No. 16–1418

In the Supreme Court of the United States

ARMANDO RAMIREZ, PETITIONER

v.

T&H LEMONT, INCORPORATED

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

REPLY BRIEF FOR THE PETITIONER

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A. The Split Is Real

The question presented is straightforward: What standard of proof must be met before a court may sanction a litigant by dismissing a suit for reasons unrelated to its legal merits? The published, precedential decision of the court below gives one answer: "In civil cases, the facts underlying a district court's decision to dismiss the suit or enter a default judgment as a sanction under Rule 37 or the court's inherent authority need only be established by a preponderance of the evidence." Pet. App. 16a. As the Seventh Circuit acknowledged, that "holding * * * conflicts with * * * decisions of other circuits as to the applicable evidentiary standard," *id.* at 15a, and thus "place[d]" the Seventh Circuit "into conflict with the decisions of [those] other circuits," *id.* at 12a.

1. Respondent suggests that, after identifying the conflict, the Seventh Circuit "went on to explain" that the "conflict disappears on closer examination." BIO 8. That just isn't so. What the Seventh Circuit actually "went on to explain" were its reasons for concluding that the courts on the other side of the split—most notably the D.C. Circuit's decision in *Shepherd* v. *Am. Broadcasting Cos.*, 62 F.3d 1469 (1995)—had gotten the law wrong. Pet. App. 13a–15a. Saying the courts on the other side of a split are all mistaken is different from saying there is no split. (So too with respect to respondent's repeated carping that other circuits provided insufficient "analysis" of the issue. BIO 10, 11, 12.)

2. Respondent also argues that there is no split because "the Seventh Circuit is *the only* Circuit to

have decided whether the *Huddleston–Grogan* presumption applies to dismissals as sanctions for litigation misconduct." BIO i. That claim is without merit.

For one thing, the "*Huddleston-Grogan* presumption" appears to be entirely of respondent's own making. Because those specific words appear no fewer than 12 times in the brief in opposition, see BIO i, 3, 7, 8, 10, 13, 17, 18, 22, one could be forgiven for thinking that the "*Huddleston-Grogan* presumption" is a well–established doctrine that some lower courts have inexplicably ignored. But a search of Westlaw's "allfeds" database reveals that neither this Court nor any other federal court has ever referred to any such doctrine.

Regardless of labels, this Court's decisions in *Herman & MacLean* v. *Huddleston*, 459 U.S. 375 (1983), and *Grogan* v. *Garner*, 498 U.S. 279 (1991), simply aren't the sort of intervening authority that might plausibly lead circuits on the other side of the split to reconsider their own previously expressed views. *Huddleston* was decided more than three decades ago, during President Reagan's first term. *Grogan* was decided more than a quarter of a century ago, before the start of the first Gulf War. Even more important, despite respondent's efforts to de–emphasize this fact, it is undisputed that six of the seven decisions on the non–Seventh Circuit side of the split were decided long *after* both *Huddleston* and *Grogan*. See Pet. 6–8.[1] Respondent pro-

[1] *Grogan*, the later of the two decisions, was issued on January 15, 1991. The Eighth Circuit's decision in *Nichols* v. *Klein Tools, Inc.*, 949 F.2d 1047 (see Pet. 7), was issued on November 27, 1991, more than eleven months later. The five other decisions comprising the split were decided between four and 22 years after *Grogan*. See Pet. 6–8 (describing split)

vides no reason to believe this conflict will go away on its own.

B. The Seventh Circuit's Decision Is Wrong

In the vast majority of standard–of–proof cases, the risks are symmetrical: the risk that the plaintiff with a meritorious claim may nonetheless lose is balanced against the risk that a defendant with a meritorious defense may nonetheless be held liable. Because we generally "view it as no more serious * * * 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," *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring), "the preponderance–of–the–evidence standard [is] generally applicable in civil actions." *Huddleston*, 459 U.S. at 390.

At least two independent reasons separate this case from nearly every other one about the appropriate standard of proof in civil litigation: (1) the nature of the risk involved; and (2) the special importance Congress has attached to civil rights claims.

