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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

The Fair Labor Standards Act (FLSA) covers more than 140 million workers and guarantees eligible workers overtime pay and a minimum wage. But the FLSA also contains 34 exemptions from those requirements. Employers do not have to pay overtime to, *e.g.*, bona fide executives, agricultural workers, and outside salesmen. *See* 29 U.S.C. § 213(a)-(b).

The question presented is:

Whether the standard of proof that employers must satisfy to demonstrate the applicability of an FLSA exemption is a mere preponderance of the evidence—as six circuits hold—or clear-and-convincing evidence, as the Fourth Circuit alone holds.

CORPORATE DISCLOSURE STATEMENT

Petitioner E.M.D. Sales, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The court of appeals' opinion is reported at 75 F.4th 345. Pet.App.3a-19a. The district court's post-trial liability opinion is unreported but available at 2021 WL 1060258. Pet.App.34a-55a.

JURISDICTION

The court of appeals entered judgment on July 27, 2023 and denied rehearing en banc on August 22, 2023. Pet.App.1a-3a. The petition for certiorari was filed on

September 5, 2023 and granted on June 17, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

29 U.S.C. § 213(a)(1) provides in relevant part:

The provisions of sections 206 … and 207 of this title shall not apply with respect to … any employee employed … in the capacity of outside salesman (as such term[] [is] defined and delimited from time to time by regulations of the Secretary …).

STATEMENT

Standards of proof reflect a policy judgment about how to allocate the risk of error in adversarial proceedings. In criminal cases, we require the government to prove its case beyond a reasonable doubt because the law deems it "better that ten guilty persons escape than that one innocent suffer." *Coffin v. United* States, 156 U.S. 432, 456 (1895) (citation omitted). But in civil cases, the default standard of proof is a preponderance of the evidence—a presumption that this Court has acknowledged at least 14 times.[1] That default rule is not inherently pro-

[1] *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 558 (2014); *CIGNA Corp. v. Amara*, 563 U.S. 421, 444 (2011); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003); *Grogan v. Garner*, 498 U.S. 279, 286 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989) (plurality op.); *Rivera v. Minnich*, 483 U.S. 574, 577 n.5 (1987); *Ellis v. Bhd. of Ry. Airline & Steamship Clerks*, 466 U.S. 435, 457 n.15 (1984); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983); *Steadman v. SEC*, 450 U.S. 91, 101-02 & n.21 (1981); *Addington v. Texas*, 441 U.S. 418, 423-24 (1979); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50 (1971) (plurality op.); *Ramsey v. United Mine Workers*, 401 U.S. 302, 308 (1971); *United States v. Regan*, 232 U.S. 37, 48 (1914); *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1877).

plaintiff or pro-defendant. Ordinarily, whoever has the stronger case, even if ever so slightly, *should* win.

This Court has generally deviated from the preponderance default in only two circumstances. First, this Court must apply whatever standard Congress dictates in the statute's text. And second, this Court has imposed the heightened "clear and convincing evidence" standard when extraordinarily important interests like involuntary commitment or the loss of parental rights—not the "mere loss of money"—are at stake. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (quoting *Addington*, 441 U.S. at 424).

Neither exception applies to this case. The Fair Labor Standards Act (FLSA) sets out 34 exemptions to its overtime and minimum-wage requirements. Nowhere does the FLSA impose a heightened standard of proof for those exemptions. And FLSA disputes are entirely about the "loss of money." *Id.* (citation omitted). While overtime wages are undoubtedly important, they are manifestly not comparable to losing one's liberty or child.

A heightened standard of proof would disserve the FLSA's objectives. The FLSA's exemptions reflect Congress' judgment that overtime and minimum-wage requirements are improper for certain jobs. Seamen cannot go ashore when they hit 40 hours. CEOs cannot clock off from their duties. And outside salespeople build client relationships and work variable, hard-to-track hours that are difficult to spread across multiple workers. For these and other types of employees, Congress made a considered policy judgment that overtime or minimum wages are infeasible or inappropriate. Because standards of proof inherently drive outcomes, a heightened clear-and-convincing standard risks erroneous results that override

Congress' considered judgment about when the FLSA should apply.

The preponderance standard covers countless critically important civil contexts like race and sex discrimination. Neither the Fourth Circuit nor respondents have ever offered a reasoned explanation for why a heightened standard of proof should apply to FLSA exemptions. As the government confirms, "there is no basis for imposing [a] heightened standard" here. CVSG Br. 14.

A. Statutory Background

Enacted in 1938, the FLSA "covers more than 143 million workers at more than 9.8 million establishments nationwide." U.S. Dep't of Lab., *Small Entity Compliance Guide to the Fair Labor Standards Act's Exemptions* 2, https://tinyurl.com/4exry5cu. The FLSA's central provisions "requir[e] time-and-a-half pay for work over 40 hours a week" and "guarantee[] a minimum wage." *Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 44 (2023); *see* 29 U.S.C. §§ 206-207. The overtime requirement in particular helps "increase overall employment by incentivizing employers to widen their distribution of available work"—nudging employers to hire more employees once the workload exceeds 40 hours per week. *Helix*, 598 U.S. at 44 (citation omitted).

