No. 17-15322

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

R. ALEXANDER ACOSTA, SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR,
Plaintiff-Appellee

v.

BLAND FARMS PRODUCTION & PACKING, LLC
Defendant-Appellant

On Appeal from the United States District Court
for the Southern District Of Georgia, Case No. 6:14-CV-00053-JRH

BRIEF OF APPELLEE

KATE S. O'SCANNLAIN
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

SARAH KAY MARCUS
Senior Attorney
U.S. Department of Labor
Office of the Solicitor, Room N-2716
200 Constitution Avenue, NW
Washington, D.C. 20210
(202) 693-5696

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-2(b), I hereby certify that the Certificate of Interested Persons and Corporate Disclosure Statement filed by Bland Farms in its opening brief is complete.

s/ Sarah Marcus
SARAH KAY MARCUS
Senior Attorney

STATEMENT REGARDING ORAL ARGUMENT

Although the Secretary of Labor will gladly participate in any oral argument scheduled by this Court, he does not believe that oral argument is necessary in this case because the issues presented on appeal may be resolved based on the district court's well-reasoned opinion and the parties' briefs filed with this Court.

TABLE OF CONTENTS

TABLE OF CITATIONS

Page

Cases:

Page

Cases--Continued:

Page

Cases--Continued:

Page

Cases--Continued:

Page

Statutes:

Code of Federal Regulations:

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that Bland Farms Production and Packing, LLC ("Bland Farms") could not properly claim the exemption from the overtime compensation requirement of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq*. ("FLSA" or "Act"), for employees "employed in agriculture," 29 U.S.C. 213(b)(12), as to workers who dried and packed Vidalia onions grown by other farmers where the court found that Bland Farms is not a farmer of those onions because, although it gives those growers advice about their operations, it does not plant or care for the onions, pay for seeds or other supplies, own the onions while they are in the growers' fields, or bear the risk of loss if the onions fail.

2. Whether the district court appropriately awarded liquidated damages in an amount equal to back wages owed to Bland Farms's packing shed employees for work performed after the Secretary of Labor ("Secretary") filed the complaint in this lawsuit where the district court determined that it was objectively unreasonable for Bland Farms to believe that the Department of Labor's interpretation of the agricultural exemption supported the company's position that it need not pay overtime compensation to those employees after the Secretary initiated litigation arguing to the contrary, and therefore such liquidated damages were mandatory under the FLSA, 29 U.S.C. 260.

STATEMENT OF THE CASE

This case is an FLSA enforcement action that the Secretary brought against Bland Farms for unpaid overtime compensation owed to over one thousand of that company's packing shed employees. Dkt. 1, Compl. & App. A (Bland App. vol. I, 12-22).[1] After a bench trial, the district court concluded that Bland Farms was not the farmer of onions it purchased from other nearby growers, meaning that Bland Farms's employees were not "employed in agriculture" while packing those onions, and therefore the exemption from the FLSA's overtime compensation requirement at 29 U.S.C. 213(b)(12) did not apply. Dkt. 109, July 31, 2017 District Court Order ("Decision") at 12-16 (Bland App. vol. IV, 847-51). The district court awarded $1,480,268.55 in damages—$968,725.36 in back wages and $511,543.19 in liquidated damages—for work packing shed employees performed during the Georgia Vidalia onion seasons from 2012 to 2017. Dkt. 119, Oct. 2, 2017 District Court Order ("Damages Award") at 2 (Bland App. vol. IV, 879). Bland Farms has appealed the district court's decision.

[1] Throughout this brief, initial citations to the record include the district court docket entry number ("Dkt.") and an identification of the document; subsequent citations use a designated term (*e.g.*, "Decision" or "Tr.") to refer to the relevant document. All record citations include both the original document page number(s) as well as, in parentheses, the corresponding Bates-stamped page number(s) (and volume number, if applicable), in either the appendix Bland Farms submitted with its opening brief ("Bland App.") or the supplemental appendix the Secretary submits with this response brief ("DOL App.").

