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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—cont'd:

Statutes, Regulation, and Rule:

Page

Statutes, Regulation, and Rule—cont'd:

Other Authorities:

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As important as employment rights may be, cases under the Fair Labor Standards Act (FLSA) are ultimately bread-and-butter civil disputes about the entitlement to money. In such quintessential civil cases, this Court has long applied a default preponderance-of-the-evidence standard, creating a level playing field for the party with the stronger case to prevail.

Respondents offer no persuasive reason to deviate from that default rule here and instead systematically skew all 34 FLSA exemptions in plaintiffs' favor with the

dramatically higher burden of clear-and-convincing evidence. Respondents (at 16) agree that nothing in the text of the FLSA supports a heightened standard of proof, despite the numerous other labor and employment statutes that expressly impose a clear-and-convincing standard. And respondents do not argue that the Constitution supports a clear-and-convincing standard.

That leaves respondents to contend that policy considerations warrant interpreting the FLSA to impose a heightened standard of proof, notwithstanding Congress' silence. But this Court has reserved heightened standards for extraordinary deprivations of individual liberty like deportation or the loss of citizenship. Respondents rightly do not suggest that money damages for overtime or minimum-wage violations are remotely comparable. And respondents' other appeals—to the FLSA's purposes, the public's interest in FLSA compliance, employers' control of evidence, and FLSA plaintiffs' demographics—come nowhere close to the kind of exceptional individual interests that might justify a judge-made heightened standard.

Respondents tellingly spend much of their merits brief not defending a clear-and-convincing standard but instead urging the Court to affirm because they would supposedly prevail under a preponderance standard. No lower court has passed on that contention, and respondents' request would require this Court to take the extraordinary step of acting as a fact-finder based on a nine-day trial record. Consistent with its typical practice in standard-of-proof cases, the Court should vacate and remand for the lower courts to apply the correct standard in the first instance.

I. The Preponderance Standard Applies to FLSA Exemptions

Respondents (at 12) agree that the preponderance standard governs "a typical civil case involving a monetary dispute between private parties." That default rule controls here. Respondents' one-sided account of the policy stakes does not counsel a different result.

A. The Default Preponderance Standard Applies

1. Respondents do not contest this Court's oft-repeated "presum[ption]" that the preponderance standard governs "civil actions between private litigants" unless (1) the statute expressly says otherwise or (2) "'particularly important individual interests or rights are at stake.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389-90 (1983)); Br. 2 n.1, 13-15; U.S. Br. 8-13; Chamber Br. 6-8; LGLC Br. 8.

Respondents agree that the first exception does not apply. Many statutes expressly impose a clear-and-convincing standard, including another provision of the FLSA. Br. 16-18; U.S. Br. 16 n.2. But "the FLSA is silent as to the relevant standard of proof when an employer seeks to prove that an employee is exempt." Resp. Br. 16. This Court ordinarily considers such "silence" "inconsistent with the view that Congress intended to require a special, heightened standard of proof." *Grogan*, 498 U.S. at 286. Congress is presumptively aware of this Court's preponderance default and is thus usually "unequivocal when imposing heightened proof requirements." *See Gross v. FBL Fin. Servs.*, 557 U.S. 167, 178 n.4 (2009) (citation omitted); U.S. Br. 16 n.2. Yet Congress imposed no such heightened standard here.

Respondents' only path then is the second, judge-made exception where courts will sometimes read in a heightened standard for "particularly important individual interests or rights." *See Grogan*, 498 U.S. at 286 (citation omitted). Respondents (at 18-19) present that inquiry as simply adding up the interests on both sides and asking which is "weightier." Respondents (at 11) thus claim that courts "routinely" impose a clear-and-convincing standard whenever "the social cost of an erroneous factual determination exceeds that in cases involving monetary disputes concerning purely private interests."