The FLSA also reflects Congress' judgment—refined over decades of amendments—that dozens of circumstances warrant exemptions from the FLSA's overtime and minimum-wage requirements. *See* 29 U.S.C. § 213(a)-(b). The FLSA exempts "bona fide executive[s]"—high-salary employees with managerial responsibilities. *See Helix*, 598 U.S. at 43-46; 29 U.S.C. § 213(a)(1). The FLSA

exempts car salesmen and mechanics. *See Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 81 (2018); 29 U.S.C. § 213(b)(10)(A). The FLSA exempts baseball players, border-patrol agents, fishermen, farmers, switchboard operators, criminal investigators, taxi drivers, maple-syrup producers, and part-time babysitters. 29 U.S.C. § 213(a)(5)-(6), (10), (15)-(16), (18)-(19), (b)(15), (17). And, relevant here, the FLSA exempts "outside salesm[e]n"—workers whose primary duty is making sales and who regularly work outside the employer's place of business. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 148 (2012); 29 U.S.C. § 213(a)(1). Each of these exemptions is "as much a part of the FLSA[]" as the overtime and minimum-wage requirements and must receive a "fair reading" just like other FLSA provisions. *Encino*, 584 U.S. at 89.

On the whole, the FLSA's overtime exemptions reflect a congressional policy judgment that, for some sectors, mandatory overtime "will not have the intended effect of expanding employment opportunities" because splitting work across multiple employees is impractical. 1 *Report of the Minimum Wage Study Commission* 117 (1981) (*Minimum Wage Study*). And the FLSA's minimum-wage exemptions target situations where the employer's "small size and low profit rates" make higher wages infeasible. *Id.* at 112.

B. Factual and Procedural Background

1. Petitioner E.M.D. Sales, Inc. (EMD) is a Maryland employer solely owned by petitioner Elda Devarie. In 1989, Devarie was a single mother struggling to support herself and her infant son, Roberto. Lorraine Mirabella, *Baltimore-Based Food Vendor Benefits from Ethnic Food Trends*, Balt. Sun (Oct. 12, 2015), https://tinyurl.com

/3267jtpy. Devarie had moved to the U.S. mainland from Puerto Rico after her then-husband, a U.S. Coast Guard officer, was stationed here. *Id.* As a military spouse, Devarie moved around frequently and struggled to find permanent work. *Id.*

Devarie decided to become her own boss. In Puerto Rico, she had helped out at her parents' gas station and worked her way up from price checker to marketing assistant at a supermarket chain. *Id.* Building on her experience, Devarie started EMD to distribute international food to Hispanic convenience stores. *Id.*

EMD began small. Devarie drove a yellow Ryder truck up and down I-95, buying food wholesale in New York and delivering it herself to small stores around the Washington, D.C. suburbs. *Id.* Four years in, Devarie got her big break, winning a deal to sell international food to Giant grocery stores. *Id.*

Today, EMD employs over 150 people and distributes thousands of products to independent and chain stores across the Washington metropolitan area. *See id.* Devarie has been recognized for her entrepreneurial success by the U.S. Small Business Administration, then-Maryland Governor Larry Hogan, and the Maryland Chamber of Commerce. Devarie's son Roberto is now EMD's marketing manager. Pet.App.36a.

2. Respondents are three Maryland-based current and former EMD sales representatives. Pet.App.7a. All agree that respondents worked more than 40 hours a week for EMD and that EMD paid them on a commission basis. Respondents allege that the FLSA obligated EMD to pay them overtime wages. EMD contends that respondents

are "outside salesm[e]n" exempt from the FLSA's overtime requirements. *See* 29 U.S.C. § 213(a)(1).

Respondents, like other EMD employees, are members of the United Food & Commercial Workers International Union. 3/10/2021 Tr. 16:9-17:1, D. Ct. Dkt. 212. EMD enjoys a productive relationship with its union and the ability to negotiate arm's length collective-bargaining agreements with union representatives. As respondents' union shop steward testified at trial, respondents' collective-bargaining agreement does not provide for overtime pay, respondents never complained to the union about the lack of overtime pay, and overtime pay has never arisen over eight years of collective bargaining. *Id.* at 16:3-11, 16:19-23, 17:6-9, 18:8-12. As respondents' collective-bargaining agreement confirmed: EMD's sales representatives "set their own hours," "do not report to the office or warehouse" except for meetings and deliveries, and "are compensated on a commission basis." EMD Collective-Bargaining Agreement art. 2.1.A, D. Ct. Dkt. 242-4; Pet.App.36a.

After a nine-day bench trial, the U.S. District Court for the District of Maryland found that respondents were not outside salesmen under the FLSA and granted judgment for respondents. Pet.App.34a-35a. Critically, the court, over EMD's objection, required EMD to prove the applicability of the outside-salesman exemption by "clear and convincing evidence." Pet.App.46a, 83a.

The court used a two-part test to determine whether respondents were outside salesman rather than ordinary employees. Pet.App.46a. The court asked (1) whether respondents "ma[d]e sales in their roles as sales representatives," and (2) whether making sales was respondents' "primary duty." Pet.App.46a. At both steps, the court

held that EMD had not offered the requisite "clear and convincing evidence." Pet.App.48a-49a.

First, as to whether respondents made sales, the court separately evaluated respondents' tasks at independent and chain grocery stores. Pet.App.48a. The court found "clear and convincing evidence that [respondents] ma[d]e sales at independent stores." Pet.App.48a. EMD sales representatives work with independent stores "to open new accounts and to increase both the type and quantity of EMD products sold by existing accounts." Pet.App.40a.

