No. 20-30815

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BYRON TAYLOR, *on behalf of himself and on behalf of all others similarly situated;* LONNIE TREAUDO; KENDALL MATTHEWS; KENNETH HUNTER; TERRAINE R. DENNIS; JOHN EDMOND; GEORGE TRICHE; ALFRED EDMOND,

Plaintiffs-Appellants,

v.

HD AND ASSOCIATES, L.L.C.; JOHN DAVILLIER,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Louisiana

BRIEF OF THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS, SUPPORTING REVERSAL

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case, in addition to the persons and entities identified by Appellants and Appellees. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Elena S. Goldstein, Deputy Solicitor of Labor, Jennifer S. Brand, Associate Solicitor, Rachel Goldberg, Counsel for Appellate Litigation, Dean Romhilt,

Senior Attorney, and Sarah M. Roberts, Attorney, U.S. Department of Labor, Attorneys for *Amicus Curiae* Secretary of Labor.

/s/ Sarah M. Roberts
SARAH M. ROBERTS

Attorney for the Secretary of Labor

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Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of the Plaintiffs-Appellants in this case. For the reasons set forth below, the district court failed to apply the correct standard for determining whether the overtime pay requirement of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq*. ("FLSA" or "Act") applied to the employer in this case.

STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE

The Secretary has a substantial interest in the proper judicial interpretation of the FLSA because he administers and enforces the Act. 29 U.S.C. 204, 211(a), 216(c), 217. In particular, the Secretary has a substantial interest in the proper determination of the enterprises and employees covered by the FLSA's minimum wage and overtime provisions at 29 U.S.C. 206(a) and 207(a)(1), respectively, because establishing coverage is a necessary precondition for employees to be entitled to the minimum wage and overtime pay protections of the Act, and enterprise-wide coverage as set forth at 29 U.S.C. 203(s)(1) is the most common method of establishing coverage. The district court's decision that there was no FLSA coverage because the employer and its employees were not engaged in interstate commerce, which failed to correctly consider enterprise-wide coverage under section 203(s)(1), is contrary to the text of the FLSA, appellate court precedent, and Department of Labor guidance. An affirmance by this Court could improperly exclude employees who work for small or "local" businesses from the protection of the FLSA in this Circuit.

This brief is filed in accordance with Federal Rule of Appellate Procedure 29(a)(2), which permits an agency of the United States to file an amicus brief as of right.

STATEMENT OF THE ISSUE

Whether the district court erred by granting summary judgment to the employer on the basis that it is not subject to the overtime pay provision of the FLSA without analyzing whether the employer was a covered enterprise under the "handling clause" of 29 U.S.C. 203(s)(1).[1]

STATEMENT OF THE CASE

A. Factual Background

The Plaintiffs are former cable installation and repair technicians who worked for HD and Associates ("HDA"), a subcontractor of Cox Communications ("Cox"), which provides cable and internet services. ROA.1128. HDA contracted with Cox to perform work installing and repairing cable and telephone equipment for Cox residential customers. ROA.1128. Plaintiffs worked as cable technicians for HDA between May 22, 2018 and May 22, 2019. ROA.1129.

The service agreement between HDA and Cox provided that Cox would assign service requests to HDA on an as-needed basis. ROA.1129. HDA is located in Louisiana and all of the work it performed for Cox during the relevant period

[1] While the district court's decision concerned only coverage under the FLSA's overtime pay provision, as that is the only FLSA provision that Plaintiffs alleged HDA violated, the relevant statutory language is equally applicable to both the FLSA's minimum wage and overtime pay provisions. *See* 29 U.S.C. 206(a) (minimum wage), 207(a)(1) (overtime compensation). Therefore, references in this brief to coverage under the FLSA's overtime provision necessarily encompass the Act's minimum wage provision as well.

occurred in Louisiana. ROA.1142. The equipment that the technicians installed was shipped to a Cox-owned facility in Louisiana, likely from out of state, and was eventually delivered to an HDA-owned warehouse in Louisiana to await installation. ROA.1128, 1144–45. The technicians retrieved the equipment from HDA's warehouse and transported it to the customer's house for installation. ROA.1145. Cox owned the equipment, even after installation, as its customers rent the equipment from Cox. ROA.1128, 1144.

Cox assigned work directly to HDA technicians, based on service requests from Cox customers. ROA.1129–30. Technicians used a handheld electronic device (a personal digital assistant, or PDA) that ran Cox's proprietary software application, "CX Connect" (or the "Cox App") to receive their daily routes and assignments from Cox. ROA.1130–31. Cox and HDA were able to use data submitted to the Cox App to track a technician's location and completion of work. ROA.1131. The Cox App could also update a technician's route and schedule during the day. ROA.1131. Technicians could use either their personal vehicles or HDA's vehicles to complete their routes. ROA.1130.

