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 PETITIONERS

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The government (at 7-14) agrees that the decision below squarely splits with the holdings of other circuits and is wrong on the merits. From those undisputed premises, the government urges this Court to either summarily reverse (at 14) or deny review (at 15). Petitioners agree that summary reversal is an appropriate disposition. But denying review would be highly inappropriate. *Some* action by this Court is obviously warranted given the entrenched, acknowledged circuit split on a frequently recurring issue and the denial of rehearing en banc even after the panel raised the issue. *See* Pet.App.2a, 15a. This Court should not let a glaring circuit split continue to affect thousands of cases.

Citing the brief in opposition's entire argument section, the government (at 15) says respondents' "arguments might suggest that the question presented is of insufficient importance" to warrant plenary review. But burdens of proof are not "an empty semantic exercise." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (citation omitted). Burdens of proof by definition are designed to affect outcomes, by setting how high the bar is for a party to prevail on a dispositive issue. Hence, this Court routinely grants certiorari in burden-of-proof cases. Cert. Reply 3 n.1. In frequently fact-intensive FLSA cases, the burden of proof is "almost always crucial to the outcome." *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1155 (10th Cir. 2012) (citation omitted). Amici confirm that the question presented "has profound real-world impact," "arises often," and frequently "prove[s] outcome-determinative." Chamber Br. 5; WLF Br. 7.

The Fourth Circuit's burden of proof invites forum shopping and skews litigation incentives, pushing employers to settle cases that would be winnable in other circuits. Pet. 17; Chamber Br. 17. Heightened burdens of proof can push meritless claims on to summary judgment or trial. Chamber Br. 17. Erroneously heightened burdens also "generate[] a prodigious waste of resources," as the government recently observed when asking the Ninth Circuit to correct an outlier clear and convincing standard that disfavored the government in the sentencing context. En Banc Pet. 2, *United States v. Lucas*, --- F.4th ---, 2024 WL 1919741 (9th Cir. May 2, 2024) (en banc) (No. 22-50064).

The government (at 15) suggests that the Fourth Circuit could resolve the split itself by granting rehearing en banc in a case "in which the standard appears to have made a difference." But that was *this* case. *Respondents*'

motion for summary judgment stressed *19 times* the "very high standard" of "clear and convincing" evidence. Pls.' Summ. J. Mem. 1, 16-17, 21-26, 29, D. Ct. Dkt. 105. Trial brought more of the same. *E.g.*, 3/1/2021 Tr. 12:22-23, D. Ct. Dkt. 248; 3/11/2021 Tr. 7:15-16, 18:3, D. Ct. Dkt. 258. The district court then invoked the clear and convincing evidence standard four times during closing arguments and six times in its opinion. 3/11/2021 Tr. 17:4-5, 56:8, 56:17-19, 65:8; Pet.App.46a, 48a-50a. The court remarked that "there's a lot to be said" for petitioners "on the liab[ility] question." 3/11/2021 Tr. 41:2-3. And the court questioned petitioners' counsel under the premise that the case presented "a really close call on whether or not [respondents'] work is sales-y enough to be outside salespersons," but "you just fall short on your clear and convincing evidence burden." *Id.* at 65:5-8.

The Fourth Circuit has now at least twice declined to go en banc to correct its patently erroneous burden of proof. Pet.App.2a; *Calderon v. GEICO Gen. Ins. Co.*, Nos. 14-2111, 14-2114 (4th Cir. Feb. 2, 2016), Dkt. 62. Only this Court can cure this persistent conflict on a frequently litigated federal statute. Neither the government nor respondents have identified any vehicle impediments to the Court's review. It would be utterly perverse to allow an entrenched, undisputed, important circuit split to fester just because the decision below is plainly wrong.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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