But, the court found, EMD had not established "clear and convincing evidence[] that sales representatives can make their own sales at chain stores." Pet.App.49a. The court explained that the evidence of respondents' sales at chain stores was mixed. On one hand, other sales representatives and EMD management testified "that sales representatives regularly sell" products at chain stores. Pet.App.48a. The court also "accredit[ed]" testimony from chain stores' buyers that sales representatives sometimes make sales. Pet.App.39a. On the other hand, "other chain store corporate representatives" testified that their store managers had "no leeway to stray" from purchases already negotiated by corporate management and thus could not buy products from respondents. Pet.App.48a-49a. Given the conflicting testimony, the court found that EMD had not carried its "clear and convincing evidence" burden. Pet.App.49a.

Second, the court found that EMD "failed to demonstrate by clear and convincing evidence" that making sales was respondents' "primary duty." Pet.App.49a. The court credited respondents' testimony that they "spent the bulk of their time at chain stores," not the independent stores where the court found that respondents made their own

sales. Pet.App.50a. And again, the court leaned heavily on the standard of proof. Pet.App.50a. While respondents did "some selling," the court concluded, "[t]he problem" for EMD was that it needed to prove by "clear and convincing evidence" that making sales was respondents' "primary duty." 3/11/2021 Tr. 55:25-56:8, D. Ct. Dkt. 213.

In short, because EMD had not adduced clear-and-convincing evidence that respondents made sales at the stores where respondents spent most of their time, the court found that EMD had not carried its heightened burden. Pet.App.50a. The court thus held that respondents were not exempt from the FLSA's overtime requirement. Pet.App.35a. The court ordered EMD to pay respondents $151,938.29 in unpaid wages and the same amount in liquidated damages pursuant to 29 U.S.C. § 216(b). Pet.App.32a, 56a; D. Ct. Dkt. 237, at 2. At the same time, the court declined to extend the time period subject to overtime claims as permitted for "willful violation[s]," finding that EMD's failure to pay overtime "was one of neglect, not recklessness or willful misbehavior." Pet.App.52a-53a; 29 U.S.C. § 255(a).

3. On appeal to the Fourth Circuit, EMD challenged the district court's liability finding "on one ground only": that "the lower 'preponderance of the evidence' standard," not the "clear and convincing evidence" standard, applies to FLSA exemptions. Pet.App.12a-13a.

The Fourth Circuit affirmed. Pet.App.3a-19a. The court held that "it is well established in our circuit that … an employer … bears the burden" to demonstrate that an FLSA exemption applies "under the 'clear and convincing evidence' standard." Pet.App.12a-13a (citing *Shockley v. City of Newport News*, 997 F.2d 18, 21 (4th Cir. 1993); *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d

688, 691 (4th Cir. 2009)). The panel rejected EMD's argument that earlier cases were inconclusive and stated that the Fourth Circuit has "unequivocally held that the proper standard is clear and convincing evidence." Pet.App.13a (quoting *Desmond*, 564 F.3d at 691 n.3).

The court also rejected EMD's argument that this Court's 2018 decision in *Encino*, 584 U.S. 79, "supersed[ed] [Fourth Circuit] precedent" by "reject[ing] the principle that exemptions to the FLSA should be construed narrowly." Pet.App.14a. In the court's view, *Encino* was "a case about statutory interpretation, and a canon of construction—now rejected—that mandated a narrow reading of the scope of the FLSA's exemptions." Pet.App.14a. The court viewed that statutory-interpretation principle as "distinct from the question of what burden of proof an employer bears in proving the facts of its case." Pet.App.15a. The court also affirmed the district court's finding that EMD did not act "willfully." Pet.App.17a-18a.

The Fourth Circuit denied rehearing en banc. Pet.App.1a-2a.

SUMMARY OF ARGUMENT

I. The default preponderance-of-the-evidence standard governs FLSA exemptions.

A. A preponderance of the evidence is the default standard of proof in civil cases. That rule sets a level playing field, treating both sides equally and letting whoever has the better case prevail. This Court has relied on that default rule in a variety of civil contexts involving important interests, including patent law, bankruptcy, securities fraud, and employment discrimination.

B. That default rule controls here. This Court has generally applied the clear-and-convincing standard only when the statutory text explicitly imposes a heightened standard or when extraordinary individual interests more substantial than mere money warrant heightened protection.

Neither exception applies. The FLSA contains no language imposing a heightened standard of proof for its exemptions. Yet across the U.S. Code—including elsewhere in the FLSA and numerous other labor and employment statutes—Congress explicitly imposed a clear-and-convincing standard. Congress' silence as to the standard for FLSA exemptions indicates that the default preponderance rule governs.

FLSA exemptions do not remotely resemble the contexts where this Court has required a clear-and-convincing standard. This Court, for example, has held that due process requires a heightened standard before depriving someone of parental rights or involuntarily committing them. And this Court has implied a clear-and-convincing standard for extraordinary nonconstitutional interests like deportation or the loss of citizenship. Respondents' claims for overtime wages vindicate quintessential economic rights for which this Court has consistently stuck to the default preponderance standard.

Moreover, this Court has generally imposed a heightened standard only when the *government* seeks to take away someone's rights. Yet this case involves purely private parties. Similarly, this Court has typically imposed a clear-and-convincing standard as a shield for defendants not, as respondents seek, a sword for plaintiffs.

A heightened standard would produce serious anomalies. The preponderance standard is the default across employment litigation, including for critical statutory rights like preventing race and sex discrimination. A heightened standard would inexplicably prioritize overtime claims above all else or invite plaintiffs in every case to seek a heightened standard.

C. Imposing a clear-and-convincing standard would undermine the FLSA's goals. Standards of proof drive results, as almost certainly happened here. A heightened standard risks erroneous outcomes, requiring employers to pay overtime even when the weight of the evidence proves more likely than not that employees fall in categories Congress exempted.