B. Procedural Background

Plaintiffs filed suit in May 2019, alleging that HDA failed to pay them for all hours worked and failed to pay them overtime as required by the FLSA. ROA.1128. On March 18, 2020, the district court conditionally certified an FLSA

collective action comprised of cable technicians employed by HDA in the twelve months preceding the filing of the case. ROA.1129–30.

HDA subsequently filed two motions for partial summary judgment. ROA.1127. First, HDA moved for summary judgment on the basis that an exemption to the FLSA's overtime requirement for certain employees of retail or service establishments whose compensation consists primarily of commissions, set out at 29 U.S.C. 207(i), applied to the technicians. ROA.1127. Second, HDA moved for summary judgment on the basis that there was no coverage under the FLSA. ROA.1127. Plaintiffs filed their own partial summary judgment motion seeking a ruling that they were employees as defined by the FLSA, not independent contractors. ROA.1127, 1136.

On December 2, 2020, the district court granted summary judgment to HDA, holding that there was no FLSA coverage and that the overtime exemption in section 207(i) applied to Plaintiffs. ROA.1141, 1145.[2] The district court denied Plaintiffs' motion for summary judgment that they were employees under the FLSA because it found there was a genuine dispute of material fact. ROA.1136. Because HDA prevailed on its summary judgment motions, the district court

[2] Because the Secretary addresses only FLSA coverage in this brief and takes no position on the applicability of the section 207(i) exemption to the facts of this case, the district court's ruling regarding that exemption is not discussed further in this brief.

dismissed the case. ROA.1147. On December 28, 2020, Plaintiffs timely appealed the district court's decision. ROA.1150.

C. The District Court Decision

In adjudicating HDA's FLSA-coverage summary judgment motion, the district court determined that HDA was entitled to summary judgment on the basis that "HDA and its technicians are not engaged in [interstate] commerce as defined under the Fair Labor Standards Act." ROA.1142. The court opined that the proper analysis was to evaluate "whether the employees are actually in or so closely related to movement of [interstate] commerce as to be a part of it," and also whether HDA is engaged in interstate commerce. ROA.1141.

The district court reasoned that "[a]n employee does not necessarily fall under FLSA coverage because the employer conducts business in more than one state." ROA.1142. In concluding that there was no FLSA coverage, the court relied on the fact that HDA works only in Louisiana and does not build, buy, or sell the equipment used by Cox customers. ROA.1142–43. HDA's contract with Cox, an out-of-state company, and the Plaintiffs' work pursuant to that contract, were not sufficient to establish that HDA engaged in [interstate] commerce. ROA.1142. The court further concluded that Plaintiffs did not engage in interstate commerce because their work consisted of picking up equipment from HDA's Louisiana

warehouse and then transporting it within Louisiana and installing it for Louisiana customers, as well as servicing those customers. ROA.1145.[3]

SUMMARY OF ARGUMENT

The district court clearly erred in its analysis of whether the FLSA's overtime pay requirement applied to HDA, and therefore erred in concluding that it did not apply. The court failed to recognize that there are two distinct methods for establishing FLSA coverage—individual coverage and enterprise-wide coverage—and that the applicable standards under each method differ. The court's reasoning is difficult to follow, but it appears to have focused primarily on whether Plaintiffs were individually covered, without fully and accurately considering whether HDA was a covered enterprise. To the extent that the court did consider enterprise coverage, its analysis incorrectly relied entirely on individual coverage cases. The court did not cite any enterprise coverage cases and, crucially, did not take into account the 1974 amendments to the FLSA, which established the current standard for enterprise coverage. The district court essentially ignored the current language of the statute, under which an enterprise is covered if its employees "handl[e]" or "work[] on" materials that have moved in interstate commerce, and the enterprise

[3] The court also opined that "even if . . . HDA [had] engaged in interstate commerce," Plaintiffs would still not be entitled to overtime under the FLSA because they would fall within an exemption to the FLSA known as the "Motor Carrier Act" exemption. ROA.1145–47.

has annual sales or business of at least $500,000. 29 U.S.C. 203(s)(1). Moreover, in analyzing whether the Plaintiffs were themselves individually covered, the court erroneously assumed that individual coverage was necessary for any coverage at all. Accordingly, the Court should reverse the district court's decision and direct the court to consider whether HDA is covered under the correct enterprise coverage standard.

