No. 23-217

IN THE

Supreme Court of the United States

E.M.D. SALES, INC.; ELDA M. DEVARIE,

Petitioners,

v.

FAUSTINO SANCHEZ CARRERA; JESUS DAVID MURO; MAGDALENO GERVACIO,

Respondents.

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

BRIEF FOR RESPONDENTS

OMAR VINCENT MELEHY
SUVITA MELEHY
ANDREW BALASHOV
MELEHY & ASSOCIATES LLC
8403 Colesville Road
Suite 610
Silver Spring, MD 20910
(301) 587-6364

LAUREN E. BATEMAN
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
lbateman@citizen.org

Attorneys for Respondents

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QUESTION PRESENTED

Whether the standard of proof that employers must satisfy to demonstrate the applicability of a Fair Labor Standards Act exemption is preponderance of the evidence or clear-and-convincing evidence.

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INTRODUCTION

The Fair Labor Standards Act of 1938 (FLSA) aims to correct and eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). The Act does so in part by establishing a federal minimum wage and guaranteeing overtime pay to covered employees who work more than 40 hours a week. It also exempts from these protections certain categories of workers, such as executives, professional employees, and outside salespeople.

When a worker brings suit alleging that an employer failed to compensate him in accordance with the FLSA's protections, the employer may invoke an FLSA exemption as an affirmative defense to liability. Although the question whether an employee's particular activities bring him within the scope of an exemption is one of law, how the employee spends his working time is a question of fact.

The question presented in this case is whether an employer seeking to invoke an exemption must establish disputed material facts by clear-and-convincing evidence or by a preponderance of the evidence. As the Fourth Circuit has held, a clear-and-convincing evidence standard should apply. That standard serves the FLSA's express purpose of "correct[ing] and as rapidly as practicable … eliminat[ing]" labor conditions detrimental to a minimum standard of living. 29 U.S.C. § 202(b). The clear-and-convincing standard is also consistent with this Court's recognition that an elevated standard is appropriate where a factfinder is at high risk of decisional error in one party's favor.

In any event, in this case, the evidence at trial overwhelmingly proved that the primary duties of respondents—three employees invoking the FLSA's protections—did not render them exempt. Petitioners did not produce evidence that would have satisfied even the lower evidentiary standard—preponderance of the evidence—that they urge this Court to adopt. Regardless of this Court's disposition of the question presented, the Court should therefore affirm the decision below.

STATEMENT

A. The Fair Labor Standards Act

The FLSA guarantees covered workers a minimum wage and overtime pay at a premium rate when they work more than 40 hours per week. *See* 29 U.S.C. §§ 206, 207. These guarantees do not apply, however, to workers who fall under one of the FLSA's statutory exemptions. *See id.* § 213.

Relevant here, the FLSA exempts "any employee employed … in the capacity of outside salesman." *Id.* § 213(a)(1). The term "outside salesman" includes employees whose "primary duty" is "making sales" and "[w]ho [are] customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. § 541.500(a); *see Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 165–66 (2012) (observing that indicia of "making sales" include extracting the "maximum commitment possible" from a customer and being "rewarded for [those] efforts with incentive compensation").

B. Factual Background and Proceedings Below

1. EMD Sales, Inc., is a distributor of food products to grocery stores in the Washington, DC, region. Pet. App. 7a. The company delivers its products directly to grocers and provides related services to customer stores, such as stocking shelves. *Id.*

Respondents Faustino Sanchez Carrera, Magdaleno Gervacio, and Jesus David Muro are current and former employees of EMD. *Id.* EMD assigned each of them to a route of grocery stores, where their daily tasks included restocking the shelves, removing damaged and expired items, issuing credits for removed items, and submitting orders to replenish stock. *Id.* at 7a–8a. The parties agree that respondents worked more than 40 hours per week and that they were not paid an overtime premium. *Id* at 8a.

2. In 2017, respondents sued EMD, alleging that the company and its CEO had withheld overtime wages in violation of the FLSA. In litigation, the parties agreed that respondents established the three elements of an FLSA claim: (1) They were employed by the defendant; (2) they worked overtime hours for which they were not compensated, and (3) they could prove the amount and extent of their overtime work. *Id.* at 44a–45a (citing *Davis v. Food Lion*, 792 F.2d 1274, 1276 (4th Cir. 1986)). The parties also agreed that, although respondents could sometimes make sales to *independent* grocery stores on their route, they spent most of their time servicing *chain* grocery stores like Walmart, Safeway, and Giant Food. *Id.* at 8a, 38a. At chain stores, sales were generally predetermined by agreements resulting from negotia-

tions between corporate store buyers and EMD management. *Id.* at 8a.

