No. 23-217

IN THE

Supreme Court of the United States

E.M.D. SALES, INC. AND ELDA M. DEVARIE, *Petitioners*,

v.

FAUSTINO SANCHEZ CARRERA, JESUS DAVID MURO, AND MAGDALENO GERVACIO, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., NATIONAL RETAIL FEDERATION, AND RESTAURANT LAW CENTER IN SUPPORT OF PETITION FOR CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business ("NFIB"), which is the Nation's leading small business association, representing members in Washington, D.C., and all fifty states. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees.

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[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. *Amici curiae* further affirm that counsel of record for all parties received notice of *amici curiae*'s intent to file this brief at least 10 days before its due date.

Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, NFIB Legal Center frequently files *amicus curiae* briefs in cases that will impact small businesses.

Established in 1911, the National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. Retail is the largest private-sector employer in the United States. The NRF's membership includes retailers of all sizes, formats, and channels of distribution, spanning all industries that sell goods and services to consumers. The NRF provides courts with the perspective of the retail industry on important legal issues impacting its members. To ensure that the retail community's position is heard, the NRF often files *amicus curiae* briefs expressing the views of the retail industry on a variety of topics.

The Restaurant Law Center is the only independent public policy organization created specifically to represent the interests of the food-service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other food-service outlets employing over 15 million people—approximately 10 percent of the U.S. workforce—making it the second largest private-sector employers in the United States. Through regular participation in *amicus curiae* briefs on behalf of the industry, the Restaurant Law Center provides courts with the industry's perspective on legal issues

significantly impacting its members and highlights the potential impact of pending cases like this one.

Amici's members employ millions of individuals throughout the United States and dedicate considerable time, energy, and resources to complying with the Nation's complex and often burdensome statutory and regulatory regimes, including the Fair Labor Standards Act ("FLSA"). *Amici* therefore have a significant interest in ensuring that the federal courts properly construe the breadth, scope, and reach of the FLSA. The Fourth Circuit's reading requires Petitioners to shoulder a burden of proof that is inconsistent with the FLSA's text and that threatens employers with significant and unanticipated overtime liabilities. *Amici* seek to ensure that federal courts properly apply the burden of proof under the applicable statute and that they do so uniformly across the Circuits.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a clean opportunity to resolve an entrenched split on an important and recurring employment law issue under the Fair Labor Standards Act. As the Petition amply demonstrates, the decision below contradicts this Court's precedents, conflicts with the decisions of numerous other Circuits, and misinterprets the FLSA. As a result, employers operating in Maryland, North Carolina, South Carolina, Virginia, and West Virginia are currently held to a higher standard than those in other jurisdictions. That disparity is alone enough to warrant review. But it is all the more troubling here, where it cuts to the central issue of what burden of

proof exists in *every* case concerning one of the FLSA's numerous exemptions.

The decision below not only entrenches a circuit split, but it is demonstrably erroneous. According to the Fourth Circuit, employers must "prove their entitlement" to an exemption from the FLSA's overtime compensation requirements "by clear and convincing evidence." Pet.App.15a. Yet the default rule in civil litigation has always been the preponderance of the evidence standard, and there is no legal reason to apply a heightened standard here. Nothing in the text of the FLSA nor the circumstances of a civil action for monetary damages warrants a departure. At least six other Circuits have reached that conclusion and rejected the Fourth Circuit's outlier approach.

By adopting an improper heightened standard, the decision below forces the thousands of employers operating in the Fourth Circuit to satisfy a legal regime that Congress never enacted. As this Court has repeatedly recognized, the burden of proof can have a profound impact on the outcome of civil litigation. *See, e.g.*, *Speiser v. Randall*, 357 U.S. 513, 525 (1958) (noting that "where the burden of proof lies may be decisive of the outcome"). And research into the "clear and convincing evidence" standard backs up this commonsense conclusion. One recent study shows that fact finders are significantly more likely to rule against a party carrying a clear and convincing evidence standard compared to a preponderance standard. *See* David L. Schwartz & Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 Harv. J.L. & Tech.

