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 Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., NATIONAL RETAIL FEDERATION, AND RESTAURANT LAW CENTER IN SUPPORT OF PETITIONERS

STEPHANIE A. MALONEY
JORDAN L. VON BOKERN
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

STEVEN A. ENGEL
MICHAEL H. MCGINLEY
Counsel of Record
JUSTIN W. AIMONETTI
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
(202) 261-3378
michael.mcginley@dechert.com

Counsel for Amici Curiae

(For Continuation of Appearances See Inside Cover)

August 19, 2024

ANGELO I. AMADOR
RESTAURANT LAW CENTER
2055 L Street, NW,
Suite 700
Washington, DC 20036

ANTHONY R. JADICK
CIRA CENTRE
DECHERT LLP
2929 Arch Street
Philadelphia, PA 19104

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT..5

I. The Preponderance Standard Applies To FLSA Exemptions 5

II. FLSA Litigation Over Exemptions Arises Frequently And The Standard Of Proof Often Proves Outcome Determinative..9

III. A Heightened Burden Of Proof Undermines The FLSA's Design And Threatens American Businesses...................14

A. The Fourth Circuit's Heightened Burden Of Proof Thwarts The FLSA's Legislative Design 14

B. The Fourth Circuit's Heightened Burden Of Proof Harms American Businesses..............................16

IV. The Preponderance Standard Will Not Unduly Burden FLSA Claims................18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases:

Addington v. Texas,
441 U.S. 418 (1979) 7, 8

Anani v. CVS RX Servs., Inc.,
730 F.3d 146 (2d Cir. 2013)...................................5

Astoria Fed. Sav. & Loan Ass'n v. Solimino,
501 U.S. 104 (1991) 6

Bertrand v. Children's Home,
489 F. Supp. 2d 516 (D. Md. 2007) 13

Brooklyn Sav. Bank v. O'Neil,
324 U.S. 697 (1945) 15

California ex rel. Cooper v. Mitchell Bros. Santa Ana Theater,
454 U.S. 90 (1981) 11

Chaplin v. SSA Cooper, LLC,
2017 WL 2618819 (D.S.C. June 16, 2017)..........13

Chaunt v. United States,
364 U.S. 350 (1960) 7

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 6, 17

Coast Van Lines v. Armstrong,
167 F.2d 705 (9th Cir. 1948) 18

Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.,
508 U.S. 602 (1993) 11

Cruzan ex rel. Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261 (1990) 11

Deasy v. Optimal Home Care, Inc., 2018 WL 10911744 (D. Colo. June 29, 2018) 18

Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) 8

Dixon v. United States, 548 U.S. 1 (2006) 6

Dybach v. State of Fla. Dep't of Corr., 942 F.2d 1562 (11th Cir. 1991) 19

Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2001) 11

Encino Motorcars, LLC v. Navarro, 584 U.S. 79 (2018) 14, 15

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 8

Fraser v. Patrick O'Connor & Assocs., L.P., 954 F.3d 742 (5th Cir. 2020) 18

Godinez v. Classic Realty Grp.-IL, Inc., 2024 WL 3442960 (N.D. Ill. July 16, 2024) 9

Griffin v. Griffin, 916 N.W.2d 292 (Mich. Ct. App. 2018) 11

Grogan v. Garner, 498 U.S. 279 (1991) 6

Halo Elecs., Inc. v. Pulse Elecs., Inc., 579 U.S. 93 (2016) 7

Hendricks v. Total Quality Logistics, LLC,
694 F. Supp. 3d 1005 (S.D. Ohio 2023) 18