ARGUMENT

I. AN ENTERPRISE THAT HAS EMPLOYEES "HANDLING" GOODS OR MATERIALS THAT HAVE MOVED IN INTERSTATE COMMERCE, AND THAT HAS ANNUAL SALES OR BUSINESS OVER $500,000, IS COVERED BY THE FLSA.

There are two methods to establish coverage under the FLSA's minimum wage and overtime compensation provisions: individual coverage or enterprise coverage. 29 U.S.C 206(a) (employers must pay the federal minimum wage to any employee who "is engaged in commerce or in the production of goods for commerce," or "is employed in an enterprise engaged in commerce or in the production of goods for commerce"), 207(a)(1) (same language for overtime compensation requirement).[4] Thus, an individual employee is covered if he or she is "engaged in commerce or the production of goods for commerce." By contrast,

[4] "Commerce" is defined as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. 203(b).

an enterprise is covered, i.e., "engaged in commerce or in the production of goods for commerce," if it "has employees engaged in commerce or in the production of goods for commerce, or . . . has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person" and has an annual gross volume of sales or business of $500,000 or more. 29 U.S.C. 203(s)(1)(A)(i).[5] When an employer is a covered enterprise, the FLSA's requirements apply to all of the employer's employees, regardless of whether each employee satisfies the statutory language. *Dunlop v. Indus. Am. Corp.*, 516 F.2d 498, 500 (5th Cir. 1975).

A. FLSA Coverage Has Broadened Over Time.

Congress has amended the FLSA several times since its original enactment, each time expanding the number of individuals and entities covered by the Act. When originally enacted in 1938, the FLSA covered only individual employees "engaged in commerce or in the production of goods for commerce." Fair Labor Standards Act of 1938, Pub. L. 75–718, 52 Stat. 1060 (1938); *see also Dunlop*, 516 F.2d at 500 (explaining that the FLSA's "reach was defined in terms of employees rather than employers"). In 1961, Congress significantly expanded the scope of the Act by providing a basis for enterprise-wide coverage. *Dunlop*, 516 F.2d at 500*;*

[5] The requirement that the employer have an annual gross volume of sales or business of $500,000 or more does not apply to individual coverage.

see also Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 295 n.8 (1985) ("Enterprise coverage substantially broadened the scope of the Act . . . ."); Fair Labor Standards Amendments of 1961, Pub. L. 87–30, 75 Stat. 65 (1961). The 1961 amendments defined a covered enterprise to include an entity that has "employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person." 29 U.S.C. 203(s) (1961). This language is commonly referred to as the "handling clause."

In 1974, Congress amended the handling clause to its current language. Fair Labor Standards Amendments of 1974, Pub. L. 93–259, 88 Stat. 55 (1974); 29 U.S.C. 203(s)(1)(A)(i) (defining a covered enterprise as, in relevant part, an entity that "has employees engaged in commerce or in the production of goods for commerce, *or* that has employees handling, selling, or otherwise working on goods or *materials* that have been moved in or produced for commerce by any person" (emphasis added)). This amendment clarified that the handling clause is an independent basis for enterprise coverage, and also broadened the clause itself to cover not just the handling of goods, but also of "materials." *See Polycarpe v. E&S Landscaping Serv., Inc.*, 616 F.3d 1217, 1221 (11th Cir. 2010) (outlining legislative history). Accordingly, the 1974 amendments explicitly established that an enterprise is covered if its employees handle, sell, or work on goods or materials that have moved in interstate commerce.

The addition of "materials" was significant because the Act's definition of "goods" explicitly excludes "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof," 29 U.S.C. 203(i) (known as the ultimate-consumer exception), but Congress did not attach such language to "materials."[6] Prior to 1974, some courts struggled with whether the "handling" clause should be read not to cover the handling of goods used in the course of the employer's business. The Tenth Circuit, for example, rejected that view, explaining that the ultimate-consumer exception appeared to have been added to the original FLSA's definition of goods in light of an entirely distinct provision, 29 U.S.C. 215(a)(1). *Brennan v. Dillion*, 483 F.2d 1334, 1337 (10th Cir. 1973). Section 215 bars transporting "goods" in interstate commerce when those goods were made in violation of the FLSA's minimum wage or overtime pay provisions. 29 U.S.C. 215(a)(1). Without the ultimate-consumer exception, section 215 could have been used against "retail purchasers" of the "goods," rather than the businesses at which the provision was aimed. *Dillion*, 483 F.2d at 1337. The Tenth Circuit determined that because the

[6] The statutory definition of "goods" reads, in full: "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." 29 U.S.C. 203(i).

ultimate-consumer exception was not intended to narrow the range of companies that could qualify as "enterprise[s] engaged in commerce," the exception did not apply to an apartment complex that consumed goods like paint and light bulbs in the course of its business. *Id.* at 1335–37; *contra Shultz v. Wilson Bldg., Inc.*, 320 F. Supp. 664, 669 (S.D. Tex. 1970) (building owner-manager not covered by FLSA because business was the ultimate consumer of products, such as cleaning materials and light bulbs, that previously moved in commerce).

