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 OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONERS

John M. Masslon II
Counsel of Record
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

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QUESTION PRESENTED

Whether employers must prove the applicability of an FLSA exemption by a preponderance of the evidence or by clear and convincing evidence.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Constitutional Provisions

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Statutes

Regulations

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(*continued*)

Page(s)

INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus urging proper interpretation of the Fair Labor Standards Act. *See, e.g., Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 587 U.S. 601 (2019); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). WLF's Legal Studies Division—its publishing arm—also produces important pieces about the FLSA. *See, e.g.,* Nathaniel M. Glasser et al., *Joint-Employment Liability: What Federal Agencies' Rule Revisions Mean for Employers*, WLF LEGAL BACKGROUNDER (Mar. 6, 2020); Anne Marie Sferra & Kara H. Herrnstein, *Sixth Circuit Should Follow Lead of* Tyson Foods *and Reject Representative Evidence Use in FLSA Collective Actions*, WLF LEGAL OPINION LETTER (June 16, 2017).

INTRODUCTION

"It is Congress's job to enact policy[,] and it is this Court's job to follow the policy Congress has prescribed." *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 368 (2018). The Fourth Circuit, however, continues to violate this well-settled principle. The Fourth Circuit views itself as a policymaking body, free to override Congress's policy judgments. *See Mountain Valley Pipeline, LLC v. Wilderness Soc'y*, 144 S. Ct. 42, 42 (2023) (per curiam) (vacating without noted dissent a

* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission.

Fourth Circuit policymaking order). Congress as the policymaker is key to separation of powers.

America's political system rests on a majoritarian foundation. *See* Daniel O. Conkle, *Toward A General Theory of the Establishment Clause*, 82 Nw. U. L. Rev. 1113, 1122 (1988). Members of the House and Senate are generally elected by a majority—and sometimes only a plurality—of their constituents. It then takes only a majority of both the House and Senate to pass a law and present it to the President. *See* U.S. Const. art. I, § 7, cl. 2. The President, in turn, is elected by a majority of the Electoral College or a majority vote of state delegations in the House. *See id.* amend. XII.

Every two years, the House adopts a set of rules by a majority vote. And shortly after the Senate first obtained a quorum, it too adopted a set of rules by majority vote. *See* U.S. Senate Comm. on Rules & Admin., *History*, https://perma.cc/7MA5-5SUZ. This makes sense as general parliamentary law requires only a majority vote to pass standing rules. *See* Henry M. Robert III et al., Robert's Rules of Order Newly Revised 2:23 (12th ed. 2020).

True, the United States is not "a pure example of the majoritarian conception of democracy." Imer B. Flores, *Law, Liberty and the Rule of Law (in A Constitutional Democracy)*, *in* 18 Comp. Persp. on L. & Just. 97 (Imer B. Flores & Kenneth E. Himma eds. 2013). But those anti-majoritarian features are explicitly built into our Constitution or adopted by the political branches to protect minority rights.

The Constitution is antimajoritarian in several ways. For example, the Senate comprises two senators from each State. U.S. Const. art. I, § 3, cl. 1. This way, the large States cannot dominate the small States, as could happen if both chambers were based on population. And amending the Constitution takes at least three-fourths of the States or state conventions. *Id.* art. V. This too ensures that a bare majority of States cannot ignore sister States through constitutional amendment.

Ratified amendments also generally protect minorities. From the Fourteenth Amendment's guarantees of due process of law and equal protection to the First Amendment's protection of freedom of speech and religion, Americans have long sought to protect minority rights—even if it took far too long in some cases.

What is key, however, is that the political process requires supermajorities only in rare circumstances. When a majority of both congressional chambers or three-fourths of the States decide to constrain the majority, the general rule of majoritarian rule yields to this more specific rule that our political branches have enacted.

The same goes for the burden of proof in court. "[T]he general rule" is "that proof by a reasonable preponderance of the evidence is sufficient." *United States v. Regan*, 232 U.S. 37, 49 (1914) (cleaned up). This makes sense. "Unlike other standards of proof such as reasonable doubt or clear and convincing evidence, the preponderance standard allows both parties to share the risk of error in roughly equal fashion, except that when the evidence is evenly

balanced, the [party with the burden of persuasion] must lose." *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997).