Herman & MacLean v. Huddleston,
459 U.S. 375 (1983) 7, 8

Hinson v. Tammy's Nail Utopia LLC,
2024 WL 3611409 (E.D.N.Y. July 31, 2024) 9

In re Winship,
397 U.S. 358 (1970) 7

Isbrandtsen Co. v. Johnson,
343 U.S. 779 (1952) 6

Jackson v. ReliaSource, Inc.,
2017 WL 193294 (D. Md. Jan. 18, 2017) 12, 13

Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.,
325 U.S. 161 (1945) 15

Jimenez v. Green Olive Inc.,
2024 WL 3763467 (E.D.N.Y. Aug. 13, 2024).........9

Lagunas v. La Ranchera, Inc.,
2024 WL 1258671
(S.D. Tex. Mar. 25, 2024) 18

Leflar v. Target Corp.,
57 F.4th 600 (8th Cir. 2023) 11, 15

Microsoft Corp. v. i4i Ltd. P'ship,
564 U.S. 91 (2011) 12

Moodie v. Kiawah Island Inn Co.,
2016 WL 11724398 (D.S.C. Dec. 16, 2016)..........10

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 9

Overnight Motor Transp. Co. v. Missel,
316 U.S. 572 (1942) 15

Perry v. Randstad Gen. Partner (US) LLC,
876 F.3d 191 (6th Cir. 2017) 18

Rogers v. AT & T Servs., Inc.,
2014 WL 4361767 (N.D. Ill. Sept. 3, 2014)..........18

Sanchez v. Ultimo, LLC,
2024 WL 3633696 (D.D.C. Aug. 2, 2024)...............9

Santosky v. Kramer,
455 U.S. 745 (1982) 7

Sea Island Broad. Corp. of S.C. v. FCC,
627 F.2d 240 (D.C. Cir. 1980) 7

Speiser v. Randall,
357 U.S. 513 (1958) 4

Steadman v. SEC,
450 U.S. 91 (1981) 7

Su v. E. Penn Mfg. Co.,
2023 WL 7336368 (E.D. Pa. Nov. 7, 2023) 10

Tyson Foods, Inc. v. Bouaphakeo,
577 U.S. 442 (2016) 10

United States v. Himler,
797 F.2d 156 (3d Cir. 1986)....................................8

United States v. Virginia,
518 U.S. 515 (1996) 9

Vela v. City of Houston,
276 F.3d 659 (5th Cir. 2001) 11

Walters v. Exel, Inc.,
2024 WL 3588546 (N.D. Tex. July 29, 2024).........9

Walton v. Greenbrier Ford, Inc.,
370 F.3d 446 (4th Cir. 2004) 11

Washington v. Glucksberg,
521 U.S. 702 (1997) 9

Woodby v. Immigr. & Naturalization Serv.,
385 U.S. 276 (1966) 7

Yuen v. U.S. Asia Com. Dev. Corp.,
974 F. Supp. 515 (E.D. Va. 1997) 13

Statutes and Rules:

15 U.S.C. § 6604(a) 16

18 U.S.C. § 4243(d) 16

29 U.S.C. § 206 5

29 U.S.C. § 207 5

29 U.S.C. § 207(a)(1)...5

29 U.S.C. § 213(a) 5, 6

29 U.S.C. § 213(a)(1)...5

29 U.S.C. § 213(a)(5)...5

29 U.S.C. § 213(a)(17)...5

29 U.S.C. § 213(a)(19)...5

29 U.S.C. § 213(b) 5

29 U.S.C. § 216(b) 10

35 U.S.C. § 282 12

49 U.S.C. § 30171(b)(2)(B)(ii) 16

29 C.F.R. § 541.2..11

Other Authorities:

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122 (Apr. 23, 2004)..................6, 17

Comment, Sean L. McLaughlin, *Controlling Smart-Phone Abuse: The Fair Labor Standards Act's Definition of "Work" in Non-Exempt Employee Claims for Overtime*, 58 U. Kan. L. Rev. 737 (2010)............14

NFIB Research Center, *Small Business Poll: Business Structure* (2004), https://bit.ly/3tluhAOt..16

NFIB Research Center, *Small Business Poll: Tax Complexity and the IRS* (2017), https://bit.ly/3rxMieK..16

NFIB Research Center, *NFIB Tax Survey 2021* (2021), https://bit.ly/3ZKYSnf.....................17

William T. Salzer, *Exploring New Routes To Early Settlement In Employment Law Cases*, Aspatore, 2013 WL 153852 (2013) 10

David L. Schwartz & Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 Harv. J.L. & Tech. 429 (2013) 4, 12

Seyfarth Shaw LLP, *18th Annual Workplace Class Action Litigation Report* (2022), https://bit.ly/3PMFamP...................................9, 10

INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the Nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all fifty State capitals, the interests of its members. To fulfill its role as the voice for small

[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

business, NFIB Legal Center frequently files *amicus curiae* briefs in cases that will impact small businesses.

