No. 23-217

IN THE
Supreme Court of the United States

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

Petitioners,

v.

FAUSTINO SANCHEZ CARRERA, ET AL.,

Respondents.

ON A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation (NELF) is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston.[1] NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting inclusive economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section of large and small businesses and other organizations from all parts of the Commonwealth, New England, and the United States.

NELF is committed to an interpretation of employment statutes that preserves the legislative balance between the competing economic interests of the employer and the employee. Amicus is also committed to upholding the principle of stare decisis, under which a lower court should apply this Court's rules of decision that are instrumental in deciding the legal issue in a case.

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding whether an employer may prove that an employee is exempt from overtime pay under the

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored NELF's amicus brief, in whole or in part, and that no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Fair Labor Standards Act by a mere preponderance of the evidence, or by clear and convincing evidence.

SUMMARY OF ARGUMENT

An employer should be able to prove that an employee is exempt from receiving overtime pay under the Fair Labor Standards Act (FLSA) by a mere preponderance of the evidence, and not by a heightened standard of clear and convincing evidence. The FLSA's 34 exemptions substantially restrict the right to overtime pay, while Congress has remained silent on the applicable standard of proof. This silence is inconsistent with an intent to require a heightened standard of proof.

The FLSA codifies a considered legislative compromise on the issue of overtime pay. While Congress has favored employees' interests with the right to receive overtime pay, Congress has also favored employers' interests with numerous exemptions restricting that right. Only a mere-preponderance standard would preserve that legislative balance of competing interests, by giving virtually equal weight to the parties' respective interests in a correct decision on the issue of overtime pay.

The FLSA's exemptions reflect the legislative judgment that the remedial purposes underlying the overtime-pay requirement are ill suited to entire industries and categories of employees. Congress has evidently determined that the employer's economic interests outweigh the exempt employee's interests on the issue of overtime pay. Only a mere-

preponderance standard would preserve this legislative judgment, by allocating the risk of an erroneous court judgment on the issue of overtime pay nearly equally between the employer and the employee.

By contrast, a clear-and-convincing standard would contravene Congress's balanced treatment of overtime pay, by placing the risk of an erroneous judgment predominately on the employer's shoulders. As a result, a heightened evidentiary standard would favor the interest in awarding overtime pay even to the exempt employee, at the employer's unwarranted expense. The FLSA's 34 exemptions to overtime pay should defeat this skewed allocation of risks.

Because a clear-and-convincing standard expresses a preference for one side's interests, the Court will not apply that standard to a private monetary dispute, unless "particularly important individual interests or rights are at stake." But the FLSA's numerous exemptions, along with Congress's silence on the issue, indicate that Congress did not conceive of overtime pay in that way. In any event, if the right to overtime pay is "particularly important," so are the FLSA's 34 exemptions that substantially restrict that right. Only a mere-preponderance standard would preserve this legislative balance of competing important interests.

ARGUMENT

I. AN EMPLOYER SHOULD BE ABLE TO PROVE THAT AN EMPLOYEE IS EXEMPT FROM RECEIVING OVERTIME PAY UNDER THE FAIR LABOR STANDARDS ACT BY A MERE PREPONDERANCE OF THE EVIDENCE, AND NOT BY A HEIGHTENED STANDARD OF PROOF.

A. The FLSA's 34 Exemptions To The Overtime-Pay Requirement Strike A Balance Between The Parties' Competing Interests On The Issue, And Only A Mere-Preponderance Standard Would Preserve That Legislative Balance.

An employer should be able to prove that an employee is exempt from receiving overtime pay under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.*, by a mere preponderance of the evidence, and not by a heightened standard of clear and convincing evidence. This is because the FLSA contains 34 exemptions that exclude entire industries and categories of employees from the right to receive overtime pay,[2] while Congress has remained *silent* on the applicable standard of proof. "This silence is inconsistent with the view that

[2] See 29 U.S.C. § 213(a) (containing 13 exemptions from minimum wage and maximum weekly hour requirements), § 213(b) (containing 21 exemptions from maximum hour requirements). At issue in this case is the exemption for "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman." 29 U.S.C. § 213(a)(1).

Congress intended to require a special, heightened standard of proof." *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (mere-preponderance standard, not clear-and-convincing standard, applied to creditor in bankruptcy seeking to prove that debt was nondischargeable under one of many statutory exceptions to general policy of dischargeability of debts under Bankruptcy Code).

The FLSA codifies a considered legislative compromise on the issue of overtime pay. "Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage." *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 89 (2018) (cleaned up). While Congress has favored employees' interests with the right to receive overtime pay, Congress has also favored employers' interests with numerous exemptions restricting that right. "Those exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement [itself]." *Id.*, 584 U.S. at 90 (rejecting narrow-construction principle for interpreting FLSA's exemptions).

