the text suggests that Congress meant to displace the default of preponderance of the evidence, the Fourth Circuit erred by not reconsidering the issue.

II. The question presented is important and arises often. First, the burden of proof is critical in all

cases and imposing the wrong burden of proof is almost always reversible error. Second, many FLSA exemptions do not lend themselves to easily proving their applicability through clear and convincing evidence. Rather, whether an FLSA exemption applies is often a close call. Applying the clear and convincing evidence standard unfairly hurts employers. Finally, the FLSA's venue provision is very broad. So allowing the Fourth Circuit's decision to stand would allow the clear and convincing evidence standard to be applied in cases based on facts that occurred in Hawaii, Maine, Florida, or Idaho. This Court should ensure uniformity in this important area of law by granting the petition.

ARGUMENT

I. THE FOURTH CIRCUIT'S OUTLIER POSITION FLOUTS THIS COURT'S PRECEDENT.

Below, Petitioners argued that even if the Fourth Circuit's precedent suggested that the clear and convincing evidence burden applied here, intervening precedent from this Court showed that the preponderance of the evidence standard applied. The panel rejected that argument, while recognizing that the en banc court may want to reconsider the issue. This was an error that deserves this Court's review.

Again, the Fourth Circuit has never explained why it requires employers to prove the applicability of FLSA exemptions by clear and convincing evidence. The best clue we have about the Fourth Circuit's rationale is the citation included in the opinion that announced this rule.

The clear and convincing evidence language first appears in *Shockley v. City of Newport News*, 997 F.2d 18, 21 (4th Cir. 1993). *Shockley* cited a single case for that proposition—without a signal. *Id.* (citing *Clark v. J.M. Benson Co.*, 789 F.2d 282, 286 (4th Cir. 1986)). *Clark*, however, did not use the word convincing. Rather, it quoted the Tenth Circuit's statement that employers must prove FLSA exemptions by "clear and affirmative evidence." *Clark*, 789 F.2d at 286 (quoting *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984)).

As the Seventh Circuit has said, this "clear and affirmative evidence" standard was "merely a clumsy invocation of the familiar principle of statutory interpretation that exemptions from a statute that creates remedies should be construed narrowly." *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 507 (7th Cir. 2007). Courts recognized this possibility even before the Seventh Circuit explicitly clarified what the language meant. *See Martin v. Indiana Michigan Power Co.*, 381 F.3d 574, 578 n.1 (6th Cir. 2004).

Even the Tenth Circuit, which the Fourth Circuit quoted in *Clark*, has since rejected the Fourth Circuit's interpretation of *Donovan*. According to the Tenth Circuit, its *Donovan* language "was originally rooted in statutory-construction cases going back to the [1940s], but became garbled over time as it was repeated by different courts." *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1158 (10th Cir. 2012) (cleaned up). In other words, the Fourth Circuit has "mistakenly viewed clear and affirmative evidence as a heightened evidentiary standard." *Id.*

The court that issued the decision at the root of the Fourth Circuit's clear and convincing evidence standard has therefore since held that the Fourth Circuit misinterpreted the precedent. So too have other courts of appeals. And all of this came before this Court ended the practice of interpreting FLSA exemptions narrowly.

For decades, courts believed that the FLSA "pursues" "its remedial" "purpose" "at all costs." *Cf. Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234-35 (2013) (describing this phenomenon for another statute). Even after the Court rejected applying that canon of construction for statutes, most courts still "invoked the principle that exemptions to the FLSA should be construed narrowly." *Encino Motorcars,* 138 S. Ct. at 1142. The Court, however, "reject[ed] this principle as a useful guidepost for interpreting the FLSA." *Id.*

As this Court explained, "the FLSA has over two dozen exemptions in § 213(b) alone." *Encino Motorcars*, 138 S. Ct. at 1142. And "[t]hose exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement." *Id.* Therefore, normal tools of statutory interpretation apply. Under normal rules of statutory interpretation, statutory exemptions are given "a fair (rather than a narrow) interpretation" unless there are "textual indication[s]" suggesting that the exemptions should be read narrowly. *Id.* (quoting Antonin Scalia & Bryan Garner, Reading Law 363 (2012)).