Nonetheless, EMD asserted that respondents were "outside salesmen" exempt from the overtime protections of the FLSA under 29 U.S.C. § 213(a)(1). Because respondents "spend almost all their time servicing chain stores," Pet. App. at 88a, the parties' dispute turned on whether, at chain stores, respondents were "able to, and in fact [did], make 'sales' under the FLSA." *Id.* (explaining that respondents' primary duty cannot be making sales if they "are effectively unable to acquire any additional space at chain stores for EMD products and are simply replenishing products that other EMD employees have already sold"); *id.* at 9a–10a.

Respondents presented evidence that they did not and could not make sales at chain stores. Rather, when they serviced chain stores, they replenished stock based on "sales terms already negotiated by management," and "their time was spent only on promotion and inventory-management activities—restocking and rearranging products, issuing credits, taking orders—that were incidental to sales made at higher levels." *Id.* at 10a.

Respondents supported their position through evidence showing that EMD management negotiates directly with chain stores to establish the quantity, price, and shelf location of each product in chain-store orders. *Id.* at 38a. Corporate representatives of chain stores testified that they cannot sell new items unless they have been entered into the store's inventory system and assigned a stock keeping unit (SKU) number, and that it was only at high-level meetings that vendors like EMD could persuade a chain-store

representative to introduce a new item and assign it a SKU number. *Id.* They also testified that these meetings allowed vendors to negotiate product placement in a store merchandising plan—a "highly detailed" document that is "set by corporate representatives." *Id.* This document includes a detailed map called a "planogram," through which corporate higher-ups tell chain-store managers precisely where to place items on shelves. *Id.* "Both in policy and practice," chain-store representatives testified, "store managers are not permitted to deviate from the planogram or order additional displays" from EMD or other suppliers. *Id.* at 38a–39a.

EMD conceded that "chain store managers are never able to sell new types of products without first clearing them with their corporate offices." *Id.* at 48a (emphasis omitted). EMD argued, though, that respondents could potentially make sales to chain-store managers by "securing additional space" on chain-store shelves for EMD products and that some EMD sales representatives testified that they had done so on occasion. *Id.* at 10a; *see id.* at 39a. But EMD management disclaimed knowledge of "how sales representatives allocate their time across the various stores on their routes," and the district court characterized management's testimony that employees could make sales as "aspirational" rather than empirical. *Id.* at 37a. EMD's own evidence confirmed that chain stores' corporate offices give store managers "no leeway to stray from the planogram or to set up unsanctioned displays," although individual managers may sometimes violate that prohibition. *Id.* at 39a, 49a.

After a nine-day bench trial, the district court ruled for respondents on liability. In considering

whether the "outside salesman" exemption applied, the court considered "(1) whether [respondents] make sales in their roles as sales representatives, and (2) whether making sales is [their] primary duty." *Id.* at 46a. Although the court stated that, under longstanding Fourth Circuit law, EMD bore the burden of establishing the applicability of the exemption by "clear and convincing evidence," *id*. at 83a, the opinion leaves no doubt that the evidentiary standard did not drive the outcome of the case.

On the first question, whether respondents make sales within the meaning of the FLSA, the court held that making a sale would entail placing an order "beyond the scope of … high-level negotiations" between EMD's management and chain stores' corporate representatives, "either by selling a new *type* of product or by selling products *outside* of the spaces already negotiated by EMD's management." *Id.* at 48a. Although respondents could sometimes make sales at *independent* stores, the court found "'substantial evidence'" that, with respect to *chain* stores where respondents spent most of their time, they were "[g]enerally not able to order [and sell] products beyond what had already been arranged." *Id.* at 47a (quoting *Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 584 (6th Cir. 2014)).

Turning to the question whether making sales was the primary duty of respondents, the district court determined that EMD had failed to demonstrate that making sales was the primary duty of sales representatives at *either* independent grocery stores or chain stores. *Id.* at 50a. The court found that "sales representatives are tasked primarily with executing the terms of sales that were previously made by EMD's management and key account managers." *Id.*

at 49a. Notably, failure to carry out non-sales tasks would subject sales representatives to suspension, whereas failure to make sales would not. *See id.* "[A]lthough EMD would undoubtedly welcome the efforts of its sales representatives to sell products beyond the planogrammed spaces in chain stores," the court found that "such efforts are ancillary to [their] primary responsibility: ensuring that EMD receives the full benefit of the bargain obtained by EMD's key account managers and management." *Id.* at 49a–50a. The court's determination that the primary responsibility of EMD sales representatives was not sales but rather inventory management was supported by EMD's commission-based compensation structure, which "does not differentiate between orders placed to fill chain store space previously negotiated by EMD's management and orders for space beyond what was negotiated by EMD's management." *Id.* at 49a.

With regard to respondents specifically, the court emphasized that they "spent the bulk of their time at chain stores." *Id.* at 50a; *see also id.* at 61a (order on summary judgment, noting that plaintiffs presented evidence that they spent "at least 97% of their time servicing chain stores" in the preceding five years). As a result, even if EMD could prove that making sales was respondents' primary duty at independent stores—which it could not—EMD had not established by any metric that respondents' "*overall* primary duty as EMD sales representatives is to make sales." *Id.* at 50 a.