The FLSA thereby strikes a balance between the competing interests of the employer and the employee with respect to overtime pay. Only a mere-preponderance standard would preserve that legislative balance, by giving virtually equal weight to the parties' respective interests in a correct decision on the issue. "[A] standard of proof serves to allocate the risk of error between the litigants . . . . A preponderance-of-the-evidence standard allows both parties to share the risk of error in roughly equal fashion. . . . Any other standard

expresses *a preference for one side's interests*." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (cleaned up) (emphasis added). *See also Grogan*, 498 U.S. at 286 ("Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants.").

Indeed, the FLSA's exemptions reflect the legislative judgment that the remedial purposes underlying the overtime-pay requirement--i.e., as an incentive for employers to hire more employees, and as compensation for a long work week[3]--are ill suited to several industries and categories of employees. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 166 (2012) (two-fold rationale for overtime pay does not apply to employees falling under exemption at issue, 29 U.S.C. § 213(a)(1),[4] because those employees are generally well-compensated and they perform non-standardized work that cannot be spread easily to other employees).[5] *See also Report*

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[3] See *Walling v. Helmerich & Payne*, 323 U.S. 37, 40 (1944) ("[T]he Congressional purpose in enacting Section [207(a)] was twofold: (1) to spread employment by placing financial pressure on the employer through the overtime pay requirement . . . ; and (2) to compensate employees for the burden of a workweek in excess of the hours fixed in the Act.").

[4] That exemption excludes from overtime pay "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman." 29 U.S.C. § 213(a)(1).

of the Minimum Wage Study Commission, Volume I, at 117-120 (May 1981) (discussing additional reasons for FLSA's exemptions, such as seasonal industries hiring large numbers of short-term workers, industries with fixed labor supplies, industries inherently requiring work periods beyond 40 hours per week, and employees earning wages from commissions).

In short, Congress has evidently determined that the employer's economic interests outweigh the exempt employee's interests on the issue of overtime pay. *See Grogan*, 498 U.S. at 287 ("The statutory provisions governing nondischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debts . . . . Congress evidently concluded that *the creditors' interest* in recovering full payment of debts in these categories *outweighed the debtors' interest* in a complete fresh start.") (emphasis added).

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[5] In particular,

> [E]xempt employees perform[] a kind of work that [i]s difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally *precluding the potential job expansion* intended by the FLSA's time-and-a-half overtime premium.

Christopher, 567 U.S. at 166 (cleaned up) (emphasis added). Moreover, these exempt employees "typically earn[] salaries well above the minimum wage and enjoy[] other benefits that set them apart from the nonexempt workers entitled to overtime pay." *Id.* (cleaned up).

Only a mere-preponderance standard would preserve this legislative judgment, by allocating the risk of an erroneous court judgment on the issue of overtime pay nearly equally between the employer and the employee. *See Grogan*, 498 U.S. at 287 ("Requiring the creditor to establish by a preponderance of the evidence that his claim is not dischargeable reflects a fair balance between these conflicting interests.").

B. A Clear-And-Convincing Standard Of Proof Would Contravene That Legislative Balance, By Favoring The Exempt Employee's Interests Over The Employer's Interests.

By contrast, a clear-and-convincing standard of proof would contravene Congress's balanced treatment of overtime pay, by placing the risk of an erroneous judgment predominately on the employer's shoulders. "The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision." *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996) (cleaned up). As a result, a heightened evidentiary standard would favor the interest in awarding overtime pay even to the exempt employee, at the employer's unwarranted financial expense. The FLSA's 34 exemptions to overtime pay should defeat this skewed allocation of risks. *See Grogan*, 498 U.S. at 297 ("We think it unlikely that Congress, in fashioning the standard of proof that governs the applicability of these [exceptions to dischargeability], would have favored the interest in giving perpetrators of fraud a fresh start over the interest

in protecting victims of fraud," under fraud exception to dischargeability).

Because a clear-and-convincing standard "expresses a preference for one side's interests," *Herman & MacLean*, 459 U.S. at 390, the Court will not apply that standard to "the typical civil case involving a monetary dispute between private parties," *Addington v. Texas*, 441 U.S. 418, 423 (1979), "unless particularly important individual interests or rights are at stake." *Grogan*, 498 U.S. at 286 (cleaned up). But the FLSA's numerous exemptions, along with Congress's silence on the issue, indicate that Congress did not conceive of overtime pay as a "particularly important individual interest or right" that warrants the special protection of a heightened standard of proof. *See Grogan*, 498 U.S. at 286-87 ("We are unpersuaded by the argument that the clear-and-convincing standard is required to effectuate the 'fresh start' policy of the Bankruptcy Code," when Congress has provided several exceptions to "the general policy of discharge").

Put differently, if the right to overtime pay is "particularly important," so are the FLSA's 34 exemptions that substantially restrict that right. "Those exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement." *Encino Motorcars*, 584 U.S. at 90. Congress has given nearly equal weight to the right to overtime pay and its many exemptions. Only a mere-preponderance standard would preserve this legislative balance of competing important interests.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court reverse the judgment of the Fourth Circuit.

Respectfully submitted,

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