

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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10 Washington, D.C.

11 Tuesday, November 5, 2024

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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:

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19 the Petitioners.

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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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P R O C E E D I N G S

(11:17 a.m.)

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

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE PETITIONERS

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

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

Respondent -- Respondents argue that a heightened standard is appropriate because FLSA rights are important. But a preponderance standard applies to rights against race discrimination and disability discrimination and rights to organize and to workplace safety, all 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 in the
4 context of actual malice, can you think of any
5 other case where there has been a requirement,
6 this Court has required clear and convincing
7 that -- where only money damages were at issue?

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

11 JUSTICE THOMAS: Yeah.

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

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

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

25 But, more importantly, the public has

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

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

25 MS. BLATT: Yeah, all -- of course,

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

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

20 But the more basic presumption is just
21 when you look at all these statutes, Title VII,
22 disability, NLRA, I mean, there's plenty of
23 cases in the labor context, NLRA, OSHA, all
24 those arguments could be made, and the
25 preponderance standard has always governed.

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

11 MS. BLATT: Well --

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

16 MS. BLATT: Mm-hmm.

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

20 MS. BLATT: Yeah.

21 JUSTICE KAVANAUGH: -- applied a
22 heightened standard?

23 MS. BLATT: So both. Let's be clear,
24 I think there's only two ways to get there. You
25 have to do it by the Constitution, which is

1 Addington, or the statute. And it's true that
2 the 1966 case would be where this Court said
3 congressional silence means it's left up to the
4 judiciary to make an independent determination
5 about these kinds of things.

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

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

22 Congress presumably knows, in the '40s
23 and '50s, you set out a kind of rule that if it
24 was a particularly important deprivation, not
25 involving money damages, then the Court will

1 read into a clear and convincing evidence. But
2 I don't think -- I do think it is a question of
3 congressional intent ultimately.

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

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

18 And I don't think it's -- it would be
19 right to go down to overtime, which I think
20 involves highly compensated employees, and to go
21 down this road of, well, how important is race
22 discrimination as opposed to sex discrimination
23 or religious discrimination and start saying
24 these are semi-fundamental rights too and Price
25 Waterhouse already put this to bed and said

1 we're going to have a preponderance of the
2 evidence standard.

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

11 But what outcome could a different
12 standard of proof have on the factual findings
13 in this case?

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

23 In terms of no --

24 JUSTICE SOTOMAYOR: Well, I don't
25 disagree just for a moment. I do think the

1 other side says this was harmless error.

2 MS. BLATT: Of course.

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

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

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

24 And, second, there were three salesmen
25 that said that the sky was the limit for them

1 and their ability to make sales at chain stores
2 and they lost track.

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

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

22 So I think all of those things would
23 lead to a sufficient basis. And the only way
24 this Court could find harmless error, of course,
25 would be to find that no reasonable fact finder

1 could find by a preponderance of the evidence.

2 JUSTICE SOTOMAYOR: On the last issue
3 you raised, which was the collective bargaining
4 issue, this right of overtime is not waivable by
5 an employee, correct?

6 MS. BLATT: Correct, prospectively,
7 yes.

8 JUSTICE SOTOMAYOR: But you're not
9 using it in that sense.

10 MS. BLATT: No, not at all.

11 JUSTICE SOTOMAYOR: You're using it in
12 the sense of what they perceived as the most
13 important part of their function?

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

21 JUSTICE SOTOMAYOR: Thank you.

22 JUSTICE KAGAN: The court of appeals
23 here applied its own circuit precedent. What's
24 your understanding of where that circuit
25 precedent came from, how it arose?

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

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

18 JUSTICE KAGAN: But it -- it relied
19 only on the Tenth Circuit opinion --

20 MS. BLATT: Correct.

21 JUSTICE KAGAN: -- not on our cases?

22 MS. BLATT: Correct, yeah, just the
23 Tenth Circuit.

24 Now -- and I don't think -- again, we
25 tried en banc, and I don't think the Fourth

1 Circuit has ever articulated a rule. And it is
2 somewhat noteworthy that they've only applied it
3 -- I mean, they're doing it in the overtime case
4 too, which seems, you know, the least policy
5 basis for it.