A. Background

Bland Farms's overtime practices. Bland Farms is the largest vendor of sweet onions in the United States, selling approximately two million 40-pound boxes of such onions each year. Dkt. 109, July 31, 2017 District Court Order ("Decision") at 2 (Bland App. vol. IV, 837); Dkt. 106, Transcript of February 6 to 8, 2017 Bench Trial Proceedings ("Tr.") 393 (Bland App. vol. III, 614). The company was founded decades ago by Delbert Bland and his father. Decision at 2 (Bland App. vol. IV, 837); Tr. 436 (Bland App. vol. III, 657). Although Bland Farms now has formal corporate leadership from outside the Bland family, Delbert's son Troy Bland has a significant role in running the company. Tr. 394-95, 397, 588 (Bland App. vol. III, 615-16, 618; vol. IV, 809).

Bland Farms runs a packing shed, located in Georgia, where it employs workers to prepare onions for sale by, among other activities, drying and packing them. Decision at 2 (Bland App. vol. IV, 837); Dkt. 98, Attachment A to Amended Pretrial Order, Parties' Stipulations ("Stipulations") at 3 (Bland App. vol. I, 178). The onions the packing shed employees handle do not all come from the same source: Bland Farms grows Vidalia onions itself, and it also purchases sweet onions from other growers, including some who operate in Georgia. Decision at 2 (Bland App. vol. IV, 837); *see* Stipulations at 4-7 (Bland App. vol. I, 179-82) (noting that in 2012, Bland Farms purchased onions from 13 other Georgia

growers that totaled 39% of the onions processed at the packing shed during the Georgia Vidalia onion season; in 2013, six growers totaling 28%; and in 2014, three growers totaling 16%).

During the Georgia Vidalia onion season, which runs from roughly April through late summer each year, the packing shed employees regularly work more than 40 hours per workweek. Stipulations at 3-4 (Bland App. vol. I, 178-79); *see* DOL App. 12-23 (examples of packing shed employees' hours worked during the 2012 through 2017 Vidalia onion seasons reflecting many employee workweeks of more than 50 or 60 hours, and some of more than 70, 80, or 90 hours);[2] Tr. 363-64 (Bland App. vol. III, 584-85) (testimony that it was "typical" for packing shed employees to work until after midnight). Bland Farms paid the employees at or slightly above the Federal minimum wage of $7.25 per hour. *See* Tr. 368 (Bland App. vol. III, 589); DOL App. 12-23. During workweeks when

[2] Pages 12 to 23 of the Secretary's Appendix are excerpts from six lengthy documents containing charts showing each packing shed employee's hours worked in each workweek of the 2012 through 2017 seasons, as well as each employee's hourly pay rate and, based on those two numbers, the amount of unpaid overtime compensation due. The excerpted pages are the first page of each document (with headings identifying each column) and one additional page from another workweek in each season. The documents are district court docket numbers 142, 143, and 144, which, respectively, are Joint Exhibits 116, 117, and 118, showing calculations of unpaid overtime for the 2012, 2013, and 2014 seasons, and district court docket number 118, which includes Exhibits A, B, and C to the parties' Joint Stipulation of Back Wages Calculations for the 2015, 2016, and 2017 Vidalia Onions Seasons.

packing shed employees processed onions grown by Bland Farms or by the other Georgia growers, Bland Farms did not pay the packing shed employees any additional amount in overtime compensation. Decision at 8-9 (Bland App. vol. IV, 843-44); Stipulations at 3 (Bland App. vol. I, 178). [3]

Bland Farms's policy of not paying overtime compensation to employees processing onions purchased from other Georgia growers is longstanding. In the company's early years, Delbert Bland or one of his parents decided not to provide overtime pay to packing shed employees. Tr. 430 (Bland App. vol. II, 651).