429, 451–69 (2013). And years of experience within the Fourth Circuit demonstrate that its heightened standard poses a formidable legal obstacle compared to the preponderance standard.

That error has profound real-world impact. The Fourth Circuit's mistaken rule will often prove outcome-determinative for businesses operating in that jurisdiction. It also reduces courts' ability to weed out meritless cases at the summary judgment stage—by skewing the burden of proof in an already fact-intensive analysis. And it will invite plaintiffs to forum shop in cases against multistate businesses. Those distortions, in turn, create competitive imbalances based on no more than geographic happenstance, and impose significant costs on employers.

This circuit split will not resolve without this Court's intervention. The Fourth Circuit has declined numerous en banc opportunities to change course. And the impact of the Fourth Circuit's error cannot be overstated. Naturally, businesses make staffing decisions based in part on applicable legal regimes. Uncertainty over whether an employee falls under the FLSA's coverage may upset business expectations, resulting in less capital investment into a company's workforce. The prospect of cumbersome and costly litigation may also chill commercial development and create a perverse disincentive for employers to either shrink their workforces or hire employees outside of the Fourth Circuit. These problems undermine the FLSA's goal of balancing fairness with practicality, the Act's laudable aim to increase the number of Americans employed, and this Court's interpretation

of the statute. This Court should grant certiorari and reverse.

ARGUMENT

I. This Case Cleanly Presents An Important And Recurring Question That Has Divided The Circuits.

The Fourth Circuit's decision confirms that it is an outlier with respect to an employer's efforts to show that a category of jobs falls under an exemption to the FLSA. The FLSA established a federal minimum wage for covered employees and set forth overtime compensation requirements. *See* 29 U.S.C. §§ 206, 207. The overtime provisions require an employer to pay employees at least 150% of their hourly pay rate when they work more than 40 hours in a week. *Id.* § 207(a)(1). But Congress identified certain employees who warrant exemptions either from federal minimum wage or the overtime requirements. *See id.* § 213(a)-(b). These exemptions were meant to provide employers with a straightforward "safe harbor" from overtime liability for specified employees. *Anani v. CVS RX Servs., Inc.*, 730 F.3d 146, 148 (2d Cir. 2013).

Specifically, the FLSA exempted 19 different categories of jobs from the minimum wage and maximum hour requirements. Some of those job categories are fairly specific (*e.g.*, fishermen, software engineers, and baseball players). *See id.* § 213(a)(5), (a)(17), (a)(19). Other exemptions apply more generally and require interpretation. For example, the FLSA exempts "outside salesm[e]n," *id.* § 213(a)(1), which this Court has described as individuals who make sales and work for the most part

outside of their employer's principal place of business, *see Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 148 (2012). Congress exempted some of these professions because "the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week." 69 Fed. Reg. 22122, 22124 (Apr. 23, 2004). The decision to provide employers with exemptions also aligns with the FLSA's recognition that the statute's protections are often unnecessary and even ill-advised where employers and employees alike would benefit from alternative compensation practices. *See* 29 U.S.C. § 213(a).

Whether the FLSA exempts an employee from coverage is frequently litigated. *See* 18th Annual Workplace Class Action Litigation Report 25 (2022), https://bit.ly/3PMFamP ("By the numbers, FLSA collective action litigation filings in 2021 far outpaced other types of employment-related class action filings because virtually all FLSA lawsuits are filed on a collective basis."). The federal courts have resolved dozens of lawsuits since just August of this year presenting the question whether an employee is exempt from FLSA coverage. *See Orbetta v. Dairyland USA Corp.*, 2023 WL 6386921, at *9 (S.D.N.Y. Sept. 30, 2023); *Esquivel v. Lima Restaurant Corp.*, 2023 WL 6338666, at *7 (E.D.N.Y. Sept. 29, 2023); *Hendricks v. Total Quality Logistics, LLC*, 2023 WL 6255723, at *5 (S.D. Ohio Sept. 26, 2023); *Hairgrove v. City of Salisbury*, 2023 WL 5985349, at *9 (M.D.N.C. Sept. 14, 2023); *Echevarria v. ABC Corp.*, 2023 WL 5880417, at *4 (E.D.N.Y. Sept. 11, 2023); *United States Dep't of Lab. v. Wireless Boys, LLC*, 2023 WL 5509560, at *12 (N.D. Ohio Aug. 25, 2023); *Stark v.*