Like other courts before *Encino Motorcars*, the Fourth Circuit held that "[e]xemptions to the FLSA are to be narrowly construed against the employers

seeking to assert them." *Schilling v. Schmidt Baking Co.,* 876 F.3d 596, 602 (4th Cir. 2017) (cleaned up). The decision below, however, pays only lip service to this Court's intervening holding. Even under the most generous interpretation of Fourth Circuit case law, the idea that employers should have to prove FLSA exemptions by clear and convincing evidence stems from the notion that FLSA exemptions must be construed narrowly. That longstanding precedent was rejected by this Court in *Encino Motorcars*. Yet the Fourth Circuit declined to apply this Court's decision. Rather, it charted a different path. In the Fourth Circuit alone, holdings based on the incorrect assumption that FLSA exemptions must be narrowly construed remain good law.

The Fourth Circuit's explanation for refusing to follow *Encino Motorcars* makes no sense. According to the panel, "*Encino Motorcars* [was] about statutory interpretation" which was "distinct from the question of what burden of proof an employer bears in proving the facts of its case." Pet. App. 14a-15a. This explanation may make sense in a vacuum. But it does not pass the smell test when the only precedent on which the Fourth Circuit relied mistakenly presumed that FLSA exemptions must be narrowly construed.

Besides, the Fourth Circuit's rationale makes no sense because deciding which burden of proof an employer must satisfy also involves statutory interpretation. When Congress wants parties to satisfy the clear and convincing evidence standard—not the preponderance of the evidence standard—it explicitly says so. *See, e.g.*, 15 U.S.C. § 6604(a); 18 U.S.C. § 4248(d). By requiring proof by clear and convincing evidence, Congress is displacing the

common law default of proof by a preponderance of the evidence.

There are no textual clues suggesting that Congress meant to displace the preponderance of the evidence standard in the FLSA. Rather, the statute uses language used in thousands of other federal statutes that create rights of action. In each one, Congress denotes when a person may sue and whether any exceptions from the general rules apply. Here, there are dozens of exceptions to the general rules about who must receive overtime. But nothing in those exemptions or other parts of the FLSA mentions clear and convincing evidence or even hints at a higher evidentiary burden for employers claiming one of those exemptions. In short, the FLSA's text does not suggest that Congress wanted courts to impose a higher burden of proof on defendants.

Under *Encino Motorcars*, this ends the inquiry. Because FLSA exemptions must be read like all other statutes, the question is whether the FLSA requires employers to prove an exemption by clear and convincing evidence. Because there is no statutory indication that Congress displaced the preponderance of the evidence standard, the Fourth Circuit's decision conflicts with this Court's precedent. This Court should grant review and remind the Fourth Circuit that it too is bound by this Court's decisions.

II. THE QUESTION PRESENTED IS IMPORTANT AND ARISES IN MANY CONTEXTS.

The Tenth Circuit has recognized that applying the wrong "burden of proof" is "always crucial." *Taylor v. Nat'l Trailer Convoy, Inc.*, 433 F.2d 569, 571 (10th

Cir. 1970). Other courts of appeals similarly recognize the importance of getting the burden of proof right. *See, e.g.*, *Boles Trucking v. United States*, 77 F.3d 236, 241 (8th Cir. 1996); *Carvalho v. Raybestos-Manhattan, Inc.*, 794 F.2d 454, 455 (9th Cir. 1986); *Mitchell v. United States*, 396 F.2d 650, 651 (6th Cir. 1968).