In 1985, after having discussions with an investigator from the U.S. Department of Labor's Wage and Hour Division ("WHD"), Delbert Bland sought written guidance from WHD regarding "the difference in Agriculture vers[u]s Non-Agriculture in relation to buying onions in the field or at the packing shed." Dkt. 138, Joint Ex. 111, Letter from Delbert C. Bland to Alfred H. Perry (Feb. 27, 1985) at 1 (DOL App. 1); Tr. 430, 442-43 (Bland App. vol. II, 651, 663-64). WHD responded by letter, first describing the principle that "agriculture" includes "where workers are employed in a farm packing shed who '…as an incident to…' the farming operations of a farmer pack crops grown by their employer," but it

[3] Bland Farms also purchases sweet onions from more distant farmers, including some in Peru, that are ready for harvest at different times of year than those produced in Georgia. Stipulations at 3 (Bland App. vol. I, 178). When packing shed employees handled those onions, Bland Farms paid them overtime compensation for hours worked over 40 in a workweek. *Id.*

does not include employees' packing crops "not grown by their farmer/employer." Dkt. 138, Joint Ex. 112, Letter from Alfred H. Perry, Deputy Assistant Regional Administrator for WHD to Delbert C. Bland (March 5, 1985) ("1985 Letter") at 1-2 (DOL App. 2-3). WHD further explained that "[w]here a farmer purchases a field of onions, or other crop, prior to harvest—and where this purchase is clearly for whatever may come out of the field (versus so much per bag packed)—we consider that field to belong to the farmer who purchased it." 1985 Letter at 2 (DOL App. 3). By contrast, if "a farmer/packer … offer[s] so much per bag rather than [making] an offer to purchase the field," regardless of whether the per-bag offer "was made at the field or at the shed," the onions "are the property of another grower" and the packing is therefore not agricultural work. *Id.*[4]

After receiving this information, Bland Farms continued not to pay overtime compensation to packing shed employees during the Georgia Vidalia onion season. Tr. 443-44 (Bland App. vol. III, 664-65). Over the following decades, it became "common knowledge" at Bland Farms that when the company purchased fields of onions from other Georgia growers, it was not required to pay overtime compensation to packing shed employees. Decision at 9 (Bland App. vol. IV, 844); Tr. 429, 442-43 (Bland App. vol. III, 650, 663-62) (testimony of Delbert

[4] WHD's letter noted in closing that WHD "look[s] at every situation on a fact-by-fact basis" and asked that "if you have a more specific fact situation to present, please let me know." 1985 Letter at 2 (DOL App. 3).

Bland that he "just knew we understood the way we needed to operate"). Although Bland Farms did not keep a copy of the 1985 letter, this general understanding was passed on to Troy Bland. Decision at 9 (Bland App. vol. IV, 844); Tr. at 589, 591 (Bland App. vol. IV, 810, 812) (testimony of Troy Bland that "[i]t's been my understanding since early on if … we purchase all the onions in the field, then we can go to the agriculture exemption … and that's … always been Bland Farms'[s] practice").[5] Specifically, Troy Bland decided not to pay overtime during the 2012 through 2017 Georgia Vidalia onion seasons based on his belief that Bland Farms was buying the entirety of the other growers' onion fields and therefore packing shed employees were performing exempt agricultural work. Decision at 9 (Bland App. vol. IV, 844); Tr. 593, 595 (Bland App. vol. IV, 814, 816) (testimony of Troy Bland that although—as explained below—Bland Farms paid the growers for marketable onions produced, rather than offering a rate for the field determined before harvest, Troy Bland believed that Bland Farms was buying the entire field and using the number of marketable onions as "a way we come up with the value" of that field).

[5] Bland Farms did not have WHD's letter during the course of the investigation that preceded this lawsuit, nor did Bland Farms rely on the letter in its answer to the Secretary's complaint. *See* Dkt. 66, March 16, 2016 District Court Order ("Summ. J. Decision") at 7 (Bland App. vol. I, 41). The letter appears in the record of this case only because the Secretary produced it during discovery. Stipulations at 10 (Bland App. vol. I, 185).

