



1           IN THE SUPREME COURT OF THE UNITED STATES

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3   E.M.D. SALES, INC., ET AL.,                    )

4                                    Petitioners,                    )

5                                    v.                                    ) No. 23-217

6   FAUSTINO SANCHEZ CARRERA, ET AL.,            )

7                                    Respondents.                    )

8   - - - - -

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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:

18   LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of  
19                   the Petitioners.

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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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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 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 have disparity and, you know, bargaining power  
23 between the people who are seeking the wages and  
24 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, or are  
16 you saying that this is different in kind from  
17 the Addington category that -- where we have --

18 MS. BLATT: Yeah.

19 JUSTICE KAVANAUGH: -- applied a  
20 heightened standard?

21 MS. BLATT: So both. Let's be clear,  
22 I think there's only two ways to get there. You  
23 have to do it by the Constitution, which is  
24 Addington, or the statute. And it's true that  
25 the 1966 case would be where this Court said

1 congressional silence means it's left up to the  
2 judiciary to make an independent determination  
3 about these kinds of things.

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

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

20           Congress presumably knows, in the '40s  
21 and '50s, you set out a kind of rule that if it  
22 was a particularly important deprivation, not  
23 involving money damages, then the Court will  
24 read into a clear and convincing evidence. But  
25 I don't think -- I do think it is a question of

1 congressional intent ultimately.

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

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

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

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

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

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

21 In terms of no --

22 JUSTICE SOTOMAYOR: Well, I don't  
23 disagree just for a moment. I do think the  
24 other side says this was harmless error.

25 MS. BLATT: Of course.

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

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

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

22 And, second, there were three salesmen  
23 that said that the sky was the limit for them  
24 and their ability to make sales at chain stores  
25 and they lost track.

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

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

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

25           JUSTICE SOTOMAYOR: On the last issue

1 you raised, which was the collective bargaining  
2 issue, this right of overtime is not waivable by  
3 an employee, correct?

4 MS. BLATT: Correct, prospectively,  
5 yes.

6 JUSTICE SOTOMAYOR: But you're not  
7 using it in that sense.

8 MS. BLATT: No, not at all.

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

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

19 JUSTICE SOTOMAYOR: Thank you.

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

24 MS. BLATT: I mean, it arose a long  
25 time ago relying on Tenth Circuit precedent.

1 And to be fair to the Fourth Circuit, the Tenth  
2 Circuit did say in that decision, it was talking  
3 about who had the burden, but it did say the  
4 employer would have to put clear and affirmative  
5 proof forward.

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

16 JUSTICE KAGAN: But it -- it relied  
17 only on the Tenth Circuit opinion --

18 MS. BLATT: Correct.

19 JUSTICE KAGAN: -- not on our cases?

20 MS. BLATT: Correct, yeah, just the  
21 Tenth Circuit.

22 Now, and I don't think -- again, we  
23 tried en banc, and I don't think the Fourth  
24 Circuit has ever articulated a rule. And it is  
25 somewhat noteworthy that they've only applied it



1 -- I mean, they're doing it in the overtime case  
2 too, which seems, you know, the least policy  
3 basis for it.

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

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

24           The cases -- many of the cases that  
25 are cited are actually post-1938 cases. So

1 what's the best evidence that Congress was  
2 actually legislating against the preponderance  
3 of the evidence standard?

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

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

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

22 JUSTICE JACKSON: And it was general  
23 civil litigation?

24 MS. BLATT: Mm-hmm.

25 JUSTICE JACKSON: Mm-hmm.

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

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 MS. BLATT: Nobody? Okay.

16 (Laughter.)

17 CHIEF JUSTICE ROBERTS: I don't think  
18 so. Anybody?

19 (Laughter.)

20 MS. BLATT: Sorry.

21 CHIEF JUSTICE ROBERTS: Ms. Brown.

22 ORAL ARGUMENT OF AIMEE W. BROWN

23 FOR THE UNITED STATES, AS AMICUS CURIAE,

24 SUPPORTING THE PETITIONERS

25 MS. BROWN: Thank you, Mr. Chief

1 Justice, and may it please the Court:

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

12           Respondents' claim seeking monetary  
13 remedies for alleged violations of the FLSA's  
14 overtime requirements is not remotely comparable  
15 to those cases. Respondents don't really argue  
16 otherwise.