That contention misstates this Court's approach to standards of proof. Absent a constitutional requirement, determining the appropriate standard of proof is a question of statutory interpretation. *See id.* Exceptions to the preponderance default are "uncommon," *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989) (plurality op.), with the clear-and-convincing standard applicable to only "a limited number of civil cases," *California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 93 (1981) (per curiam). This Court has generally reserved a heightened standard for cases where "the government seeks to take unusual coercive action—action more dramatic than entering an award of money or other conventional relief—against an individual." *Price Waterhouse*, 490 U.S. at 253 (plurality op.). "[I]mposition of even severe civil sanctions" cannot justify a heightened standard. *Herman & MacLean*, 459 U.S. at 389. Whatever the *interests* advanced by the FLSA, the relief at issue here is purely monetary. *See* Pet.App.32a-33a.

This Court has only once required clear-and-convincing evidence for money damages: defamation actions against public figures. Br. 18-19. That unusual standard

of proof reflects a "constitutional protection" rooted in the First Amendment. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-42 (1974). But respondents do not contend that the Constitution supports a heightened standard here. And respondents do not dispute that, absent a constitutional requirement or express statutory command, this Court has not imposed a clear-and-convincing standard in *any* civil case against a private party since 1966. Br. 18-19.

In those older cases, this Court imposed a heightened standard of proof only when extraordinarily important deprivations of individual rights by the government were at stake—deportation or denaturalization—not mere monetary relief. Br. 19-20. Respondents rightly do not contend that FLSA overtime benefits are analogous to such weighty interests. The lack of such an extraordinary individual interest here should be dispositive.

Were more needed, this Court has typically imposed a heightened standard only in cases brought by the government and never on defendants, as respondents seek. And the preponderance standard is the norm across employment statutes. Br. 21-22. The preponderance standard governs Title VII cases, for example, even though Title VII plaintiffs might equally claim that "the social disutility" of racial discrimination is "greater than the disutility of requiring employers" to compensate plaintiffs. *Cf.* Resp. Br. 16. Opening the door to judicial policy judgments over which interests are sufficiently "weight[y]" (Resp. Br. 19) to justify a heightened standard of proof would invite countless litigants to argue that their claims too warrant special treatment.

2. Respondents (at 14-15) note that common-law courts applied a clear-and-convincing standard to fraud

and undue-influence claims and for specific performance of an oral contract or to establish the terms of a lost will. But this Court has already rejected "[r]eference to common law practices" as "misleading" when applying federal statutes because the common law's concerns over fabricated written instruments have little relevance to modern civil litigation. *Herman & MacLean*, 459 U.S. at 388 & n.27; *see* U.S. Br. 10 n.1. Thus, the default preponderance rule governs statutory federal fraud claims, notwithstanding the historical clear-and-convincing standard for fraud. *Herman & MacLean*, 459 U.S. at 390; *Grogan*, 498 U.S. at 291. Here, where *no* historical analogue to FLSA claims carried a heightened standard of proof, the case for clear-and-convincing evidence is even weaker.

Respondents (at 15) also rely on the fact that some circuits in the 1980s and 1990s imposed a heightened standard of proof before entering default judgments as a sanction for litigation misconduct. Respondents omit that the Seventh Circuit has since expressly disagreed with these decisions in light of "the Supreme Court's repeated rejection of more demanding evidentiary burdens in the civil setting." *Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 779 (7th Cir. 2016). Regardless, the courts that impose a heightened standard of proof for litigation misconduct emphasize the "fundamentally punitive" nature of the default-judgment remedy, which involves allegations of "quasi-criminal wrongdoing." *Shepherd v. ABC*, 62 F.3d 1469, 1476-77 (D.C. Cir. 1995) (citation omitted). Respondents do not explain how FLSA money-damages claims are remotely analogous. As the United States (at 7) confirms, "a straightforward application of [this Court's] precedent" resolves this case.

B. Policy Arguments Do Not Justify a Clear-and-Convincing Standard Here

Even were standards of proof simply a matter of calculating the "social disutility" of error, Resp. Br. 12, 16, 19 (citation omitted), respondents' policy arguments for a clear-and-convincing standard applicable to all 34 FLSA exemptions fail on their own terms.

