

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

E.M.D. SALES, INC., ET AL.,)
 Petitioners,)
 v.) No. 23-217
 FAUSTINO SANCHEZ CARRERA, ET AL.,)
 Respondents.)

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8 - - - - -
9
10 Washington, D.C.
11 Tuesday, November 5, 2024
12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:17 a.m.
16
17 APPEARANCES:
18 LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of
19 the Petitioners.
20 AIMEE W. BROWN, Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; for the
22 United States, as amicus curiae, supporting the
23 Petitioners.
24 LAUREN E. BATEMAN, ESQUIRE, Washington, D.C.; on
25 behalf of the Respondents.

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1 P R O C E E D I N G S

2 (11:17 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 23-217, E.M.D. Sales
5 versus Carrera.

6 Ms. Blatt.

7 ORAL ARGUMENT OF LISA S. BLATT

8 ON BEHALF OF THE PETITIONERS

9 MS. BLATT: Mr. Chief Justice, and may
10 it please the Court:

11 For over a century, this Court has
12 held that the default standard in civil cases is
13 preponderance of the evidence. That default
14 rule should resolve this case. Nothing in the
15 text suggests that Congress intended a clear and
16 convincing evidence standard to apply to the 34
17 exemptions under the Fair Labor Standard -- Fair
18 Labor Standards Act.

19 Respondent -- Respondents argue that a
20 heightened standard is appropriate because FLSA
21 rights are important. But a preponderance
22 standard applies to rights against race
23 discrimination and disability discrimination and
24 rights to organize and to workplace safety, all
25 super-important rights.

1 This Court has reserved the clear and
2 convincing standard to deprivations by the
3 government of critical rights that don't involve
4 money damages. This Court has never allowed
5 plaintiffs to use a clear and convincing
6 standard as a sword, and it certainly has never
7 read a clear and convincing standard into a
8 statute for money damages.

9 Respondents also argue that overtime
10 rights aren't waivable. But waivability and
11 standards of proof are unrelated and don't go
12 hand in hand. Waivability goes to who owns the
13 right, the government or the individual, and the
14 standard of proof goes to how hard it is to
15 prove that the right attaches in the first
16 place.

17 Thus, the preponderance of the
18 evidence standard governs non-waivable rights,
19 such as those under the NLRA and OSHA, and
20 heightened standards govern waivable rights,
21 such as those in criminal trials and deportation
22 hearings.

23 Because the court below applied only
24 the clear and convincing standard, we think this
25 Court should remand for the application of the

1 preponderance standard.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Other than the -- in
4 context of actual malice, can you think of any
5 other case where the -- there has been a
6 requirement, this Court has required clear and
7 convincing that -- where only money damages were
8 at issue?

9 MS. BLATT: No. The only example we
10 would say is in the water rights cases, where
11 there are sovereigns. So I don't think --

12 JUSTICE THOMAS: Yeah.

13 MS. BLATT: -- that's really money
14 damages. But, in those apportionment cases,
15 this Court has long held clear and convincing
16 applies in -- in cases between sovereigns.

17 JUSTICE THOMAS: How would you
18 respond -- what do you have to say about
19 Respondents' public/private right or
20 private/public rights argument?

21 MS. BLATT: Sure, a couple things. I
22 mean, I do think public nature goes to the
23 waivability, and as my opening talked about,
24 that's a distinct issue in terms of standard of
25 proof.

1 But, more importantly, the public has
2 an equal interest in the accurate implementation
3 of the Act, and this Court in Encino said the
4 exemptions are equally a part of the statute.
5 And the public has an interest in making sure,
6 if it's more likely than not an employee doesn't
7 fall within a category and should be exempt,
8 then, under a clear and convincing standard,
9 that employee may be required to pay overtime
10 even when the purposes of the statute are not
11 only not -- not invoked, but they're
12 counterproductive because it imposes very
13 unjustified costs, particularly under small
14 businesses.

15 CHIEF JUSTICE ROBERTS: How -- are we
16 supposed to -- you make the argument that the
17 higher standard applies in, you know,
18 termination of parental rights and all that.
19 But I -- how are we supposed to make the
20 judgment that the concern to remediate dire
21 labor situations when this Act was passed are
22 similarly worthy of a heightened standard? But
23 do you know the disparity in, you know,
24 bargaining power between the people who -- who
25 are seeking -- the wages and the employer and

1 all that?

2 MS. BLATT: Yeah, all -- of course,
3 all, you know, good points. 1938, though, we
4 cite these cases from both, the 1877 and 1914,
5 the Lilienthal's Tobacco and the Regan case
6 involving civil penalties. And one was just --
7 and it cites, you know, centuries' worth of
8 precedent -- or treatises saying the
9 preponderance standard is the back -- the
10 background presumption.

11 And I -- I do think the government
12 makes a good point that in the original Act,
13 there was -- Congress did speak to a standard of
14 proof. It was in an administrative context for
15 minimum wages, and Congress provided for a
16 preponderance of the evidence standard for the
17 administrator of the Wage and Hour Division to
18 exempt certain categories. So we think the
19 government is correct that that is at least some
20 indication that Congress thought a preponderance
21 of the evidence standard.

22 But the more basic presumption is just
23 when you look at all these statutes, Title VII,
24 disability, NLRA, I mean, there's plenty of
25 cases in the labor context, NLRA, OSHA, all

1 those arguments could be made, and the
2 preponderance standard has always governed.

3 JUSTICE KAVANAUGH: Well, how do we
4 apply the particularly important individual
5 interest then in thinking about the cases that
6 have had a heightened standard because they seem
7 to distinguish cases involving mere money? I
8 think that's the phrase. But, when it's minimum
9 wage, it's not mere money in the same way, I
10 guess, to follow up on the Chief Justice's
11 question. How are we supposed to make those
12 value judgments, I guess?