Established in 1911, the National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. Retail is the largest private-sector employer in the United States. The NRF's membership includes retailers of all sizes, formats, and channels of distribution, spanning all industries that sell goods and services to consumers. The NRF provides courts with the perspective of the retail industry on important legal issues impacting its members. To ensure that the retail community's position is heard, the NRF often files *amicus curiae* briefs expressing the views of the retail industry on a variety of topics.

The Restaurant Law Center is the only independent public policy organization created specifically to represent the interests of the food-service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other food-service outlets employing over 15 million people—approximately 10 percent of the U.S. workforce—making the industry the second largest private-sector employers in the United States. Through regular participation in amicus curiae briefs on behalf of the industry, the Restaurant Law Center provides courts with the industry's perspective on legal issues significantly impacting its members and highlights the potential impact of pending cases like this one.

Amici's members employ millions of individuals throughout the United States and dedicate

considerable time, energy, and resources to complying with the Nation's complex and often burdensome statutory and regulatory regimes, including the Fair Labor Standards Act ("FLSA"). *Amici* therefore have a significant interest in ensuring that the federal courts properly construe the breadth, scope, and reach of the FLSA. The Fourth Circuit's reading requires Petitioners to shoulder a burden of proof that is inconsistent with the FLSA's text and that threatens employers with significant and unanticipated overtime liabilities. *Amici* seek to ensure that federal courts properly apply the burden of proof under the applicable statute and that they do so uniformly across the Circuits.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress did not expressly specify a standard of proof for the Fair Labor Standards Act's (FLSA's) exemptions to employers' overtime pay requirements. But the default rule in civil litigation has always been the preponderance of the evidence standard, and there is no reason to apply a heightened standard here. Nothing in the text of the FLSA nor the circumstances of a civil action for monetary damages warrants a departure.

A heightened standard, like the Fourth Circuit's clear and convincing evidence standard, may apply where the matter implicates special liberty interests. But no such interests are involved here. Disputes over the FLSA's exemptions are essentially quarrels over money—which are the bread and butter of civil litigation. Adopting the preponderance standard would hardly deprive employees of a remedy for valid

claims. Instead, it would simply require them—like most civil litigants—to prove their claims without a thumb on the scale in their favor.

By contrast, an improper heightened standard forces employers to satisfy a legal regime that Congress never enacted. As this Court has repeatedly recognized, the burden of proof can have a profound impact on the outcome of civil litigation. *See, e.g.*, *Speiser v. Randall*, 357 U.S. 513, 525 (1958) (noting that "where the burden of proof lies may be decisive of the outcome"). And research into the "clear and convincing evidence" standard backs up this common sense conclusion. One recent study shows that fact finders are significantly more likely to rule against a party carrying a clear and convincing evidentiary standard compared to a preponderance standard. *See* David L. Schwartz & Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 Harv. J.L. & Tech. 429, 451–66 (2013).

Imposing a heightened standard has profound real world impact and will often prove outcome determinative for businesses. Naturally, businesses make staffing decisions based in part on applicable legal regimes. Uncertainty over whether an employee falls under the FLSA's coverage may upset business expectations, resulting in less capital investment into a company's workforce. The prospect of cumbersome and costly litigation may also chill commercial development and create perverse disincentives for employers to shrink their workforces. These problems undermine the FLSA's goal of balancing fairness with practicality, the Act's laudable aim to increase the

number of Americans employed, and this Court's interpretation of the statute. This Court should hold that the default preponderance standard governs FLSA exemptions.