Given the confusion among courts, Congress added "materials" in 1974 to clarify that enterprise coverage extends to enterprises whose employees use materials (such as tools or machinery) that previously traveled in interstate commerce. The Senate Report explained that Congress did not view the original enterprise coverage provision as excluding businesses that could be said to be the ultimate consumer of goods used by the business (such as soap used by a laundry), but that the addition of "materials" was meant to clarify that point. S. Rep. No. 93-690, at 17 (1974) (citing *Dillion*, 483 F.2d at 1334 as correctly interpreting "goods" not to exclude items used by a business); *see also Polycarpe*, 616 F.3d at 1224 (same).

B. Appellate Courts Interpret The FLSA To Cover An Enterprise With Annual Sales Or Business Over $500,000 That Has Employees Handling Materials That Previously Moved In Interstate Commerce.

Appellate courts have consistently interpreted the amended statutory provision at 29 U.S.C. 203(s)(1)(A)(i) to cover enterprises with annual sales or business exceeding $500,000 whose employees handle goods or materials that have moved in interstate commerce, including where the goods or materials are no longer moving in commerce. Indeed, this Court recently acknowledged that "an employer can trigger enterprise coverage if its employees handle items that had travelled in interstate commerce at some point in the past, even if the act of handling those items does not amount to engaging in commerce in the present." *Molina-Aranda v. Black Magic Enters., LLC*, 983 F.3d 779, 786–87 (5th Cir. 2020) (citing *Polycarpe*, 616 F.3d at 1221 and *Sec'y of Labor v. Timberline S., LLC*, 925 F.3d 838, 845 (6th Cir. 2019)). This Court has rejected the argument that plaintiffs must "allege that their actual work activities directly affected interstate commerce," and explained that they "merely" need to claim "that the goods or materials they handled had previously come into the state from elsewhere." *Id.* at 787 (applying the standard at the motion to dismiss stage). In *Polycarpe*, the Eleventh Circuit rejected the argument that the employer must be using goods or materials that are *actively* moving in interstate commerce to meet the definition of a covered enterprise, because the amended statute is phrased in the past tense,

referencing "goods or materials that *have been* moved in or produced for [interstate] commerce." *Id.* at 1221 (emphasis added). And the Sixth Circuit in *Timberline* deemed irrelevant the fact that the employees did not themselves place the equipment they used in commerce, because all that the statute requires is that the equipment "had previously been moved in and produced for commerce by others prior to being handled by the . . . employees." 925 F.3d at 845.

Appellate courts have also recognized that the meaning of the term "materials" as used in the handling clause is broader than the term "goods" because it does not include the ultimate-consumer exception, although it is not without limitation. This Court previously noted in dictum that "materials" does not include the ultimate-consumer exception. *Dunlop*, 516 F.2d at 501–02 & n.8. In addition, the Eleventh Circuit discussed the meaning of "goods" and "materials" at length in *Polycarpe*, 616 F.3d at 1221–27. After comparing the statutory definition of "goods," which excludes items that have been delivered into the possession of the "ultimate consumer," and the plain language meaning of "materials," which is not defined in the FLSA, and applying principles of statutory construction, the court reasoned that "materials" means "tools or other articles necessary for doing or making something." *Id.* at 1222–24.

The Eleventh Circuit further refined the meaning of "materials" as used in the handling clause by limiting it to materials that have a "significant connection"

to the employer's commercial purposes. *Id.* at 1226. Thus, the court concluded that an enterprise is covered when its employees handle "tools or other articles necessary for doing or making something" and those materials have a significant connection to the employer's commercial activity. *Id.* at 1227; *see also Timberline*, 925 F.3d at 848 (adopting *Polycarpe*'s definition of "materials" as used in the handling clause). *Polycarpe* had consolidated several cases in one appeal, and the court noted that the plaintiffs in most of the cases identified facts that could suffice to show that they had handled goods and materials that had moved in interstate commerce—such as using paint, tape, and screws produced out of state for a home repair company, or performing landscaping tasks using tools like lawn mowers and trucks made out of state for a landscaping company—before remanding to the district courts to apply the correct standard. 616 F.3d at 1227–29.