Other growers' operations. The sweet onions Bland Farms purchased from other Georgia-based growers were the product of those growers' efforts and financial investments. The growers (or their employees) did the work of "preparing the seedbeds, planting the onions, transplanting the onions, fertilizing the onions, spraying herbicides and pesticides, irrigating the onions, and harvesting the onions." Decision at 4 (Bland App. vol. IV, 839); *see, e.g.*, Tr. 16-18, 23, 94-100, 153, 177-82, 186, 214-20, 290-92 (Bland App. vol. II, 237-239, 244, 315-21, 374, 398-402, 407, 435-41; vol. III, 511-13) (testimony of individual growers that they or their employees performed these tasks and did so using their own tractors and other equipment). The growers "paid all the expenses of growing the onions, including the seed, fertilizer, herbicide, pesticide, and labor costs." Decision at 4 (Bland App. vol. IV, 839); *see, e.g.*, Tr. 20, 101, 153, 177-82, 261, 290 (Bland App. vol. II, 241, 322, 374, 398-403; vol. III, 482, 511) (grower testimony that they paid these costs). Other than on rare occasions and with the expectation of reimbursement, Bland Farms did not provide labor or otherwise perform any farming tasks for the growers. Decision at 4-5 (Bland App. vol. IV, 839-40); *see, e.g.*, Tr. 43-44, 101-03, 188-89, 234 (Bland App. vol. II, 264-65, 322-24, 409-10, 455) (grower testimony that Bland Farms did not plant seeds, apply fertilizer, apply pesticide, transplant onions, or undercut onions on their fields); Tr. 29-30 (Bland App. vol. II, 250-51) (grower testimony that Bland Farms

would provide him cash advances and often hauled his onions to its packing shed, but Bland Farms deducted the value of those services from the amount it paid him at the end of the season).

The growers entered into agreements with Bland Farms in which they committed to selling sweet onions they grew on particular fields to the company, and Bland Farms typically agreed to pay the growers based on the marketable onions they produced. Decision at 5 (Bland App. vol. IV, 840).[6] Under this "pack-out" method of payment, the growers owned the onions until they were

[6] Bland Farms typically had informal, oral agreements with the growers, *see, e.g.*, Tr. 26, 186, 202, 212 (Bland App. vol. II, 247, 407, 423, 433), but in some years and with some growers, it entered into written contracts, *see, e.g.*, Tr. 26 (Bland App. vol. II, 247). Examples of such contracts in the record suggest that they were generally consistent with the manner in which the growers and Bland Farms conducted business in practice, as reflected in the trial testimony. Specifically, in one contract, the grower was required to "properly prepare, plant, grow and care for" a specified number of acres of Vidalia onions of a specified size and quality at the grower's "sole cost and expense"; the grower was "the sole and lawful owner of all the Onions" until title to them was transferred to Bland Farms; the grower was obligated to maintain crop insurance covering the value of the onions; Bland Farms had "the right, but not the obligation" to inspect the grower's operations; Bland Farms could "at its sole and absolute discretion … purchase or reject any Onions not meeting" the specifications; and the grower was "solely an independent contractor to Bland [Farms] hereunder and nothing herein contained shall be construed to create a partnership, agency, joint venture or other mutual enterprise or relationship of any kind." Dkt. 128, Joint Ex. 45, Agreement for Vidalia Sweet Onions between Bland Farms and Ashley Day (Nov. 21, 2011) ("JE 45") at 1-2, 4, 7 (DOL App. 4-5, 7, 10). The contract also required the grower to adhere to the direction of Bland Farms's "Quality Assurance Coordinator," but it did not specify what types of instructions were included in this reference or if any penalty resulted from non-compliance. *Id.* at 2 (DOL App. 5).