13 MS. BLATT: Well --

14 JUSTICE KAVANAUGH: Are you saying --
15 and, relatedly, are you saying we should never
16 expand the category of where we've done clear
17 and convincing, the Addington category?

18 MS. BLATT: Mm-hmm.

19 JUSTICE KAVANAUGH: Or are you saying
20 that this is different in kind from the
21 Addington category that -- where we have --

22 MS. BLATT: Yeah.

23 JUSTICE KAVANAUGH: -- applied a
24 heightened standard?

25 MS. BLATT: So both. Let's be clear,

1 I think there's only two ways to get there. You
2 have to do it by the Constitution, which is
3 Addington, or the statute. And it's true that
4 the 1966 case would be where this Court said
5 congressional silence means it's left up to the
6 judiciary to make an independent determination
7 about these kinds of things.

8 But starting with Grogan and certainly
9 by the time of Octane Fitness and Halo, this
10 Court has basically treated it as an absolute
11 sort of we look at congressional silence and
12 that's dispositive.

13 Now I will say that I've not been able
14 to think of a statutory right where Congress has
15 not addressed a burden of proof that involves a
16 deprivation up to, like, deportation and
17 denaturalization, which were the two examples
18 where this Court read it in, but if this Court
19 wanted to leave that open, I don't think you
20 need to do it as a "well, we'll just throw up
21 our hands and do what we want," but more of a
22 background presumption against which Congress
23 legislates.

24 Congress presumably knows, in the '40s
25 and '50s, you set out a kind of rule that if it

1 was a particularly important deprivation, not
2 involving money damages, then the Court will
3 read into a clear and convincing evidence. But
4 I don't think -- I do think it is a question of
5 congressional intent ultimately.

6 And, again, I -- I have not been able
7 to think of an example. And I think it is
8 significant that Congress has both codified,
9 superseded, and overruled the deportation and
10 denaturalization contexts. Congress went in
11 and, you know, very carefully said when it
12 wanted clear and convincing in deportation,
13 overruled it in the denaturalization.

14 It's hard for me to think of a case
15 involving a -- deprivation of an interest that
16 comes close to the Constitution, like the, you
17 know, civil commitment or -- or right to -- to
18 your children, that doesn't involve money
19 damages.

20 And I don't think it's -- it would be
21 right to go down to overtime, which I think
22 involves highly compensated employees, and to go
23 down this road of, well, how important is race
24 discrimination as opposed to sex discrimination
25 or religious discrimination and start saying

1 these are semi-fundamental rights too and Price
2 Waterhouse already put this to bed and said
3 we're going to have a preponderance of the
4 evidence standard.

5 JUSTICE KAVANAUGH: Mm-hmm.

6 JUSTICE SOTOMAYOR: Can I just ask a
7 practical question? You asked us to vacate and
8 remand. The SG wants us to reverse, which
9 usually suggests to me that they think the
10 judgment below can't be sustained under any
11 reading. And the other side says, regardless of
12 the standard, affirm. Our practice is to
13 remand.

14 But what outcome could a different
15 standard of proof have on the factual findings
16 in this case?

17 MS. BLATT: So let me address just
18 sort of the -- I don't think at least we
19 intended any difference between vacatur and
20 reversal. We just copied what the Court did in
21 the Starbucks case because it involved a similar
22 misapplication, so we just took identically what
23 you said in your opinion. I don't think the
24 government's -- I think the government and --
25 and we both just think send it back.

1 In terms of no -- no --

2 JUSTICE SOTOMAYOR: Well, I -- I don't
3 disagree just for a moment. I do think the
4 other side says this was harmless error.

5 MS. BLATT: Of course.

6 JUSTICE SOTOMAYOR: All right? So I
7 don't think we should get into that. The court
8 below should. But I'm asking you, why isn't it
9 harmless error?

10 MS. BLATT: Right, yeah. So we think
11 the ultimate -- we think there's more than ample
12 evidence for the Court to find and will find
13 below by a preponderance of the evidence. And
14 the main reason -- and the regulation is cited
15 at page 43A of the Pet. App. -- that whether
16 your primary duty is one of making sales -- this
17 is an outside salesman -- it's not the time
18 spent, but it's the most important, i.e., the
19 character and time spent is one factor but not
20 dispositive.

21 And the four things that we would
22 point to -- and I think, again, the evidence
23 is -- is great for us -- one, it's the testimony
24 of the CEO, which is that just when she started
25 the business, your job is to make sales. It's

1 to push that inventory and to increase the
2 product.

3 And, second, there were three salesmen
4 that said that the sky was the limit for them
5 and their ability to make sales at chain stores
6 and they lost track.

7 Third, there was testimony of the
8 Walmart former buyer for sauces and dressings
9 and either he or she -- I can't remember -- said
10 that planograms, which are basically your floor
11 plans for your inventory shelf, that those were
12 honored in the breach. It's true that the
13 Safeway and Giant people said we can't control
14 where we put the food, but the Walmart person
15 said: Listen, sometimes we let them, you know,
16 sell us more tortillas or whatever they were
17 selling and get more space.

18 And finally, and the fourth one, and I
19 think it is important at least to our client in
20 terms of common sense, they are called sales
21 representatives, and the collective bargaining
22 unit designated them as such, and nobody
23 complained about overtime. So this was a, you
24 know, longstanding provision in the -- in -- in
25 the CBA.

1 So I think all of those things would
2 lead to a sufficient basis. And the only way
3 this Court could find harmless error, of course,
4 was -- would be to find that no reasonable fact
5 finder could find by a preponderance of the
6 evidence.

7 JUSTICE SOTOMAYOR: On the last issue
8 you raised, which was the collective bargaining
9 issue, this right of overtime is not waivable by
10 an employee, correct?

11 MS. BLATT: Correct, not --
12 prospectively, yes.

13 JUSTICE SOTOMAYOR: But you're not
14 using it in that sense.

15 MS. BLATT: No, not at all.

16 JUSTICE SOTOMAYOR: You're using it in
17 the sense of what they perceived as the most
18 important part of their function?