Those outcome-skewing errors frustrate the FLSA's purposes. FLSA exemptions ensure that overtime requirements do not impose infeasible and inappropriate burdens on employers. For many jobs, overtime is impractical because work is irregular, offsite, or difficult to track. The FLSA also aims to increase employment by encouraging businesses to hire additional workers when an employee's workload tops 40 hours a week. But some jobs, from corporate executive to criminal investigator, are not easily spread across multiple employees. A heightened standard of proof risks imposing costs on employers that Congress did not intend, harming businesses' ability to hire more workers in the first place.

II. Neither the Fourth Circuit nor respondents have explained why a clear-and-convincing standard should apply to FLSA exemptions. Tracing citations in court-of-appeals decisions suggests that the Fourth Circuit's rule originates in a misreading of a Tenth Circuit case holding

that FLSA exemptions should be interpreted narrowly. But the Tenth Circuit has rejected that reading, and, in any event, this Court repudiated the narrow-construction principle in *Encino*, 584 U.S. at 88-89.

ARGUMENT

I. The Preponderance-of-the-Evidence Standard Applies to FLSA Exemptions

This Court "presume[s]" that the preponderance-of-the-evidence standard applies in civil cases unless the statutory text says otherwise or "particularly important individual interests or rights are at stake." *See Grogan*, 498 U.S. at 286 (quoting *Herman & MacLean*, 459 U.S. at 389). That default rule controls here. Nothing in the FLSA's text suggests that the rare clear-and-convincing standard governs. And respondents' monetary claims for overtime wages are far afield from the extraordinary, coercive circumstances where this Court has imposed a higher standard. Deviating from the default rule would undermine the FLSA's purposes and bizarrely privilege overtime-wage claims over countless other vital statutory protections.

A. The Preponderance Standard Is the Default in Civil Cases

In any adjudication, the standard of proof "serves to allocate the risk of error between the litigants" and reflects the "relative importance attached to the ultimate decision." *Addington*, 441 U.S. at 423. At one extreme are criminal prosecutions. Because the criminal defendant "has at stake interests of immense importance," *In re Winship*, 397 U.S. 358, 363 (1970), the law deems it "better that ten guilty persons escape than that one innocent suffer," *Coffin*, 156 U.S. at 456 (citation omitted). Society

thus "imposes almost the entire risk of error upon itself" by requiring proof beyond a reasonable doubt. *Addington*, 441 U.S. at 424.

At the opposite "end of the spectrum is the typical civil case involving a monetary dispute between private parties." *Id.* at 423. In such cases, the law "view[s] it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." *Winship*, 397 U.S. at 371 (Harlan, J., concurring). The preponderance standard—which requires a party to prove that a fact is more probable than not—is therefore "peculiarly appropriate" in such cases. *Id.* By allowing the "parties to share the risk of error in roughly equal fashion," the preponderance standard declines to "express[] a preference for one side's interests." *Herman & MacLean*, 459 U.S. at 390 (citation omitted).

A third option is the clear-and-convincing standard. This standard imposes a "heavy burden," *Morrison v. County of Fairfax*, 826 F.3d 758, 773 (4th Cir. 2016), requiring "evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue," *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 285 n.11 (1990) (cleaned up). This onerous standard is "reserved to protect particularly important interests in a limited number of civil cases." *California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 93 (1981) (per curiam).

The preponderance standard is "the conventional rule of civil litigation." *Desert Palace*, 539 U.S. at 99 (cleaned up). This Court "presume[s]" that the preponderance standard governs civil cases—a rule this Court has

acknowledged at least 14 times. *Grogan*, 498 U.S. at 286; *supra* p. 2 n.1.

To give just a few examples: This Court has held that the preponderance standard applies to treble-damages and attorneys' fees claims under the Patent Act because the statute's text "imposes no specific evidentiary burden." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 107 (2016) (citation omitted); *Octane Fitness*, 572 U.S. at 557-58. This Court has held that the preponderance standard applies to claims that a debt is nondischargeable in bankruptcy due to fraud. *Grogan*, 498 U.S. at 286. This Court has held that the preponderance standard applies to civil securities-fraud claims. *Herman & MacLean*, 459 U.S. at 390. And this Court has held that the preponderance standard applies under Title VII when employers contend that they would have taken the same adverse action absent discrimination. *Price Waterhouse*, 490 U.S. at 253 (plurality op.); *id.* at 260 (White, J., concurring in judgment); *id.* at 261 (O'Connor, J., concurring in judgment).

B. The Preponderance Standard Applies to FLSA Exemptions

"Exceptions to th[e] [preponderance] standard are uncommon." *Price Waterhouse*, 490 U.S. at 253 (plurality op.). This Court has generally applied the heightened clear-and-convincing standard in only two circumstances: (1) when a statute's text explicitly imposes a heightened standard, or (2) when "the individual interests at stake … are both 'particularly important' and 'more substantial than mere loss of money.'" *See Santosky*, 455 U.S. at 756 (quoting *Addington*, 441 U.S. at 424). Neither scenario applies here.

1. Most obviously, the clear-and-convincing standard applies when Congress says it does. *Steadman*, 450 U.S. at 95. Section 18c of the FLSA, for example, bars discrimination against employee whistleblowers. 29 U.S.C. § 218c(a). That section incorporates the "burdens of proof" in 15 U.S.C. § 2087(b), which allows employers to avoid liability if they can show "by clear and convincing evidence" that they would have taken the same action regardless of the whistleblowing. 29 U.S.C. § 218c(b)(1); 15 U.S.C. § 2087(b)(2)(B)(iv).