Several other appellate courts have also concluded that "local" businesses with annual sales or business exceeding $500,000 were covered enterprises because their employees handle materials that previously moved in interstate commerce. The Sixth Circuit determined that logging and harvesting equipment used by a timber harvester's employees, which was purchased in state but manufactured out of state, constituted "materials" such that the timber harvesting company was a covered enterprise under the FLSA. *Timberline*, 925 F.3d at 848. This was true even though all of the company's business activities were conducted

entirely within the state of Michigan. *Id.* at 841–42. Similarly, this Court held that plaintiffs who worked as heavy truckers sufficiently alleged that their employer was a covered enterprise where they handled "water, sand, gravel, construction equipment, oilfield equipment, trucks, and fuel . . . that had potentially been moved in commerce before being handled by [the employer] and its employees," and that these items could be goods or materials because "they are all items one could plausibly conclude are used in or produced during construction and trucking work." *Molina-Aranda*, 983 F.3d at 787.

Polycarpe, *Timberline*, and *Molina-Aranda* are consistent with prior appellate decisions that applied the handling clause to determine that a business with annual sales or business over $500,000 is a covered enterprise where its employees handle goods or materials that previously moved in interstate commerce. *See Dole v. Odd Fellows Home Endowment Bd.,* 912 F.2d 689, 693, 695 (4th Cir. 1990) (applying handling clause to hold that residential facility was covered enterprise where its "employees, *inter alia*, prepared and served food to the residents, washed the residents' laundry and cleaned the [facility], and performed maintenance tasks, all the time using goods and materials that had traveled in interstate commerce"); *Brock v. Hamad*, 867 F.2d 804, 808 (4th Cir. 1989) (explaining that "it is well established that local business activities fall within the FLSA when an enterprise employs workers who handle goods or

materials that have moved or have been produced in interstate commerce" in concluding that employer, which owned and operated rental properties and "bought goods that had been moved in interstate commerce" which were "used in the course of his employees' employment," was covered enterprise); *Donovan v. Pointon*, 717 F.2d 1320, 1322 (10th Cir. 1983) (identifying "[t]he critical issue" in evaluating enterprise coverage as "whether the goods or materials handled by [the employer] and his employees had moved in interstate commerce" and determining that construction workers' use of machinery like bulldozers, tractors, and chain saws satisfied this definition because the equipment was manufactured out of state, even though much of it was acquired in state); *Marshall v. Brunner*, 668 F.2d 748, 751–52 (3d Cir. 1982) (explaining that the FLSA applies to "businesses, which in the course of their own operations, use materials which have been moved in or produced for [interstate] commerce," and concluding that garbage collection business that used trucks, tires, shovels, and oil and gas that had been manufactured out of state satisfied this definition).[7]

[7] The Department of Labor's Wage and Hour Division (WHD) has also issued opinion letters explaining that an employer with annual sales or business exceeding $500,000 can be a covered enterprise under the FLSA if its employees handle goods or materials that were manufactured out of state, even if the employer purchased the goods or materials within the state. In a 1997 opinion letter, WHD concluded that a fast food retailer that only sells or uses products purchased in-state could still be a covered enterprise if, "[f]or example, the coffee served, cleaning supplies utilized, cooking equipment (ranges[,] fryers, grills) operated, etc., . . . have been produced outside of . . . or shipped by any person from outside

II. THE DISTRICT COURT FAILED TO APPLY THE CORRECT STANDARD TO DETERMINE WHETHER THERE WAS FLSA COVERAGE.

Here, the district court erred by failing to apply the current enterprise coverage standard, as established by the 1974 FLSA amendments.[8] Instead of examining whether HDA's technicians handled or worked on goods or materials that had moved in interstate commerce, as required by the authority discussed *supra*, the court used an inapplicable standard concerning the relationship of HDA and its technicians to interstate commerce. It is not clear whether the district court actually evaluated enterprise coverage at all, or whether the court instead considered only whether the individual Plaintiffs were covered. But if the court considered enterprise coverage, it applied the wrong standard. And its individual coverage analysis seemed to assume, incorrectly, that individual coverage was

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the State." Op. Letter, 1997 WL 958726, at *1 (Dep't of Labor Jan. 22, 1997); *see also* Op. Letter, 1982 WL 213484, at *1 (Dep't of Labor Apr. 21, 1982) (determining that a plumbing contractor was a covered enterprise if its plumbers "handled or otherwise worked on goods" such as "tools, furnaces," or "piping," that "although purchased locally," were manufactured or shipped from outside the state). Indeed, the Eleventh Circuit commented in *Polycarpe* that the reasoning of the 1997 opinion letter "seem[ed] in accord with [the court's] understanding of the handling clause." 616 F.3d at 1225.