19 MS. BLATT: Absolutely correct, that
20 it was just the union, you know, and -- and they
21 were paid on a commission basis. It necessarily
22 wasn't based on new sales. So this is more
23 completely atmospherically inconsistent with
24 their title, not in any way -- not in any way
25 binding.

1 JUSTICE SOTOMAYOR: Thank you.

2 JUSTICE KAGAN: The court of appeals
3 here applied its own circuit precedent. What --
4 what's your understanding of where that circuit
5 precedent came from, how it arose?

6 MS. BLATT: I mean, it arose a long
7 time ago relying on Tenth Circuit precedent.
8 And to be fair to the Fourth Circuit, the Tenth
9 Circuit did say in that decision, it was talking
10 about who had the burden, but it did say the
11 employer would have to put clear and affirmative
12 proof forward.

13 Then later the Tenth Circuit said:
14 But what we meant by that was not clear and
15 convincing evidence. We were just -- you know,
16 you weren't supposed to take us literally. We
17 just meant you have -- the burden is on the
18 employer, but it's just a preponderance of the
19 evidence. And the Fourth Circuit just never
20 deviated from it. They have been asked twice en
21 banc to overrule it, and they've declined twice
22 to overrule it.

23 JUSTICE KAGAN: But it -- it relied
24 only on the Tenth Circuit opinion --

25 MS. BLATT: Correct.

1 JUSTICE KAGAN: -- not on our cases?

2 MS. BLATT: Correct, yeah, just --
3 just the Tenth Circuit.

4 Now -- and I don't think -- again, we
5 tried en banc, and I don't think the Fourth
6 Circuit has ever articulated a rule. And it is
7 somewhat noteworthy that they've only applied
8 it -- I mean, they're doing it in the overtime
9 case too, which seems, you know, the least
10 policy basis for it.

11 And the only other thing I just want
12 to say on the preponderance of the evidence is
13 the district court said at the -- in -- just in
14 the connection of the hearing, there's a lot to
15 be said on the liability question. Obviously, a
16 throwaway. The district court's going to make
17 its own independent decision on remand, but we
18 don't think there's anything that could be said
19 where this Court sitting as -- as nine members
20 would find that no reasonable fact finder could
21 conclude that a preponderance of the evidence
22 wasn't satisfied.

23 JUSTICE JACKSON: Can I ask you, you
24 started off by saying that the default standard
25 of proof was the preponderance of the evidence

1 standard and that it's a matter of congressional
2 intent, and so I guess the question is how clear
3 was it as of 1938, when the FSLA was passed,
4 that preponderance of the evidence was the
5 standard of proof as a default?

6 The cases -- many of the cases that
7 are cited are actually post-1938 cases. So
8 what's the best evidence that Congress was
9 actually legislating against the preponderance
10 of the evidence standard?

11 MS. BLATT: Yeah. In that Footnote 2,
12 where we list all the cases, there are only two
13 cases to be sure that were pre-1938. It's the
14 Lilienthal's Tobacco from 1877, I think, and
15 United States versus Regan, which is 1914.

16 But that case is a civil penalties
17 case, and it was basically saying, even though
18 if hit with these civil penalties, you could be
19 subject to a criminal law, preponderance of the
20 evidence standard applies.

21 Now, in Regan, what the Court did was
22 not only cite treatises, but it canvassed state
23 law and federal cases. In the Lilienthal's
24 Tobacco, it just cited two treatises, and I
25 think those treatises are -- I don't know. I

1 have the dates, but they're in the 1800s, and
2 they're Wigmore and whoever else the famous
3 evidence person is.

4 JUSTICE JACKSON: And it was general
5 civil litigation?

6 MS. BLATT: Mm-hmm.

7 JUSTICE JACKSON: Mm-hmm.

8 MS. BLATT: And so, you know, the
9 civil penalties. So it's just -- and then,
10 besides just those treatises and the two Supreme
11 Court cases, it's the -- I think the government
12 did make a good argument that Congress, when it
13 thought about the issue in the administrative
14 context, said it thought preponderance of the
15 evidence was sufficiently protective of workers
16 in the minimum wage context, which I think is a
17 little more sympathetic for the worker, so it's
18 worse for the other side. And I'm -- I don't --
19 oh, go ahead.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 MS. BLATT: Nobody? Okay.

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: I don't think
25 so. Anybody?

1 (Laughter.)

2 MS. BLATT: Sorry.

3 CHIEF JUSTICE ROBERTS: Ms. Brown.

4 ORAL ARGUMENT OF AIMEE W. BROWN

5 FOR THE UNITED STATES, AS AMICUS CURIAE,

6 SUPPORTING THE PETITIONERS

7 MS. BROWN: Thank you, Mr. Chief

8 Justice, and may it please the Court:

9 When Congress does not address the
10 standard of proof in a statute, this Court has
11 long recognized that the preponderance of the
12 evidence is a default rule for civil actions.
13 The Court has only departed from that default in
14 a tiny number of cases, where the Constitution
15 required it or in cases involving a significant
16 deprivation, more dramatic than money damages,
17 like deportation, denaturalization, and
18 expatriation.

19 Respondents' claim seeking monetary
20 remedies for alleged violations of the FLSA's
21 overtime requirements is not remotely comparable
22 to those cases.

23 Respondents don't really argue
24 otherwise. Instead, they offer an assortment of
25 policy reasons for favoring employee interests,

1 but the policies promoted by the FLSA are
2 materially similar to workplace protections like
3 those in Title VII that this Court has
4 recognized are adequately protected by the
5 default standard of proof.

6 The Court should apply its
7 longstanding precedent and hold that the
8 preponderance of the evidence standard applies
9 here, remand for the lower courts to decide
10 whether the Petitioners met that standard in the
11 first instance.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Would this be a bit
14 stronger case on -- on Respondents' part if
15 Respondent had a minimum wage claim?