Congress has expressly imposed a clear-and-convincing standard on employers in numerous other statutes, demonstrating that when Congress wants to require clear-and-convincing evidence, it knows how to do so. Title 29—which houses labor and employment statutes—expressly requires clear-and-convincing evidence at least eight times. Union-established trusteeships under the Labor-Management Reporting and Disclosure Act, for example, are presumptively valid absent "clear and convincing proof" of bad faith. 29 U.S.C. § 464(c). And the Rehabilitation Act provides that disabled workers are presumptively eligible for vocational rehabilitation services unless the government can produce "clear and convincing evidence" to the contrary. *Id.* § 722(a)(3)(A)(ii).[2]

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[2] *See also* 29 U.S.C. § 106 (labor organizations and members not liable for unlawful acts during labor disputes absent "clear proof" of participation or authorization); *id.* § 464(c) (after 18 months, union trusteeships are presumptively invalid absent "clear and convincing proof" of necessity); *id.* § 722(a)(5)(C)(i) (requiring notification of "clear and convincing evidence" of ineligibility for vocational rehabilitation services); *id.* § 722(c)(5)(F)(ii) (initial determinations of vocational-rehabilitation-service eligibility control absent "clear and convincing evidence" of error); *id.* § 1322(c)(4) (employer determinations of benefit-

Congress has expressly required employers to produce clear-and-convincing evidence in other contexts as well. Take 8 U.S.C. § 1324a, which prohibits knowingly hiring noncitizens without work authorization but allows employers using multi-employer hiring associations to rebut a presumption of knowledge "through the presentation of clear and convincing evidence." *Id.* § 1324a(a)(6)(C)(ii). Likewise, 49 U.S.C. § 30171 exempts certain employers from investigations or liability for whistleblower retaliation "if the employer demonstrates, by clear and convincing evidence," that it would have taken the same action absent the whistleblowing. *Id.* § 30171(b)(2)(B)(ii), (iv).[3]

Other examples abound. The exact phrase "clear and convincing evidence" appears over 100 times in the U.S. Code.[4] And Congress uses other equivalent formulations like "clear proof" and "clear, unequivocal, and convincing

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plan termination payments are binding absent "clear and convincing evidence" of unreasonableness); *id.* § 1344(f)(4) (same).

[3] *Accord* 6 U.S.C. § 1142(c)(2)(B)(ii), (iv); 12 U.S.C. § 5567(c)(3)(B)-(C); 15 U.S.C. § 2087(b)(2)(B)(ii), (iv); 21 U.S.C. § 399d(b)(2)(C)(ii), (iv); 49 U.S.C. § 60129(b)(2)(B)(ii), (iv).

[4] *E.g.*, 11 U.S.C. § 362(c)(3)(C) (requiring "clear and convincing evidence" of good faith before extending automatic stay in bankruptcy); 20 U.S.C. § 7946(c)(1) (requiring "clear and convincing evidence" of "willful," "criminal," or "flagrantly indifferent" conduct before allowing punitive damages against teachers); 26 U.S.C. § 280G(b)(4) (excluding from nondeductible "parachute payment" amounts shown by "clear and convincing evidence" to be reasonable compensation); 28 U.S.C. § 2254(e)(1) (requiring habeas petitioner to produce "clear and convincing evidence" that state-court factual determinations were incorrect); 47 U.S.C. § 532(f) (requiring "clear and convincing evidence" to overcome presumption that cable-television conditions are reasonable and in good faith).

evidence." *E.g.*, 29 U.S.C. § 106; 8 U.S.C. § 1229a(b)(5)(A); *see United Mine Workers v. Gibbs*, 383 U.S. 715, 737 (1966); *Cooper*, 454 U.S. at 93 n.6.

Nowhere does the FLSA contain similar language. "[T]he fact that Congress expressly erected a higher standard of proof elsewhere," but not for the FLSA's exemptions, is "telling." *See Halo*, 579 U.S. at 107. The FLSA's "silence is inconsistent with the view that Congress intended to require a special, heightened standard of proof." *See Grogan*, 498 U.S. at 286.

2. Absent express statutory text, this Court has demanded an extraordinary justification before imposing the clear-and-convincing standard. The instances in which this Court has done so are vanishingly narrow and decades old. For instance, this Court has applied the clear-and-convincing standard when deciding disputes between States given the unique sovereign interests at stake. *E.g.*, *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *New York v. New Jersey*, 256 U.S. 296, 309 (1921).

In civil suits against private parties, this Court has not imposed a clear-and-convincing standard since 1982 and has not done so absent constitutional concerns since 1966. From the 1960s through the early 1980s, this Court imposed a clear-and-convincing-evidence standard in a handful of cases when required by the Constitution. In *Santosky*, this Court held that "due process requires" clear-and-convincing evidence before States permanently sever parents' rights in their children. 455 U.S. at 747-48. Similarly, in *Addington*, this Court explained that "due process requires" clear-and-convincing evidence before States involuntarily commit individuals to mental institutions. 441 U.S. at 427. And in *New York Times Co. v. Sullivan*, this Court held that the First Amendment requires

public figures to prove actual malice with "convincing clarity" in defamation actions. 376 U.S. 254, 285-86 (1964). This Court later described *New York Times* as requiring "clear and convincing proof." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