ABC Pediatric Clinic, P.A., 2023 WL 5961657, at *4–5 (S.D. Tex. Aug. 25, 2023); *Mondragon v. Sushitobox*, 2023 WL 5370245, at *2 n.2 (D.N.J. Aug. 22, 2023); *Heras v. Metropolitan Learning Institute, Inc.*, 2023 WL 5810784, at *5–11 (E.D.N.Y. Aug. 18, 2023); *Manteuffel v. HMS Host Tollroads, Inc.*, 2023 WL 5287722, at *2–6 (6th Cir. Aug. 17, 2023); *Covington v. FMC & Assocs., LLC*, 2023 WL 5133184, at *3–5 (D.D.C. Aug. 10, 2023); *Williams v. Core Energy, Inc.*, 2023 WL 5677543, at *2 (S.D. Fla. Aug. 3, 2023); *Chouinard v. Perfection Snacks*, 2023 WL 4980939, at *5 (E.D. Pa. Aug. 3, 2023); *Luna Vanegas v. Signet Builders, Inc.*, 2023 WL 4926237, at *1 (W.D. Wis. Aug. 2, 2023).

Because these actions are frequently brought on behalf of classes of employee, *see Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 448 (2016) ("Section 216 is a provision of the FLSA that permits employees to sue on behalf of 'themselves and other employees similarly situated.'" (quoting 29 U.S.C. § 216(b))), any decision concerning an FLSA exemption can have significant financial consequences. Employers may end up saddled with liability in the form of backpay, but also additional penalties, for certain FLSA violations. *See* 29 U.S.C. § 216(b); *id.* § 215(a)(3). The figures at stake can be staggering. For instance, in *Su v. E. Penn Mfg. Co.*, No. CV 5:18-cv-01194 (E.D. Pa. May 16, 2023), a jury recently awarded employees more than $22 million in overtime compensation. And settlements routinely exceed $1 million. *See, e.g.*, *Moodie v. Kiawah Island Inn Co., LLC*, 2016 WL 11724398 (D.S.C. Dec. 16, 2016).

Given the potential for massive monetary awards, FLSA litigation has proven attractive to plaintiffs' lawyers. Under the FLSA, employees may file collective actions in any district where their employer can be served with process. *See* 29 U.S.C. § 216(b). As a result, employers that operate nationwide will often have employees domiciled and working within the Fourth Circuit's borders. Savy plaintiffs will file their FLSA actions within the Fourth Circuit to take advantage of the heightened clear and convincing evidence standard. *See* 18th Annual Workplace Class Action Litigation Report 26 (2022), https://bit.ly/3PMFamP ("Virtually all FLSA lawsuits are filed as collective actions; therefore, these filings represent the most significant exposure to employers in terms of any workplace laws.").

It thus becomes all the more vital that these cases are litigated under the appropriate standard of proof, lest employers who make good faith judgments about the requirements of the law later find themselves at risk of potentially crushing liability in a cherrypicked forum. *See* William T. Salzer, *Exploring New Routes To Early Settlement In Employment Law Cases*, Aspatore, 2013 WL 153852, at *4 (2013) ("The past couple of years have resulted in an explosion of FLSA class action litigation that creates tremendous expense and exposure for employers."). This Court has frequently granted certiorari to resolve cases implicating the FLSA in order to eliminate the acute risk of forum shopping. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012); *Long Island Care At Home, Ltd. v. Coke*, 551 U.S. 158

(2007). But the clean circuit split presented here makes this petition all the more certworthy.

