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* NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS AND INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION IN SUPPORT OF PETITIONERS

RICHARD P. HUTCHISON
LANDMARK LEGAL FOUNDATION
3100 Broadway, Suite 1210
Kansas City, MO 64111

MICHAEL J. O'NEILL
Counsel of Record
MATTHEW C. FORYS
LANDMARK LEGAL FOUNDATION
19415 Deerfield Avenue, Suite 312
Leesburg, VA 20176
(703) 554-6100
mike@landmarklegal.org

Attorneys for Amici Curiae

August 19, 2024

116994

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT. 4

A. Outside salespeople play a unique and integral role in business operations that justifies exemption from FLSA's overtime and minimum wage provisions. 5

B. Courts, the Department of Labor, and organized labor all recognize the unique role played by outside salespeople and the need to exempt them from FLSA's overtime and minimum wage provisions. 9

C. Courts are to apply a fair reading approach when determining the applicability of the FLSA's overtime and minimum wage provisions.. 12

Table of Contents

Page

D. Application of the clear and convincing standard is the rare exception reserved for a handful of cases where the litigants seek more than monetary damages 15

CONCLUSION 16

TABLE OF CITED AUTHORITIES

Page

Cases:

Addington v. Texas,
441 U.S. 418 (1979) 15, 16

Bittner v. United States,
598 U.S. 85 (2023) 13

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 4

Comm'r of Internal Revenue v. Acker,
361 U.S. 87 (1959) 13

Dubin v. United States,
599 U.S. 110 (2023) 13

Encino Motorcars, LLC. v. Navarro,
584 U.S. 79 (2018) 3, 5, 12

Grogan v. Garner,
498 U.S. 279 (1991) 14

Halo Elecs., Inc. v. Pulse Elecs., Inc.,
579 U.S. 93 (2016) 14

Herman & MacLean v. Huddleston,
459 U.S. 375 (1983) 14

Cited Authorities

Page

Jennings v. Rodriguez,
583 U.S. 281 (2018) 13

Jewel Tea Co. v. Williams,
118 F.2d 202 (10th Cir. 1941) 9

King v. Burwell,
576 U.S. 473 (2015) 12

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 15

Russello v. United States,
464 U.S. 16 (1983) 12

Santosky v. Kramer,
455 U.S. 745 (1982) 15

Schneiderman v. United States,
320 U.S. 118 (1943) 16

United States v. Hansen,
599 U.S. 762 (2023) 13

United States v. Santos,
553 U.S. 507 (2008) 13

United States v. Wong Kim Bo,
472 F.2d 720 (5th Cir. 1972) 12

Cited Authorities

Page

Woodby v. INS,
385 U.S. 276 (1966) 16

Yi v. Sterling Collision Ctrs., Inc.,
480 F.3d 505 (7th Cir. 2007) 14

Constitution, Statutes and Regulations:

29 U.S.C. § 213(a)(1). 2, 4

29 C.F.R. § 541.500(a) 4

29 C.F.R. § 541.700(a) 4

89 Fed. Reg. 32,855 (Apr. 26, 2024) (to be codified
at 29 C.F.R. § 541) 10

Other Authorities:

2024 Cross-Industry Compensation & Benefits Survey, National Association of Wholesaler-Distributors 6, 8

Admin. Off. of the U.S. Cts., *U.S. District Courts – Civil Cases Filed, by Nature of Suit*, tbl. 4.4 (Sept. 30, 2022), https://tinyurl.com/wvvvmjcc 11

Antonin Scalia & Bryan A. Garner, Reading Law: The Legal Interpretation of Legal Texts, (2012) 12, 13-14

Cited Authorities

Page

Executive, Administrative, Professional . . . Outside Salesman Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct. 10, 1940) ("Stein Report") 9

Samir Majumdar, *What is Outside Sales? Everything You Need to Know in 2024*, Veloxy (May 21, 2024), https://veloxy.io/what-is-outside-sales/ 5, 6, 7