In cases from the 1940s to 1960s, this Court imposed a clear-and-convincing standard without invoking the Constitution. *See Vance v. Terrazas*, 444 U.S. 252, 265 (1980) (explaining that earlier cases "did not purport to be" constitutional). But these cases imposed a heightened standard only when "the government s[ought] to take unusual coercive action … against an individual." *Price Waterhouse*, 490 U.S. at 253 (plurality op.). This Court required the government to offer "clear, unequivocal, and convincing evidence" of the facts supporting deportation. *Woodby v. INS*, 385 U.S. 276, 277 (1966). This Court required clear-and-convincing evidence when the government sought to strip a Japanese-American's U.S. citizenship for being drafted into the Japanese army. *Nishikawa v. Dulles*, 356 U.S. 129, 137-38 (1958). And this Court required clear-and-convincing evidence when the government sought to denaturalize a citizen for joining the Communist Party. *Schneiderman v. United States*, 320 U.S. 118, 122-23 (1943). The Court stressed that these deprivations were "drastic," *Woodby*, 385 U.S. at 285; *Nishikawa*, 356 U.S. at 134, putting "precious right[s]" "more serious than a taking of one's property" in jeopardy, *Schneiderman*, 310 U.S. at 122.[5]

[5] This Court in *Sawyer v. Whitley* also imposed a clear-and-convincing standard on death-penalty habeas petitioners seeking to meet the actual-innocence exception to the bar on second and successive petitions. 505 U.S. 333, 336 (1992). Congress later codified a similar evidentiary standard in 28 U.S.C. § 2244(b)(2)(B)(ii).

In each of these cases, the stakes for the litigants and their families were "more dramatic than entering an award of money damages or other conventional relief." *Price Waterhouse*, 490 U.S. at 253 (plurality op.). As this Court has repeatedly noted, the clear-and-convincing standard is "reserved to protect particularly important interests," *Cooper*, 454 U.S. at 93—interests "more substantial than mere loss of money," *Santosky*, 455 U.S. at 756 (quoting *Addington*, 441 U.S. at 424).

A heightened standard is thus inappropriate where, as here, monetary relief is at issue. In *Grogan*, this Court acknowledged that bankruptcy offers debtors a "fresh start" to live "unhampered by the pressure and discouragement of preexisting debt." 498 U.S. at 286 (citation omitted). But this Court held that such interests are not sufficiently "fundamental" to require creditors to prove by clear-and-convincing evidence the fraud exception to discharge. *Id.* (citation omitted). Likewise, in *Herman & MacLean*, this Court held that the financial losses and opprobrium resulting from "even severe civil sanctions" for securities fraud cannot justify a heightened standard. 459 U.S. at 389-90. And in *Halo*, this Court found "no basis" to depart from the default preponderance standard in the statutory text, 579 U.S. at 107, despite the argument that the "punitive" nature of treble damages warranted a heightened standard, Resp. Br. 41, *Halo*, 579 U.S. 93 (No. 14-1513).

Like *Grogan*, *Herman & MacLean*, and *Halo*, this case involves a monetary dispute. There is no argument that the Constitution *requires* a heightened standard of proof in FLSA cases. And, as much as the FLSA vindicates important economic rights, such concerns are far

afield from the core liberty interests—like avoiding involuntary commitment, denaturalization, or loss of parental rights—for which this Court has reserved the clear-and-convincing standard.

3. A clear-and-convincing standard is inappropriate here for three additional reasons. First, this Court has typically imposed a heightened standard only in disputes between "the State and an individual." *Rivera*, 483 U.S. at 581. "Because the State has superior resources" and the consequences of government action can be "especially severe," society "impose[s] upon itself a disproportionate share of the risk." *Id.* The government's absence as a party here is "an important distinction" that militates against a heightened standard. *Id.* at 580.

Second, the clear-and-convincing standard serves to protect defendants from "'a significant deprivation of liberty' or 'stigma.'" *Santosky*, 455 U.S. at 776 (quoting *Addington*, 441 U.S. at 425). Accordingly, the clear-and-convincing "standard ordinarily serves as a shield" for defendants. *Price Waterhouse*, 490 U.S. at 253 (plurality op.). This Court has never permitted plaintiffs to use the clear-and-convincing standard as "a sword" against defendants, as respondents seek here. *Id.*; *see Cruzan*, 497 U.S. at 282-83 n.10.

Third, subjecting FLSA exemptions to a uniquely onerous burden of proof would produce bizarre anomalies. The preponderance standard is the norm for affirmative defenses across employment-related statutes. *E.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (Title VII); *Baker v. Upson Reg'l Med. Ctr.*, 94 F.4th 1312, 1320 (11th Cir. 2024) (Equal Pay Act); *Silk v. City of Chicago*, 194 F.3d 788, 805 (7th Cir. 1999) (Americans with Disabilities Act); *Carroll v. Del. River Port Auth.*, 843 F.3d 129,

131 (3d Cir. 2016) (Uniformed Services Employment and Reemployment Rights Act). These other statutes vindicate vitally important interests—prohibiting discrimination in employment on the basis of race, color, sex, religion, national origin, disability, and military service. Standards of proof reflect policy judgments about what issues are more or "less important." *Price Waterhouse*, 490 U.S. at 254 (plurality op.). Courts have no license to say that wage and overtime disputes are somehow more important than combatting discrimination.

Imposing a clear-and-convincing standard here would invite countless litigants to argue for a heightened standard in *any* civil case involving money damages. If monetary damages for lost overtime warrant a higher standard, plaintiffs in any number of contexts could argue that affirmative defenses against their claims deserve the same treatment. This Court should not open the door to infinite judicial policy judgments about what statutory rights are sufficiently deserving of an elevated standard of proof.