[8] HDA admitted that it "has had annual gross revenue in excess of $500,000," ROA.37, and did not argue at summary judgment that it had less than $500,000 in sales or business during the relevant time period, ROA.987–96.

necessary for coverage to exist at all. Under either analysis, the court's conclusion that there was no FLSA coverage was fundamentally flawed.

Confusingly, the district court initially appeared to recognize that workers are covered by the FLSA's overtime provision if either each individual employee is covered or the employer is a covered enterprise. ROA.1133 (citing 29 U.S.C. 207). And the court cited and paraphrased the handling clause in referring to the definition of a covered enterprise. ROA.1133 (citing 29 U.S.C. 203(s)(1)(A)). In its actual analysis several pages later, however, the court did not mention the handling clause or cite any cases applying it. ROA.1141–47. Instead, the court incorrectly relied on cases that nearly all predate the 1974 FLSA amendments that provide the current definition of enterprise coverage (with most cases predating 1961, when enterprise coverage was first added) and that all analyzed *only* whether an employee was individually covered. ROA.1141–45 (citing *Mitchell v. H.B. Zachry Co.*, 362 U.S. 310 (1960), *McLeod v. Threlkeld*, 319 U.S. 491 (1943), *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943), *Grimes v. Castleberry*, 381 F.2d 758 (5th Cir. 1967), *Wirtz v. Wohl Shoe Co.*, 382 F.2d 848 (5th Cir. 1967), *Wilson v. Reconstruction Fin. Corp.*, 158 F.2d 564 (5th Cir. 1947), *Lewis v. Florida Power & Light Co.*, 154 F.2d 751 (5th Cir. 1946), *Joseph v. Nichell's Caribbean Cuisine, Inc.*, 862 F. Supp. 2d 1309 (S.D. Fla. 2012), *Navarro v. Broney Auto. Repairs, Inc.*,

533 F. Supp. 2d 1223 (S.D. Fla. 2008), *Mitchell v. Welcome Wagon, Inc.*, 139 F. Supp. 674 (W.D. Tenn. 1954), *aff'd* 232 F.2d 892 (6th Cir. 1956)).[9]

Though the district court occasionally used language that suggested that it was evaluating whether HDA was a covered enterprise, the bulk of its analysis and its reliance on these individual coverage cases indicate that it focused primarily on whether the technicians were themselves engaged in commerce and therefore individually covered. Accordingly, because the district court did not clearly evaluate enterprise coverage or apply the correct enterprise coverage standard, its reasoning and conclusion were unsound and cannot be upheld.[10]

A. To The Extent That The District Court Evaluated Enterprise Coverage, It Applied An Incorrect Standard.

It is unclear whether the district court even conducted an enterprise coverage analysis at all. Crucially, the court did not cite to or rely on a *single case* that concerned enterprise coverage. However, there are some indications that it evaluated enterprise coverage, including its statement that "unless the employer is

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[9] The two cases from 1967, though decided after the 1961 amendments added enterprise coverage, evaluated coverage only in terms of individual coverage; they did not analyze enterprise coverage as defined in section 203(s). *Grimes*, 381 F.2d at 761–62; *Wohl Shoe*, 382 F.2d at 850–51.

[10] Plaintiffs alleged in their complaint that HDA was a covered enterprise "within the meaning of the FLSA," citing 29 U.S.C. 203(s)(1). ROA.21. Defendants sought summary judgment on the basis that HDA was not a covered enterprise. ROA.987. Thus, the district court erred by failing to clearly conduct an enterprise coverage analysis based on the correct law.

engaged in commerce, the employees are not engaged in commerce." ROA.1141–42 (citing *Lewis*, 154 F.2d 751 and *Wilson*, 158 F.2d 564). The court also reasoned, based on *Lewis*, *Wilson*, and the cases cited above, that HDA was not engaged in commerce because it did not perform work or serve customers outside Louisiana, and it did not build, buy, or sell the cable equipment. ROA.1141–43. The court further opined that HDA's contract with Cox, an out-of-state company, did not alone establish that it engaged in commerce. ROA.1145. Thus, it is possible the court intended to adjudicate whether HDA itself was a covered enterprise, rather than analyzing only whether the Plaintiffs were individually covered.