17           Instead, they offer an assortment of  
18 policy reasons for favoring employee interests,  
19 but the policies promoted by the FLSA are  
20 materially similar to workplace protections like  
21 those in Title VII that this Court has  
22 recognized are adequately protected by the  
23 default standard of proof.

24           The Court should apply its  
25 longstanding precedent and hold that the

1 preponderance of the evidence standard applies  
2 here, remand for the lower courts to decide  
3 whether the Petitioners met that standard in the  
4 first instance.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Would this be a bit  
7 stronger case on Respondents' part if Respondent  
8 had a minimum wage claim?

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

14 And in that context, I think the  
15 statutory history that we cite on pages 14 and  
16 15 of our brief would be even more relevant,  
17 where Congress did make the judgment in the  
18 minimum wage context that the preponderance of  
19 the evidence standard would apply for the  
20 exception when the administrator was -- was  
21 making that determination.

22 So I think the same -- the same  
23 standard would -- would be applicable there.

24 CHIEF JUSTICE ROBERTS: Did I  
25 understand your opening to -- to say that if

1 it's just money, you wouldn't address the clear  
2 and convincing standard at all?

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

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

21 JUSTICE JACKSON: But what do we do  
22 about the fact that the money damages here are  
23 actually, I thought, doing more significant work  
24 than just providing damages in that particular  
25 scenario?

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

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

17                   MS. BROWN: Certainly, we recognize  
18 there are very important policy interests at  
19 stake in this case and in the FLSA and that  
20 Congress legislated with those in mind. I think  
21 the same thing is true for Title VII. It's not  
22 just about the individual employee who's seeking  
23 damages. It's about the broader interest in  
24 eradicating discrimination from the workplace.

25                   Congress often makes these policy

1 findings in its statutes where it lays out all  
2 of the interests that are at stake here, and  
3 those can be addressed through a variety of  
4 means, for example, through this waivability  
5 issue or waivability aspect of the statute where  
6 it can't be waived.

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

19           I -- I wanted to just make a couple --  
20 a couple of points if there are no further  
21 questions on -- on that. The Respondents have  
22 -- have asserted the variety of reasons to  
23 depart from the default here, and the Court has  
24 never accepted those kinds of reasons in cases  
25 dealing with conventional remedies. And I think



1 it's important here to note that no court has  
2 actually accepted them because the Fourth  
3 Circuit here, as Ms. Blatt already discussed,  
4 did not actually come up with any reasoned basis  
5 for the decision.

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

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

22 JUSTICE JACKSON: Can I ask you, is  
23 this the same standard of proof that would apply  
24 to the government, the Department of Labor, if  
25 it is bringing suit to enforce the FLSA?

1 MS. BROWN: Yes, it's the same  
2 standard of proof.

3 JUSTICE JACKSON: And it's the same  
4 standard that the Department of Labor applies in  
5 its own administrative proceedings?

6 MS. BROWN: So the Department of Labor  
7 does it -- the Department of Labor enforces this  
8 statute through district court litigation.

9 JUSTICE JACKSON: Through the courts.

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

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

19 MS. BROWN: It's difficult to say. I  
20 mean, the amicus and -- and the parties here  
21 have tried to kind of point to various cases  
22 where they think the standard may or may not  
23 have been dispositive. In the Department of  
24 Labor's cases, its own litigation, where --  
25 where we might have more of an idea, the

1 standard of proof I think is -- is pretty rarely  
2 dispositive, but that's likely because most of  
3 the litigation in the context of the Department  
4 of Labor is about the interpretation of an  
5 exemption or, you know, whether an employer is  
6 -- an employee is -- is covered by the FLSA at  
7 all, whether they are an employee or an  
8 independent contractor.

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

16           JUSTICE JACKSON: And one final  
17 question -- oh, sorry.

18           JUSTICE KAGAN: No, go ahead.

19           JUSTICE JACKSON: I was just going to  
20 say, finally, is the government taking the  
21 position that this same standard should apply to  
22 all of the exemptions?