ARGUMENT

I. The Preponderance Standard Applies To FLSA Exemptions.

The FLSA established a federal minimum wage for covered employees and set forth overtime compensation requirements. *See* 29 U.S.C. §§ 206, 207. The overtime provisions require an employer to pay employees at least 150% of their hourly pay rate when they work more than 40 hours in a week. *Id.* § 207(a)(1). But Congress identified certain employees who warrant exemptions either from federal minimum wage or the overtime requirements. *See id.* § 213(a)–(b). These exemptions and their implementing regulations were meant to provide employers with a straightforward "safe harbor" from overtime liability for specified employees. *See Anani v. CVS RX Servs., Inc.*, 730 F.3d 146, 148 (2d Cir. 2013).

Specifically, the FLSA exempted over a dozen different categories of jobs from the minimum wage and maximum hour requirements. Some of those job categories are fairly specific (*e.g.*, fishermen, software engineers, and baseball players). *See id.* § 213(a)(5), (a)(17), (a)(19). Other exemptions apply more generally and require interpretation. For example, the FLSA exempts "outside salesm[e]n," *id.* § 213(a)(1), which this Court has accepted to mean individuals who primarily make sales and work

customarily outside of their employer's place of business, *see Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 148 (2012). Congress exempted some of these professions because "the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week." *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22122, 22124 (Apr. 23, 2004). The decision to provide employers with exemptions also aligns with the FLSA's recognition that the statute's protections are often unnecessary and even ill-advised where employers and employees alike would benefit from alternative compensation practices. *See* 29 U.S.C. § 213(a).

Congress did not specify an evidentiary standard for FLSA exemptions. Such silence triggers the long-recognized default rule that the preponderance of the evidence standard controls. *Dixon v. United* States, 548 U.S. 1, 17 (2006); *see Grogan v. Garner*, 498 U.S. 279, 286 (1991) (explaining that congressional "silence is inconsistent with the view that Congress intended to require a special, heightened standard of proof").

This Court has held that "Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (internal citations omitted) (quoting

Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)). The preponderance standard has long served as "the traditional standard in civil . . . proceedings." *Sea Island Broad. Corp. of S.C. v. FCC*, 627 F.2d 240, 243 (D.C. Cir. 1980); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981) (noting "the traditional preponderance-of-the-evidence standard"); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387–88 (1983) (similar).

Standards of proof function "to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). "In a civil suit between two private parties for money damages, . . . we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." *Id.* at 371; *see also Addington v. Texas*, 441 U.S. 418, 423 (1979) (observing that a chosen standard of proof "indicate[s] the relative importance attached to the ultimate decision"). Unless some special "basis" exists for "a clear and convincing standard of proof," the standard is the preponderance of the evidence. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 107 (2016).

This Court has imposed a clear and convincing evidence standard only "where particularly important individual interests or rights are at stake." *Herman & MacLean*, 459 U.S. at 389; *see Addington*, 441 U.S. at 424. Those circumstances have proven rare. *See Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (termination of parental rights); *Woodby v. Immigr. & Naturalization Serv.*, 385 U.S. 276, 285 (1966)

(deportability); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (setting aside a naturalization decree). And "[t]he interests at stake in those cases are deemed to be more substantial than mere loss of money." *Addington*, 441 U.S. at 424.

Courts seldom impose the heightened standard because it "expresses a preference for one side's interests." *Herman & MacLean*, 459 U.S. at 390. And it conflicts with the presumption that the preponderance standard applies in civil matters. *See id.* at 387–90. That explains why this Court has clarified that the "imposition of even severe civil sanctions" begets just the preponderance standard. *Id.* at 389–90; *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (holding that the preponderance standard applies to employer's affirmative defense to a Title VII hostile-environment claim).

Nothing about the FLSA warrants a departure. Absent a contrary indication from Congress, and given the FLSA's "silence with respect to the type of evidence required," this Court "should not depart from the conventional rule of civil litigation" that the preponderance standard governs. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (quotation marks omitted); *see also United States v. Himler*, 797 F.2d 156, 161 (3d Cir. 1986) (stating that "in the absence of express direction from Congress," there is "no reason to deviate from the traditional preponderance of the evidence standard").