C. The Clear-and-Convincing Standard Would Frustrate the FLSA's Goals

FLSA exemptions are "as much a part of the FLSA's purpose as the overtime-pay requirement" itself. *Encino*, 584 U.S. at 89. A standard designed to allow the erroneous denial of the exemptions would undermine Congress' objectives in passing the exemptions in the first place.

1. Standards of proof are not "an empty semantic exercise." *Addington*, 441 U.S. at 425 (citation omitted). Standards of proof by definition determine outcomes, "allocat[ing] the risk of error between the litigants" on a dispositive issue. *Id.* at 423. A vast gulf separates the preponderance standard—which requires merely that a fact

be more probable than not—from the clear-and-convincing standard—which requires "a firm belief or conviction, without hesitancy," of a fact's truth. *United States v. Watson*, 793 F.3d 416, 420 (4th Cir. 2015) (citation omitted); *see Cruzan*, 497 U.S. at 285 n.11. In concrete terms, the clear-and-convincing standard would allow employees to prevail even where the evidence produces say 65-85% certainty that they fall in an FLSA-exempt category.

Amici confirm that the standard of proof in FLSA cases "has profound real-world impact" and often "prove[s] outcome-determinative." Chamber Cert. Br. 5; WLF Cert. Br. 7. Imposing the clear-and-convincing standard here would "frequently preclude dismissal or summary judgment," pushing cases to trial and pressuring employers to settle. Chamber Cert. Br. 17.

All indications are that the heightened standard was outcome-determinative in this case. The district court repeatedly fell back on the standard of proof in ruling for respondents, mentioning the need for "clear and convincing evidence" six times in its opinion. Pet.App.46a, 48a-50a. And, during closing argument, the court remarked that "there's a lot to be said" for EMD "on the liab[ility] question" and questioned respondents' counsel under the premise that "the Court is of the view that it's actually a close question" with the result "largely" driven by "how the law assigns burdens of proofs." 3/11/2021 Tr. 40:3-6, 41:2-3, D. Ct. Dkt. 213. By requiring factfinders to rule against employers even when the evidence demonstrates that an FLSA exemption is more likely than not applicable, the clear-and-convincing standard would increase the risk of erroneous outcomes.

2. That risk of error undermines the FLSA's objectives. Many FLSA exemptions reflect Congress' judgment that jobs with irregular hours may be "unsuitable for overtime pay." *Encino*, 584 U.S. at 95 (Ginsburg, J., dissenting). Take the exemption for car salesmen. 29 U.S.C. § 213(b)(10)(A). Car salesmen regularly work offsite and "'at unusual hours,'" "rendering time worked not easily tracked." *Encino*, 584 U.S. at 95 (Ginsburg, J., dissenting) (quoting 112 Cong. Rec. 20,504 (1966) (statement of Sen. Bayh)). The same is true for outside salesmen, who by definition work offsite. *See* 29 U.S.C. § 213(a)(1). Requiring overtime pay for such employees would "create major administrative problems in securing compliance, since it is difficult to verify actual hours worked per week." 4 *Minimum Wage Study* 235.

That same concern led Congress to exempt other jobs with offsite or unpredictable hours, such as "partsmen[] and mechanics." *Encino*, 584 U.S. at 96 (Ginsburg, J., dissenting) (citing 112 Cong. Rec. 20,502-04 (1966) (statements of Sens. Bayh, Hruska, and Mansfield)). A similar rationale supports the exemptions for jobs that involve substantial personal time onsite like camp counselors and seamen. *See* 29 U.S.C. § 213(a)(3), (12), (b)(6). Because such workers eat, sleep, and socialize where they work, employers cannot readily distinguish working from nonworking hours. *See* 4 *Minimum Wage Study* 235 (discussing similar problems for outside salesmen).

Another objective of the FLSA is to "increase overall employment." *Helix*, 598 U.S. at 44 (citation omitted). By mandating extra pay for overtime, the FLSA encourages businesses to hire additional workers when an employee's workload is likely to break 40 hours in a week. *Id.*; *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577-78

(1942). That way, an employer can pay the second worker the standard wage instead of paying the original worker time-and-a-half.

But Congress understood that for certain jobs, mandatory overtime pay would undermine that objective. Many FLSA-exempt jobs involve "the type of work" that "could not be easily spread to other workers after 40 hours in a week." 69 Fed. Reg. 22,122, 22,124 (Apr. 23, 2004). For those workers, overtime pay will not increase employment. *See id.*; 4 *Minimum Wage Study* 235-40. Instead, overtime could *decrease* employment by inflicting costs on businesses—hampering small-business growth and its associated job creation.

Overtime pay for a given role may not lead to increased employment for any number of reasons. For instance, when workers exceed 40 hours only occasionally or unpredictably, "it is likely advantageous for the employer to pay for this occasional overtime rather than to adjust permanent staffing." 80 Fed. Reg. 38,516, 38,571 (July 6, 2015); *accord Encino*, 584 U.S. at 95 n.3 (Ginsburg, J., dissenting). Agricultural workers may be particularly busy at harvest time or maple-syrup producers during the tapping season, but with less work the rest of the year to justify increased staffing. *See* 29 U.S.C. § 213(a)(6), (b)(12)-(13), (15); 4 *Minimum Wage Study* 100, 103.