As Petitioners have explained, the Fourth Circuit's heightened standard conflicts with the approach embraced by six other Circuits. *See Herrera v. TBC Corp.*, 18 F. Supp. 3d 739, 741 (E.D. Va. 2014) (cataloging the split of authority). In the Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, courts resolve whether an employer has proven an FLSA exemption under the preponderance of the evidence standard. *See Faludi v. U.S. Shale Sols., L.L.C.*, 950 F.3d 269, 273 (5th Cir. 2020); *Renfro v. Indiana Michigan Power Co.*, 497 F.3d 573, 576 (6th Cir. 2007); *Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 507 (7th Cir. 2007); *Coast Van Lines v. Armstrong*, 167 F.2d 705, 707 (9th Cir. 1948); *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1158 (10th Cir. 2012); *Dybach v. State of Fla. Dep't of Corr.*, 942 F.2d 1562, 1566 n.5 (11th Cir. 1991). And the Fourth Circuit has repeatedly declined requests, including in the proceedings below, to overturn this heightened standard through the en banc process. *See* Pet.App.1a-2a; *see also Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688, 691 n.3 (4th Cir. 2009) (highlighting the Fourth Circuit's entrenched precedent and noting that a "panel cannot overrule the decision of a prior panel"). This clearly entrenched circuit split on a significant issue warrants this Court's review. Indeed, tying up employers in litigation over the technical details of an employee's job responsibilities turns the FLSA on its head.

II. The Fourth Circuit's Outlier Approach Undermines The FLSA's Design And Poses A Threat To American Business.

A. The Fourth Circuit's Heightened Burden Of Proof Thwarts The FLSA's Legislative Design.

The Fourth Circuit decision is not only an outlier, but it is also wrong. The Fourth Circuit's heightened standard conflicts with this Court's express rejection of efforts to construe the FLSA narrowly against the employer's interest. In *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), for example, this Court refused to apply a narrowing construction to the FLSA's overtime exemptions and instead held that courts "have no license to give the exemption[s] anything but a fair reading." *Id.* at 1142. Rather than putting a thumb on the scale for either party, a "fair reading" requires the "straight-up weighing of the evidence" through the preponderance of the evidence standard. *Leflar v. Target Corp.*, 57 F.4th 600, 604 (8th Cir. 2023). Doing so will further the legislature's intent, as "Congress intended . . . to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167 (1945) (citation omitted). This "policy of uniformity in the application of the provisions of the Act" can only be achieved with "equality of treatment," including the applicable burden of proof. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 710 (1945).

That Congress has specified in other statutes a heightened burden of proof buttresses the conclusion

that a preponderance standard should apply to the circumstances here. In various statutes, Congress has prescribed the applicable burden of proof as well as dictated the party that bears it. In some of those laws, Congress has expressly required that a party must prove an issue by clear and convincing evidence. *See* 15 U.S.C. § 6604 ("[T]he defendant shall not be liable for punitive damages unless the plaintiff proves by clear and convincing evidence that the applicable standard for awarding damages has been met."); 18 U.S.C. § 4243 ("[A] person . . . has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person . . . ."); 49 U.S.C. § 30171 ("[N]o investigation . . . shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior."). Congress did not take such a step in the FLSA.

Where, as here, Congress has not specified a burden of proof on a civil matter, the long-recognized default rule is that the matter must be proven by a preponderance of the evidence. *See Steadman v. SEC*, 450 U.S. 91, 101 n.21 (1981). Unless some special "basis" exists for "a clear and convincing standard of proof," the standard is the preponderance of the evidence. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 107 (2016). And, when deciding upon the applicable burden, courts must always remain mindful that a chosen standard "indicate[s] the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979). Thus, a clear and convincing evidence standard applies only

"where particularly important individual interests or rights are at stake." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983).

Those circumstances have proven rare. *See Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (termination of parental rights); *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 285 (1966) (deportability); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (setting aside a naturalization decree). Courts seldom impose the heightened standard because it "expresses a preference for one side's interests," *Herman & MacLean*, 459 U.S. at 390, and it conflicts with the presumption that the preponderance of the evidence standard applies in civil matters, *see id.* at 388. That explains why this Court has clarified that the "imposition of even severe civil sanctions" begets just the preponderance of the evidence standard. *Id.* at 389–90; *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (holding that the preponderance standard applies to employer's affirmative defense).