1. Respondents (at 16-17) urge that the FLSA's "explicit remedial purpose" of helping workers warrants a heightened standard of proof. But as this Court has already explained—in a decision respondents do not acknowledge outside their statement—the FLSA does not "pursue[] its remedial purpose at all costs." *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 89 (2018) (citation omitted). Instead, the FLSA, like all statutes, reflects a "compromise": Congress required overtime and minimum wages for certain employees while offering exemptions for others. *Id.* (citation omitted); NELF Br. 5-7. Those exemptions "are as much a part of the FLSA's purpose as the overtime-pay" and minimum-wage requirements themselves. *See Encino*, 587 U.S. at 89. This Court has thus rejected the FLSA's purposes as a basis for systematically *construing* the exemptions against employers. *Id.* at 88-89. It makes equally little sense to systematically skew *litigation* of those same exemptions against employers. Br. 29; WLF Br. 9-12.

Respondents' account of the FLSA's goals also ignores the entire point of the 34 exemptions: Congress recognized that, for certain jobs, overtime and minimum wages may be inappropriate. Work might occur offsite, at unpredictable hours, or seasonally, or the job might require discretion or specialized training that makes hiring additional workers infeasible. Br. 24-26. For outside

salesmen in particular, overtime is "often impracticable or unworkable" given their variable, hard-to-track hours. NAW Br. 2; *see id.* at 5-11. Yet a heightened standard will inevitably produce incorrect outcomes, treating workers who are, in fact, exempt from the FLSA as subject to the Act whenever an employer cannot overcome the higher bar of clear-and-convincing evidence. Br. 22-23; Chamber Br. 11-14; LGLC Br. 6; WLF Br. 17-20. Indeed, respondents do not dispute that a clear-and-convincing standard might require overtime even where the evidence establishes with, say, 85% certainty that the employee is FLSA exempt. Br. 23. Erroneously applying the FLSA to people that Congress determined should *not* be covered by the statute does not further Congress' objectives.

The consequences of those errors will often fall on the very workers whose interests respondents purport to advance. As respondents recognize, one critical purpose of the FLSA is "to increase overall employment by incentivizing employers to widen their 'distribution of available work.'" Resp. Br. 18 (quoting *Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 44 (2023)); *accord* Br. 4, 24-25.

But a skewed standard of proof may "create perverse disincentives for employers to *shrink* their workforces." *See* Chamber Br. 4 (emphasis added). FLSA cases are costly. Million-dollar settlements are "routine[]," *id.* at 10, and the cases are expensive to litigate, LGLC Br. 16. The "uncertainty" of the clear-and-convincing standard exacerbates that problem, *id.* at 3, pushing more cases to settlement or trial, Chamber Br. 14. Those burdens would be especially pronounced for small businesses like EMD with a limited number of employees, many of whom wear multiple hats. Br. 26-27; Chamber Br. 16-18. And local gov-

ernments too face "serious and far-reaching" "potential financial consequences." LGLC Br. 2.[1] Faced with those risks, employers face a menu of bad options: restructure their workforce, raise prices, or fire workers. WLF Br. 14-16; NAW Br. 3. A standard of proof that leads to *less* employment is antithetical to the FLSA's goals.

2. Respondents (at 18-21) also argue for a higher standard by portraying the FLSA as protecting nonwaivable public rights. As an initial matter, respondents are incorrect that FLSA rights may never be waived. While FLSA rights may not be waived *prospectively*, *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981), employees may waive FLSA rights *retrospectively* in a settlement approved by the Department of Labor or a court, 29 U.S.C. § 216(c); *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352-53 (11th Cir. 1982).

Regardless, respondents never explain what waivability has to do with the standard of proof. Whether or not a right is waivable turns on *to whom* the right belongs. Courts asks whether the right protects the "personal" interests of the individual or broader societal or institutional concerns. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 678 (2015) (citation omitted). The standard of proof, by contrast, dictates "how difficult it will be for the

[1] Respondents (at 19 n.2) note that the Office of Personnel Management requires federal agencies to pay their own employees overtime when there is "reasonable doubt" whether an FLSA exemption applies. 5 C.F.R. § 551.202(d). The government is uniquely well suited to absorb costs and, like any employer, is free to impose a more onerous standard on itself when choosing to pay overtime. But the Solicitor General's brief makes clear that the United States agrees that the default preponderance standard is the appropriate rule for civil litigation of the FLSA's exemptions.

party bearing the burden of persuasion" to show, as a factual matter, that the right applies in the first place. *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 101 n.4 (2011).