In addition, the court held that EMD lacked objectively reasonable grounds for believing that respondents were exempt, making an award of liquidated damages appropriate. *Id.* at 52a, 56a.

Assessing damages for a two-year period for non-willful violations, *id.* at 53a, the court awarded respondents $303,876.57. *Id.* at 32a–33a.

EMD moved to alter or amend the portion of the judgment awarding liquidated damages, arguing that it had acted in good faith and had reasonable grounds for believing that respondents were outside salespeople for the purposes of the FLSA. *Id.* at 21a. The district court, on review of its factual findings, denied the motion. The court explained that EMD's "testimony regarding the mission of sales representatives was largely aspirational in nature and did not establish the actual responsibilities of sales representatives." *Id.* at 29a (emphasis omitted).

3. On appeal to the Fourth Circuit, EMD challenged the district court's liability finding and the award of liquidated damages. Respondents cross-appealed the court's finding that the violation was not willful and its attendant application of the two-year statute of limitations. The court of appeals affirmed in full.

On liability, EMD argued only that the district court erred in holding that the employer must show "clear and convincing evidence" to satisfy its burden of proving that the exemption for outside salesmen applied. Pet. App. 12a. Finding no error, the Fourth Circuit agreed that its precedent compelled application of that standard. *Id.* at 13a. The court of appeals also rejected EMD's argument that application of the standard was foreclosed by this Court's decision in *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79 (2018). *Encino Motorcars*, the court explained, "is a case about statutory interpretation, and a canon of construction—now rejected—that mandated a narrow

reading of the scope of the FLSA's exemptions." Pet. App. 14a. That question is "distinct from the question of what burden of proof an employer bears in proving the facts of its case—here, what EMD's employees actually *do* on the job." *Id.* at 15a. These precedents could therefore be read "'harmoniously'" by "giving a fair, not narrow, legal construction to the FLSA's exemptions while also requiring employers to prove the facts that would put their employees within those exemptions by clear and convincing evidence." *Id.* (quoting *Taylor v. Grubbs*, 930 F.3d 611, 619 (4th Cir. 2019) (citation omitted)).

EMD filed a petition for rehearing en banc, which was denied. *Id.* at 2a.

SUMMARY OF ARGUMENT

An employer seeking to prove that its employees are exempt from the FLSA's minimum wage and overtime requirements must prove the applicability of a statutory exemption by clear-and-convincing evidence. This heightened standard is necessary to carry out the FLSA's explicit public purpose and is consistent with this Court's guidance that a heightened standard is appropriate where one party is more susceptible to erroneous findings of fact.

I. Standards of proof allocate the risk of error in findings of fact. When a standard is not dictated by Congress or the Constitution, the judiciary must prescribe one, based on consideration of the social cost of erroneous judgments. In cases where the cost of error is greater than in cases involving monetary disputes over purely private interests, a clear-and-convincing-evidence standard is appropriate.

Petitioners' argument that a preponderance-of-the-evidence standard should govern questions of fact

regarding the applicability of an FLSA exemption is based on the incorrect premise that FLSA actions are mere monetary disputes. Congress, however, made explicit that the FLSA is designed to do more than make a worker whole when the employer pays less than minimum wage or fails to pay earned overtime. The FLSA is also designed "to correct and as rapidly as practicable to eliminate" unfair labor conditions that create widespread economic problems by burdening the free flow of commerce and generating labor disputes. 29 U.S.C. § 202(b). The FLSA thus protects the *public's* interest in an economy in which workers are guaranteed a fair wage.

For this reason, the social costs of an erroneous finding of fact in an employer's favor in an FLSA case are significant. In addition to denying the FLSA plaintiff a subsistence wage, such an erroneous factual finding also harms the public interest in eliminating substandard labor conditions. By contrast, an erroneous finding in an employee's favor comes with but one cost: The employer pays its employee the federal minimum wage and earned overtime. This kind of asymmetrical risk is precisely what drives courts to demand clear-and-convincing evidence when the party better situated to bear the risk disputes a fact.

Application of the clear-and-convincing standard is also supported by other factors that this Court has deemed important in assessing the correct evidentiary standard: The employer is better situated to adduce evidence in its favor because it is subject to a statutory recordkeeping requirement and because it unilaterally controls pertinent evidence, such as job descriptions and titles. In addition, victims of wage theft are often poor and less educated, and are disproportionately members of minority communities—factors that

render them more susceptible to erroneous findings of fact based on class or cultural biases.

II. Regardless of this Court's disposition of the question presented, this case is not one in which the standard of proof affected the outcome. The Court should therefore affirm to prevent further delay in making respondents—low-income workers who have been unlawfully deprived of rightful compensation—whole.