The FLSA was enacted against these background principles, and they apply here with full force. Nothing about the FLSA warrants a departure. Not the FLSA's statutory text, nor the regulations enforcing it, nor general legal principles "justif[y] imposing a requirement of proving entitlement to [an FLSA] exemption by 'clear and affirmative evidence.'" *Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 506 (7th Cir. 2007). Rather, the FLSA is silent on the applicable burden of proof. *See Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1158 (10th Cir. 2012); *see also Grogan v. Garner*, 498 U.S. 279, 286 (1991)

(noting that the silence in a statute is inconsistent with the view that Congress intended to require a heightened standard of proof).[2]

The question whether a particular employee qualifies for overtime compensation under the FLSA is also far afield from the kind of core individual rights involving speech, life, and liberty for which this Court has imposed a heightened burden. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (requiring public officials to prove actual malice to set forth a viable claim of defamation); *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997) (explaining that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests"); *United States v. Virginia*, 518 U.S. 515 (1996) (applying intermediate scrutiny to gender-based classifications under equal protection). Thus, the scope of the FLSA's exemptions does not rise to the level of "particularly important individual interests or rights" that have justified imposition of a heightened burden. *Herman & MacLean*, 459 U.S. at 389–91.

A clear and convincing standard is moreover at odds with the FLSA's design. As this Court has explained, "the FLSA overtime rules encourage employers to hire more individuals who work 40–hour weeks, rather than maintaining a staff of fewer employees who consistently work longer hours." *Encino Motorcars*, 138 S. Ct. at 1144 n.3. But

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[2] And there is likewise nothing in the legislative history that speaks to the imposition of a heightened burden. *See Lederman*, 685 F.3d at 1158.

increasing the number of employees who will fall outside an exception—by ratcheting up the defendant's burden of proof—is likely to cause the opposite downstream effect. It will reduce the capacity of businesses—especially small businesses—to grow their workforce and "spread employment." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577–78 (1942), *superseded on other grounds by statute as stated in Trans World Air Lines, Inc. v. Thurston*, 469 U.S. 111, 128 n.22 (1985).

B. The Fourth Circuit's Heightened Burden Of Proof Has A Profound Impact On The Business Community.

The burden of proof in FLSA cases is not an academic exercise. Rather, it is often outcome determinative. That is especially so in this context, where the application of an exemption is a fact-intensive inquiry based on the scope of an employee's duties. *See* 29 C.F.R. § 541.2 (stating that "[a] job title alone is insufficient to establish the exempt status of an employee"); *see also Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446, 452–53 (4th Cir. 2004) (same); *Vela v. City of Houston*, 276 F.3d 659, 677 (5th Cir. 2001). Thus, by ratcheting up the burden of proof, the Fourth Circuit decreases the likelihood that employers will be able to rely on the FLSA's exemptions.

The very nature of the two standards bears this out. The "preponderance-of-the-evidence standard involves a straight-up weighing of the evidence to determine which side has the better of the argument." *Leflar*, 57 F.4th at 604; *see Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 622 (1993). The clear and

convincing evidence standard, by contrast, requires proof that "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 285 n.11 (1990); *California ex rel. Cooper v. Mitchell Bros. Santa Ana Theater*, 454 U.S. 90, 93 n.6 (1981). Naturally, then, application of the clear and convincing standard over the preponderance standard can "dramatically alter" the outcome of a case. *Griffin v. Griffin*, 916 N.W.2d 292, 299 n.8 (Mich. App. Ct. 2018); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting) (noting the material difference between the standards).

A recent study confirmed this intuitive conclusion. A court may invalidate a patent if a challenger proves the patent's invalidity by clear and convincing evidence. *See Microsoft Corp. v. I4I L. P.*, 564 U.S. 91, 97 (2011).[3] An academic study determined that jurors "who received the clear and convincing standard found the patent invalid less often (27.1%) than those who received the preponderance standard (38.3%)." Schwartz & Seaman, *Standards of Proof in Civil Litigation* at 459. The researchers therefore concluded that "even after holding all . . . other variables constant, the preponderance standard correlated with an increase in the odds ratio." *Id.* at 461.