The FLSA context illustrates why the two concepts are distinct. As respondents (at 18) recognize, FLSA rights are in part nonwaivable because they protect the public's interest in market competition. Allowing employees to prospectively waive their FLSA rights would allow some employers to gain a "competitive advantage" by paying below-market wages. *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 36 (1987). But erroneous FLSA judgments equally harm market competition by forcing some employers to pay *above*-market wages not required by the FLSA. The public's interest is in the *accurate* application of the FLSA, not in erroneous results driven by a heightened standard of proof.

This Court has never relied on a right's nonwaivability to support a heightened standard. In fact, this Court has reserved a heightened standard for "particularly important *individual* interests," *Grogan*, 498 U.S. at 286 (citation omitted) (emphasis added), which generally *are* waivable. Criminal defendants can waive their right to trial by pleading guilty, yet the government's obligation to prove guilt beyond a reasonable doubt is the highest standard of proof known to the law. *See Peretz v. United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are … subject to waiver."). Noncitizens can waive their right to a deportation hearing by voluntarily departing the United States. 8 U.S.C. § 1229c(a)(1). And citizens can waive denaturalization proceedings by renouncing their American citizenship. *Id.* § 1481(a)(5). Those rights are among the handful to

which this Court has applied a heightened standard. Br. 19.[2] Yet individuals waive those rights every day.

At the same time, countless nonwaivable rights are subject to the preponderance-of-the-evidence default. Current National Labor Relations Board precedent holds that employees may not waive their rights to engage in activity protected by the National Labor Relations Act (NLRA) or to file unfair-labor-practice charges. *McLaren Macomb*, 372 NLRB No. 58, 2023 WL 2158775, at *7 (Feb. 21, 2023), *enf'd*, 2024 WL 4240545 (6th Cir. Sept. 19, 2024). Yet employers' affirmative defenses under the NLRA are subject to the preponderance standard. *See NLRB v. Transp. Mgmt. Co.*, 462 U.S. 393, 403 (1983). Likewise, in the Department of Labor's view, workers may not waive the protections of the Occupational Safety and Health Act (OSH Act). U.S. Dep't of Lab., *Employer Liability and Payment Requirements for Prescription Protective Eyewear* (May 14, 2007), https://tinyurl.com/ybkem7x7; *see* 29 U.S.C. § 654(a)(2) (employers "shall comply" with OSH Act standards). Yet OSH Act proceedings too are governed by a preponderance standard. *Echo Powerline, L.L.C. v. OSHRC*, 968 F.3d 471, 476 (5th Cir. 2020).

Moreover, the preponderance standard is the norm for nonwaivable rights outside the labor and employment context. Subject matter jurisdiction, of course, is nonwaivable. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Yet the preponderance standard applies to myriad subject-matter-jurisdiction doctrines. *E.g.*, *Broidy Cap. Mgmt. LLC v. Benomar*, 944 F.3d 436, 443-44 (2d Cir.

[2] Congress has since imposed an express preponderance-of-the-evidence standard on denaturalization proceedings. 8 U.S.C. § 1481(b); *see Vance v. Terrazas*, 444 U.S. 252, 264-65 (1980).

2019) (diplomatic immunity); *Harris v. Kellogg Brown & Root Servs.*, 724 F.3d 458, 464, 469 (3d Cir. 2013) (political-question doctrine); *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347-48 (4th Cir. 2009) (statutory jurisdictional bar). Likewise, the Military Lending Act and the Electronic Fund Transfer Act both bar waivers of statutory rights yet expressly impose a preponderance standard for affirmative defenses. 10 U.S.C. § 987(e)(2), (f)(5)(D); 15 U.S.C. §§ 1693h(b), 1693*l*, 1693m(c). The waivability of a right *vel non* simply has nothing to do with the standard of proof.