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

18 JUSTICE JACKSON: Can I ask you, you
19 started off by saying that the default standard
20 of proof was the preponderance of the evidence
21 standard and that it's a matter of congressional
22 intent, and so I guess the question is how clear
23 was it as of 1938, when the FSLA was passed,
24 that preponderance of the evidence was the
25 standard of proof as a default?

1 The cases -- many of the cases that
2 are cited are actually post-1938 cases. So
3 what's the best evidence that Congress was
4 actually legislating against the preponderance
5 of the evidence standard?

6 MS. BLATT: In that Footnote 2, where
7 we list all the cases, there are only two cases
8 to be sure that were pre-1938. It's the
9 Lilienthal's Tobacco from 1877, I think, and
10 United States versus Regan, which is 1914.

11 But that case is a civil penalties
12 case, when it was basically saying, even though
13 you're hit with these civil penalties, you could
14 be subject to a criminal law, preponderance of
15 the evidence standard applies.

16 Now, in Regan, what the Court did was
17 not only cite treatises, but it canvassed state
18 law and federal cases. In the Lilienthal's
19 Tobacco, it just cited two treatises, and I
20 think those treatises are -- I don't know. I
21 have the dates, but they're in the 1800s, and
22 they're Wigmore and whoever else the famous
23 evidence person is.

24 JUSTICE JACKSON: And it was general
25 civil litigation?

1 MS. BLATT: Mm-hmm.

2 JUSTICE JACKSON: Mm-hmm.

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

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 MS. BLATT: Nobody? Okay.

18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: I don't think
20 so. Anybody?

21 (Laughter.)

22 MS. BLATT: Sorry.

23 CHIEF JUSTICE ROBERTS: Ms. Brown.

24

25

1 ORAL ARGUMENT OF AIMEE W. BROWN
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONERS

4 MS. BROWN: Thank you, Mr. Chief
5 Justice, and may it please the Court:

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

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

20 Respondents don't really argue
21 otherwise. Instead, they offer an assortment of
22 policy reasons for favoring employee interests,
23 but the policies promoted by the FLSA are
24 materially similar to workplace protections like
25 those in Title VII that this Court has

1 recognized are adequately protected by the
2 default standard of proof.

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

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Would this be a bit
11 stronger case on Respondents' part if Respondent
12 had a minimum wage claim?

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

18 And in that context, I think the
19 statutory history that we cite on pages 14 and
20 15 of our brief would be even more relevant,
21 where Congress did make the judgment in the
22 minimum wage context that the preponderance of
23 the evidence standard would apply for the
24 exception when the administrator was -- was
25 making that determination.

1 So I think the same -- the same
2 standard would -- would be applicable there.

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

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

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

25 JUSTICE JACKSON: But what do we do

1 about the fact that the money damages here are
2 actually, I thought, doing more significant work
3 than just providing damages in that particular
4 scenario?

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

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

21 MS. BROWN: Certainly, we recognize
22 there are very important policy interests at
23 stake in this case and in the FLSA and that
24 Congress legislated with those in mind. I think
25 the same thing is true for Title VII. It's not

1 just about the individual employee who's seeking
2 damages. It's about the broader interest in
3 eradicating discrimination from the workplace.

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

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

23 I -- I wanted to just make a couple --
24 a couple of points if there are no further
25 questions on -- on that. The Respondents have

1 -- have asserted the variety of reasons to
2 depart from the default here, and the Court has
3 never accepted those kinds of reasons in cases
4 dealing with conventional remedies. And I think
5 it's important here to note that no court has
6 actually accepted them because the Fourth
7 Circuit here, as Ms. Blatt already discussed,
8 did not actually come up with any reasoned basis
9 for the decision.