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[3] Notably, the Court has rested this conclusion on the text of the Patent Act, which provides that patents are to be "presumed valid," 35 U.S.C. § 282, a term that had a "settled meaning in the common law" including a "heightened standard of proof." *Microsoft*, 564 U.S. at 101–04.

The Fourth Circuit's erroneous standard not only skews the results in many FLSA cases, but it also reduces the federal courts' ability to adjudicate meritless claims at early stages in the litigation. A heightened burden on defendants, coupled with an already fact-intensive analysis will frequently preclude dismissal or summary judgment—and thus send weak claims on to trial. *See* Comment, *Controlling Smart-Phone Abuse: The Fair Labor Standards Act's Definition of "Work" in Non-Exempt Employee Claims for Overtime*, 58 U. Kan. L. Rev. 737, 748 (2010) (noting that the fact-intensive inquiry increases "the potential for endless litigation at great expense to [] compan[ies]"). That, in turn, increases the pressure on employers to settle suits that would fail at early stages in other Circuits. *See* Gretchen Agena, *What's So 'Fair' About It?: The Need to Amend the Fair Labor Standards Act*, 39 Hous. L. Rev. 1119, 1131 (2002) (noting that "for employers with hundreds or thousands of employees, the burden of engaging in the kind of intensive, individualized determination required to ensure compliance with the FLSA is tremendous"). Meanwhile, trial is not a foregone conclusion in the other Circuits that apply the correct burden of proof.[4] As a result, employers within the

[4] *See, e.g.*, *McCartt v. Kellogg USA, Inc.*, 139 F. Supp. 3d 843, 858 (E.D. Ky. 2015) (granting employer's motion for summary judgment where employee worked in a sales job); *Lint v. Nw. Mut. Life Ins. Co.*, 2010 WL 4809604, at *3 (S.D. Cal. Nov. 19, 2010) (finding that a salesperson who spent around 20 percent of his time meeting with clients or prospective clients outside of the office qualified for the outside sales exemption); *Perry v. Randstad Gen. Partner (US) LLC*, 2018 WL 2363979, at *4 (E.D. Mich. May 24, 2018) (same); *see also Puentes v. Siboney Contracting Co.*, 2012 WL 5193417, at *8 (S.D. Fla. Oct. 19, 2012)

Fourth Circuit are forced into a more onerous and costly legal regime, based on nothing more than the vagaries of geography.

A number of decisions within the Fourth Circuit illustrate how that Circuit's distorted burden of proof skews outcomes. For instance, in *Jackson v. ReliaSource, Inc.*, 2017 WL 193294 (D. Md. Jan. 18, 2017), a former supervisor brought a lawsuit for unpaid overtime against a small business. *Id.* at *4. The employer provided evidence that the employee "directed the work of teams of technicians, kept timesheets, made travel arrangements for himself and others, and prepared numerous reports" and therefore was an exempt employee. *Id.* In response, the employee stated that his work involved manual labor as well as following the instructions of managers above him. *Id.* at 5. The employee further disputed the scope of his executive responsibilities, including his role in hiring, firing, budgeting, and the like. *See id.* The district court, while suggesting that the employer would have prevailed under the preponderance standard, denied summary judgment because it could not say that the evidence was clear and convincing. *Id.*

Chaplin v. SSA Cooper, LLC, 2017 WL 2618819 (D.S.C. June 16, 2017), similarly highlights the impact of the Fourth Circuit's erroneous standard. There, an employee of a stevedoring company filed a lawsuit arguing that his former employer had misclassified

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(granting summary judgment to employer based on administrative exemption despite employee's contention that discovery was incomplete).

him as exempt from the FLSA's overtime protections. *Id.* at *1. When evaluating the company's evidence in support of its motion for summary judgment, the court recognized that "the FLSA's 'clear and convincing evidence' standard present[ed] a *formidable* evidentiary burden for [the defendant] to overcome." *Id.* at *7 (emphasis added). Applying that heightened standard, the court held "that a reasonable juror could conclude that [the employer] ha[d] not proven by 'clear and convincing evidence' that" the employee fell outside of the FLSA's coverage. *Id.*