16 MS. BROWN: So I -- I -- I think that
17 the policy in -- in support of minimum wage is
18 certainly an important policy. I would say that
19 the same standard would apply in that context.
20 It's still a claim for money -- money damages.

21 And in that context, I think the
22 statutory history that we cite on pages 14 and
23 15 of our brief would be even more relevant,
24 where Congress did make the judgment in the
25 minimum wage context that the preponderance of

1 the evidence standard would apply for the
2 exception when the administrator was -- was
3 making that determination.

4 So I think the same -- the same
5 standard would -- would be applicable there.

6 CHIEF JUSTICE ROBERTS: Did -- did I
7 understand your opening to -- to say that if
8 it's just money, you wouldn't address the clear
9 and convincing standard at all?

10 MS. BROWN: So the -- the way that
11 this Court has framed the -- the test here,
12 essentially, is that the -- the deprivation
13 needs to be a significant deprivation. And it
14 has never applied outside of the First Amendment
15 context the -- the clear and convincing evidence
16 standard when it's just money damages.

17 And so I -- I think as a general
18 matter that the presumption is at its strongest
19 when you're in a case dealing with conventional
20 remedies, like money damages, injunctive relief,
21 things like that. The -- the very, very narrow
22 category of cases in which this Court has
23 departed from the default standard without a
24 constitutional backdrop is in these deportation,
25 denaturalization, and expatriation cases, where

1 there's a coercive government action that's
2 being taken.

3 JUSTICE JACKSON: But what do we do
4 about the fact that the money damages here are
5 actually, I thought, doing more significant work
6 than just providing damages in that particular
7 scenario?

8 So, I mean, when Congress enacted the
9 FSLA -- the FLSA, they talked about the fact
10 that there were interests at stake that were
11 beyond money damages, that setting up the
12 statute in the way that they did ensured that
13 businesses don't gain a competitive advantage by
14 misclassifying employees. It protects certain
15 groups from substandard wages and thereby
16 protecting health and well-being.

17 There was also the notion of spreading
18 employment through the application of this law.
19 So isn't this more than just money damages? I
20 mean, I take your point that it might not be
21 denaturalization, but I would think the
22 government would say the interests go beyond
23 just pure money damages.

24 MS. BROWN: Certainly, we recognize
25 there are very important policy interests at

1 stake in this case and in the FLSA and that
2 Congress legislated with those in mind. I think
3 the same thing is true for Title VII. It's not
4 just about the individual employee who's seeking
5 damages. It's about the broader interest in
6 eradicating discrimination from the workplace.

7 Congress often makes these policy
8 findings in its statutes where it lays out all
9 of the interests that are at stake here, and
10 those can be addressed through a variety of
11 means, for example, through this waivability
12 issue or -- or waivability aspect of the statute
13 where it can't be waived.

14 And so that is how some of those
15 policy concerns are addressed. But the
16 heightened standard of proof has just never been
17 used as the kind of tool that would -- that
18 would be addressed in those kinds of instances.
19 Otherwise, I think it would -- it would risk
20 making that standard no longer -- the
21 preponderance of the evidence may no longer be
22 the default standard in those cases because
23 those kinds of interests are -- are very
24 frequently at stake when Congress is
25 legislating.

1 I -- I would -- wanted to just make a
2 couple -- a couple of points if there are no
3 further questions on -- on that. The
4 Respondents have -- have asserted the variety of
5 reasons to depart from the default here, and the
6 Court has never accepted those kinds of reasons
7 in cases dealing with conventional remedies.
8 And I think it's important here to note that --
9 that no court has actually accepted them because
10 the Fourth Circuit here, as Ms. Blatt already
11 discussed, did not actually come up with any
12 reasoned basis for the decision.

13 It -- it misconstrued this earlier
14 precedent, but it never tried to reconcile the
15 heightened standard of proof with the Court's
16 precedents here and with the -- the very narrow
17 set of circumstances in which the Court has
18 suggested that it would be appropriate.

19 So the -- the reasons that Respondents
20 have provided here are generally the policy
21 interests in -- in -- in overtime requirements,
22 which, again, we agree are important, but other
23 statutes also implicate very important reasons.
24 And, as this Court held in Grogan, I think the
25 exemptions here are also a part of the

1 congressional policy and are also a part of what
2 Congress was doing when it was balancing the
3 interests here.

4 JUSTICE JACKSON: Can I ask you, is
5 this the same standard of proof that would apply
6 to the government, the Department of Labor, if
7 it is bringing suit to enforce the FLSA?

8 MS. BROWN: Yes, it's the same
9 standard of proof.

10 JUSTICE JACKSON: And it's the same
11 standard that the Department of Labor applies in
12 its own administrative proceedings?

13 MS. BROWN: So the Department of Labor
14 does it -- the Department of Labor enforces this
15 statute through district court litigation.

16 JUSTICE JACKSON: Through the courts.

17 MS. BROWN: So it would always be
18 the -- the same standard. OPM -- there are
19 other administrative -- OPM administers it for
20 the government on behalf of -- of government
21 employees, and those go through litigation as
22 well and the same standard --

23 JUSTICE JACKSON: Does the government
24 have an idea of how often the standard of proof
25 is dispositive in a case like this or any other?

1 MS. BROWN: It's difficult to say. I
2 mean, the amicus and -- and the parties here
3 have tried to kind of point to various cases
4 where they think the standard may or may not
5 have been dispositive. In the Department of
6 Labor's cases, its -- its own litigation,
7 where -- where we might have more of an idea,
8 the standard of proof I think is -- is pretty
9 rarely dispositive, but that's likely because
10 most of the litigation in the context of the
11 Department of Labor is about the interpretation
12 of an exemption or, you know, whether an
13 employer is -- an employee is -- is covered by
14 the FLSA at all, whether they are an employee or
15 an independent contractor.