ARGUMENT

I. Employers should show clear-and-convincing evidence to demonstrate the applicability of an FLSA exemption.

Exercising their authority to set standards of proof, courts routinely require clear-and-convincing evidence in cases where the social cost of an erroneous factual determination exceeds that in cases involving monetary disputes concerning purely private interests. In light of the FLSA's purpose and the policies manifest in its text, the social cost of erroneously depriving a worker of FLSA protections exceeds that of erroneously requiring an employer to pay minimum wage and applicable overtime. It is therefore appropriate for courts to require an employer to adduce clear-and-convincing evidence when it seeks to establish that a worker is exempt from the basic wage and hour protections of the FLSA.

A. Courts' selection of an evidentiary standard reflects a calculation of the relative disutility of factual error.

The degree of proof required to resolve a factual dispute "is the kind of question [that] has traditionally been left to the judiciary to resolve." *Woodby v. INS*,

385 U.S. 276, 284 (1966). In the absence of relatively unusual circumstances where the Constitution or a statute specifies a particular evidentiary standard of proof for a particular issue, the determination of the standard falls within the courts' inherent authority to develop evidentiary and procedural standards governing the trial of cases. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983); *Steadman v. SEC,* 450 U.S. 91, 95 (1981).

In selecting the appropriate standard, courts are mindful that "[t]here is always in litigation a margin of error." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). That margin of error stems from the fact that it is impossible to "acquire unassailably accurate knowledge of" an earlier event that is factually disputed in the courtroom. *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). Because an erroneous finding of fact can result in judgment in favor of one litigant when the "true facts" would "warrant a judgment" for the other, *id.*, the choice of standard serves "to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication'" and "to allocate the risk of error between the litigants," *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. at 370 (Harlan, J., concurring)). In light of these functions, "the choice of the standard to be applied" should "reflect an assessment of the comparative social disutility" of erroneous judgments in favor of a plaintiff or defendant. *In re Winship*, 397 U.S. at 371 (Harlan, J., concurring).

In a typical civil case involving a monetary dispute between private parties, the social disutility of an erroneous decision in favor of one party or the other is

equal. Lacking a "preference for one side's interests," courts adjudicating such a case apply the preponderance-of-the-evidence standard. *Herman & MacLean*, 459 U.S. at 390; *In re Winship,* 397 U.S. at 371–72 (Harlan, J., concurring) (observing that in an ordinary civil suit, a preponderance standard "seems peculiarly appropriate" because "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"). This standard "requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade," *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (alteration in original) (quoting *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993)), thereby "allow[ing] both parties to 'share the risk of error in roughly equal fashion,'" *Herman & MacLean*, 459 U.S. at 390 (quoting *Addington*, 441 U.S. at 423).

In criminal cases, by contrast, only "one party"—the accused—"has at stake an interest of transcending value." *Speiser*, 357 U.S. at 525–26. And the interest of the accused in their liberty is "of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Addington*, 441 U.S. at 423. Requiring the government to persuade the factfinder of a criminal defendant's guilt beyond a reasonable doubt therefore reflects a societal recognition that the "social disutility of convicting an innocent man" is profoundly greater than the "disutility of acquitting someone who is

guilty." *In re Winship*, 397 U.S. at 372 (Harlan, J., concurring).

An intermediate evidentiary standard—clear-and-convincing evidence—applies when the risk of harm flowing from an erroneous factual determination in one party's favor is "more substantial than mere loss of money," *Addington*, 441 U.S. at 424, but less than total deprivation of individual liberty. *See Santosky v. Kramer*, 455 U.S. 745, 756–57 (1982); *see also, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (in light of the value of a free press, holding that public figures "may recover for injury to reputation only on clear and convincing proof that [a] defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth"). This standard—"no stranger to the civil law," *Woodby*, 385 U.S. at 285—is "greater than a burden of convincing one that the facts are more probably true than not true," but "[i]t is not a burden of convincing one that the facts which are asserted are certainly true or that they are almost certainly true" and "does not … require that the evidence negate all reasonable doubt or that the evidence must be uncontroverted." 29 Am. Jur. 2d Evidence § 170 (2024).

The clear-and-convincing evidence standard is, for example, commonly applied to measure the necessary persuasion for a charge of fraud or undue influence. *See* 2 McCormick on Evid. § 340 (8th ed. 2022). Application of this standard, as opposed to a preponderance-of-the-evidence standard, reflects that where a defendant is accused of fraud, he risks more than money; he also risks "having his reputation tarnished erroneously." *Addington*, 441 U.S. at 424. Thus, "the disutility of an erroneous judgment against him may be greater than that of an erroneous

judgment against the plaintiff." John Kaplan, *Decision Theory and the Factfinding Process*, 20 Stan. L. Rev. 1065, 1072 (1968). Courts therefore "reduce the risk" to such defendants by increasing the burden of proof. *Addington*, 441 U.S. at 424; *see also* Kaplan, 20 Stan. L. Rev. at 1072 (explaining that "[t]he assumption of equal disutilities that the preponderance-of-the-evidence test reflects" does not apply in various types of civil cases, including those involving accusations of fraud). A similar rationale has prompted some federal courts to require clear-and-convincing evidence that a party has abused the judicial process before entering a default judgment as a sanction. *See*, *e.g.*, *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1477–78 (D.C. Cir. 1995); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989).