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

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

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

5 MS. BROWN: Yes, it's the same
6 standard of proof.

7 JUSTICE JACKSON: And it's the same
8 standard that the Department of Labor applies in
9 its own administrative proceedings?

10 MS. BROWN: So the Department of Labor
11 does it -- the Department of Labor enforces this
12 statute through district court litigation.

13 JUSTICE JACKSON: Through the courts.

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

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

23 MS. BROWN: It's difficult to say. I
24 mean, the amicus and -- and the parties here
25 have tried to kind of point to various cases

1 where they think the standard may or may not
2 have been dispositive. In the Department of
3 Labor's cases, its own litigation, where --
4 where we might have more of an idea, the
5 standard of proof I think is -- is pretty rarely
6 dispositive, but that's likely because most of
7 the litigation in the context of the Department
8 of Labor is about the interpretation of an
9 exemption or, you know, whether an employer is
10 -- an employee is -- is covered by the FLSA at
11 all, whether they are an employee or an
12 independent contractor.

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

20 JUSTICE JACKSON: And one final
21 question -- oh, sorry.

22 JUSTICE KAGAN: No, go ahead.

23 JUSTICE JACKSON: I was just going to
24 say, finally, is the government taking the
25 position that this same standard should apply to

1 all of the exemptions?

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

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

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

21 MS. BROWN: No. We originally, at the
22 certiorari stage, had recommended a summary
23 reversal, and that's just kind of the
24 colloquialism that this Court uses for deciding
25 cases without full merits briefing, and so we

1 kind of just used that same formulation when we
2 were making our -- our -- our argument here as
3 well. But we don't think that the Court needs
4 to reach out and decide whether or not the
5 actual evidence here was sufficient to show that
6 the employees fell within the exemption.

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

15 MS. BROWN: Right. My understanding
16 would be that the court of appeals would likely
17 just remand this also back to the district court
18 that was making --

19 CHIEF JUSTICE ROBERTS: Yeah.

20 MS. BROWN: -- the -- the individual
21 factual findings. And because this was a bench
22 trial, the district court will have the full --
23 the full transcript, the full -- all of the
24 evidence that was put in at that point. And
25 then the district court will just make the

1 determination and will -- will follow up.

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

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

16 JUSTICE SOTOMAYOR: Is it your
17 position on this record that there is the
18 potential, evidentiary potential, of a different
19 outcome?

20 MS. BROWN: We haven't taken a
21 position on -- on whether the -- whether the
22 right outcome here under the preponderance of
23 the evidence standard is to find an exemption or
24 not. I do think that the -- the lower court
25 should be given that opportunity. We don't

1 think that there's anything we've seen so far to
2 absolutely foreclose that. But, again, we -- we
3 haven't taken a position on what the overall
4 outcome here should be.

5 JUSTICE SOTOMAYOR: Thank you.

6 MS. BROWN: Mm-hmm.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 Thank you -- I'm sorry.

9 Justice Alito?

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

16 MS. BROWN: So I don't think that
17 there is any need to take -- take that kind of
18 further step, particularly in this case. This
19 isn't an area where there has been a lot of
20 confusion among the lower courts as to how this
21 Court's standards apply. There are not a lot of
22 other cases in which we're seeing lower courts
23 applying a heightened standard of proof, absent
24 statutory text or absent the case falling into
25 one of these categories that the Court has

1 already addressed. So I don't think it's
2 necessary to do that.

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

15 So I don't think it's necessary to
16 kind of take that further step. I -- there's
17 not, like, a lot of confusion in the lower
18 courts on that point.

19 JUSTICE ALITO: Well, then --

20 CHIEF JUSTICE ROBERTS: Go ahead.

21 JUSTICE ALITO: -- what methodology do
22 you think we should apply in determining whether
23 economic interests are particularly important
24 under the test?

25 MS. BROWN: So I -- I think that you

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

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

23 JUSTICE ALITO: Thank you.

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

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Anyone else? No?