3. Respondents (at 21-23) also argue for a clear-and-convincing standard because of a purportedly "high risk of … decisional errors in the employer's favor."

Respondents (at 21-22) note that the "employer controls much of the evidence relevant to establishing an FLSA violation" and could "manipulate[]" evidence in its favor. But in countless civil cases, the defendant controls most of the evidence. Defendants, including FLSA defendants, generally bear the *burden* of proof for affirmative defenses—incentivizing them to put forward relevant evidence in their control. *Cf. Murray v. UBS Sec., LLC*, 601 U.S. 23, 35-36 (2024) (discussing Title VII burdens). And American courts allow broad discovery, permitting "[m]utual knowledge of all the relevant facts gathered by both parties." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). If one side's control of most evidence justified a heightened standard of proof, clear-and-convincing evidence would be the rule, not the exception.

As for "manipulated" evidence, district courts are well situated to address that issue without skewing the standard of proof. For example, in respondents' one FLSA case (at 22) where the employer purportedly "manipulated" the

plaintiff's job title, the court ignored the job title and awarded overtime. *Sanchez v. Ultimo, LLC*, 2024 WL 3633696, at *6-7 (D.D.C. Aug. 2, 2024). Respondents' cited study (at 22) identifies similar examples where plaintiffs prevailed. Lauren Cohen et al., *Too Many Managers* 3 (Nov. 2023) (discussing *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1269-71 (11th Cir. 2008)); *see id.* app. B (collecting examples of multimillion-dollar settlements against employees notwithstanding plaintiffs' managerial job titles). District courts may also impose sanctions for evidentiary misconduct. *See* Fed. R. Civ. P. 26(g)(3). A heightened standard of proof has never been the solution to the potential for manipulated evidence, which is not an issue unique to the FLSA.

Seizing on one line in *Santosky v. Kramer*, respondents also urge a heightened standard because FLSA plaintiffs are disproportionally "'poor, uneducated,' or … member[s] of a minority group." Resp. Br. 22-23 (quoting 455 U.S. 745, 763 (1982)). *Santosky* held that a heightened standard for the termination of parental rights is required by the Due Process Clause, 455 U.S. at 747-78, not that a clear-and-convincing standard is more appropriate whenever the plaintiffs belong to historically disadvantaged groups.

Subsequent cases refute the idea that race, class, or education level are appropriate considerations. This Court has imposed the ordinary preponderance standard on exceptions to discharge in bankruptcy, even though debtors are by definition in dire financial straits. *Grogan*, 498 U.S. at 287-88. And this Court has imposed the preponderance default on Title VII affirmative defenses without asking whether Title VII plaintiffs are more likely to

be minorities. *Price Waterhouse*, 490 U.S. at 253 (plurality op.). Class, education level, and especially race should have no place in the standard-of-proof analysis.

Moreover, respondents' discussion of FLSA-plaintiff demographics (at 22-23) covers only minimum-wage plaintiffs, not overtime. Respondents' cited study (at 23) reveals that, for *overtime*, white workers actually experience the highest rate of violations. Annette Bernhardt, *Broken Laws, Unprotected Workers* 44 (2009). Additionally, the FLSA's exemptions cover job categories that no one would describe as at risk of "class bias." *Contra* Resp. Br. 22 (quoting *Santosky*, 455 U.S. at 763). Bona fide executives (*e.g.*, CEOs), professionals (*e.g.*, doctors and lawyers), computer programmers, airline pilots, and small-town television anchors and police chiefs are all exempt from the FLSA's overtime requirements. 29 U.S.C. § 213(a)(1), (17), (b)(3), (9), (20). The plaintiff in this Court's last FLSA overtime case made over $200,000 a year. *Helix*, 598 U.S. at 47.

Respondents themselves are hardly the "low-income workers" that they (at 11) make themselves out to be. EMD's union-negotiated collective-bargaining agreement offers salesmen the chance to earn generous commissions up to 6.6%, plus bonuses. EMD Collective-Bargaining Agreement art. 2.1.B. Taking advantage of those opportunities, respondent Magdaleno Gervacio earned over $115,000 in 2020. Pls.' Damages Calculation 9, D. Ct. Dkt. 242-11.