This is like majority rule. Under both majority rule and the preponderance of the evidence standard, whichever side commands a majority prevails. And under both systems, the tie goes to the status quo—either no change in law or the one with the burden of persuasion loses. This differs from clear and convincing evidence, which resembles the two-thirds vote required when a legislative body wants to suspend the rules. *See* Robert, *supra* at 44:4. And this differs from beyond a reasonable doubt, which recalls the unanimous consent requirement that sometimes governs a legislative procedure. *See* U.S. Senate Rule XXII ¶ 2.3.

Our justice system deviates from the default rule sometimes. But again, it does so when either the Constitution requires it or a legislative body has decided that a different burden of proof should apply. For example, "the 'fundamental value determination of our society' [is] that 'it is far worse to convict an innocent man than to let a guilty man go free.'" *Francis v. Franklin*, 471 U.S. 307, 313 (1985) (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)). The Fifth and Fourteenth Amendments' Due Process Clauses therefore allow for criminal convictions only on proof beyond a reasonable doubt. *See United States v. O'Brien*, 560 U.S. 218, 237 n.4 (2010) (citation omitted). Some legislatures have also abrogated the preponderance of the evidence default in certain cases. *See, e.g.*, Ky. Rev. Stat. § 411.184(2) (changing the burden of proof required for punitive damages).

The Constitution does not require a specific burden of proof for proving an FLSA exemption. (If anything, there is an argument that the Fourteenth Amendment's Equal Protection Clause requires use of the preponderance of the evidence standard.) Nor has Congress changed the default rule in FLSA cases. Thus, just as the default rule of majoritarian rule applies in most government institutions, the default burden of preponderance of the evidence applies to proving FLSA exemptions. The Fourth Circuit's contrary decision warrants vacatur.

STATEMENT

The FLSA "guarantee[s] a minimum wage" and "requir[es] time-and-a-half pay for work over 40 hours [per] week." *Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 44 (2023); *see* 29 U.S.C. §§ 206, 207. But Congress recognized that it makes no sense for the minimum-wage and overtime requirements to cover all workers. So the FLSA exempts summer-camp employees, community newspaper employees, and seamen from its reach. 29 U.S.C. §§ 213(a)(3), (8), (12). As relevant here, the FLSA also exempts "outside salesm[e]n"—workers whose primary duty is making sales and who regularly work outside employers' places of business. *Id.* § 213(a)(1); *see Christopher*, 567 U.S. at 148.

Elda Devarie owns E.M.D., which employs over 150 people and distributes products to stores in the District of Columbia, Maryland, and Virginia. Three Maryland-based E.M.D. sales representatives sued Petitioners for alleged FLSA violations. Plaintiffs, who were paid on commission, worked more than 40 hours per week for E.M.D. Plaintiffs claimed that

they were therefore entitled to overtime pay, while Petitioners contended that they need not pay overtime because Plaintiffs were "outside salesm[e]n." 29 U.S.C. § 213(a)(1).

The District Court held that Petitioners were required to pay Plaintiffs overtime because they are not outside salesmen. Pet. App. 34a-35a. In reaching this conclusion, the District Court held that Petitioners had to prove that Plaintiffs were outside salesmen by "clear and convincing evidence." Pet. App. 46a.

Petitioners appealed and challenged the liability finding on the sole ground that the District Court erred by applying the clear and convincing evidence standard. The Fourth Circuit rejected this argument. It held that the "employer" must show that an FLSA exemption applies by "clear and convincing evidence." Pet. App. 12a-13a (cleaned up). This outlier position conflicts with decisions of six other courts of appeals, which all hold that employers must prove FLSA exemptions by a preponderance of the evidence. This Court granted certiorari to resolve the circuit split.

SUMMARY OF ARGUMENT

I. The Fourth Circuit has never explained why it requires employers to prove FLSA exemptions by clear and convincing evidence. But its citations suggest that it requires that heightened burden based on the principle that FLSA exemptions must be construed narrowly. Six years ago, in *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79 (2018), this Court soundly rejected that principle. Rather than

being construed narrowly, FLSA exemptions must be given their ordinary meaning.