Courts also apply the clear-and-convincing standard to mitigate the risk of erroneous factfinding when that risk disproportionately accrues to one party. For example, the standard applies in parental neglect cases, partly in recognition of the fact that "parents subject to termination proceedings are often poor, uneducated, or members of minority groups" and, consequently, are "vulnerable to judgments based on cultural or class bias." *Santosky*, 455 U.S. at 762–63. Likewise, courts require clear-and-convincing evidence "where there is thought to be special danger of deception," such as suits for specific performance of an oral contract, suits to establish the terms of a lost will, and proceedings to set aside or modify written transactions. 2 McCormick on Evid. § 340; *see Woodby*, 385 U.S. at 285 n.18 (observing that the clear-and-convincing standard, "or an even higher one, has traditionally been imposed" in a "variety of … civil cases"). More generally, the standard may be appro-

priate where one party's "unusual ability to structure the evidence increases the risk of an erroneous factfinding." *Santosky*, 455 U.S. at 763 n.13.

B. The policies manifest in the FLSA reveal that the social cost of error in miscategorizing employees as exempt calls for use of the clear-and-convincing evidence standard.

1. The text of the FLSA is silent as to the relevant standard of proof when an employer seeks to prove that an employee is exempt. Thus, as in cases arising under innumerable other statutes, courts should supply the evidentiary standard for resolving factual disputes in accordance with general principles developed over the centuries. Here, those general principles demand an analysis of the social cost of erroneous findings of fact. And the statute's explicit remedial purpose reflects Congress's judgment that the social disutility of allowing American workers to languish "ill-nourished, ill-clad, and ill-housed"[1] is greater than the disutility of requiring employers to pay exempt employees minimum wage and overtime.

The FLSA was enacted "in 1938 in response to a national concern that the price of American development was the exploitation of an entire class of low-income workers." *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 615 (9th Cir. 2018) (en banc). The Act represents an "unprecedented governmental effort to demand that businesses across the country eliminate the practice of child labor and provide minimum wages for regular hours and overtime premiums for

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[1] U.S. Congress, House Committee on Labor, Fair Labor Standards Act, Report to Accompany S. 2475, 75th Cong., 1st sess., Aug. 6, 1937, Report No. 1452, p.8.

long hours." Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 Cornell L. Rev. 557, 558 (2019).

Congress made this far-reaching aim explicit in the text. As this Court has noted, "[t]he Act declared its purposes in bold and sweeping terms." *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 516 (1950). The FLSA is premised on the congressional determination that the existence of "labor conditions detrimental to the maintenance of the minimum standard of living" both harms workers directly affected by those conditions and generates widespread economic dysfunction. 29 U.S.C. § 202(a). Recognizing that when workers accept substandard labor conditions out of necessity and desperation, employers have an economic incentive to perpetuate those conditions, Congress concluded that this race to the bottom "burdens commerce," "constitutes an unfair method of competition," and "leads to labor disputes burdening and obstructing commerce." *Id.* The FLSA therefore declares its purpose to "correct and as rapidly as practicable to eliminate" labor conditions below that minimum standard of living. *Id.* at § 202(b).

Belying Petitioner's assertion that the stakes at issue are solely "an award of money damages or other conventional relief" to an individual litigant, Pet. Br. 20, this Court has repeatedly explained that the FLSA vindicates two kinds of rights. It is, of course, designed in part to protect "the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others." *Tenn. Coal, Iron & R. Co. v. Muscoda Loc. No. 123*, 321 U.S. 590, 597 (1944), *superseded by statute on other grounds as stated in Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 31 (2014). But that is "certainly not the *only* aim

of the FLSA." *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 36 (1987). The Act also creates a "private-public" right in the "maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707, 709 (1945) (citing 29 U.S.C. § 202(a)); *see Wirtz v. Milton J. Wershow Co.*, 416 F.2d 1071, 1073 (9th Cir. 1969) ("It must be remembered that restraining [an employer] from withholding the minimum wages and overtime compensation is meant to vindicate a public, rather than a private, right, and that the withholding of the money due is considered a 'continuing public offense.'"); *Hodgson v. Hotard*, 436 F.2d 1110, 1113–14 (5th Cir. 1971) (referring to withholding of wages as "a continuing offense against the public interest").