The Sales Incentive Compensation Act: Before the Subcomm. on Workforce Protections of the House Committee on Education and the Workforce, 107th Cong. (2001) (statement of Christine L. Owens, Deputy Director, AFL-CIO) 11

Will Kenton, *Outside Sales: What They Are, How They Work*, Investopedia (July 28, 2021), https://tinyurl.com/ywytr254 . . . . . .5, 6, 7

INTEREST OF *AMICI CURIAE*[1]

National Association of Wholesaler-Distributors ("NAW") is an employer and a non-profit, non-stock, incorporated trade association that represents the wholesale distribution industry—the essential link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is made up of direct member companies and a federation of national, regional, and state associations across 19 commodity lines of trade which together include approximately 35,000 companies operating nearly 150,000 locations throughout the nation. The overwhelming majority of wholesaler distributors are small-to-medium-size, closely held businesses. As an industry, wholesale distribution generates more than $8 trillion in annual sales volume providing stable and well-paying jobs to more than 6 million workers.

The International Foodservice Distributors Association ("IFDA") is the premier trade association representing foodservice distributors throughout the United States. IFDA members play a crucial role in the foodservice supply chain, delivering food and related products to restaurants, K-12 schools, hospitals and care facilities, hotels and resorts, U.S. military bases and government facilities, and other operations that make

1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *Amici Curiae* provided notice to counsel for parties of its intent to file this brief on August 8, 2024. No person other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

meals away from home possible. The industry generates $382 billion in sales, employs 431,000 people, and operates 17,100 distribution centers in all fifty states and the District of Columbia.

INTRODUCTION AND SUMMARY OF ARGUMENT

Employees who engage in outside sales play an essential role in business operations. Their distinct role in the corporate world involves working autonomously outside the formal office setting and beyond the traditional nine-to-five workday. Business owners describe outside salespeople as individuals who are "always working" as they need to be "on call" to answer the needs of the clients they serve. Taking a business call on a weekend or at odd hours is often the norm for outside salespeople. The nature of their work means that tracking their hours and tying them to traditional salary or pay structures are often impracticable or unworkable. They are incredibly valuable to their employers, often generating millions in revenue and enjoying almost unlimited earnings potential. This is why, since the passage of the Fair Labor Standards Act ("FLSA" or "Act"), outside salespeople have been exempt from the Act's minimum wage and overtime provisions. 29 U.S.C. § 213(a)(1). Without these exemptions, businesses that rely on outside salespeople would be unable to operate.

The Fourth Circuit, as the lone jurisdiction that applies the heightened clear and convincing evidentiary standard for determining entitlement to an FLSA exemption, places an undue burden on businesses. This case shows that application of a specific evidentiary standard often decides

who will prevail when litigating whether an employee falls under the FLSA's outside salesperson exemption. If the Court were to universally impose the higher evidentiary standard currently used by the Fourth Circuit, millions of businesses and hundreds of thousands of employees will be harmed. In the near term, businesses relying on outside salespeople will likely reduce their workforce (in anticipation of heightened costs) or redesignate outside salespeople as 1099 independent contractors. Over the long term, businesses will no longer operate without the revenue generated by their outside sales workforce.

In the wake of the Court's decision in *Encino Motorcars v. Navarro*, the Court should now apply a fair reading to the FLSA's exemptions that will control in all cases – including in those coming before the Fourth Circuit. And in the absence of any statutory or regulatory obligation to apply the clear and convincing standard, the default and commonly used preponderance of the evidence standard should apply. The clear and convincing evidentiary standard is an extraordinary burden, reserved for rare cases involving unusual, non-monetary relief – it should not apply in disputes on the applicability of FLSA's exemption provisions.

Reversing the Fourth Circuit's decision will correct three legal errors resulting from the lower court's decision. First, it will rectify the current 6-1 circuit split; second, it will mandate that the default evidentiary standard of preponderance of the evidence controls when an employer must prove that a given employee falls under any of the FLSA's exemptions; third, it will bring consistency and certainty to businesses that rely on the FLSA's exemption to employ workers who play a unique and integral role in ensuring the viability of their respective employers.