The Fourth Circuit refuses to faithfully apply this Court's precedent. Rather than recognize that this Court's decision undercut the entire rationale for using the clear and convincing evidence standard, the Fourth Circuit distinguished this Court's decision in *Encino Motorcars* as one of statutory interpretation. But the burden of proof an employer must satisfy to prove an exemption is also a matter of statutory interpretation. Because nothing in the text suggests that Congress meant to displace the default of preponderance of the evidence, the Fourth Circuit erred by not reconsidering the issue.

II.A. The FLSA was enacted as part of the New Deal. Its purpose was to help struggling workers while not hurting the economy. The outside salesmen exemption, for example, was enacted because of the difficulty in tracking such workers. The Fourth Circuit's decision will not only lead to decreased economic output, it will also make the outside salesmen exemption useless. These are just two ways in which the Fourth Circuit's decision departs from the FLSA's purpose and history.

B. The outside salesmen exemption is hardly the only one that does not lend itself to proof by clear and convincing evidence. Many of the exemptions raise difficult issues, and neither side could prove or disprove the exemptions' applicability by clear and convincing evidence. The exemption for administrative employees is one example. Congress did not say that it should be almost impossible for employers to prove an FLSA exemption. Thus, this is

another way in which the Fourth Circuit's decision departs from the FLSA's purpose.

ARGUMENT

I. THE FOURTH CIRCUIT'S OUTLIER POSITION FLOUTS THIS COURT'S PRECEDENT.

The Fourth Circuit has never explained why it requires employers to prove the applicability of FLSA exemptions by clear and convincing evidence. The best clue we have about the Fourth Circuit's rationale is the citation included in the opinion announcing this rule.

The clear and convincing evidence language first appears in *Shockley v. City of Newport News*, 997 F.2d 18, 21 (4th Cir. 1993). *Shockley* cited a single Fourth Circuit case for that proposition—without a signal. *Id.* (citing *Clark v. J.M. Benson Co.*, 789 F.2d 282, 286 (4th Cir. 1986)). *Clark*, however, did not use the word convincing. Rather, it quoted the Tenth Circuit's statement that employers must prove FLSA exemptions by "clear and *affirmative* evidence." *Clark*, 789 F.2d at 286 (quoting *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984) (emphasis added)).

As the Seventh Circuit has said, this "clear and affirmative evidence" standard was "merely a clumsy invocation of the familiar principle of statutory interpretation that exemptions from a statute that creates remedies should be construed narrowly." *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 507 (7th Cir. 2007). Courts recognized that could be the meaning of "clear and affirmative evidence" even

before the Seventh Circuit explicitly clarified what the language meant. *See Martin v. Ind. Mich. Power Co.*, 381 F.3d 574, 578 n.1 (6th Cir. 2004).

Even the Tenth Circuit, quoted by the Fourth Circuit in *Clark*, has since rejected the Fourth Circuit's interpretation of *Donovan*. According to the Tenth Circuit, its *Donovan* language "was originally rooted in statutory-construction cases going back to the [1940s], but became garbled over time as it was repeated by different courts." *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1158 (10th Cir. 2012) (cleaned up). In other words, the Fourth Circuit has "mistakenly viewed clear and affirmative evidence as a heightened evidentiary standard." *Id.*

The very court whose decision inspired the Fourth Circuit's clear and convincing evidence standard has therefore since held that the Fourth Circuit misinterpreted the precedent. So too have other courts of appeals. And all this came before this Court ended the practice of interpreting FLSA exemptions narrowly. That is why the Fourth Circuit's decision is so wrong that the Solicitor General urged the Court to summarily reverse.

For decades, courts believed that the FLSA "pursues" "its remedial" "purpose" "at all costs." *Cf. Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234-35 (2013) (describing this phenomenon for another statute). Even after the Court rejected applying that canon of construction for statutes, most courts still "invoked the principle that exemptions to the FLSA should be construed narrowly." *Encino Motorcars,* 584 U.S. at 88 (citation omitted). The

Court, however, "reject[ed] this principle as a useful guidepost for interpreting the FLSA." *Id.*

As this Court explained, "the FLSA has over two dozen exemptions in § 213(b) alone." *Encino Motorcars*, 584 U.S. at 89. And "[t]hose exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement." *Id.* (citing *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017)).