4 Thank you, counsel.

5 Ms. Bateman.

6 ORAL ARGUMENT OF LAUREN E. BATEMAN

7 ON BEHALF OF THE RESPONDENTS

8 MS. BATEMAN: Mr. Chief Justice, and

9 may it please the Court:

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

15 Here, application of the clear and
16 convincing standard of proof is necessary to
17 carry out the explicit public purpose of the
18 Fair Labor Standards Act.

19 Section 202(b) of the Act declares
20 that it is designed to eliminate as rapidly as
21 practicable labor conditions that fall below a
22 minimum standard of living. The preponderance
23 of the evidence standard falls short of that
24 purpose because it allocates the risk of factual
25 error equally between employers and workers.

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

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

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

22 It's also appropriate because
23 employers are likely to possess and control
24 evidence relevant to these kinds of factual
25 determinations. And employers can and sometimes

1 do manipulate evidence in their favor, such as
2 job descriptions or titles.

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

9 I welcome the Court's questions.

10 JUSTICE THOMAS: What is the standard
11 in discrimination cases?

12 MS. BATEMAN: You're right, Your
13 Honor, it is -- it is a preponderance of the
14 evidence standard.

15 JUSTICE THOMAS: So why should FLSA be
16 treated more advantageously than the
17 discrimination cases?

18 MS. BATEMAN: I think the key
19 difference between the FLSA and Title VII is
20 waivability. And Title VII vindicates certainly
21 extremely important rights, but although Title
22 VII vindicates a public interest, it doesn't
23 expressly create a public right separate and
24 independent from the right that accrues to the
25 individual.

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

7 By contrast, this Court has said that
8 private waivers of FLSA back wages or liquidated
9 damages would, and I quote, "nullify the
10 purposes of the Act."

11 So you cannot waive or compromise
12 those claims unless there's a bona fide dispute
13 as to the amount owed.

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

22 CHIEF JUSTICE ROBERTS: The
23 Petitioner, in her brief, says that this Court
24 has never permitted plaintiffs to use the clear
25 and convincing standard as a sword against

1 defendants. Is that right?

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

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

12 CHIEF JUSTICE ROBERTS: How does that
13 address the question of using the clear and
14 convincing standard as -- as a sword --

15 MS. BATEMAN: I -- I --

16 CHIEF JUSTICE ROBERTS: -- for
17 defendants? I -- I -- I missed the connection.

18 MS. BATEMAN: Sorry, Your Honor. I --
19 I think my -- my point is merely that at the
20 point at which the right vests in the employee,
21 the standard would be used as a shield to
22 prevent an erroneous deprivation of -- of the
23 right that had already accrued to the employee.

24 JUSTICE JACKSON: So I'm discerning a
25 methodological difference between the two of you

1 that I'd like to ask about.

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

12 And I thought, at least the way
13 Petitioner has set this up, is that it's not our
14 role to do that, that what we should be doing,
15 she says, is determining whether Congress's
16 silence meant that it acquiesced to the default
17 rule, which is preponderance of the evidence.

18 So can you speak to the difference of
19 methodology?

20 MS. BATEMAN: Certainly. I think
21 Petitioners' methodology is inconsistent with
22 the way this Court has actually analyzed
23 standards of proof issues, and I think the
24 immigration cases are a really great example.

25 Starting in *Schneiderman*, this Court

1 grappled with the standard of proof in
2 denaturalization proceedings, and those
3 proceedings took place under a very specific
4 portion of a statute that even contained a -- a
5 host of evidentiary directives, but it didn't
6 contain a standard of proof.

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

15 But I thought we sort of got rid of
16 that at the top by sort of assessing this not as
17 being in one of those categories, and so then
18 the question becomes: How does the Court treat
19 it?

20 MS. BATEMAN: Well, I -- I think,
21 again, the immigration cases are -- are a good
22 example. And I -- I take Your Honor's point
23 that perhaps there's a quasi-constitutional
24 interest at play. But -- but that interest is
25 never articulated by the Court in Schneiderman

1 or -- or in Woodbury.