II. The Judgment Below Should Be Vacated

Respondents (at 23-28) devote a conspicuously large section of their brief to an alternative ground for affirmance: That, even under the preponderance standard,

they are not outside salesmen. That fact-bound argument failed to persuade this Court to deny certiorari, *see* BIO 15-18; Resp. Cert. Supp. Br. 1-2, and is even less persuasive as an alternative ground for affirmance.

1. To start, respondents' alternative argument is outside the scope of the question presented and was not pressed or passed upon below. In the district court, respondents heavily relied on the Fourth Circuit's heightened standard. Respondents' motion for summary judgment underscored the "very high standard" of "clear and convincing" evidence *19 times*. Pls.' Summ. J. Mem. 1, 16-17, 21-26, 29, D. Ct. Dkt. 105. Respondents' counsel opened trial by telling the court that "defendants have the burden of proving the outside sales exemption by clear and convincing evidence. It's a very heavy burden." 3/1/2021 Morning Tr. 12:22-24, D. Ct. Dkt. 198. And in closing, respondents' counsel reiterated EMD's "burden" under the "clear and convincing standard." 3/11/2021 Tr. 7:15-16, 18:3, D. Ct. Dkt. 213.

The district court followed respondents' lead, mentioning the clear-and-convincing standard four times during closing arguments and six times in its opinion. *Id.* at 17:4-5, 56:8, 56:17-19, 65:8; Pet.App.46a, 48a-50a.[3] And the Fourth Circuit affirmed liability exclusively based on the standard of proof. Pet.App.12a-15a. Having successfully

[3] Respondents (at 26) accuse petitioners of "misleading" the Court about the district court's remarks during closing argument. Respondents never explain what is misleading about petitioners' accurate statement that the district court "questioned respondents' counsel under the premise" that this was a close case. Br. 23. And respondents ignore the district court's equally telling, unqualified remark that "there's a lot to be said" for EMD "on th[e] liability question." 3/11/2021 Tr. 40:3-6; Br. 23.

persuaded the lower courts to apply the exacting clear-and-convincing standard, respondents cannot now claim that the standard is irrelevant.

Beyond their individualized desire to resolve this case sooner, Resp. Br. 28, respondents offer no reason for this Court to forgo its "usual practice" of not adjudicating "factual questions in the first instance." *See CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 435 (2016). When this Court decides standard-of-proof questions, it routinely leaves application of the correct standard for remand. *E.g., Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 107, 110 (2016); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 557-58 (2014); *Price Waterhouse*, 490 U.S. at 254-55 (plurality op.). Lower courts are invariably more familiar with the facts and better situated to make case-specific evidentiary determinations than this Court. And standards of proof are well understood. Lower courts are not crying out for this Court's guidance on what a preponderance of the evidence means.

In opposing certiorari, respondents contended that even a "brief[]" summary reversal reaffirming the default preponderance standard, *see* U.S. Cert. Br. 15, would unduly "tax this Court's time and resources." Resp. Cert. Supp. Br. 2. Yet respondents now ask this Court to review a 1,533-page trial transcript and 219 exhibits covering topics like how much discretion supermarket managers enjoy over displaying crackers and soda, 3/10/2021 Morning Tr. 21:19-22:19, D. Ct. Dkt. 212, and how salespeople can best arrange tortillas and avocados to maximize sales, *see* C.A. J.A.1400-09.

Respondents, however, appear not to have undertaken that endeavor themselves. Respondents' brief (at

24-27) cites only the district court's opinion and statements by EMD's counsel during closing argument—not the actual trial evidence. Respondents (at 25) point to the closing-argument transcript as supposed proof of a "highly skewed factual presentation."[4] And respondents (at 25-26) note that the district court compared the version of the facts that it found under the clear-and-convincing standard to the facts of a Sixth Circuit case finding the outside-salesman exemption inapplicable.