The question whether a particular employee qualifies for overtime compensation under the FLSA is also far afield from the kind of core individual rights

involving speech, life, and liberty for which this Court has imposed a heightened burden. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (requiring public officials to prove actual malice to set forth a viable claim of defamation); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (explaining that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests"); *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (applying intermediate scrutiny to gender-based classifications under equal protection).

II. FLSA Litigation Over Exemptions Arises Frequently And The Standard Of Proof Often Proves Outcome Determinative.

Whether the FLSA exempts an employee from coverage is frequently litigated. *See* Seyfarth Shaw LLP, *18th Annual Workplace Class Action Litigation Report* 25 (2022), https://bit.ly/3PMFamP ("By the numbers, FLSA collective action litigation filings in 2021 far outpaced other types of employment-related class action filings because virtually all FLSA lawsuits are filed on a collective basis."). The federal courts have resolved a number of lawsuits in recent months presenting the question whether an employee is exempt from FLSA coverage. *See, e.g.*, *Jimenez v. Green Olive Inc.*, 2024 WL 3763467, at *13 (E.D.N.Y. Aug. 13, 2024); *Sanchez v. Ultimo, LLC*, 2024 WL 3633696, at *5 (D.D.C. Aug. 2, 2024); *Hinson v. Tammys Nail Utopia LLC*, 2024 WL 3611409, at *12 (E.D.N.Y. July 31, 2024); *Walters v. Exel, Inc.*, 2024 WL 3588546, at *7–9 (N.D. Tex. July 29, 2024); *Godinez v. Classic Realty Grp.-IL, Inc.*, 2024 WL

3442960, at *5 n.6 (N.D. Ill. July 16, 2024). Because these actions are frequently brought on behalf of classes of employee, *see Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 448 (2016) ("Section 216 is a provision of the FLSA that permits employees to sue on behalf of 'themselves and other employees similarly situated.'" (quoting 29 U.S.C. § 216(b))), any decision concerning an FLSA exemption can have significant financial consequences. *See 18th Annual Workplace Class Action Litigation Report*, *supra*, at 26 ("Virtually all FLSA lawsuits are filed as collective actions; therefore, these filings represent the most significant exposure to employers in terms of any workplace laws."). Employers may end up saddled with liability in the form of backpay, but also additional penalties, for certain FLSA violations. *See* 29 U.S.C. § 216(b).

The figures at stake can be staggering. For instance, in *Su v. E. Penn Mfg. Co.*, 2023 WL 7336368, at *8(E.D. Pa. Nov. 7, 2023), a jury recently awarded employees more than $22 million in overtime compensation. And settlements routinely exceed $1 million. *See, e.g.*, *Moodie v. Kiawah Island Inn Co.*, 2016 WL 11724398 (D.S.C. Dec. 16, 2016). It thus becomes all the more vital that these cases are litigated under the appropriate standard of proof, lest employers who make good-faith judgments about the requirements of the law later find themselves at risk of potentially crushing liability. *See* William T. Salzer, *Exploring New Routes To Early Settlement In Employment Law Cases*, Aspatore, 2013 WL 153852, at *4 (2013) ("The past couple of years have resulted in an explosion of FLSA class action litigation that

creates tremendous expense and exposure for employers . . . .").

The burden of proof in FLSA cases is not an academic exercise. Rather, it is often outcome determinative. That is especially so in this context, where the application of an exemption is a fact-intensive inquiry based on the scope of an employee's duties. *See* 29 C.F.R. § 541.2 (stating that "[a] job title alone is insufficient to establish the exempt status of an employee"); *see also Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446, 452–53 (4th Cir. 2004) (same); *Vela v. City of Houston*, 276 F.3d 659, 677 (5th Cir. 2001) (same).