Therefore, normal tools of statutory interpretation apply. Under normal rules of statutory interpretation, statutory exemptions are given "a fair (rather than a narrow) interpretation" unless there are "textual indication[s]" suggesting that the exemptions should be read narrowly. *Encino Motorcars*, 584 U.S. at 88 (quoting Antonin Scalia & Bryan A. Garner, Reading Law 363 (2012)).

Like other courts before *Encino Motorcars*, the Fourth Circuit held that "[e]xemptions to the FLSA are to be narrowly construed against the employers seeking to assert them." *Schilling v. Schmidt Baking Co.,* 876 F.3d 596, 602 (4th Cir. 2017) (cleaned up). But again, this Court rejected that interpretation of the FLSA in *Encino Motorcars*.

The decision below, however, pays only lip service to this Court's intervening holding. Even under the most generous interpretation of Fourth Circuit case law, the idea that employers should have to prove FLSA exemptions by clear and convincing evidence stems from the notion that FLSA exemptions must be construed narrowly. That longstanding belief was rejected by this Court in

Encino Motorcars. Yet the Fourth Circuit declined to apply this Court's decision. Rather, it charted a different path. In the Fourth Circuit, holdings based on the incorrect assumption that FLSA exemptions must be narrowly construed remain good law.

The Fourth Circuit's explanation for refusing to follow *Encino Motorcars* makes no sense. According to the panel, "*Encino Motorcars* [was] about statutory interpretation" which was "distinct from the question of what burden of proof an employer bears in proving the facts of its case." Pet. App. 14a-15a. This explanation may make sense in a vacuum. But it does not pass the smell test when the only precedent on which the Fourth Circuit relied mistakenly presumed that FLSA exemptions must be narrowly construed.

Besides, the Fourth Circuit's rationale makes no sense because deciding which burden of proof an employer must satisfy also involves statutory interpretation. When Congress wants parties to satisfy the clear and convincing evidence standard—not the default preponderance of the evidence standard—it explicitly says so. *See, e.g.*, 15 U.S.C. § 6604(a); 18 U.S.C. § 4248(d). By requiring proof by clear and convincing evidence, Congress is displacing the common law default of proof by a preponderance of the evidence. In other words, determining the burden of proof is a form of statutory interpretation.

There are no textual clues suggesting that Congress meant to displace the preponderance of the evidence standard in the FLSA. Rather, the statute uses language used in thousands of other federal statutes that create rights of action. In each one, Congress denotes when a person may sue and

whether there are any exceptions to the general rule. Here, there are dozens of exceptions to the general rule about who must receive overtime. But nothing in those exemptions or other FLSA sections mentions clear and convincing evidence or even hints at a higher evidentiary burden for employers claiming one of those exemptions. In short, the FLSA's text does not suggest that Congress wanted courts to impose a higher burden of proof on employers.

Under *Encino Motorcars*, this ends the inquiry. Because FLSA exemptions must be read like all other statutes, the question is whether the FLSA requires employers to prove an exemption by clear and convincing evidence. Because there is no statutory indication that Congress displaced the preponderance of the evidence standard, the Fourth Circuit's decision conflicts with this Court's precedent. *See CIGNA Corp. v. Amara*, 563 U.S. 421, 444 (2011) (The burden of proof under 29 U.S.C. § 1132(a)(3) is a preponderance of the evidence because nothing in the statute suggests displacement of that default.).

II. REQUIRING EMPLOYERS TO PROVE THE APPLICABILITY OF AN FLSA EXEMPTION BY CLEAR AND CONVINCING EVIDENCE CONFLICTS WITH THE STATUTE'S PURPOSE AND HISTORY.

A. Congress Did Not Intend To Force Employers To Prove The Applicability Of The Outside Salesmen Exemption By Clear And Convincing Evidence.