ARGUMENT

Individuals employed in the capacity of an outside salesperson are exempt from the Act's minimum wage and overtime provisions. 29 U.S.C. § 213(a)(1). Congress has specifically delegated to the Secretary of Labor the authority to define an outside salesperson. *Id.* In turn, the Secretary considers an "employee employed in the capacity of outside salesman" as one "[w]hose primary duty is making sales within the meaning of the Act, or 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 is 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). And, under this regulation, "an outside [salesperson] is any employee whose primary duty is making any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 148 (2012). The Secretary defines "primary duty" as "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). Determinations regarding FLSA exemptions are "based on all the facts in a particular case." *Id.*

This statutory and regulatory exemption serves a necessary and important purpose: if outside salespeople are subject to minimum wage and overtime provisions, employers will have little recourse but to eliminate these positions. Put simply, the unique role played by outside salespeople requires exemption from the overtime and minimum wage provisions of the FLSA.

Employers should be subject to the same evidentiary standards as typical litigants when establishing whether a given employee or group of employees falls within the outside sales exemption. There is nothing in the FLSA indicating that Congress intended for courts to use the higher clear and convincing standard. And now, after the Court's decision in *Encino Motorcars*, under a fair reading interpretation of the FLSA's exemption provisions, the default civil preponderance of the evidence standard should apply.

A. Outside salespeople play a unique and integral role in business operations that justifies exemption from FLSA's overtime and minimum wage provisions.

"Outside sales" refers "to the sales of products or services by sales personnel that physically go out into the field to meet with prospective customers." Will Kenton, *Outside Sales: What They Are, How They Work*, Investopedia (July 28, 2021), https://tinyurl.com/ywytr254. It "involves the practice of selling products and services through direct, in-person interactions." Samir Majumdar, *What is Outside Sales? Everything You Need to Know in 2024*, Veloxy (May 21, 2024), https://veloxy.io/what-is-outside-sales/. Outside salespeople "tend to work autonomously outside of a formal office setting or a formal team environment." Kenton, *supra*. Their typical workday is spent on the road traveling to meet in-person with clients or potential clients. An outside salesperson tends "to work without a formalized schedule" that offers flexibility. *Id.* This flexibility, though, means that the outside salesperson must be "always on call to meet the demands of a customer." *Id.* Sometimes their workday

begins on the road as early as 6:00 AM – meeting with clients or potential clients. Other times, the workday extends well into the evening as the outside salesperson takes clients or potential clients to dinner. Outside salespeople often attend sales conventions, pitching their products to an audience of hundreds. In many companies they have no set hours, working as many as eighty hours one week and very few hours the next.

As part of their daily workday, outside salespeople typically maintain "a schedule of client meetings" and should be ready to meet and adjust their workflow to the client's demands. *Id.* They routinely engage in direct sales at conferences, trade shows, and customer offices and often travel to meet with customers to "strengthen relationships and close deals." Majumdar, *supra*.

Independence and initiative are desirable traits for an outside salesperson. Consistent with this independence, they are often given the same level of authority as management-level employees. This authority is necessary to ensure outside salespeople have the flexibility to negotiate high-value sales contracts and extend credit to clients. They enjoy high levels of trust. In some companies, outside salespeople generate millions in revenue and have almost unlimited earnings potential. And, in general, they are well compensated. For example, a survey sponsored by *Amicus Curiae* NAW found the average compensation of an outside salesperson in the distribution industry for the year 2023 was $87,406 annually. *2024 Cross-Industry Compensation & Benefits Survey*, National Association of Wholesaler-Distributors.

Developing relationships with potential clients and maintaining those relationships takes time. It is crucial that outside salespeople nurture relationships with customers and potential customers. Employers thus expect an outside salesperson to be ready to network "at all times." Kenton, *supra*. These individuals are "deeply involved in every step of the sales process, from prospecting to closing. . . ." Majumdar, *supra*. They need to be proficient in all aspects of the business they represent and be prepared to answer any questions posed by customers or potential customers.