The very nature of the two standards bears this out. The "preponderance-of-the-evidence standard involves a straight-up weighing of the evidence to determine which side has the better of the argument." *Leflar v. Target Corp.*, 57 F.4th 600, 604 (8th Cir. 2023); *see Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993). The clear and convincing evidence standard, by contrast, requires proof that "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Cruzan ex rel. by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 285 n.11 (1990); *see California ex rel. Cooper v. Mitchell Bros. Santa Ana Theater*, 454 U.S. 90, 93 n.6 (1981). Naturally, then, application of the clear and convincing standard over the preponderance standard can "dramatically alter" the outcome of a case. *Griffin v. Griffin*, 916 N.W.2d 292, 299 n.8 (Mich. Ct. App. 2018); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 160 (2001) (Breyer, J.,

dissenting) (noting the material difference between the standards).

A recent study confirmed this intuitive conclusion. A court may invalidate a patent if a challenger proves the patent's invalidity by clear and convincing evidence. *See Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 102 (2011).[2] An academic study determined that subject jurors "who received the clear and convincing standard found the patent invalid less often (27.1%) than those who received the preponderance standard (38.3%)." Schwartz & Seaman, *supra*, at 459. The researchers therefore concluded that "even after holding all . . . other variables constant, the preponderance standard correlated with an increase in the odds ratio." *Id.* at 461.

A number of decisions within the Fourth Circuit illustrate that employers, from small businesses to social services organizations, face skewed outcomes from a heightened burden of proof. For instance, in *Jackson v. ReliaSource, Inc.*, 2017 WL 193294, at *4–5 (D. Md. Jan. 18, 2017), a former supervisor brought a lawsuit for unpaid overtime against a small business. The employer provided evidence that the employee "directed the work of teams of technicians, kept timesheets, made travel arrangements for himself and others, and prepared numerous reports" and therefore was an exempt employee. *Id.* at *4. In

---

[2] Notably, this Court has rested this conclusion on the text of the Patent Act, which provides that patents are to be "presumed valid," 35 U.S.C. § 282, a term that had a "settled meaning in the common law" including a "heightened standard of proof," *Microsoft*, 564 U.S. at 101–04.

response, the employee stated that his work involved manual labor as well as following the instructions of managers above him. *Id.* at *5. The employee further disputed the scope of his executive responsibilities, including his role in hiring, firing, budgeting, and the like. *See id.* The district court, while suggesting that the employer "might ultimately be able to establish Plaintiff's exempt status," would have prevailed under the preponderance standard, denied summary judgment because it could not say that the evidence was clear and convincing. *Id.*

Consider also *Bertrand v. Children's Home*, 489 F. Supp. 2d 516 (D. Md. 2007). There, a former secretary for the Children's Home—a social services organization that provides mental health services to at-risk youth—sued for unpaid overtime wages. *See id.* at 517. Children's Home argued that the employee was exempt because her work "directly related to the [organization's] management or general business operations" and moved for summary judgment. *Id.* at 517, 519. The district court, despite finding that the employee provided "valuable and important" services, denied the motion "bearing in mind the *burden of proof here of clear and convincing evidence*." *Id.* at 520 (emphasis added).[3]

---

[3] *See also, e.g.*, *Chaplin v. SSA Cooper, LLC*, 2017 WL 2618819 (D.S.C. June 16, 2017) (ruling, after applying the heightened standard, "that a reasonable juror could conclude that [the employer] ha[d] not proven by 'clear and convincing evidence' that" the employee fell outside of the FLSA's coverage); *Yuen v. U.S. Asia Com. Dev. Corp.*, 974 F. Supp. 515, 527 (E.D. Va. 1997) (similar).

Applying the clear and convincing standard not only skews the results in many FLSA cases, but it also reduces the federal courts' ability to adjudicate meritless claims at early stages in the litigation. A heightened burden on defendants, coupled with an already fact-intensive analysis will frequently preclude dismissal or summary judgment—and thus send weak claims on to trial. *See* Comment, Sean L. McLaughlin, *Controlling Smart-Phone Abuse: The Fair Labor Standards Act's Definition of "Work" in Non-Exempt Employee Claims for Overtime*, 58 U. Kan. L. Rev. 737, 748 (2010) (noting that the fact-intensive inquiry increases "the potential for endless litigation at great expense to . . . compan[ies]"). That, in turn, increases the pressure on employers to settle suits that would (and should) fail under a preponderance standard. The net result will be to force employers into a more onerous and costly legal regime, with little upside for legitimate claims.