brought to Bland Farms's packing shed for weighing and evaluation of marketability, and Bland Farms did not pay the growers for onions that were not of sufficient quality to sell. Decision at 5, 6 (Bland App. vol. IV, 840, 841); Tr. 26, 30 (Bland App. vol. II, 247, 251) (grower testimony that "[t]he employees on the grading line at Bland Farms" would determine which onions were marketable and he would not be compensated for his unmarketable onions); Tr. 107, 110, 187, 204, 231-32, 269 (Bland App. vol. II, 328, 331, 408, 425, 452-53; vol. III, 490) (additional grower testimony that they were not paid for "bad onions"); *see* Tr. 29, 64, 123, 144-45, 270-71 (Bland App. vol. II, 250, 285, 344, 365-66; vol. III, 491-92) (testimony of five growers that they could make decisions about farming operations while the onions were in the fields because "they're my onions" or "it was my crop"). Therefore, the growers—who, as noted, made the financial investments in the growing onions—faced the risk of loss if the onions were ultimately not marketable. Decision at 5 (Bland App. vol. IV, 840). Indeed, the growers maintained insurance to protect against crop failure. Decision at 5 (Bland App. vol. IV, 840); *see, e.g.*, Tr. 104-05, 161, 230, 293 (Bland App. vol. II, 325-26, 382, 451; vol. III, 514).

Bland Farms's involvement with the growers' onions before bringing them to the packing shed was limited to providing advice about the growers' operations. Decision at 6 (Bland App. vol. IV, 841). In particular, Omar Cruz, Bland Farms's

Director of Farm Production and Chief Agronomist, gave the growers guidance regarding decisions such as which variety of seeds to plant, which fertilizers and pesticides to apply to the fields, and when to transplant and harvest the onions, all with the goals of minimizing the risk of failed crops and maximizing the production of marketable onions of Bland Farms's desired type and size. Decision at 6 (Bland App. vol. IV, 841); *see, e.g.*, Tr. 20-21, 48, 58, 130-31 (Bland App. vol. II, 241-42, 269, 279, 351-52) (grower testimony regarding Cruz's recommendations). Because the growers wanted to satisfy Bland Farms and raise their own incomes by successfully growing onions Bland Farms would purchase, they generally followed Cruz's recommendations. Decision at 6 (Bland App. vol. IV, 841); *see, e.g.*, Tr. 20-21, 63 (Bland App. vol. II, 241-42, 284) (grower testimony that he would "usually" follow Cruz's recommendations because the grower "looked at Bland Farms as the customer" and "tried to grow my crop according to what I would think would meet their standard to give them the product they were looking for").

Importantly, Bland Farms did not control the growers' operations: the growers made decisions regarding the farming of their onions, and they were not required to take Cruz's advice. Decision at 6-7 (Bland App. vol. IV, 841-42); Tr. 64 (Bland App. vol. II, 285) (grower testimony that he made the "final determination" about when to harvest onions); Tr. 74-82 (Bland App. vol. II,

295-303) (grower testimony that the "final decision" regarding what variety of seeds to plant, how to space the onion plants, what pesticides to apply, and when to move the onions from the seed bed to the field was his); Tr. 92 (Bland App. vol. II, 313) (grower testimony that he "would always talk to [Cruz] and [Cruz] would recommend [seed] varieties" but "[i]n the end it would be me" selecting the seeds); Tr. 144-45 (Bland App. vol. II, 365-66) (grower testimony that it was "ultimately [his] decision" when to transplant onions and how many seeds to plant per acre); Tr. 270 (Bland App. vol. III, 491) (grower testimony that "[i]t wasn't mandatory that I took [Cruz's] recommendations"). And in fact, the growers did not always follow Cruz's guidance. *See* Tr. 20-21 (Bland App. vol. II, 241-242) (grower testimony that if he already owned a pesticide similar to what Cruz recommended, he would use it instead of purchasing a new one, and that if he could not find a fertilizer Cruz recommended, he would buy a different type); Tr. 121-24 (Bland App. vol. II, 342-345) (grower testimony that he sometimes sprayed a different fungicide than Cruz recommended because an alternative type was less expensive, and he did not tell Cruz about that decision or feel that he needed to); Tr. 125-26 (Bland App. vol. II, 346-47) (grower testimony that he did not always plant the seed varieties that Cruz recommended, a fact Cruz knew but for which the grower faced no consequences); Tr. 190, 196 (Bland App. vol. II, 411,416) (grower testimony that Cruz would sometimes recommend "putting a more expensive