23           MS. BROWN: Yes. I don't think that  
24 there's any reasoned basis to distinguish among  
25 the exemptions. If there were a different

1 background rule in place, maybe when a different  
2 exemption was enacted, then you might think that  
3 Congress had a different rule in mind, but this  
4 has been the longstanding background presumption  
5 since, you know, 1878 in *Lilienthal's Tobacco*,  
6 even before that, I think. In *Lilienthal's*  
7 *Tobacco*, it's kind of stated as though it were  
8 already a well-established rule. And so I don't  
9 think that there's any basis for concluding that  
10 -- that Congress would have had something  
11 different in mind for any of the different  
12 exemptions.

13 JUSTICE KAGAN: Just going back to  
14 Justice Sotomayor's question, is there any  
15 difference between your recommendation to  
16 reverse and Ms. Blatt's to vacate?

17 MS. BROWN: No. We originally, at the  
18 certiorari stage, had recommended a summary  
19 reversal, and that's just kind of the  
20 colloquialism that this Court uses for deciding  
21 cases without full merits briefing, and so we  
22 kind of just used that same formulation when we  
23 were making our -- our -- our argument here as  
24 well. But we don't think that the Court needs  
25 to reach out and decide whether or not the

1 actual evidence here was sufficient to show that  
2 the employees fell within the exemption.

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

11 MS. BROWN: Right. My understanding  
12 would be that the court of appeals would likely  
13 just remand this also back to the district court  
14 that was making --

15 CHIEF JUSTICE ROBERTS: Yeah.

16 MS. BROWN: -- the -- the individual  
17 factual findings. And because this was a bench  
18 trial, the district court will have the full --  
19 the full transcript, the full -- all of the  
20 evidence that was put in at that point. And  
21 then the district court will just make the  
22 determination and will -- will follow up.

23 CHIEF JUSTICE ROBERTS: So the  
24 district court is going to look at this and say,  
25 well, I evaluated this under clear and

1       convincing and decided this, but if it's just  
2       preponderance, it comes out the other way?

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

12              JUSTICE SOTOMAYOR:  Is it your  
13      position on this record that there is the  
14      potential, evidentiary potential, of a different  
15      outcome?

16              MS. BROWN:  We haven't taken a  
17      position on -- on whether the -- whether the  
18      right outcome here under the preponderance of  
19      the evidence standard is to find an exemption or  
20      not.  I do think that the lower court should be  
21      given that opportunity.  We don't think that  
22      there is anything we've seen so far to  
23      absolutely foreclose that.  But, again, we -- we  
24      haven't taken a position on what the overall  
25      outcome here should be.

1 JUSTICE SOTOMAYOR: Thank you.

2 MS. BROWN: Mm-hmm.

3 CHIEF JUSTICE ROBERTS: Thank you.

4 Thank you -- I'm sorry.

5 Justice Alito?

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

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

24 I will also say that I think that the  
25 Court's case in -- the Court's decision in

1 Grogan goes pretty far towards saying something  
2 like that. It says essentially that statutory  
3 silence is inconsistent with the presumption or  
4 with the understanding that Congress would have  
5 intended a heightened standard of proof. And  
6 the only way I think that presumption is  
7 overcome is if it is a significant deprivation,  
8 which, again, has really been limited to those  
9 kind of three cases that I've talked about,  
10 deportation, denaturalization, expatriation.

11 So I don't think it's necessary to  
12 kind of take that further step. I -- there's  
13 not, like, a lot of confusion in the lower  
14 courts on that point.

15 JUSTICE ALITO: Well, then --

16 CHIEF JUSTICE ROBERTS: Go ahead.

17 JUSTICE ALITO: -- what methodology do  
18 you think we should apply in determining whether  
19 economic interests are particularly important  
20 under the test?

21 MS. BROWN: So I -- I think that you  
22 should apply the same presumption that you've  
23 applied in every other case, including in  
24 Grogan, which is that when there is a  
25 conventional remedy in civil litigation, the



1 very, very strong presumption is that the  
2 preponderance of the evidence standard is going  
3 to apply. And this Court has never recognized  
4 or never seen a case in which that is the -- the  
5 -- the -- the lay of the land, and that would  
6 nevertheless overcome that presumption.