16 So, in those cases, in the cases that
17 the Department has -- has litigated, I don't
18 think it often makes a huge difference, but it
19 certainly can make a difference in edge cases
20 here, and I think that the Petitioners should be
21 given the opportunity to show that this is one
22 of those cases.

23 JUSTICE JACKSON: And one final
24 question -- oh, sorry.

25 JUSTICE KAGAN: No, go ahead.

1 JUSTICE JACKSON: I was just going to
2 say, finally, is -- it the government taking the
3 position that this same standard should apply to
4 all of the exemptions?

5 MS. BROWN: Yes. I don't think that
6 there's any reasoned basis to distinguish among
7 the exemptions. If there were a different
8 background rule in place, maybe when a different
9 exemption was enacted, then you might think that
10 Congress had a different rule in mind.

11 But this has been the longstanding
12 background presumption since, you know, 1878 in
13 Lilienthal's Tobacco, even before that, I think.
14 In Lilienthal's Tobacco, it's kind of stated as
15 though it were already a well-established rule.
16 And so I -- I don't think that there's any basis
17 for concluding that -- that Congress would have
18 had something different in mind for any of the
19 different exemptions.

20 JUSTICE KAGAN: Just going back to
21 Justice Sotomayor's question, is there any
22 difference between your recommendation to
23 reverse and Ms. Blatt's to vacate?

24 MS. BROWN: No. We originally, at the
25 certiorari stage, had recommended a -- a summary

1 reversal, and -- and that's just kind of the
2 colloquialism that this Court uses for deciding
3 cases without full merits briefing, and so we
4 kind of just used that same formulation when we
5 were making our -- our -- our -- our argument
6 here as well. But we don't think that the Court
7 needs to reach out and decide whether or not the
8 actual evidence here was sufficient or to -- to
9 show that the employees fell within the
10 exemption.

11 CHIEF JUSTICE ROBERTS: What -- what
12 happens when the case goes back? I mean, you've
13 got a factual record. Does the court just say
14 I'm going to look at this under predominance
15 rather than clear and convincing, or do you -- I
16 mean, is -- you don't -- I -- I guess I don't
17 see how you would have different evidentiary
18 proceedings given the standard of proof, so --

19 MS. BROWN: Right. My understanding
20 would be that the -- the court of appeals would
21 likely just remand this also back to the
22 district court that was making --

23 CHIEF JUSTICE ROBERTS: Yeah.

24 MS. BROWN: -- the -- the individual
25 factual findings. And because this was a bench

1 trial, the district court will have the full --
2 the full transcript, the full -- all of the
3 evidence that was put in at that point. And
4 then the district court will just make the
5 determination and will -- will follow up.

6 CHIEF JUSTICE ROBERTS: So the
7 district court is going to look at this and say,
8 well, I evaluated this under clear and
9 convincing and decided this, but if it's just
10 preponderance, it comes out the other way?

11 MS. BROWN: It could make that
12 determination. As the Petitioners note, the
13 district court did cite the standard of proof
14 several different times in its decision and --
15 and mentioned it during the argument as well.
16 And so there is a possibility that the court
17 would -- would reach that determination, and we
18 should at least allow the court to -- to have
19 the opportunity to do so.

20 JUSTICE SOTOMAYOR: Is it your
21 position on this record that there is the
22 potential, evidentiary potential, of a different
23 outcome?

24 MS. BROWN: We haven't taken a
25 position on -- on whether the -- whether the

1 right outcome here under the preponderance of
2 the evidence standard is to find an exemption or
3 not. I -- I do think that the -- the lower
4 court should be given that opportunity. We
5 don't think that there's anything we've seen so
6 far to absolutely foreclose that. But, again,
7 we -- we haven't taken a position on what the
8 overall outcome here should be.

9 JUSTICE SOTOMAYOR: Thank you.

10 MS. BROWN: Mm-hmm.

11 CHIEF JUSTICE ROBERTS: Thank you.

12 Thank you -- I'm sorry.

13 Justice Alito?

14 JUSTICE ALITO: Should we just draw a
15 clear line and say, when a higher standard of
16 proof is not required by the Constitution and
17 there is no liberty interest at stake, then the
18 standard is -- we -- we presume conclusively
19 that the standard is preponderance?

20 MS. BROWN: So I -- I don't think that
21 there is any need to take -- take that kind of
22 further step, particularly in this case. This
23 isn't an area where there has been a lot of
24 confusion among the lower courts as to how this
25 Court's standards apply. There are not a lot of

1 other cases in which we're seeing lower courts
2 applying a heightened standard of proof, absent
3 statutory text or absent the case falling into
4 one of these categories that the Court has
5 already addressed. So I don't think it's
6 necessary to do that.

7 I will also say that I think that the
8 Court's case in -- the Court's decision in
9 Grogan goes pretty far towards saying something
10 like that. It says essentially that statutory
11 silence is inconsistent with the presumption or
12 with the understanding that Congress would have
13 intended a heightened standard of proof. And
14 the only way I think that presumption is
15 overcome is if it is a significant deprivation,
16 which, again, has really been limited to those
17 kind of three cases that I talked about,
18 deportation, denaturalization, and expatriation.

19 So I don't think it's -- it's
20 necessary to kind of take that further step.
21 I -- there's not, like, a lot of confusion in
22 the lower courts on that point.

23 JUSTICE ALITO: Well, then --

24 CHIEF JUSTICE ROBERTS: Go ahead.

25 JUSTICE ALITO: -- what methodology do

1 you think we should apply in determining whether
2 economic interests are particularly important
3 under the test?

4 MS. BROWN: So I -- I think that you
5 should apply the same presumption that you've
6 applied in every other case, including in
7 Grogan, which is that when there is a
8 conventional remedy in civil litigation, the
9 very, very strong presumption is that the
10 preponderance of the evidence standard is going
11 to apply. And this Court has never recognized
12 or never seen a case in which that is the --
13 the -- the -- the lay of the land, and that
14 would nevertheless overcome that presumption.