chemical out" on the field but the grower would "use[] a cheaper supplement chemical," a decision he might have mentioned to Cruz, although he "didn't have to" because he "didn't answer to [Cruz]"); Tr. 307 (Bland App. vol. III, 528) (grower testimony that he did not always use the fertilizers Cruz recommended). Bland Farms took no action to ensure that the growers took Cruz's advice. *See* Tr. 483-84 (Bland App. vol. III, 704-05) (testimony of Cruz that the consequence to the growers of not following his advice was a lower percentage of successful onions); Tr. 422-23 (Bland App. vol. III, 643-44) (testimony of Delbert Bland that there was no discipline or financial penalty for growers who did not follow Cruz's directions).

B. Procedural History and the District Court's Decisions

In 2013, WHD initiated an investigation of Bland Farms's compliance with the FLSA, which revealed Bland Farms's practice of not paying overtime compensation to packing shed employees during the Georgia Vidalia onion season. Decision at 3 (Bland App. vol. IV, 838). Bland Farms maintained that it was not violating the FLSA because the agricultural exemption to the FLSA's overtime requirement applied. Decision at 9 (Bland App. vol. IV, 844).[7]

[7] Bland Farms has conceded that it would be obligated to comply with FLSA requirements in the absence of an applicable exemption. *See* 29 U.S.C. 203(s)(1)(A), 206(a), 207(a) (defining "an enterprise engaged in commerce" and requiring such entities to pay minimum wage and overtime compensation to their

On May 29, 2014, the Secretary filed this action. *See* Dkt. 1, Compl. (Bland App. vol. I, 12-15). After discovery, the parties cross-moved for summary judgment on the issue of whether the agricultural exemption at 29 U.S.C. 213(b)(12) applied to the packing shed employees during the Georgia Vidalia onion season. *See* Summ. J. Decision at 1, 11-12 (Bland App. vol. I, 35, 45-46). The district court explained that for purposes of the exemption, the packing shed employees are engaged in "agriculture" only if their work "'relate[s] to the farmer's'"—that is, the employer's—"'own farming operations and not to the farming operations of others ….'" *Id.* at 13 (Bland App. vol. I, 47) (quoting *Mitchell v. Huntsville Wholesale Nurseries, Inc.*, 267 F.2d 286, 290 (5th Cir. 1959)). The applicability of the exemption, therefore, turned on whether Bland Farms was engaged in "primary agriculture" with respect to the other growers' onions. *Id.* Because of conflicting evidence relevant to a determination of whether Bland Farms was a farmer of the growers' onions—in particular, whether Cruz controlled the growers' operations or merely provided advice, as well as whether Bland Farms purchased, and therefore owned, the growers' entire fields of onions while those onions were still in the fields—the district court

employees); Stipulations at 1 (Bland App. vol. I, 176) (stipulating that Bland Farms meets the statutory definition of "an enterprise engaged in commerce").

concluded that it could not grant summary judgment to either party. *Id.* at 15-17 (Bland App. vol. I, 49-51).[8]

The district court subsequently held a bench trial. Eight Georgia-based growers who sold sweet onions to Bland Farms during the relevant seasons testified, as did Delbert Bland, Troy Bland, Omar Cruz, and a manager of the packing shed employees. Tr. 2, 358-59 (Bland App. vol. II, 223; vol. III, 579-80).