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

19           JUSTICE ALITO: Thank you.

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

22           JUSTICE ALITO: Thank you.

23           CHIEF JUSTICE ROBERTS: Thank you.

24           Anyone else? No?

25           Thank you, counsel.

1 Ms. Bateman.

2 ORAL ARGUMENT OF LAUREN E. BATEMAN

3 ON BEHALF OF THE RESPONDENTS

4 MS. BATEMAN: Mr. Chief Justice, and  
5 may it please the Court:

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

11 Here, application of the clear and  
12 convincing standard of proof is necessary to  
13 carry out the explicit public purpose of the  
14 Fair Labor Standards Act.

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

22 But the FLSA is not your typical civil  
23 statute where only individual monetary damages  
24 are at stake and so, as far as the public is  
25 concerned, the interests of plaintiff and

1 defendant are in equipoise. Instead, it's a  
2 statute that protects both the worker's right to  
3 a fair day's pay for a fair day's work but also  
4 the public's right to an economic system that  
5 doesn't depend on and inexorably lead to the  
6 impoverishment and immiseration of the American  
7 worker.

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

18 It's also appropriate because  
19 employers are likely to possess and control  
20 evidence relevant to these kinds of factual  
21 determinations.

22 And employers can and sometimes do  
23 manipulate evidence in their favor, such as job  
24 descriptions or titles. Unchecked, these  
25 factors lead to disproportionate errors of fact

1 finding in favor of employers. Thus, it's  
2 sensible to insist that where an employer seeks  
3 to prove that an employee is exempt from these  
4 protections, the employer must do so clearly and  
5 convincingly.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: What is the standard  
8 in discrimination cases?

9 MS. BATEMAN: You're right, Your  
10 Honor, it is -- it is a preponderance of the  
11 evidence standard.

12 JUSTICE THOMAS: So why should FLSA be  
13 treated more advantageously than the  
14 discrimination cases?

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

23 And I think an example might be  
24 illustrative here. An individual can feel free  
25 to sign a severance agreement saying: I agree

1 to waive any Title VII claims that might have  
2 accrued during the course of my employment for  
3 \$50.

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

8 So you cannot waive or compromise  
9 those claims unless there's a bona fide dispute  
10 as to the amount owed.

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

19 CHIEF JUSTICE ROBERTS: The  
20 Petitioner, in her brief, says that this Court  
21 has never permitted plaintiffs to use the clear  
22 and convincing standard as a sword against  
23 defendants. Is that right?

24 MS. BATEMAN: I -- I think I -- I'd --  
25 I'd suggest that the premise of -- of the

1 statement might be inaccurate because, here,  
2 exemptions -- FLSA exemptions are only even  
3 arguably applicable at the point where a fact  
4 finder has already determined that the employee  
5 has proven his or her prima facie case.

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

9 CHIEF JUSTICE ROBERTS: How does that  
10 address the question of using the clear and  
11 convincing standard as -- as a sword --

12 MS. BATEMAN: I -- I --

13 CHIEF JUSTICE ROBERTS: -- for  
14 defendants? I -- I -- I missed the connection.

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

21 JUSTICE JACKSON: So I'm discerning a  
22 methodological difference between the two of you  
23 that I'd like to ask about.

24 Petitioner said that the standard of  
25 proof question is ultimately a matter of

1 congressional intent.

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

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

15           So can you speak to the difference of  
16 methodology?

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

22           Starting in *Schneiderman*, this Court  
23 grappled with the standard of proof in  
24 denaturalization proceedings, and those  
25 proceedings took place under a very specific

1 portion of a statute that even contained a -- a  
2 host of evidentiary directives, but it didn't  
3 contain a standard of proof.

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

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

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

24 JUSTICE JACKSON: But what do you do  
25 with Grogan?



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

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

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

17                  And -- and granted, in those cases, it  
18                  determined after that weighing preponderance of  
19                  the evidence was the relevant standard.

20                  JUSTICE JACKSON: Did it do so on the  
21                  basis of the Court's own view of the interests  
22                  in stake, or was it trying to ascertain how  
23                  Congress viewed those interests?

24                  MS. BATEMAN: I -- I think the -- the  
25                  structure and nature of the statute is relevant

1 to the court's determination of how it manages  
2 these factual questions.

3           Ultimately, of course, courts will  
4 answer these sorts of procedural questions  
5 consistent with general principles that have  
6 emerged from other cases.