III. A Heightened Burden Of Proof Undermines The FLSA's Design And Threatens American Businesses.

A. The Fourth Circuit's Heightened Burden Of Proof Thwarts The FLSA's Legislative Design.

The Fourth Circuit decision is not only an outlier, but it is also wrong. A heightened standard conflicts with this Court's express rejection of efforts to construe the FLSA narrowly against the employer's interest. In *Encino Motorcars, LLC v. Navarro*, 584 U.S. 791 (2018), for example, this Court refused to apply a narrowing construction to the FLSA's overtime exemptions and instead held that courts

"have no license to give the exemption[s] anything but a fair reading." *Id.* at 89. Rather than putting a thumb on the scale for either party, a "fair reading" requires the "straight-up weighing of the evidence" through the preponderance standard. *Leflar*, 57 F.4th at 604. Doing so will further the legislature's intent, as "Congress intended . . . to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 167 (1945) (citation omitted). This "policy of uniformity in the application of the provisions of the Act" can only be achieved with "equality of treatment," including the applicable burden of proof. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 710 (1945).

A clear and convincing standard is thus at odds with the FLSA's design. As this Court has explained, "the FLSA overtime rules encourage employers to hire more individuals who work 40–hour weeks, rather than maintaining a staff of fewer employees who consistently work longer hours." *Encino Motorcars, LLC*, 584 U.S. at 95. But increasing the number of employees who will fall outside an exemption—by ratcheting up the defendant's burden of proof—is likely to cause the opposite downstream effect. It will reduce the capacity of businesses—especially small businesses—to grow their workforce and "spread employment." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577–78 (1942), *superseded on other grounds by statute as stated in Trans World Air Lines, Inc. v. Thurston*, 469 U.S. 111, 128 n.22 (1985).

That Congress has specified in other statutes a heightened burden of proof buttresses the conclusion that a preponderance standard should apply to the circumstances here. In various statutes, Congress has prescribed the applicable burden of proof as well as dictated the party that bears it. In some of those laws, Congress has expressly required that a party must prove an issue by clear and convincing evidence. *See* 15 U.S.C. § 6604(a) ("[T]he defendant shall not be liable for punitive damages unless the plaintiff proves by clear and convincing evidence that the applicable standard for awarding damages has been met."); 18 U.S.C. § 4243(d) ("[A] person . . . has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person . . . ."); 49 U.S.C. § 30171(b)(2)(B)(ii) ("[N]o investigation . . . shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior."). Congress did not take such a step in the FLSA.

B. The Fourth Circuit's Heightened Burden Of Proof Harms American Businesses.

Should this Court adopt a heightened standard, small businesses and service organizations may be the hardest hit. As small businesses tend to task single employees with a wide array of responsibilities, some of those businesses may be forced to reduce the number of their employees. *See* NFIB Research Center, *Small Business Poll: Business Structure* at 6 (2004), https://bit.ly/3tluhAO (noting that small businesses far less frequently employ specialists to

perform a single role). For example, about half of small businesses process their payroll in-house and rely on a non-specialized employee with various responsibilities to process the payroll. *See* NFIB Research Center, *NFIB National Small Business Poll*: Tax Complexity and the IRS at 1 (2017), https://bit.ly/3rxMieK; NFIB Research Center, *NFIB Tax Survey 2021* at 16 (2021), https://bit.ly/3ZKYSnf (same). Categorizing those employees under the FLSA will prove fact-intensive and ratcheting up the burden of proof will skew outcomes against those businesses—who will then be forced to choose between expending resources on overtime or hiring more employees.