"In 1937, the United States was recovering from the Great Depression. As part of the recovery effort, President Franklin D. Roosevelt endorsed a series of economic programs, known as the New Deal." Sarah A. Donovan, Cong. Rsch. Serv., R42713, *The Fair Labor Standards Act (FLSA): An Overview*, 1 (Mar. 8, 2023). The entire purpose of the New Deal was to "stimulate and rebuild the U.S. economy." *Id.*

The FLSA was part of the New Deal. Donovan, *supra* at 1. "Congress endorsed the [FLSA] because its provisions were meant to both protect workers and stimulate the economy." *Id.* Congress thought that "one-third of the U.S. population" was "'ill-nourished, ill-clad, and illhoused'" because of their poor wages and working conditions. *Id.* (quoting S. Rep. No. 75-884, 1 (1938)). And it believed that ensuring a respectable minimum wage and overtime pay for these workers was one way to increase the standard of living for that one-third of the population.

But workers' welfare was not Congress's only worry when it passed the FLSA. Again, the FLSA was part of President Roosevelt's New Deal, which sought

to lift the country out of the worst recession in its history. That is why even when the FLSA passed in 1938, it included exemptions to both the minimum-wage and overtime requirements. *See* Donovan, *supra* at 8. These exemptions were meant to allow companies to comply with the FLSA while staying in business.

The exemption at issue here is the outside salesmen exemption. It applies to those whose primary duty is "(i) making sales within the meaning of [29 U.S.C. § 203(k)], or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer;" and who are "away from the employer's place or places of business [when] performing such primary duty." 29 C.F.R. § 541.500(a)(1-2).

The exemption for outside salesmen makes sense. "Different from most workplace-based employees, an outside sales[man] may work hours that are convenient for the customer, and have work hours that may be difficult for employers to monitor." Donovan, *supra* at 10. In other words, Congress thought that the benefits of providing overtime for outside salesmen were outweighed by the costs associated with requiring companies pay them overtime.

If companies had to pay outside salesmen overtime, they would have several options. But all of them would be bad for employers, employees, and consumers. First, companies could eliminate outside salesmen. "Outside sales does not include sales made by mail, telephone or the Internet. * * * Thus, any fixed site, whether home or office, used by a

salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business." 29 C.F.R. § 541.502.

Companies could eliminate the headaches of dealing with outside salesmen by making them all phone and internet salesmen. This, however, would come with great cost. Companies use outside salesmen because they are more efficient than phone or internet salesmen. So there would be deadweight loss if this transition occurs. It would also harm consumers as the frequency of annoying telemarketing calls would increase. Normally, not having to pay overtime for outside salesmen compensates for the increased headaches the arrangement comes with. But with that benefit gone, companies may turn to telephone and internet salesmen.

Another choice for companies would be increasing consumer prices. Because companies would have to pay the outside salesmen overtime, their overall costs would rise. As rapid inflation has made profit margins razor thin, the companies would just pass along those increased costs to consumers.

Finally, the most likely solution for mid- and large size companies would be laying off some of their outside salesmen. Again, the FLSA requires that those eligible for overtime receive at least a 50% wage premium if they work more than 40 hours per week. *Helix Energy Sols. Grp.*, 598 U.S. at 44. A recent study shows just how devastating such government-mandated wage increases are.

Seattle, Los Angeles, and San Francisco all raised the minimum wage by about 50% during the 2010s. *See* Paul Beaudry et al., *In Search of Labor Demand*, 108 Am. Econ. Rev. 2714, 2750 (2018). In Los Angeles, the unemployment rate rose 3.32% because of the increase. *Id.* at 2754. In Seattle the unemployment rate rose 2.1% while in San Francisco it rose 1.33%. *Id.* All three figures were statistically significant at the 95% confidence level. *See id.*

The decrease in employment surprised no one who took high school economics. When something becomes more expensive, the demand for that product decreases. *See* N. Gregory Mankiw, Principles of Microeconomics 65 (4th ed. 2006). (Leaving aside exceptions like Veblen goods. *See* Paul F. Campos, *The Extraordinary Rise and Sudden Decline of Law School Tuition: A Case Study of Veblen Effects in Higher Education*, 48 Seton Hall L. Rev. 167, 174 (2017) (citation omitted)). In the cities that increased the minimum wage, the cost of labor increased. Thus, companies demanded less labor and laid off employees. This, of course, decreased companies' profits and hurt those employees who no longer have jobs. The same will happen here if the Court affirms.