7           And those principles, I think, do  
8 embody a default rule in a weak sense, which is  
9 that when there's a statutory lacuna, those --  
10 those questions are reserved for -- for the  
11 courts and that in civil litigation, issues tend  
12 to be decided under the preponderance of the  
13 evidence, unless the reasons that courts have  
14 developed for exercising a more stringent  
15 standard apply.

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

18           JUSTICE KAVANAUGH: Well, are --

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

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

25           JUSTICE KAGAN: Well, you said it's up

1 to the courts to figure this out, so I'm just  
2 wondering: Is this a kind of this case and this  
3 case only? And if so, why?

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

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

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

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

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

24 JUSTICE ALITO: Well, the government  
25 provides lots of benefits that are critically --

1 monetary benefits that are critically important  
2 to some people. Would you have us say that none  
3 of those can rise to the level of importance  
4 that is present when what's involved is overtime  
5 payments under the FLSA?

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

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

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

21 JUSTICE ALITO: What about revocation  
22 of an occupational license for somebody whose  
23 whole livelihood depends upon pursuing that  
24 license, pursuing that occupation?

25 MS. BATEMAN: I --

1                   JUSTICE ALITO:  Somebody's worked for  
2   30 years as a barber and let's say the District  
3   of Columbia yanks the -- the license to operate  
4   a barber shop.

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

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

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

21                   MS. BATEMAN:  Yes, Your Honor.  I -- I  
22  think that's right.  I think this Court can  
23  adhere to the standard that it's developed in  
24  previous cases and -- and determine that, you  
25  know, a right is particularly important where it

1 implicates not just individual monetary damages.

2 CHIEF JUSTICE ROBERTS: Well, but, I  
3 mean, I think it's the same point Justice Alito  
4 was making. But the Clean Water Act, right?  
5 There's a big statement of purposes there. It's  
6 necessary to preserve life and -- and everything  
7 else.

8 And so, if you want -- if you're suing  
9 somebody under that, why aren't they put to --  
10 they, the polluter -- a higher standard of proof  
11 to prove that they're not doing -- they're not  
12 polluting the environment, they're not  
13 endangering people's lives and -- through the --  
14 through their emissions?

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

22 And because here the right is  
23 non-waivable, that suggests that Congress did  
24 believe that this is -- this is not your  
25 mine-run civil litigation type case where only

1 individual monetary damages are at stake.

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

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

17 JUSTICE KAGAN: We created it, not  
18 particularly based on any statutory language?

19 MS. BATEMAN: Well, I think this Court  
20 was fairly interpreting the statutory in the  
21 Fair Labor Standards Act when it reached this  
22 determination that -- that to waive any portion  
23 of it would nullify the purposes of -- of the  
24 Act.

25 And I think that goes back to the

1 public rights that -- that are enshrined in the  
2 Act. Of course, the minimum wage is designed to  
3 eliminate, you know, substandard conditions for  
4 the individual, but it's also designed to  
5 eliminate the competitive advantage enjoyed by  
6 goods produced under substandard conditions. So  
7 that's sort of the public valence of the -- the  
8 minimum wage provision. In terms of the  
9 overtime provision, it's not just meant to  
10 protect the individual from the evil of overwork  
11 but also designed to increase overall employment  
12 by widening the distribution of work.

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

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 MS. BATEMAN: Thank you.

22 CHIEF JUSTICE ROBERTS: Rebuttal,  
23 Ms. Blatt?

24

25



1 REBUTTAL ARGUMENT OF LISA S. BLATT

2 ON BEHALF OF THE PETITIONERS

3 MS. BLATT: Thank you, Mr. Chief

4 Justice.

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

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

18 In terms of waivability, we cited in  
19 our brief and in my opening the NLRA and OSHA.  
20 We -- rights aren't waivable. The NLRB  
21 certainly thinks those rights are not waivable,  
22 and so does OSHA. Those are both workplace  
23 rights. And I just cited in the brief the  
24 workplace ones, and there's throughout the U.S.  
25 code non-waivable rights, but we could talk

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

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

21 And thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 The case is submitted.

25 (Whereupon, at 12:00 p.m., the case

1 was submitted.)

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## Official - Subject to Final Review

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