Thus, as this Court has explained, the minimum wage provision was designed both to guarantee a basic standard of living for working Americans *and* to "eliminate the competitive advantage enjoyed by goods produced under substandard conditions." *Citicorp*, 483 U.S. at 36. And "[t]he overtime provision was designed both to 'compensate [employees] for the burden' of working extra-long hours *and* to increase overall employment by incentivizing employers to widen their 'distribution of available work.'" *Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 44 (2023) (second alteration in original) (emphasis added) (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942)).

In light of the dual interests advanced by the FLSA, the disutility of factual error in determining the applicability of an exemption implicates several interests: On one side of the ledger is the risk that an

employer is erroneously required to pay an employee minimum wages and applicable overtime. On the other side of the ledger is the risk that an employee is erroneously deprived of a living wage *and* the risk that the public is erroneously deprived of an economic system that guarantees a fair day's pay for a fair day's labor. Congress made clear that the interests on the latter side are weightier when it articulated that the purpose of the FLSA is to "correct and as rapidly as practicable to eliminate" substandard labor conditions. 29 U.S.C. § 202(b). And it is precisely this kind of lopsided social disutility analysis that calls for one party—here, the employer—to bear the burden of establishing that its version of the facts is highly probable by producing clear-and-convincing evidence.[2]

Indeed, in light of the FLSA's purposes of advancing both private and public rights, an employee cannot waive substantive FLSA rights. *See Tony & Susan Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290, 302 (1985) ("[T]he purposes of the Act require that it be applied even to those who would decline its protections."); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (noting that, in light of the FLSA's purpose, this Court's decisions have "frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay"); *D.A. Schulte, Inc. v. Gangi*, 328 U.S.

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[2] Perhaps in recognition of the unequal disutility of factual error, a regulation of the U.S. Office of Personnel Management (OPM) instructs agencies under its purview to apply an even *higher* standard to the determination whether an employee is exempt. *See* 5 C.F.R. § 551.202(d) ("If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee will be designated FLSA nonexempt.").

108, 115–16 (1946); *Brooklyn Sav. Bank*, 324 U.S. at 707.

The FLSA is sui generis in this regard: If mere financial loss were at issue, employees could knowingly and voluntarily waive their statutory rights under the FLSA. But, *unlike every other employment statute cited by EMD*,[3] FLSA rights "cannot be abridged by contract or otherwise waived"—even retrospectively—"because this would 'nullify the

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[3] *See, e.g.*, EEOC, *Q&A—Understanding Waivers of Discrimination Claims in Employee Severance Agreements* (July 15, 2009), https://www.eeoc.gov/laws/guidance/qa-understanding-waivers-discrimination-claims-employee-severance-agreements (explaining that a waiver in a severance agreement of statutorily-conferred rights under the Age Discrimination in Employment Act (ADEA), Title VII, the Americans with Disabilities Act, and the Equal Pay Act (EPA) "generally is valid when an employee knowingly and voluntarily consents to the waiver" (emphasis omitted)); *Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1108 (6th Cir. 2010) (holding that a waiver of rights under the Uniformed Services Employment and Reemployment Rights Act is valid where the release "used clear and unambiguous language and involved a valuable amount of consideration"); *Morrison v. Cir. City Stores, Inc.*, 317 F.3d 646, 668 (6th Cir. 2003) (applying "ordinary contract principles" in determining whether waiver of prospective Title VII claims was valid); *Warnebold v. Union Pac. R.R.*, 963 F.2d 222, 223 (8th Cir. 1992) (same for Title VII and ADEA claims). Some courts have reasoned that the EPA is part of the FLSA and, for that reason, creates non-waivable rights. *See Boaz v. FedEx Customer Info. Servs., Inc.*, 725 F.3d 603, 607 (6th Cir. 2013); *see also* Stephanie Bornstein, *The Statutory Public Interest in Closing the Pay Gap*, 10 Ala. C.R. & C.L.L. Rev. 1, 18 (2019) ("[B]ecause the EPA was drafted and adopted as one section within the FLSA, the regulatory architecture of the FLSA applies similarly. This means that, like FLSA rights, EPA rights cannot be waived by private individuals, because those rights derive from a statute with a broader public purpose.").

purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine*, 450 U.S. at 740–41 (citing *Brooklyn Sav. Bank*, 324 U.S. at 707).

2. Allocating the risk of factual error by applying a clear-and-convincing evidence standard in this context also makes sense because, for several reasons, factfinders adjudicating FLSA exemption disputes are at high risk of making decisional errors in the employer's favor. Application of the standard in this context is thus consistent with its application in other contexts where courts seek clear-and-convincing evidence from one party in light of factors that "combine to magnify the risk of erroneous factfinding." *Santosky*, 455 U.S. at 762.

To start, the employer controls much of the evidence relevant to establishing an FLSA violation—a fact that Congress recognized when it included in the FLSA an expansive recordkeeping provision. *See* 29 U.S.C. § 211(c) ("Every employer subject to any provision of this chapter … shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him."). Yet this evidence can be—and sometimes is—manipulated by employers to support an improperly claimed exemption.