But to address respondents' alternative argument, this Court could not rely on the district court's factual findings, which are inherently infected by the erroneous standard of proof, or on counsel's closing arguments. Instead, this Court would need to take the extraordinary

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[4] Respondents (at 24) misparaphrase EMD's counsel as "conced[ing] that it was generally not possible for respondents to make new sales at chain stores." All counsel said was that "the *products* have to be approved" at "some of the big chain stores," 3/11/2021 Tr. 46:18-21 (emphasis added), *i.e.*, at some stores, salespeople cannot walk in and sell completely new items. But as counsel explained, the evidence showed that salespeople *can* get "more space on the floor to sell product that's approved." *Id.* at 47:7-8.

Respondents (at 24-25) also incorrectly suggest that counsel below "concede[d] that respondents 'do a lot … more merchandising'" (like stocking products) "'than they do selling.'" Counsel was simply addressing what he thought "[t]he concern [wa]s … from the Court's point of view"—not stating EMD's position. *Id.* at 62:5-6. Counsel clarified: "[I]f [respondents] really were merchandisers, they would be working for a different company … and would be in a different [bargaining] unit." *Id.* at 62:14-17. EMD employs merchandisers via a different corporate affiliate. Respondents work (or worked) for E.M.D. *Sales* Inc. and belong to the *Salespersons* bargaining unit. *See* Collective-Bargaining Agreement, D. Ct. Dkt. 242-4.

step of analyzing the voluminous record itself to determine in the first instance whether EMD carried its burden to demonstrate by a preponderance of the evidence that respondents are FLSA-exempt outside salesmen. It is hard to imagine a poorer use of this Court's certiorari docket.

2. Were this Court to undertake that dubious exercise, EMD should prevail. The evidence at trial showed that EMD's business is divided "about 50/50" between independent and chain stores. 3/8/2021 Afternoon Tr. 45:9, D. Ct. Dkt. 210. At independent stores, the district court found "clear and convincing evidence that [respondents] make sales." Pet.App.48a. *A fortiori*, a preponderance of evidence supports the same conclusion.

"A core issue" is thus whether respondents could also "make their own sales of EMD products at chain stores." Pet.App.37a. The evidence on that question was split. Respondents (at 24) offer a one-sided account of their evidence: Chain-store representatives testified that they negotiated purchases in advance with EMD's managers, leaving no room for salespeople like respondents to sell additional merchandise to individual stores. Pet.App.38a.

But EMD's evidence suggested otherwise. One EMD salesperson (who was also respondents' union representative) testified that he made sales at chain stores "many times" and that "there are always opportunities" to sell by talking to a store manager. 3/10/2021 Morning Tr. 16:9-13, 21:19-23, 22:18-24. Another EMD salesperson testified that she "always ha[s] the intention of increasing sales" at chain stores by talking to the store managers, "tell[ing] them about products that are selling well" and the "promotions that we have." 3/9/2021 Afternoon Tr. 47:15-25, D. Ct. Dkt. 211. At multiple chains, she had "lost count"

of how many extra sales she had made. *Id.* at 48:13-18, 50:17-19. As a third EMD salesperson put it: "[T]here's no limit as to how much we can sell to [chain stores]." *Id.* at 25:24-25. So long as you "keep[] at it" and push additional products, "it works." *Id.* at 29:15. Confirming that such sales were possible, a former Walmart corporate representative testified that store managers sometimes purchase additional products, even if technically prohibited by corporate policy. Pet.App.39a.

Likewise, EMD's owner, a former saleswoman herself, testified that EMD salespeople's "job function" and "mission is to sell." 3/8/2021 Afternoon Tr. 37:2; 3/9/2021 Morning Tr. 40:22. She therefore trained her salespeople to be "aggressive" because "[t]here is free space" available at "[p]retty much" "all chain stores," and "[w]e want to get it all for EMD." 3/8/2021 Afternoon Tr. 79:5-16. "[T]he sky is the limit on what" salespeople can sell. *Id.* at 80:23-24. Under the correct preponderance standard, EMD should prevail—on remand.

CONCLUSION

The court of appeals' judgment should be vacated and the case remanded.

Respectfully submitted,

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