These characteristics justify an outside salesperson's exemption from the FLSA's minimum wage and overtime rules. Employers also value the relationships that their outside salespeople develop with clients and customers. In the best scenarios, these relationships evolve into lasting friendships. But, in those cases, work and personal time intermingle. Expecting those salespeople to differentiate between leisure and professional time borders on the absurd. Imagine a scenario where an outside salesperson takes a joint vacation with a friend who is also a client. This individual should not be expected to itemize the hours or minutes he spent closing a sales transaction with his friend/client while enjoying leisure time.

In short, outside salespeople are highly valued employees who operate with a degree of trust. Employers agree that the best outside salespeople are flexible and independent workers who take time to maintain existing client relationships and develop new ones. Thus, tracking and delineating hours spent engaging in sales is next to impossible as a given sale, or activities leading to a sale, can occur at any time.

Subjecting employers, therefore, to a heightened standard of proof when attempting to exempt these employees from FLSA's minimum wage and overtime provisions means that employers will no longer be able to give outside workers the flexibility necessary to adequately do their jobs. And the results could be catastrophic for business: If an employer has to meet a higher evidentiary standard, the employer will simply minimize exposure by eliminating outside sales positions or convert their outside sales staff to 1099 independent contractors. This change in employment status will also deprive outside salespeople from benefits such as health insurance and retirement.

Exempting outside salespeople from overtime and minimum wage provisions allows employers to vary how they design and implement compensation structures. Some employers condition compensation on commissions and others use a salary-commission hybrid. Others utilize a salary-based structure while others integrate bonuses into compensation.[2]

2. *Amicus Curiae* NAW's most recent survey of the distribution industry reports that 48.9% of outside salespeople are compensated via salary plus commission; 25.3% are compensated via salary, commission, and bonus or contest award; 12.1% are compensated via salary plus bonus or contest award; 6.1% are compensated via draw and commission; and 4.1% are compensated via commission only. *2024 Cross-Industry Compensation & Benefits Survey*, National Association of Wholesaler-Distributors.

B. Courts, the Department of Labor, and organized labor all recognize the unique role played by outside salespeople and the need to exempt them from FLSA's overtime and minimum wage provisions.

The reasoning for exempting outside salespeople from the FLSA's overtime and minimum wage provisions is summarized in *Jewel Tea Co. v. Williams*:

> Such salesman, to a great extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day.

Jewel Tea Co. v. Williams, 118 F.2d 202, 207-208 (10th Cir. 1941).

As to application of overtime pay, the court concludes, "[t]o apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman." *Id.* at 208. Recognizing the unique role of the outside salesperson proved instructive in applying the exemption.

The Department of Labor has also long recognized the unique role outside salespeople play in the business world.

Shortly after the FLSA's enactment, the Department's Wage and Hour Division ("WHD") held extensive hearings on issuing a preliminary definition of what constituted an outside salesman. WHD noted that an outside salesman "customarily and regularly performs his work away from his employer's place or places of business" and "is one who makes his sales at his customer's place of business." *Executive, Administrative, Professional . . . Outside Salesman Redefined*, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct. 10, 1940) ("Stein Report"). When weighing whether to include non-sales related activities such as attendance at a sales conference or travel, the Division noted that such work was integral and therefore fell within the ambit of the exemption. *Id.* The Division concluded, "it appears proper to consider as part of outside sales, all time spent by the outside salesman in work performed incidental to and in conjunction with his outside sales." *Id.*

Indeed, section 13(1)'s exemptions are premised on the belief that "the type of work exempt employees perform is difficult to standardize to any time frame and cannot be easily spread to other workers after 40 hours in a week. . . ." 89 Fed. Reg. 32,855 (Apr. 26, 2024) (to be codified at 29 C.F.R. § 541). Again, this is, in part, an acknowledgment of the special role played by outside salespeople and the need for those individuals to be exempt from the FLSA's overtime provisions. Outside sales jobs are built on the relationships they maintain with clients. Such relationships are not easily replicable if the outside salesperson leaves the business, as their role in a company cannot be pigeonholed into a typical nine-to-five, forty-hour work week.