2 JUSTICE JACKSON: But what do you do
3 with Grogan?

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

11 MS. BATEMAN: I -- I think cases like
12 Grogan and Herman & MacLean are illustrative
13 that our view of the methodology is the more
14 accurate one because, in those cases, the Court
15 did undertake a balancing analysis.

16 It didn't just observe a statutory
17 lacuna and decide: Well, certainly,
18 preponderance of the evidence applies. It -- it
19 weighed the interests at stake.

20 And -- and granted, in those cases, it
21 determined after that weighing preponderance of
22 the evidence was the relevant standard.

23 JUSTICE JACKSON: Did it do so on the
24 basis of the Court's own view of the interests
25 in stake, or was it trying to ascertain how

1 Congress viewed those interests?

2 MS. BATEMAN: I -- I think the -- the
3 structure and nature of the statute is relevant
4 to the court's determination of how it manages
5 these factual questions.

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

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

20 JUSTICE KAVANAUGH: Well, are --

21 JUSTICE KAGAN: Do you think that
22 there are any other contexts in which we should
23 say clear and convincing evidence?

24 MS. BATEMAN: I -- I hesitate with
25 "should." I -- I will say that there are other

1 contexts --

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

6 Or is this -- is the argument: No,
7 there are a variety of areas in which it should
8 be a clear and convincing evidence because of,
9 you know, the following reasons?

10 MS. BATEMAN: As far as I'm aware,
11 it's in the FLSA -- or we would advocate for the
12 FLSA context and the FLSA context only, and
13 that's because of the unique nature, the
14 non-waivability of the right.

15 It's also because it's -- the
16 statement of purpose, which, you know, Congress
17 embodied in the statute, is incredibly broad.
18 It's an economy-wide regulatory scheme.

19 There are also other indicia that
20 Congress thought the FLSA was sort of a sui
21 generis statute, for example, permitting the
22 collective action mechanism.

23 Altogether, these indicate that
24 Congress thought this was an exceptional statute
25 for which a heightened standard of proof --

1 JUSTICE ALITO: Well, the government
2 provides lots of benefits that are critically --
3 monetary benefits that are critically important
4 to some people. Would you have us say that none
5 of those can rise to the level of importance
6 that is present when what's involved is overtime
7 payments under the FLSA?

8 MS. BATEMAN: I -- I think that
9 necessarily this is a -- this is a question left
10 to the judiciary to ascertain in a case-by-case
11 basis, but -- but --

12 JUSTICE ALITO: Yeah. Well, how would
13 we go about doing that? Say it's a
14 determination of welfare benefits. Is that less
15 important than this?

16 MS. BATEMAN: Certainly not. But I
17 think one operative question is whether those
18 rights are waivable by the individual. And
19 because they're not waivable in the FLSA
20 context, that is an indicator that there's a
21 broader remedial scheme at issue than just
22 individual monetary damages.

23 JUSTICE ALITO: What about revocation
24 of an occupational license for somebody whose
25 whole livelihood depends upon pursuing that

1 license, pursuing that occupation?

2 MS. BATEMAN: I --

3 JUSTICE ALITO: Somebody's worked for
4 30 years as a barber and let's say the District
5 of Columbia yanks the -- the license to operate
6 a barbershop.

7 MS. BATEMAN: I -- I think, if there
8 is a statutory -- if there is statutory silence
9 on that matter, there, as far as I can see,
10 would be no reason to believe that a higher
11 standard of proof would be necessary to carry
12 out the statutory scheme at issue.

13 I think, again, the FLSA is just such
14 a unique statute in terms of its breadth, its
15 statement of purpose, and its remedial nature,
16 its non-waivability.

17 JUSTICE ALITO: Well, if the test is
18 whether it's particularly important and you want
19 the judiciary to decide whether things are
20 particularly important, then we would need some
21 methodology to determine whether something is
22 particularly important.