15 And there -- there may be a -- a time
16 in which there are, like, common-law background
17 principles that would inform the way the statute
18 is interpreted. That was the case, for example,
19 in Microsoft versus i4i, where Congress did not
20 specifically say that the preponderance -- or
21 that the clear and convincing evidence standard
22 should apply, but there was a background
23 common-law principle that in patent invalidity
24 cases, a patent's invalidity has to be shown by
25 clear and convincing evidence, and that informed

1 the way the Court read the statute.

2 JUSTICE ALITO: Thank you.

3 MS. BROWN: So, certainly, I would
4 want to leave that open as well.

5 JUSTICE ALITO: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you.

7 Anyone else? No?

8 Thank you, counsel.

9 Ms. Bateman.

10 ORAL ARGUMENT OF LAUREN E. BATEMAN

11 ON BEHALF OF THE RESPONDENTS

12 MS. BATEMAN: Mr. Chief Justice, and
13 may it please the Court:

14 When neither the Constitution nor any
15 statute sets a standard of proof to govern a
16 particular factual determination, the degree of
17 proof required for any given claim or defense is
18 a question traditionally left to the judiciary.

19 Here, application of the clear and
20 convincing standard of proof is necessary to
21 carry out the explicit public purpose of the
22 Fair Labor Standards Act.

23 Section 202(b) of the Act declares
24 that it is designed to eliminate as rapidly as
25 practicable labor conditions that fall below a

1 minimum standard of living. The preponderance
2 of the evidence standard falls short of that
3 purpose because it allocates the risk of factual
4 error equally between employers and workers.

5 But the FLSA is not your typical civil
6 statute where only individual monetary damages
7 are at stake, and so, as far as the public is
8 concerned, the interests of plaintiff and
9 defendant are in equipoise.

10 Instead, it's a statute that protects
11 both the worker's right to a fair day's pay for
12 a fair day's work but also the public's right to
13 an economic system that doesn't depend on and
14 inexorably lead to the impoverishment and
15 immiseration of the American worker.

16 Congress implicitly recognized in
17 Section 202(b) that the social disutility of a
18 factual error that deprives a worker of minimum
19 wages or overtime to which he's entitled is
20 greater than the social disutility of imposing
21 those costs on the employer. And that lopsided
22 disutility analysis, under principles long
23 recognized by this Court, calls for requiring
24 the employer to prove an exemption clearly and
25 convincingly.

1 It's also appropriate because
2 employers are likely to possess and control
3 evidence relevant to these kinds of factual
4 determinations. And employers can and sometimes
5 do manipulate evidence in their favor, such as
6 job descriptions or titles.

7 Unchecked, these factors lead to
8 disproportionate errors of fact finding in favor
9 of employers. Thus, it's sensible to insist
10 that where an employer seeks to prove that an
11 employee is exempt from these protections, the
12 employer must do so clearly and convincingly.

13 I welcome the Court's questions.

14 JUSTICE THOMAS: What is the standard
15 in discrimination cases?

16 MS. BATEMAN: You're right, Your
17 Honor, it is -- it is a preponderance of the
18 evidence standard.

19 JUSTICE THOMAS: So why should FLSA be
20 treated more advantageously than the
21 discrimination cases?

22 MS. BATEMAN: I think the key
23 difference between the FLSA and Title VII is
24 waivability. And Title VII vindicates certainly
25 extremely important rights, but although Title

1 VII vindicates a public interest, it doesn't
2 expressly create a public right separate and
3 independent from the right that accrues to the
4 individual.

5 And I think an example might be
6 illustrative here. An individual can feel free
7 to sign a severance agreement saying: I agree
8 to waive any Title VII claims that might have
9 accrued during the course of my employment for
10 \$50.

11 By contrast, this Court has said
12 that -- that private waivers of FLSA back wages
13 or liquidated damages would, and I quote,
14 "nullify the purposes of the Act."

15 So you cannot waive or compromise
16 those claims unless there's a bona fide dispute
17 as to the amount owed.

18 So, if an employer were to do the same
19 thing in the FLSA context and say that he would
20 settle his claims for \$50 and it was later found
21 that the employee was owed a hundred dollars of
22 back wages, that waiver just wouldn't be
23 operable. The Department of Labor or the
24 employee could still pursue that remaining \$50
25 in litigation.

1 CHIEF JUSTICE ROBERTS: The
2 Petitioner, in her brief, says that this Court
3 has never permitted plaintiffs to use the clear
4 and convincing standard as a sword against
5 defendants. Is that right?

6 MS. BATEMAN: I -- I think I -- I'd --
7 I'd suggest that the premise of -- of the
8 statement might be inaccurate because, here,
9 exemptions -- FLSA exemptions are only even
10 arguably applicable at the point where a fact
11 finder has already determined that the employee
12 has proven his or her prima facie case.

13 So, at that point, there's already a
14 right vested in the employee for back wages or
15 overtime pay to which he or she is entitled.

16 CHIEF JUSTICE ROBERTS: How -- how
17 does that address the question of using the
18 clear and convincing standard as -- as a
19 sword --

20 MS. BATEMAN: I -- I --

21 CHIEF JUSTICE ROBERTS: -- for
22 defendants? I'm -- I -- I -- I missed the
23 connection.

24 MS. BATEMAN: Sorry, Your Honor. I --
25 I think my -- my point is merely that at the

1 point at which the right vests in the employee,
2 the standard would be used as a shield to
3 prevent an erroneous deprivation of -- of the
4 right that had already accrued to the employee.

5 JUSTICE JACKSON: So I'm discerning a
6 methodological difference between the two of you
7 that I'd like to ask about.

8 Petitioner said that the standard of
9 proof question is ultimately a matter of
10 congressional intent. And I take you to be
11 pushing back on that a little bit by your
12 opening when you said that when there's no
13 constitutional requirement and Congress is
14 silent, the standard of proof is a question
15 traditionally left to the judiciary, and you
16 seem to be inviting us to be weighing these
17 values.