Even if the court's statements and reasoning can be interpreted to reflect some sort of enterprise coverage standard, however, that standard is not based on the definition found in current section 203(s)(1)(A) or the cases interpreting that statutory language. As discussed *supra*, following the 1974 FLSA amendments, an enterprise is covered if its employees handle, sell, or work on goods or materials that have moved in commerce. *See, e.g., Molina-Aranda*, 983 F.3d at 786–87; *Timberline*, 925 F.3d at 845; *Polycarpe*, 616 F.3d at 1221. Accordingly, the current law required the district court to conduct an entirely different analysis to evaluate enterprise-wide coverage from the one it performed, if it performed one at all. The court's focus on the location of HDA's work and its customers, the fact that HDA did not manufacture, buy, or sell products, and its contract with Cox are not

relevant to the key question: whether HDA's employees handled or worked on goods or materials that previously moved in commerce. To answer that question, *Molina-Aranda*, *Polycarpe*, and *Timberline* instruct that the court should have assessed whether the technicians handled or worked on tools or other articles that had previously moved in interstate commerce and that are necessary for achieving HDA's commercial purposes.[11] By failing to do so, the court neglected to analyze whether HDA was covered under the current standard for establishing enterprise coverage.

B. The District Court Erroneously Assumed That The Coverage Determination Turned Entirely On Whether The Technicians Were Individually Covered.

The district court's statements and analysis implied, incorrectly, that coverage would exist only if the technicians were individually covered. The court set forth, as a general principle, that evaluating FLSA coverage requires examining

[11] The district court's decision did not clearly state that any of the materials used by HDA's employees originated out of state, which may preclude this Court from determining that HDA was a covered enterprise under the FLSA. However, there are strong indications that HDA's technicians handled or worked on materials that previously moved in interstate commerce. For example, the cable and phone equipment that the technicians installed was likely shipped from out of state into Louisiana. ROA.1144. In addition, the technicians used tools, PDAs, and trucks that were likely produced out of state. ROA.1128, 1130–31. And their work on the cable and phone equipment and use of tools, PDAs, and trucks had a significant connection to HDA's commercial activity. However, the court's opinion does not clearly indicate that any of these items previously moved in interstate commerce, so the Court should remand for further consideration of this issue.

"the relationship of the employment to 'commerce,'" and in particular, "whether the employees are actually in or so closely related to movement of commerce as to be a part of it," and stated that the "application of the FLSA depends on the character of employees' activities, rather than the nature of the employer's business." ROA.1141 (citing *H.B. Zachry*, 362 U.S. 310, *McLeod*, 319 U.S. 491, and *Overstreet*, 318 U.S. 125). Then, the court analogized the instant case to the facts of two district court cases that concerned only individual coverage. ROA.1144–45 (citing *Navarro*, 533 F. Supp. 2d 1223 and *Joseph*, 862 F. Supp. 2d 1309). The court cited *Joseph* for the proposition that the "origin of products are irrelevant" to determining whether an employee is engaged in interstate commerce. ROA.1145 (emphasis removed). And the court cited *Navarro* as holding that an employee who handled automobile parts was not covered by the FLSA because the parts, though acquired out of state, had stopped flowing in commerce. ROA.1144. Relying on these cases, the court concluded that Plaintiffs' work was "purely intrastate" because they picked up equipment from HDA's Louisiana warehouse and delivered and installed the equipment in homes in Louisiana. ROA.1145. Thus, the court concluded that the "HDA technicians did not engage in commerce as defined under the FLSA." ROA.1145.[12]

[12] While the Secretary focuses in this brief on the district court's error in not considering the proper enterprise coverage standard, it bears noting that the court may not have applied the correct individual coverage standard. This Court has said

Apart from the fact that the district court may not have correctly applied the law in regard to individual FLSA coverage, the court failed to recognize that there are two distinct methods to establish coverage—individual coverage and enterprise-wide coverage. Individual employees are covered under the FLSA where they are "engaged in commerce or in the production of goods for commerce," 29 U.S.C. 206(a), 207(a)(1); in contrast, an entire enterprise is covered where the enterprise's employees handle goods or materials that previously moved in commerce, 29 U.S.C. 203(s)(1)(A)(i), 206(a), 207(a)(1). (And, as noted *supra*,