23 MS. BATEMAN: Yes, Your Honor. I -- I
24 think that's right. I think this Court can
25 adhere to the standard that -- that it's

1 developed in previous cases and -- and determine
2 that, you know, a right is particularly
3 important where it implicates not just
4 individual monetary damages.

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

17 MS. BATEMAN: Again, I would say, if
18 -- if Congress hasn't spoken as to the
19 evidentiary standard of proof, then the Court
20 has to determine, using a host of factors,
21 including the importance of the right, what the
22 operative standard of proof ought to be. It's
23 -- it's really a question of judicial
24 administration.

25 And because, here, the right is

1 nonwaivable, that -- that suggests that Congress
2 did believe that this is -- this is not your
3 mine-run civil-litigation-type case where only
4 individual monetary damages are at stake.

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

14 MS. BATEMAN: I think it -- yes, it is
15 unique, and I think it exists because of this
16 Court's jurisprudence interpreting the Fair
17 Labor Standards Act going back to Brooklyn
18 Savings Bank, where it's such an important right
19 to preserving --

20 JUSTICE KAGAN: We created it, not
21 particularly based on any statutory language?

22 MS. BATEMAN: Well, I think this Court
23 was fairly interpreting the statutory language
24 in the Fair Labor Standards Act when it reached
25 this determination that -- that to waive any

1 portion of it would nullify the purposes of the
2 Act.

3 And I think that goes back to the
4 public rights that -- that are enshrined in the
5 Act. Of course, the minimum wage is designed to
6 eliminate, you know, substandard conditions for
7 the individual, but it's also designed to
8 eliminate the competitive advantage enjoyed by
9 goods produced under substandard conditions. So
10 that's sort of the public valence of the -- the
11 minimum wage provision.

12 In terms of the overtime provision,
13 it's not just meant to protect the individual
14 from the evil of overwork but also designed to
15 increase overall employment by widening the
16 distribution of work.

17 And both of these provisions really
18 only work if -- if they're adopted economy-wide.
19 Otherwise, it permits bad actors to enjoy
20 competitive advantage, and it disadvantages good
21 companies who -- who wish to adhere to the
22 regulations.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 MS. BATEMAN: Thank you.

1 CHIEF JUSTICE ROBERTS: Rebuttal,
2 Ms. Blatt?

3 REBUTTAL ARGUMENT OF LISA S. BLATT
4 ON BEHALF OF THE PETITIONERS

5 MS. BLATT: Thank you, Mr. Chief
6 Justice.

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

16 Mr. Chief Justice, we think it should
17 be the same record. The Court already heard all
18 this. We think the Court can look at it just
19 based on it.

20 In terms of waivability, we cited in
21 our brief and in my opening the NLRA and OSHA.
22 We -- rights aren't waivable. The NLRB
23 certainly thinks those rights are not waivable,
24 and so does OSHA. Those are both workplace
25 rights. And I just cited in the brief the

1 workplace ones, and there's throughout the U.S.
2 Code nonwaivable rights, but we could talk
3 endless about Article III. I don't think that's
4 waivable either. And we could talk about who's
5 public and why that's in there, but all kinds of
6 separation of powers issues. No one thinks that
7 we start importing burdens of proof into Article
8 III rights.

9 And then just on the -- the bit about
10 sort of the policies of the Act, after Encino,
11 you know, half the statute is the exemptions,
12 and, by definition, if it's more likely than not
13 that an employee is exempt, that means the
14 nature of the employment is such that the
15 employer can't hire more workers because, if
16 there's a salesman or a manager or an
17 administrator, you know, they have certain
18 routes, certain sales representatives, and what
19 happens is the employer will just pay the
20 overtime, and, ultimately, especially for small
21 businesses operating at the margin, you're just
22 talking about laying off workers.

23 And thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. The case is submitted.

1 (Whereupon, at 12:00 p.m., the case
2 was submitted.)
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