1. Most standard–of–proof cases involve allocating the risk of error between the *parties*. For example, in *Huddleston*, the risks were that "purchasers of registered securities who allege they were defrauded by misrepresentations in a registration statement" would lose despite presenting a meritorious case versus the risk that the defendant company would have to pay a monetary judgment despite having a meritorious defense. *Id.* at 377. And in *Grogan*, the risks were that a debtor who was legally entitled to discharge a particular debt would not be able to do so versus the risk that a creditor would lose the ability to recover a claim that the

Bankruptcy Code said that it was entitled to keep. 498 U.S. at 280–281.

This case, in contrast, involves allocating the risk of error about the *basis* for the court's decision. Here, the relevant risks are that one party (whether a plaintiff or a defendant) will be wrongfully denied its right to have its claim decided on its legal merit versus the risk that some litigation misconduct may be underdeterred.

Those risks are not equal. "Because of the fundamental importance of trying cases on their merits, * * * the 'social disutility' of granting a trial on the merits to a party guilty of litigation misconduct is less than the social disutility of denying a trial to a party innocent of such misconduct." *Shepherd*, 62 F.3d at 1476. "Put another way, it is better to risk permitting" a party who is "guilty" of litigation misconduct to prosecute or defend its case on the merits "than to risk denying an 'innocent' [party] its day in court." *Ibid.*

Recognition of this principle would not "swallow[] up" the general rule that the preponderance standard governs in civil litigation. BIO 18. Absent reasons for a contrary conclusion, factual determinations involving the merits of a civil dispute—questions like whether the defendant acted with a particular intent or whether a statement was false or misleading, see BIO 19—can and should be governed by the preponderance standard. What we propose is a simple corollary: When a court is deciding whether to deprive a party of its day in court for reasons that are "fundamentally punitive" (*Shepherd*, 62 F.3d at 1477) a more–likely–than–not approach fails to correctly reflect the interests at stake.

2. In any event, this case does not involve simply petitioner and respondent. A Title VII plaintiff

does not merely seek to "redress[] his own injury": he "also vindicates the important congressional policy against discriminatory employment practices." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). By affirming the dismissal of petitioner's suits for reasons unrelated to its merits, the court of appeals did not simply deprive petitioner "the opportunity to win money damages from his former employer." Pet. App. 15a. Instead, the court also prevented petitioner from serving as "the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418 (1978) (citation omitted). For that reason, too, a mere preponderance was not enough.

C. This Case Is A Clean Vehicle

If the Seventh Circuit agreed with respondent that "[t]he evidence of Ramirez's witness tampering was clear and convincing," BIO 22; see also BIO 1–3, it seems more than a little odd it never said so. After all, the district court had found that the clear–and–convincing–evidence standard was satisfied, see Pet. App. 20a, and the arguments on appeal focused squarely on whether that inherently factbound and case–specific assessment was correct.[2] Yet the court of appeals was careful to say—and say only—that "[t]he evidence presented to the district court was sufficient to support a finding by" the lesser "preponderance of the evidence" stand-

[2] Compare Pet. C.A. Br. 32 ("The key to this appeal is the meaning of 'clear and convincing evidence' and the key issue is whether Defendant provided Plaintiff's alleged witness tampering with 'clear and convincing evidence.'" (internal quotation marks omitted), with Resp. C.A. Br. 8 ("[T]here was clear and convincing evidence of witness tampering here.").

ard. Pet. App. 16a. The court of appeals also flagged the possibility that petitioner's primary accuser "was a mercenary witness whose testimony was for sale to the highest bidder" and it specifically stated that the record would have "permitted, but did not compel, the district court to discredit his testimony." *Id.* at 16a–17a.

"Our litigation system is based upon the assumption that standards of proof matter." David L. Schwartz & Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 Harv. J.L. & Tech. 429, 430 (2013). Here, the court of appeals reached no conclusion about whether the record was sufficient to support a finding under the appropriate standard of proof. Because this Court is one "of review, not of first view," *Hernandez* v. *Mesa*, 137 S. Ct. 2003, 2007 (2017) (per curiam) (citation omitted), the Court should grant certiorari, reverse the Seventh Circuit's judgment, and remand for application of the correct standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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