Labor leaders agree that the unique role outside salespeople play necessitates an FLSA exemption. Testifying before the U.S. House of Representative's Subcommittee on Workforce Protections, an AFL-CIO official stated, "Congress believed it was both unreasonable and unfair to expect employers to satisfy minimum wage and overtime requirements for employees, when employers had no practical way to know how many hours these employees worked, and no real power to control their hours." *The Sales Incentive Compensation Act: Before the Subcomm. on Workforce Protections of the House Committee on Education and the Workforce*, 107th Cong. (2001) (statement of Christine L. Owens, Deputy Director, AFL-CIO). Therefore, "[e]xempting 'outside sales' workers from minimum wage and overtime requirements was thus a fair reasonable accommodation to a practical reality created by the nature of the job." *Id.*

FLSA exemption cases constitute a significant percentage of all labor lawsuits. See Admin. Off. of the U.S. Cts., *U.S. District Courts – Civil Cases Filed, by Nature of Suit* tbl. 4.4 (Sept. 30, 2022), https://tinyurl.com/wvvvmjcc. Obligating employers to demonstrate, by clear and convincing evidence, that a given employee is an outside salesperson will impose an untenable burden on employers. It will invariably result in termination of these positions and possible cessation of all business activities as companies will no longer have the benefit of maintaining a flexible and client-centric workforce.

C. Courts are to apply a fair reading approach when determining the applicability of the FLSA's overtime and minimum wage provisions.

In *Encino Motorcars*, the Court rejected the narrow construction approach in favor of a fair reading approach when interpreting exceptions to the FLSA's overtime and minimum wage provisions. 584 U.S. 79, 89 (2018). Noting that the FLSA "gives no 'textual indication' that its exemptions should be construed narrowly," the Court reasoned that these "exceptions are as much a part of the FLSA's purpose as the overtime-pay requirement." Thus, "'there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation.'" *Id.* at 89 (quoting *Antonin Scalia & Bryan A. Garner, Reading Law: The Legal Interpretation of Legal Texts*, 363 (2012)).

The fair reading approach is the default, textualist method of interpreting a statute, except where "textual interactions" would lead one to take a "narrow construction." Scalia & Garner, *supra* at xviii, 363. Under the fair reading approach, one asks "what did the statute mean to a reasonable, competent reader at the time a statute was issued?" *Id.* at 33. It "demands a fair understanding of the legislative plan" when the statute was originally enacted. *King v. Burwell*, 576 U.S. 473, 498 (2015); See also Scalia & Garner, *supra* at 33. The fair reading approach assumes "that Congress acts intentionally and purposely" in drafting laws so that every word is significant and none is irrelevant. *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

In contrast, application of the narrow construction approach is much less common than application of the fair reading approach. Narrow construction is applied where there is a perceived discrepancy in power between litigants such as in suits against the government or when fundamental constitutional rights are at issue. See *United States v. Santos*, 553 U.S. 507, 514 (2008). The narrow construction approach, more than the fair reading approach, depends on the particular circumstances of the case, the kind of which are not present in this case.

For example, the Court uses a narrow construction for interpreting some tax and speech regulation penalties. See *Bittner v. United States*, 598 U.S. 85, 101 (2023) (quoting *Commissioner v. Acker*, 361 U.S. 87, 91 (1959)); *United States v. Hansen*, 599 U.S. 762; See also *United States v. Hansen*, 599 U.S. at 792 (2023) (Jackson, J., dissenting). It may also be used when the case impacts the infringement of constitutional rights so the Court may avoid such concerns. See *Jennings v. Rodriguez*, 583 U.S. 281, 298, 304 (2018); See also *Jennings v. Rodriguez*, 583 U.S. at 318-319 (Thomas, J., concurring). This is especially true in federal criminal cases, where "if two rational readings are possible, the one with the less harsh treatment of the defendant prevails." Scalia & Garner, *supra* at 296; See also *Dubin v. United States*, 599 U.S. 110, 126, 131 (2023).

