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

## SUPPLEMENTAL BRIEF FOR RESPONDENTS


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Respondents submit this supplemental brief in response to the Brief for the United States as Amicus Curiae submitted in response to the Court's order inviting the Solicitor General to express the government's views.

## ARGUMENT

The government agrees with respondents that this case does not merit plenary review. And the government does not dispute that the answer to the question presented does not affect the outcome of this case, or perhaps any case at all. Nonetheless, the government suggests that the Court expend its resources to address a question that no member of the Fouth Circuit found sufficiently consequential to merit en banc consideration in an opinion summarily reversing the decision below. The Court's resources, however, are better spent "answer[ing] a question that does matter" rather "than one that almost certainly does not." *Warner Chappell Music, Inc. v. Nealy*, 601 U.S. __, 2024 WL 2061137, at *6 (May 9, 2024) (Gorsuch, J., dissenting). The Court should deny the petition for certiorari.

**1.** The government does not contest respondents' demonstration that the standard of proof for an employer to establish an exemption under the Fair Labor Standards Act (FLSA) is rarely if ever dispositive, that it was not dispositive in this case, and that the court of appeals' standard has not led to forum shopping. U.S. Br. 15. In addition, the government "agrees that such arguments might suggest that the question presented is of insufficient importance to merit expending the resources necessary for plenary review." *Id.* It nevertheless

suggests that this Court should reverse the Fourth Circuit's decision. *Id.* at 14–15.

The value proposition of that path is exceedingly low. Summary reversal would both tax this Court's time and resources and require the lower courts to use their limited resources to reckon with a question that made no difference to the outcome of this case. *See* Resp. Br. 15–18. It would also cause needless delay in making respondents—low-income workers whom the district court found were unlawfully deprived of rightful compensation—whole. Indeed, the district court found that EMD lacked "objectively reasonable grounds for believing" that respondents fell within the FLSA's outside sales exemption. Pet. App. 52a.

**2.** What is more, neither the government nor petitioners have identified a single Fourth Circuit case where application of the clear and convincing standard was dispositive to the outcome. As respondents' brief in opposition explained, this is because the standard of proof becomes relevant only in the edge case where there is a close factual dispute as to how an employee spends her working hours. *See* Resp. Br. at 9–13. The question whether an FLSA exemption applies, however, almost always turns on the *legal* question whether a particular exemption applies to facts that are not meaningfully disputed, or to disputes of fact that are so lopsided that the standard of proof would not conceivably play a role in resolving them.

Absent a showing that the question presented affects the outcome of cases, the question is more academic than practical. Thus, to the extent that the Court agrees with the government that the Fourth

Circuit has stated the wrong standard, it should await that rara avis in which the standard of proof bears on the outcome of that particular case. As the government seems to agree, that is not this case.

## CONCLUSION

For the foregoing reasons and those set forth in respondents' brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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