Yuen v. U.S. Asia Com. Dev. Corp., 974 F. Supp. 515 (E.D. Va. 1997), is likewise illustrative. There, a former employee of a "private consulting company" filed a lawsuit claiming that her employer had misclassified her as exempt from the FLSA. *Id.* at 517–18. The employer moved for summary judgment, arguing that the former employee exercised discretion and independent judgment on matters of consequence and took on managerial responsibilities. *Id.* at 526. The employee never disputed that these duties represented a *portion* of her job responsibilities. *Id.* But she claimed that her job was more "clerical" in nature and that the managerial duties represented just a small percentage of her work. *Id.* The court denied the employer's motion for summary judgment because the employer failed to satisfy "the clear and convincing burden of proof." *Id.* at 527 (internal quotations omitted). The court recognized that the "record evidence present[ed] a close case," but "*the high burden of proof* on an employer seeking to classify an employee as exempt under FLSA *tips the balance* in favor of a denial of summary judgment." *Id.* at 527 n.15 (emphasis added).

As these cases demonstrate, the Fourth Circuit's heightened standard poses an unwarranted threat to businesses—especially small businesses—that rely on employees with flexible roles in an ever-increasing gig economy. Consider the role of salespeople. The sales industry is massive and critical to our Nation's economy. By offering flexible earning opportunities to millions of Americans, the industry has long been an entrepreneurial and economic powerhouse, driving innovation and commercial growth. As Congress recognized when enacting the FLSA and its "outside salesman" exemption, the salesperson's role does not fit neatly within the FLSA's standard hourly wage and overtime requirements. Indeed, this Court has recognized that many salespeople "'earn salaries well above the minimum wage' and enjoy[] other benefits that 'set them apart from nonexempt workers entitled to overtime pay.'" *Christopher*, 567 U.S. at 166 (quoting 69 Fed. Reg. 22,124). The outside salesman exemption thus promotes fairness and practicality. But the Fourth Circuit's heightened standard undermines those principles.

If left undisturbed, the Fourth Circuit's precedent will continue to result in disparate treatment of similarly situated salespeople, other gig workers, and businesses based on no more than geographic happenstance. It will also likely result in businesses, especially smaller ones, within the Circuit either cutting back on the number of employees or outsourcing jobs to other parts of the country. Indeed, small businesses often require employees to take on a variety of responsibilities. *See Business Structure*, NFIB Small Business Poll at 6 (2004), https://bit.ly/3tluhAO (noting that few small

businesses employ specialists to take on a single role). For instance, almost half of all small businesses process their payroll in-house and often rely on an employee with several responsibilities to do so. *See NFIB National Small Business Poll*, Tax Complexity and the IRS at 1 (2017), https://bit.ly/3rxMieK; *NFIB Tax Survey*, NFIB 2021 Tax Survey: Summary of Findings at 16 (2021), https://bit.ly/3ZKYSnf (same). Categorizing those employees under the FLSA will prove fact-intensive and ratcheting up the burden of proof will skew outcomes against those businesses—who will then be forced to choose between expending resources on overtime or hiring more employees. That result hardly furthers the FLSA's goal of encouraging employees to hire more workers.

Finally, and as noted above, the Fourth Circuit's heightened standard not only threatens employers headquartered within its geographic bounds, but it also raises the risk of forum shopping in multistate cases. Employers that operate nationwide will often have employees domiciled and working within the Fourth Circuit's borders. Plaintiffs will file their FLSA collective actions within the Fourth Circuit to take advantage of the heightened clear and convincing evidence standard. *See* 29 U.S.C. § 216(b). This Court should bring the Circuits into harmony to eliminate the incentive for such overt forum shopping. This Court has resolved in the past to discourage forum shopping. *See Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (noting that the Court seeks to promote the "discouragement of forum-shopping"); *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990). It should do the same here.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to grant the petition for certiorari.

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