The Court's fair reading approach requires "the interpretation that would be given to a text by a reasonable reader, fully competent in the language, who seeks to understand what the text meant at its adoption, and who considers the purpose of the text but derives purpose from the words actually used." Scalia & Garner, *supra*

at 428. Alternatively, the Court's narrow construction approach requires a literal interpretation of the exact words of a statute, emphasizing distinct words or phrases that narrow a statute's (or statute section's) scope.

Under a fair reading, a trier of fact is obligated to use the default preponderance of the evidence standard when determining applicability of the FLSA's exemption provisions. Courts will only use the clear and convincing standard when there is some basis in law. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 107 (2016). And nothing in the FLSA, "the regulations under it, or the law of evidence justifies imposing [the higher evidentiary standard]." *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 506 (7th Cir. 2007). Application of the higher evidentiary standard is limited to cases where "particularly important individual interests or rights are at stake." *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 389-390 (1983)). As noted by Judge Posner, "[t]he exemption from the FLSA's overtime provision. . . . curtails no greater individual interest or right than the right to a discharge in bankruptcy, at issue in *Grogan* where the Supreme Court rejected a requirement that a creditor prove by clear and convincing evidence his entitlement to an exception. . . ." *Yi*, 480 F.3d at 507-508.

Further, universal application of the preponderance of the evidence standard (rather than clear and convincing) will avoid the likelihood of far-reaching consequences. Preponderance of the evidence is the standard in six circuits, with the higher standard being applicable in only the Fourth Circuit. Imposing a higher standard in these courts would invite new litigation as employees

would invariably challenge their status as outside sales employees, subject to the FLSA's exemption.

In contrast, a decision reversing the lower court's decision will simply maintain the status quo in these six circuits and bring the Fourth Circuit into line.

D. Application of the clear and convincing standard is the rare exception reserved for a handful of cases where the litigants seek more than monetary damages.

Courts have long recognized preponderance of the evidence as the default evidentiary standard in ordinary civil trials. While the heightened clear and convincing standard is used in some civil cases, the lower standard of preponderance of the evidence is generally used in the "typical civil case involving a monetary dispute between the parties." *Addington v. Texas*, 441 U.S. 418, 423 (1979). In these cases, "[t]he litigants thus share the risk of error in roughly equal fashion." *Id.* The clear and convincing standard (or some variation) may apply in cases "involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant." *Id.* at 424. Courts will use it only when the interests at stake "are deemed to be more substantial than mere loss of money." *Id.* In other words, "exceptions [to the preponderance of the evidence standard] are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action -- action more dramatic than entering an award of money damages or other conventional relief -- against an individual." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989). These types of cases include termination of parental rights, *Santosky v. Kramer*, 455 U.S. 745 (1982);

involuntary commitment, *Addington v. Texas*, 441 U.S. 418; deportation, *Woodby v. INS*, 385 U.S. 276 (1966); and denaturalization, *Schneiderman v. United States*, 320 U.S. 118 (1943).

A dispute where one party seeks overtime wage compensation involves a "monetary dispute," thus necessitating the typical standard of proof. Requiring employers to establish exemption applicability beyond the preponderance of the evidence standard tips the balance against businesses and harms their outside salespeople.

CONCLUSION

For these reasons, the Court should reverse the decision of the lower court.

Respectfully submitted,

Richard P. Hutchison
Landmark Legal Foundation
3100 Broadway, Suite 1210
Kansas City, MO 64111

Michael J. O'Neill
Counsel of Record
Matthew C. Forys
Landmark Legal Foundation
19415 Deerfield Avenue, Suite 312
Leesburg, VA 20176
(703) 554-6100
mike@landmarklegal.org

Attorneys for Amici Curiae