Moreover, workers who make discretionary judgments—such as executives, administrators, and professionals, 29 U.S.C. § 213(a)(1)—produce "output [that] is not clearly associated with hours of work per day." 4 *Minimum Wage Study* 236. The nature of those jobs "generally precludes" employers from breaking up the work across hourly workers. *Id.*

Many jobs also require specialized training or knowledge that restrict hiring new staff. *See* 29 C.F.R. § 541.301 (exempting "work requiring advanced knowledge in a field of science or learning"). Small-town radio and television hosts develop relationships with their audiences and communities. *See* 29 U.S.C. § 213(a)(9). Criminal investigators must be intimately familiar with the details of their cases. *See id.* § 213(a)(16), (b)(30). And software engineers must understand their product and code. *See id.* § 213(a)(17).

In each of these cases, erroneously requiring overtime would inflict unjustifiable costs on employers—even where the employer has no option to avoid paying overtime by hiring more workers. Imposing a heightened standard of proof would therefore improperly inflict costs that threaten businesses' financial health and undercut growth. Instead of promoting the "potential job expansion intended by the FLSA's time-and-a-half overtime premium," 69 Fed. Reg. at 22,124, those increased burdens would reduce businesses' capacity to hire more employees in the first place.

Those burdens would fall disproportionately on small businesses. To qualify for the administrative, professional, and outside-salesmen exemptions, employers must prove that their employees' "primary duty" is the performance of exempt work. 29 C.F.R. § 541.700; *see Christopher*, 567 U.S. at 148. But countless employees perform a variety of responsibilities that make their primary duty difficult to determine—multi-tasking that is especially common at small businesses. *See* William J. Dennis, Jr., *Business Structure*, 4 NFIB Small Bus. Poll, No. 7, at 6 (2004), https://tinyurl.com/bdfkweuh. Requiring clear-and-convincing evidence for FLSA exemptions would thus

disproportionately burden small businesses like EMD—which had already negotiated respondents' pay structure through arm's length collective bargaining—and disserve the FLSA's pro-employment goals.

II. The Fourth Circuit's Rule Is Unsupported

In the thirty years that the Fourth Circuit has imposed the clear-and-convincing standard, that court has never explained why that heightened burden would apply to FLSA exemptions. Below, the court rested solely on circuit precedent. Pet.App.12a-13a. And respondents to date have never defended the heightened standard either—not in their briefing below, nor in their brief in opposition, nor in their supplemental brief after the United States called the Fourth Circuit's error so "obvious[]" as to warrant summary reversal. CVSG Br. 6.

Tracing the Fourth Circuit's clear-and-convincing standard to its source reveals a daisy chain of misreading precedent. The decision below (Pet.App.13a) cites *Desmond*, 564 F.3d at 691, and *Shockley*, 997 F.2d at 21. *Desmond* simply cites *Shockley*. A sentence in *Shockley* stated that "[e]mployers must prove by clear and convincing evidence that an employee qualifies for an exemption." *Id.* The court offered no explanation for that extraordinary rule aside from citing an older Fourth Circuit case, *Clark v. J.M. Benson Co.*, 789 F.2d 282, 286 (4th Cir. 1986).

Clark, however, held only that employers carry the "full burden of persuasion" in FLSA exemption cases—it never decided the *standard* by which the employer must carry its burden. *Id.* In support of that holding on who bears the burden, *Clark* quoted a Tenth Circuit case stating that "[t]he employer who asserts the … exemption has the burden of establishing … [the] requirements by clear

and affirmative evidence." *Id.* (quoting *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984)).

The Tenth Circuit in *Donovan* did not endorse a heightened standard of proof either. Rather, that case's "clear and affirmative" language traces to another Tenth Circuit case holding that an employer "has the burden of showing affirmatively" that employees fall within FLSA exemptions. *McComb v. Farmers Reservoir & Irrigation Co.*, 167 F.2d 911, 915 (10th Cir. 1948), *cited in Legg v. Rock Prods. Mfg. Corp.*, 309 F.2d 172, 174 & n.7 (10th Cir. 1962), *cited in Donovan*, 725 F.2d at 581. The *Donovan* court's reference to "clear and affirmative evidence" establishes that the employer bears the burden—not that the *standard* of proof is higher.

The Tenth Circuit itself has rejected any reading of its precedent that supports a heightened standard. *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1157-58 (10th Cir. 2012). The Tenth Circuit explained that, although the "clear and affirmative" language had led to "confusion," Tenth Circuit precedent required only that a claimed FLSA "exemption fall[] 'plainly and unmistakably' within the terms of the statute." *Id.* (citation omitted). In other words, *Donovan* stands for the proposition that FLSA exemptions must be interpreted narrowly—"not for the proposition that an employer need prove such an exemption by anything more than a preponderance of the evidence." *Id.* As the Seventh Circuit has summarized: Courts took the narrow-construction principle, "garbled" it, and "repeated" it until "the original meaning [was] forgotten." *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 507 (7th Cir. 2007); *see Renfro v. Ind. Mich. Power Co.*, 497 F.3d 573, 576 (6th Cir. 2007).

Today, even the narrow-construction principle on which these old cases (erroneously) rested is bad law. For a time, courts interpreted FLSA exemptions narrowly based on the "flawed premise that the FLSA pursues its remedial purposes at all costs." *Encino*, 584 U.S. at 89 (citation omitted). But today, FLSA exemptions receive "a fair reading," just like any other statute. *Id.* After *Encino*, there is no arguable justification for a clear-and-convincing standard. The default preponderance-of-the-evidence standard should apply to FLSA exemptions just as it does across civil litigation.

CONCLUSION

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

Respectfully submitted,

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