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that an individual coverage analysis requires examining whether an employee's "work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity." *Sobrinio v. Med. Ctr. Visitor's Lodge, Inc.*, 474 F.3d 828, 829 (5th Cir. 2007) (quoting *H.B. Zachry*, 362 U.S. at 324). The Secretary has issued regulatory guidance explaining that employees who work on the "maintenance, repair, or improvement of existing instrumentalities of commerce," including telephone lines, are engaged in commerce, 29 C.F.R. 776.11(a), (b), and the Eleventh Circuit has determined that employees "working for an instrumentality of interstate commerce, *e.g.*, . . . communication industry employees" are "engaged in commerce," *Thorne v. All Restoration Servs., Inc.*, 448 F.3d 1264, 1266 (11th Cir. 2006). But the district court did not discuss whether the technicians' work on an instrumentality of interstate commerce—a telephone and cable communications system—constituted engagement in commerce. Moreover, the FLSA defines "commerce" to include communication across state lines, 29 U.S.C. 203(b), and the Eleventh Circuit has held that regularly using instrumentalities of interstate commerce, such as regularly making interstate telephone calls, is sufficient to show engagement in interstate commerce. *St. Elien v. All Cty. Envtl. Servs., Inc.*, -- F.3d --, 2021 WL 1034800, at *3 (11th Cir. Mar. 18, 2021). Here, an out-of-state company, Cox, transmitted assigned routes to the HDA technicians each day via the PDA, but the court did not consider whether these potential interstate communications constituted interstate "commerce."

enterprise-wide coverage results in the Act's protections extending to all of the enterprise's employees, regardless of whether each individual employee handles goods or materials that moved in commerce.)

Further, the court failed to recognize that the individual coverage standard differs from the enterprise coverage standard in key respects. A product's out-of-state origin is absolutely relevant to evaluating enterprise coverage under section 203(s). *See, e.g., Polycarpe*, 616 F.3d at 1221 (explaining that plain text of section 203(s) covers employees handling goods that previously moved in interstate commerce, even if the goods were acquired intrastate and therefore no longer moving in commerce); *Timberline*, 925 F.3d at 845 (same). Therefore, the court's acknowledgement that the equipment may have been produced out of state, then shipped to Louisiana, ROA.1144, is extremely relevant to the enterprise coverage analysis, apart from any significance it may have to individual coverage. Thus, the district court's comparison of the instant case to individual coverage cases led it to an erroneous conclusion that there was no FLSA coverage.[13]

[13] The district court further erred by speculating that even if the technicians were covered by the FLSA's overtime provision, they would fall within the Motor Carrier Act ("MCA") exemption. ROA.1145–47. *See* 29 U.S.C. 213(b)(1) (setting forth MCA exemption). First, HDA did not even assert that the MCA exception applied. Even if HDA had argued that the MCA exemption should apply, it would bear the burden of proving the exemption was applicable, *see Faludi v. U.S. Shale Solutions, L.L.C.*, 950 F.3d 269, 273 (5th Cir. 2020) (employer bears the burden of proving that a claimed FLSA exemption applies), and HDA does not appear to have introduced sufficient evidence to support the application of the exemption

In sum, the district court's reasoning was flawed in multiple respects. The court failed to acknowledge that individual coverage and enterprise coverage are two separate means to establish FLSA coverage. The court also failed to recognize that the scope of individual coverage differs from that of enterprise coverage. This led the court to apply inapposite criteria, based entirely on individual coverage cases, to reach an incorrect conclusion: that Plaintiffs were not covered by the FLSA. This reasoning cannot be affirmed. Instead, the Court should vacate the summary judgment decision and remand for the district court to conduct an enterprise coverage analysis based on current law, which requires evaluating whether HDA's employees handled or worked on goods or materials that previously moved in interstate commerce.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's summary judgment decision that HDA is not subject to the overtime pay provision of the FLSA because it and its employees were not "engage[d] in commerce." The

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here. For example, the MCA exemption does not apply to employees who operate vehicles lighter than 10,000 pounds, *McMaster v. E. Armored Servs., Inc.*, 780 F.3d 167, 169 (3d Cir. 2015), and there is no indication that HDA introduced evidence that the vehicles used by its technicians weighed more than 10,000 pounds. Thus, the court erred by opining that the technicians would fall under the MCA exemption.

Court should remand to the district court for application of the correct standard under 29 U.S.C. 203(s)(1).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 14, 2021, I electronically filed the foregoing Brief of the Secretary of Labor as *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF Electronic Filing System. All participants in the case are registered CM/ECF users and service on them will be accomplished by the appellate CM/ECF system.

s/ Sarah M. Roberts
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,321 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word 2016.

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