The three most likely outcomes if outside salesmen receive overtime, therefore, all hurt employers, employees, and consumers. This would conflict with the FLSA's purpose, which is to increase the quality of life for employees while also not hurting the economy. *See* David H. Bradley, Cong. Rsch. Serv., R45007, *Overtime Exemptions in the Fair Labor Standards Act for Executive, Administrative, and Professional Employees*, 1 (Oct. 31, 2017).

It is no answer to say that outside salesmen would still be exempt from overtime under the FLSA but employers would just have to prove the exemption's applicability with clear and convincing evidence. As the Congressional Research Service stated, "an outside sales[man] may work hours that are convenient for the customer, and have work hours that may be difficult for employers to monitor." Donovan, *supra* at 10. This makes it very difficult to prove the applicability of the exemption by clear and convincing evidence. This case proves the point. Petitioners showed, by a preponderance of the evidence, that Plaintiffs are outside salesmen. But Plaintiffs could not prove the exemption's applicability by clear and convincing evidence. An exemption is useless if it is impossible to meet the burden required to prove its applicability.

B. Congress Did Not Intend To Force Employers To Prove Other FLSA Exemptions By Clear And Convincing Evidence.

Of course, this Court's decision will apply to all employers' arguments that employees are exempt from FLSA requirements. By their very nature, many of the FLSA exemptions lend themselves to close calls. Unless a party is litigating in bad faith, neither side will be able to show the applicability (or inapplicability) of exemptions by clear and convincing evidence. Rather, the cases mostly fall between those two extremes.

One example shows how even exemptions that look straightforward are hotly contested. The FLSA's overtime requirement does not apply to "any

employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). The issue of who is employed in an administrative capacity is an oft-litigated one. The exemption applies to employees who are (1) "[c]ompensated on a salary or fee basis at a rate of not less than $684 per week;" (2) "[w]hose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers;" and (3) "[w]hose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a)(1-3).

The first part of the test for administrative employees is complex. For example, the weekly salary for an administrative employee may fall below $684 if the employee is not "ready, willing and able to work." 29 C.F.R. § 541.602(a)(2). This issue is often disputed. Proving an employee is not ready, willing, and able to work by clear and convincing evidence is hard. And it makes it much easier for employees to prevail in an FLSA case alleging that they were misclassified as administrative employees.

That is just the first part of the test for administrative employees. If the employer can prove that it pays sufficient wages, the next question is whether the employee's "primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. § 541.200(a)(2). "The term 'primary duty' means the principal, main, major or most important duty that the employee performs.

Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." *Id.* § 541.700(a). So even the Department of Labor's regulations use a preponderance of the evidence standard when determining whether an FLSA exemption applies.

Courts must inquire into what an employee's main job duty is, which is often a tricky question. Imagine an employee who splits work almost evenly between office duties and manual labor. If most of the time is spent on office duties, it would be feasible to prove that the primary duty is office work by a preponderance of the evidence. But it may not be possible to make that showing by clear and convincing evidence; the split between office duty and manual labor may be too close to make that showing.

Finally, the last part of the test for administrative workers asks whether an employee uses independent judgment for matters of significance. Generally, "the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term 'matters of significance' refers to the level of importance or consequence of the work performed." 29 C.F.R. § 541.202(a).

Again, this is not a test that easily lends itself to proof by clear and convincing evidence. For example, whether discretion is used for matters of significance is often a difficult question. It may be possible to show that a matter is of significance by a

preponderance of the evidence but impossible to make that same showing by clear and convincing evidence.

Employers have a fighting chance to prove that administrative employees are exempt from the FLSA by a preponderance of the evidence. But it is nearly impossible to prove by clear and convincing evidence. Again, nothing in the FLSA suggests that Congress wanted to stack the deck against employers and make it easier for employees to prevail, especially if most of the evidence shows that the FLSA does not cover them.

CONCLUSION

This Court should vacate and remand for further proceedings.

Respectfully submitted,

John M. Masslon II
Counsel of Record
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

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