18 And I thought, at least the way
19 Petitioner has set this up, is that it's not our
20 role to do that, that what we should be doing,
21 she says, is determining whether Congress's
22 silence meant that it acquiesced to the default
23 rule, which is preponderance of the evidence.

24 So can you speak to the difference of
25 methodology?

1 MS. BATEMAN: Certainly. I -- I think
2 Petitioners' methodology is inconsistent with
3 the way this Court has actually analyzed
4 standards of proof issues, and I think the
5 immigration cases are a really great example.

6 Starting in *Schneiderman*, this Court
7 grappled with the standard of proof in
8 denaturalization proceedings, and those
9 proceedings took place under a very specific
10 portion of a statute that even contained a -- a
11 host of evidentiary directives, but it didn't
12 contain a standard of proof.

13 JUSTICE JACKSON: But isn't that
14 because they were sort of -- the -- I think
15 everyone concedes that there's this kind of
16 special category of cases that based on their
17 interest, whether it's a constitutional interest
18 or sort of quasi-constitutional because of the
19 nature of the deprivation, due process kind of
20 thing, the Court has work to do.

21 But I thought we sort of got rid of
22 that at the top by sort of assessing this not as
23 being in one of those categories, and so then
24 the question becomes: How does the Court treat
25 it?

1 MS. BATEMAN: Well, I -- I think,
2 again, the immigration cases are -- are a good
3 example. And I -- I take Your Honor's point
4 that perhaps there's a quasi-constitutional
5 interest at play. But -- but that interest is
6 never articulated by the Court in Schneiderman
7 or -- or in Woodbury.

8 JUSTICE JACKSON: But what do you do
9 with Grogan?

10 I mean, I thought from then on, the
11 sort of way in which we thought about this was
12 Congress -- you know, there's no constitutional
13 interest here, Congress didn't speak to it. So
14 what does Congress's silence tell us about what
15 it intended with respect to the cause of action
16 that it was creating?

17 MS. BATEMAN: I -- I think cases like
18 Grogan and Herman & MacLean are illustrative
19 that our view of the methodology is the more
20 accurate one because, in those cases, the Court
21 did undertake a balancing analysis.

22 It didn't just observe a statutory
23 lacuna and decide: Well, certainly,
24 preponderance of the evidence applies. It -- it
25 weighed the interests at stake.

1 And -- and granted, in those cases, it
2 determined after that weighing preponderance of
3 the evidence was the relevant standard.

4 JUSTICE JACKSON: Did it do so on the
5 basis of the Court's own view of the interests
6 in stake, or was it trying to ascertain how
7 Congress viewed those interests?

8 MS. BATEMAN: I -- I think the -- the
9 structure and nature of the statute is relevant
10 to the court's determination of -- of how it
11 manages these factual questions.

12 Ultimately, of course, courts will
13 answer these sorts of procedural questions
14 consistent with general principles that have
15 emerged from other cases. And those principles,
16 I think, do embody a default rule in a weak
17 sense, which is that when there's a statutory
18 lacuna, those -- those questions are reserved
19 for -- for the courts and that in civil
20 litigation, issues tend to be decided under the
21 preponderance of the evidence, unless the
22 reasons that courts have developed for
23 exercising a more stringent standard apply.

24 So I think the question here is
25 whether those reasons are present in this case.

1 JUSTICE KAVANAUGH: Well, are --

2 JUSTICE KAGAN: Do you think that
3 there are any other contexts in which we should
4 say clear and convincing evidence?

5 MS. BATEMAN: I -- I hesitate with
6 "should." I -- I will say that there are other
7 contexts --

8 JUSTICE KAGAN: Well, you said it's up
9 to the courts to figure this out, so I'm just
10 wondering: Is this a kind of this case and this
11 case only? And if so, why?

12 Or is this -- is the argument: No,
13 there are a variety of areas in which it should
14 be a clear and convincing evidence because of,
15 you know, the following reasons?

16 MS. BATEMAN: As far as I'm aware,
17 it's in the FLSA -- or we would advocate for the
18 FLSA context and the FLSA context only, and
19 that's because of the unique nature, the
20 non-waivability of the right.

21 It's also because it's -- the
22 statement of purpose, which, you know, Congress
23 embodied in the statute, is incredibly broad.
24 It's an economy-wide regulatory scheme.

25 There are also other indicia that

1 Congress thought the FLSA was sort of a sui
2 generis statute, for example, permitting the
3 collective action mechanism.

4 Altogether, these indicate that
5 Congress thought this was an exceptional statute
6 for which a heightened standard of proof --

7 JUSTICE ALITO: Well, the government
8 provides lots of benefits that are critically --
9 monetary benefits that are critically important
10 to some people. Would you have us say that none
11 of those can rise to the level of importance
12 that is present when what's involved is overtime
13 payments under the FLSA?

14 MS. BATEMAN: I -- I think that
15 necessarily this is a -- this is a question left
16 to the judiciary to ascertain in a case-by-case
17 basis, but -- but --

18 JUSTICE ALITO: Yeah. Well, how would
19 we go about doing that? Say it's a
20 determination of welfare benefits. Is that less
21 important than this?

22 MS. BATEMAN: Certainly not. But I
23 think one operative question is whether those
24 rights are waivable by the individual. And
25 because they're not waivable in the FLSA

1 context, that is an indicator that there's a --
2 a broader remedial scheme at issue than just
3 individual monetary damages.

4 JUSTICE ALITO: What about revocation
5 of an occupational license for somebody whose
6 whole livelihood depends upon pursuing that
7 license, pursuing that occupation?

8 MS. BATEMAN: I --

9 JUSTICE ALITO: Somebody's worked for
10 30 years as a barber and let's say the District
11 of Columbia yanks the -- the license to operate
12 a barbershop.