A heightened standard poses an unwarranted threat to businesses—especially small businesses—that rely on employees with flexible roles in an ever-increasing gig economy. Consider the role of salespeople. The sales industry is massive and critical to our Nation's economy. By offering flexible earning opportunities to millions of Americans, the industry has long been an entrepreneurial and economic powerhouse, driving innovation and commercial growth. As Congress recognized when enacting the FLSA and its "outside salesman" exemption, the salesperson's role does not fit neatly within the FLSA's standard hourly wage and overtime requirements. Indeed, this Court has recognized that many salespeople "'earn[] salaries well above the minimum wage' and enjoy[] other benefits that 'set them apart from nonexempt workers entitled to overtime pay.'" *Christopher*, 567 U.S. at 166 (alteration adopted) (quoting 69 Fed. Reg. at 22124). The outside salesman exemption thus promotes

fairness and practicality. But a heightened standard undermines those principles.

IV. The Preponderance Standard Will Not Unduly Burden FLSA Claims.

Should this Court adhere to the default preponderance standard, many employees may still prevail in their FLSA suits. Examples abound in the six circuits that adhere to the preponderance evidence standard. *See, e.g., Fraser v. Patrick O'Connor & Assocs., L.P.*, 954 F.3d 742, 748 (5th Cir. 2020) (applying the preponderance of the evidence standard to affirm district court's holding that employees did not fall under the FLSA's administrative exemption); *Lagunas v. La Ranchera, Inc.*, 2024 WL 1258671, at *10–11 (S.D. Tex. Mar. 25, 2024) (denying employer's motion for summary judgment premised on the outside salesman exemption under the Fifth Circuit's preponderance of the evidence standard); *Perry v. Randstad Gen. Partner (US) LLC*, 876 F.3d 191, 212 (6th Cir. 2017) (concluding under the preponderance of the evidence standard that jury could conclude staffing consultant-employees did not fall under the FLSA's administrative exemption); *Hendricks v. Total Quality Logistics, LLC*, 694 F. Supp. 3d 1005, 1026, 1033 (S.D. Ohio 2023) (concluding that plaintiff-employees did not fall within the FLSA's administrative exemption under a preponderance of the evidence standard); *Rogers v. AT & T Servs., Inc.*, 2014 WL 4361767, at *8 (N.D. Ill. Sept. 3, 2014) (rejecting defendant-employer's motion for summary judgment based on the administrative exemption under a preponderance of the evidence framework); *Coast Van Lines v. Armstrong*, 167 F.2d 705, 707 (9th

Cir. 1948) (applying a preponderance of the evidence standard and affirming district court's judgment for plaintiff-employees); *Deasy v. Optimal Home Care, Inc.*, 2018 WL 10911744, at *4 (D. Colo. June 29, 2018) (employing a preponderance of the evidence standard and denying defendant-employer's motion for summary judgment premised on the learned professional exemption to the FLSA); *Dybach v. State of Fla. Dep't of Corr.*, 942 F.2d 1562, 1566 & n.5 (11th Cir. 1991) (employing the preponderance of the evidence standard and reversing district court's judgment that plaintiff-employee was an exempt professional under the FLSA). By no means does application of the preponderance standard always result in the employer prevailing.

* * * *

In sum, the traditional preponderance standard preserves the balance Congress struck when it passed the FLSA. Going forward, employees and employers should be able to make their arguments and present their evidence without a thumb on the scale for either side.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to reverse.

Respectfully submitted,

STEVEN A. ENGEL
MICHAEL H. MCGINLEY
Counsel of Record
JUSTIN W. AIMONETTI
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
(202) 261-3378
michael.mcginley@dechert.com

ANTHONY R. JADICK
CIRA CENTRE
DECHERT LLP
2929 Arch Street
Philadelphia, PA 19104

STEPHANIE A. MALONEY
JORDAN L. VON BOKERN
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

ANGELO I. AMADOR
RESTAURANT LAW
CENTER
2055 L Street, NW,
Suite 700
Washington, DC 20036

Counsel for Amici Curiae

August 19, 2024