State courts also recognize the importance of the burden of proof. *See, e.g., Hui v. Phila. Parking Auth.*, 913 A.2d 994 (Pa. Commw. 2006); *Kirchner v. Wilson*, 554 N.W.2d 782, 785 (Neb. 1996); *Atl. & Pac. Ins. Co. v. Barnes*, 666 P.2d 163, 165 (Colo. App. 1983).

Although the burden of proof is important in all cases, it is particularly important in FLSA cases. The petition describes (at 16-17) several FLSA cases in which the burden of proof was outcome determinative, including this one. The outcome-determinate nature of this case is shown by the District Court's repeated invocation of the burden of proof. *See* Pet. 6-8, 17-18. But the salesmen exemption is not the only one that lends itself to close calls. And in these close-call cases, it is impossible for employers to prevail under the clear and convincing evidence standard.

Even exemptions that look straightforward are hotly contested. The FLSA's overtime requirement does not apply to "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). The issue of who is employed in an administrative capacity is an often-litigated issue. The exemption applies to employees who are (1) "[c]ompensated on a salary or fee basis at

a rate of not less than $684 per week;" (2) "[w]hose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers;" and (3) "[w]hose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a)(1-3).

Although the first part of the test for administrative employees seems straightforward on the surface, it is not. For example, the weekly salary for an administrative employee may fall below $684 if the employee is not "ready, willing and able to work." 29 C.F.R. § 541.602(a)(2). This is often disputed. Under the majority rule, the employer must prove that an employee was not ready to work by a preponderance of the evidence. In the Fourth Circuit, however, employers must prove that fact by clear and convincing evidence. That is no easy task. And it makes it much easier for employees to prevail in an FLSA case alleging that they were misclassified as administrative employees.

That is just the first part of the test for administrative employees. If the employer can prove that it pays sufficient wages, the next question is whether the employee's "primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. § 541.200(a)(2). "The term 'primary duty' means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the

major emphasis on the character of the employee's job as a whole." *Id.* § 541.700(a). So even the Department of Labor's regulations use a preponderance of the evidence standard when determining whether an FLSA exemption applies.

Courts must inquire into what an employee's main job duty is, which is sometimes a tricky question. Imagine an employee who splits their work almost evenly between office duties and manual labor. If most of the time is spent on office duties, it would be feasible to prove that the primary duty is office work by a preponderance of the evidence. But it may not be possible to make that showing by clear and convincing evidence; the split between office duty and manual labor may be too close to make that showing.

Finally, the last part of the test for administrative workers asks whether an employee uses independent judgment for matters of significance. Generally, "the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term 'matters of significance' refers to the level of importance or consequence of the work performed." 29 C.F.R. § 541.202(a).

Again, this is not a test that lends itself to proof by clear and convincing evidence. For example, whether discretion is used for matters of significance is often a difficult question. It may be possible to show that a matter is of significance by a preponderance of the evidence but impossible to make that same showing by clear and convincing evidence.

Under the burden used in six circuits, employers have a fighting chance to prove that employees are exempt from the FLSA because they satisfy the administrative employee test. But under the Fourth Circuit's rule, it is a very steep hill to climb. Again, nothing in the FLSA suggests that Congress wanted to stack the deck against employers and make it easier for employees to prevail, especially if most of the evidence shows that the FLSA does not cover them.

Finally, the Fourth Circuit's deeply flawed rule will have broad implications beyond the boundaries of West Virginia, Maryland, Virginia, North Carolina, and South Carolina. Under the FLSA, a collective action may be filed in any district in which the employer can be served. *See* 29 U.S.C. § 216(b). That is, even if no member of the collective action works in that district, the action may still be filed there. In other words, despite never having set foot in the continental United States, a group of Alaskan workers could sue Marriott International in the District of Maryland. Thus, the Fourth Circuit's rule will control suits in which all actions occurred in other circuits. This is unsustainable, and this Court's intervention is necessary to ensure uniformity about the burden for employers to prove the applicability of FLSA exemptions.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

John M. Masslon II
Counsel of Record
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

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