For example, courts routinely rely on job descriptions crafted by the employer. *See, e.g.*, *Smith v. Johnson & Johnson*, 593 F.3d 280, 283 (3d Cir. 2010) (concluding that employee was exempt under the administrative exemption in part because her job description required her "to plan and prioritize her responsibilities in a manner that maximized business

results"); *Chicca v. St. Luke's Episcopal Health Sys.*, 858 F. Supp. 2d 777, 783 (S.D. Tex. 2012) (noting that "general job descriptions … prepared by the employer may be considered" in ascertaining an employee's primary duty). "Job descriptions prepared by the employer," however, "may or may not fairly describe job content." *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 724 (5th Cir. 1970). Indeed, empirical research shows a widespread practice of job title manipulation to avoid paying overtime. The National Bureau of Economic Research recently reported "a systematic, robust, and sharp increase in firms' use of managerial titles around the federal regulatory threshold that allows them to avoid paying for overtime." Lauren Cohen, et al., *Too Many Managers: The Strategic Use of Titles to Avoid Overtime Payments*, Nat'l Bureau of Econ. Rsch., (Nov. 2023), at 3, https://www.nber.org/system/files/working_papers/w30826/w30826.pdf. For instance, seeking to skirt the FLSA, employers recast receptionists as "front desk managers," restaurant hosts as "guest experience leaders," and barbers as "grooming managers." *Id.* at App'x A; *see, e.g.*, *Sanchez v. Ultimo, LLC,* No. 1:19-CV-03188-RMM, 2024 WL 3633696, at *2, 6–7 (D.D.C. Aug. 2, 2024) (restaurant cook given title "kitchen manager" despite having virtually no managerial duties).

In addition, the demographics of FLSA plaintiffs amplify the risk of erroneous factfinding in employers' favor. As this Court has recognized, application of a clear-and-convincing standard is more appropriate in cases where one party tends to be "poor, uneducated," or a member of a minority group, because those statuses render the party more "vulnerable to judgments based on cultural or class bias." *Santosky*,

455 U.S. at 763. FLSA plaintiffs, as a group, are vulnerable along each of these dimensions. "By definition, minimum wage violations withhold earnings from the lowest-paid workers in society, who typically are the least able to afford a loss of income." David Cooper, et al., *Employers steal billions from workers' paychecks each year*, Econ. Pol'y Inst. (2017), https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/. Among the millions of workers experiencing such violations, 21.4 percent had total family incomes below the poverty line. *Id.* And employers commit wage theft at disproportionate rates against workers of color. *See* Annette Bernhardt, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, Nat'l Emp. L. Proj. (2009), https://www.nelp.org/app/uploads/2015/03/BrokenLawsReport2009.pdf. Foreign-born Latino workers are victims of minimum wage violations at a rate higher than any other racial or ethnic group. *Id.* And among workers born in the United States, the minimum-wage violation rate for African-American workers is triple that of their white counterparts. *Id.*

These factors point in one direction: Requiring an employer to produce clear-and-convincing evidence that an employee is exempt is a more appropriate allocation of risk than requiring the employer to produce only a preponderance of evidence.

II. Under either standard of proof, the Court should affirm.

Regardless of this Court's view on the question presented, it should affirm the judgment below. In this case, the evidence produced at trial did not permit the conclusion—under *either* standard of proof—that the

employees' primary duty was making outside sales. Although EMD highlights that the district court cited the "clear and convincing" standard in its opinion, Pet. Br. 23, the opinion and evidentiary record show that the factual dispute was not a close call.

The evidence presented at trial included respondents' testimony that their primary responsibility is "inventory management," including "re-stocking, replenishing depleted products, removing damaged and expired items from the shelves, and issuing credits to the serviced stores for removed items." Pet. App. 36a–37a. The court also heard testimony of current and former chain-store buyers and store managers that "store managers are not permitted to deviate" from inventory plans established at the corporate level or to "order additional displays." *Id.* at 38a–39a; *see id.* at 48a–49a (noting the testimony of three chain-store corporate representatives "that chain stores' corporate offices afford store managers no leeway to stray from the planogram or to set up unsanctioned displays").

At trial, EMD did not seriously dispute these facts. Indeed, EMD's attorney conceded that it was generally not possible for respondents to make new sales at chain stores. 3/11/21 Tr. 46:17–21. Rather than pointing to factual evidence that making sales was the primary duty of respondents, EMD emphasized EMD's *desire* that respondents make additional sales. *See*, *e.g.*, *id.* at 44:19–21 (stating in closing argument that EMD "wants [respondents] … to go out and sell."), 44:25–45:1 (stating "that's what the company wanted"); *see also* Pet. App. 17a (finding "ample evidence" to support the district court's finding that EMD's description of respondents' duties was "aspirational" rather than factual). And EMD seemed

to concede that respondents "do a lot … more merchandising"—that is, stocking and cleaning shelves, and removing damaged or expired products—"than they do selling of product," although it disagreed that this fact rendered them nonexempt. 3/11/21 Tr. 62:2–13.