13 MS. BATEMAN: I -- I think, if there
14 is a statutory -- if there is statutory silence
15 on that matter, there, as far as I can see,
16 would be no reason to believe that there -- a
17 higher standard of proof would be necessary to
18 carry out the statutory scheme at issue.

19 I think, again, the FLSA is just such
20 a unique statute in terms of its breadth, its
21 statement of purpose, and its remedial nature,
22 its non-waivability.

23 JUSTICE ALITO: Well, if the test is
24 whether it's particularly important and you want
25 the judiciary to decide whether things are

1 particularly important, then we would need some
2 methodology to determine whether something is
3 particularly important.

4 MS. BATEMAN: Yes, Your Honor. I -- I
5 think that's right. I think this Court can
6 adhere to the standard that -- that it's
7 developed in previous cases and -- and determine
8 that, you know, a right is particularly
9 important where it implicates not just
10 individual monetary damages.

11 CHIEF JUSTICE ROBERTS: Well, I --
12 but, I mean, I think it's the same point Justice
13 Alito was making. But, the Clean Water Act,
14 right? There's a big statement of purposes
15 there. It's necessary to preserve life and --
16 and everything else. And so, if you want -- if
17 you're suing somebody under that, why aren't
18 they put to -- they, the polluter -- a higher
19 standard of proof to prove that they're not
20 doing -- they're not polluting the environment,
21 they're not endangering people's lives and --
22 through the -- through their emissions?

23 MS. BATEMAN: Again, I would say,
24 if -- if Congress hasn't spoken as to the
25 evidentiary standard of proof, then the Court

1 has to determine, using a host of factors,
2 including the importance of the right, what the
3 operative standard of proof ought to be.
4 It's -- it's really a question of judicial
5 administration.

6 And because, here, the right is
7 nonwaivable, that -- that suggests that Congress
8 did believe that this is -- this is not your
9 mine-run civil-litigation-type case where only
10 individual monetary damages are at stake.

11 CHIEF JUSTICE ROBERTS: Nothing?

12 JUSTICE KAGAN: So could you say a
13 little bit more about nonwaivability? Because
14 that -- that is the one thing that you have that
15 seems, on your account, to make this, the FLSA,
16 different from a variety of other things that we
17 could think of. I mean, is that right? Are
18 there really no other nonwaivability rules of
19 the same kind? And, if so, where did this one
20 come from? Why does it exist?

21 MS. BATEMAN: I -- I -- I think it --
22 yes, it is unique, and I think it exists because
23 of this Court's jurisprudence interpreting the
24 Fair Labor Standards Act going back to Brooklyn
25 Savings Bank, where it's such an important right

1 to preserving --

2 JUSTICE KAGAN: We created it, not
3 particularly based on any statutory language?

4 MS. BATEMAN: Well, I think this Court
5 was fairly interpreting the statutory language
6 in the Fair Labor Standards Act when it reached
7 this determination that -- that to waive any
8 portion of it would nullify the purposes of the
9 Act.

10 And I think that goes back to the
11 public rights that -- that are enshrined in the
12 Act. Of course, the minimum wage is designed to
13 eliminate, you know, substandard conditions for
14 the individual, but it's also designed to
15 eliminate the competitive advantage enjoyed by
16 goods produced under substandard conditions. So
17 that's sort of the public valence of the -- the
18 minimum wage provision.

19 In terms of the overtime provision,
20 it's not just meant to protect the individual
21 from the evil of overwork but also designed to
22 increase overall employment by widening the
23 distribution of work.

24 And both of these provisions really
25 only work if -- if they're adopted economy-wide.

1 Otherwise, it permits bad actors to enjoy
2 competitive advantage, and it disadvantages good
3 companies who -- who wish to adhere to the
4 regulations.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 MS. BATEMAN: Thank you.

8 CHIEF JUSTICE ROBERTS: Rebuttal,
9 Ms. Blatt?

10 REBUTTAL ARGUMENT OF LISA S. BLATT
11 ON BEHALF OF THE PETITIONERS

12 MS. BLATT: Thank you, Mr. Chief
13 Justice.

14 So just one thing on the -- sort of
15 the balance for workers. I just wanted to point
16 out, Justice Jackson, the FLSA does provide for
17 liquidated damages as the norm. So, at least in
18 that sense, the employees do get double damages
19 when there's a finding of liability. And at
20 page 26A, the district court says that's the
21 norm. So, in addition to things like
22 nonwaivability, there's liquidated damages.

23 Mr. Chief Justice, we think it should
24 be the same record. The Court already heard all
25 this. We think the Court can look at it just

1 based on it.

2 In terms of waivability, we cited in
3 our brief and in my opening the NLRA and OSHA.
4 We -- rights aren't waivable. The NLRB
5 certainly thinks those rights are not waivable,
6 and so does OSHA. Those are both workplace
7 rights. And I just cited in the brief the
8 workplace ones, and there's throughout the U.S.
9 Code nonwaivable rights, but we could talk
10 endless about Article III. I don't think that's
11 waivable either. And we could talk about who's
12 public and why that's in there, but all kinds of
13 separation of powers issues. No one thinks that
14 we start importing burdens of proof into Article
15 III rights.

16 And then just on the -- the bit about
17 sort of the policies of the Act, after Encino,
18 you know, half the statute is the exemptions,
19 and, by definition, if it's more likely than not
20 that an employee is exempt, that means the
21 nature of the employment is such that the
22 employer can't hire more workers because, if
23 there's a salesman or a manager or an
24 administrator, you know, they have certain
25 routes, certain sales representatives, and what

1 happens is the employer will just pay the
2 overtime, and, ultimately, especially for small
3 businesses operating at the margin, you're just
4 talking about laying off workers.

5 And thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. The case is submitted.

8 (Whereupon, at 12:00 p.m., the case
9 was submitted.)

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