It was this highly skewed factual presentation—and not the heightened standard of proof—that led the district court to conclude that respondents were not exempt. In fact, although EMD identifies the Sixth Circuit as in conflict with the Fourth Circuit, *see* Pet. 16, the district court relied on and described at length *Killion v. KeHE Distributors, LLC*, 761 F.3d 574 (6th Cir. 2014), which, applying the preponderance standard to extremely similar facts, likewise held that making sales was not the employees' primary duty. Like respondents, the plaintiffs in *Killion* were current and former sales representatives employed by a distributor of "specialty ethnic and health foods to retailers, some of which are independent stores and some of which are large chain stores." *Killion*, 761 F.3d at 577–78. They likewise spent the "majority of their work hours" servicing chain stores, where they were "generally unsuccessful" in soliciting orders because the orders were "typically limited to displays prearranged and 'plan-o-grammed' by [the] account manager for that particular chain store." *Id.* at 577–78, 584. And "[a]s in the case at bar, the plaintiffs in *Killion* 'presented substantial evidence that the [defendant's] account managers actually control the volume through 'plan-o-grams' and restrictions on reordering,' and that the plaintiffs were generally not able to order products beyond what had already been arranged by the defendant's account managers." Pet. App. 47a (quoting *Killion*, 761 F.3d at 584). Indeed, as

the district court emphasized, the Sixth Circuit held that "even assuming the plaintiffs made their own sales, selling was not the plaintiffs' primary duty" because—as in this case—"plaintiffs' responsibilities included ordering products; stocking products; maintaining backroom conditions; removing expired products from the shelves; reconciling invoices; and reviewing products that went out of stock." *Id.* at 47a–48a (citing *Killion*, 761 F.3d at 585).

Moreover, the district court observed that EMD relied on the testimony of a witness who could describe the employees' duties "only at a high degree of generality" and "did not know how often [they] actually made their own sales at chain stores, let alone more specific details regarding sales representatives' schedules." *Id.* at 28a. Based on this factual record, the court went so far as to conclude that EMD lacked "objectively reasonable grounds for believing" that respondents fell within the FLSA's outside sales exemption. *Id.* at 52a.

In this regard, EMD's characterization of the district court's treatment of the standard of proof is misleading. Suggesting that the district court believed the factual question to be close, EMD states that the district court "questioned respondents' counsel under the premise that 'the Court is of the view that it's actually a close question' with the result 'largely' driven by 'how the law assigns burdens of proofs.'" Pet. Br. 23 (quoting 3/11/21 Tr. 40:3–6, 41:2–3). In reality, the district court, in the passage on which EMD relies, was not describing its assessment of the evidence in this case; it was posing a hypothetical to probe the argument that—for the purposes of establishing willfulness—the existence of the litigation should have put the employer on notice that

its ongoing compensation practices violated the FLSA. *See* 3/11/21 Tr. at 41:6–16 ("But let's assume…").

The court's finding that respondents' primary duty was not making sales is further supported by Department of Labor guidance, which identifies four factors to consider in determining an employee's primary duty:

- the relative importance of the major or most important duty as compared with other types of duties;
- the amount of time spent performing the major or most important duty;
- the employee's relative freedom from direct supervision; and
- the relationship between the employee's salary and the wages paid to other employees for performance of similar work.[4]

As the district court recognized, three of these four factors support respondents here. Pet. App. 37a, 49a–50a. Sitting as factfinder, the court found that the employees' most important duty was "keeping shelves full, keeping shelves clean, and placing orders promptly." *Id.* at 49a–50a.

In short, the factual record makes clear that, under either standard, respondents must prevail. Congress has recognized that delay harms FLSA plaintiffs, and that "failure to pay the statutory minimum on time" is "detrimental to maintenance of the minimum stand-

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[4] Dep't of Labor, Compliance Assistance Resources, FLSA Overtime Security Advisor, Glossary, https://webapps.dol.gov/elaws/whd/flsa/overtime/glossary.htm?wd=primary_duty.

ard of living 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce." *Brooklyn Sav. Bank*, 324 U.S. at 707 (quoting 29 U.S.C. § 202(a)). It has been more than three and a half years since the district court determined EMD was liable for failure to pay overtime wages in violation of the FLSA. Pet. App. 56a–57a (March 2021 order on liability). Regardless, then, of this Court's disposition of the legal question, it should affirm the judgment below to avoid further delay in making respondents whole.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

OMAR VINCENT MELEHY
SUVITA MELEHY
ANDREW BALASHOV
MELEHY & ASSOCIATES LLC
8403 Colesville Road
Suite 610
Silver Spring, MD 20910
(301) 587-6364

LAUREN E. BATEMAN
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
lbateman@citizen.org

Attorneys for Respondent

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