After trial, the district court issued an opinion concluding that Bland Farms had violated the FLSA because the agricultural exemption did not apply to the company's packing shed employees, and awarding back wages as well as partial liquidated damages. Decision at 2 (Bland App. vol. IV, 837). In its opinion, the district court again described the relevant law regarding the scope of the exemption from the FLSA's overtime requirement for employees "employed in agriculture," including by summarizing the facts of two cases addressing analogous circumstances. Decision at 11-15 (Bland App. vol. IV, 846-50). In *Mitchell v. Huntsville Wholesale Nurseries*, 267 F.2d 286 (5th Cir. 1959), the district court explained, the Fifth Circuit determined that a nursery stock wholesaler was not the farmer of plants it sold where it provided growers from whom it purchased plants with advice, financial advances, and other assistance but did not own the plants

[8] The district court also denied summary judgment as to whether Bland Farms could properly claim "a good-faith defense" from liquidated damages. Summ. J. Decision at 20-21 (Bland App. vol. I, 54-55).

before purchasing only those "deemed merchantable." Decision at 14-15 (Bland App. vol. IV, 849-50) (citing *Huntsville*, 267 F.2d at 291). In *Wirtz v. Tyson's Poultry, Inc.*, 355 F.2d 255 (8th Cir. 1966), by contrast, the district court explained, the Eighth Circuit held that a company was a farmer of eggs its employees processed because it was "completely integrated" with the contractors who raised the chickens that laid the eggs; specifically, the egg processor "provided all the feed and medicine for the chickens" and "owned the chickens and the eggs throughout the whole process," meaning it "bore the risk of loss." Decision at 15 (Bland App. vol. IV, 850) (citing *Tyson's Poultry*, 355 F.2d at 256-58).

The district court determined, in light of several factual findings it made on the basis of the evidence presented at trial, that the circumstances of the case before it were more like those in *Huntsville* than those in *Tyson's Poultry*. Decision at 16 (Bland App. vol. IV, 851). Specifically, "Bland Farms did not own the onions throughout the growing process"; rather, the growers owned them. Decision at 6, 16 (Bland App. vol. IV, 841, 851). Moreover, "[t]he contract growers carried the risk of loss." Decision at 5, 16 (Bland App. vol. IV, 840, 851) (finding that "[t]he risk of loss … was on the contract growers throughout the entire growing process" because "Bland Farms took no responsibility for the onions until it purchased them" and generally only paid for marketable onions). In addition, the growers "paid all the expenses of growing the onions," such as those

for labor, seeds, and pesticides; to the extent Bland Farms provided any financial or other assistance, it "always deducted the amounts advanced and the costs of its services from what it paid the growers." Decision at 4-5, 16 (Bland App. vol. IV, 839-40, 851). And although Cruz made recommendations to the onion growers as the growers performed the tasks—such as planting, fertilizing, and irrigating—necessary to growing onions, he "could not require them to follow his advice." Decision at 4, 6, 16 (Bland App. vol. IV, 839, 841, 851) (finding that the growers farmed the onions and that Cruz "did not control the contract growers' operations"; instead, he "made suggestions" and "the contract growers made the final decision about how they grew their onions"). Based on these facts, "Bland Farms was not the farmer of the onions grown by the contract growers," and the agricultural exemption therefore "did not apply to the packing-shed employees." Decision at 16 (Bland App. vol. IV, 851).

Because Bland Farms violated the FLSA by not paying overtime to its packing shed employees, the district court awarded back wages to those employees in amounts to which the parties stipulated. Decision at 17 (Bland App. vol. IV, 852) (award of damages for 2012, 2013, and 2014 seasons); Damages Award at 2 (Bland App. vol. IV, 879) (additional award of damages for 2015, 2016, and 2017 seasons). The total back wages due to more than one thousand employees for the

six Vidalia onion seasons at issue was $968,725.36. Damages Award at 2 (Bland App. vol. IV, 879).

The district court next considered whether to award liquidated damages, noting that under the FLSA "courts must typically" include them "in an amount equal to the actual damages awarded," though it may reduce the amount if the employer shows that it "acted in good faith and with the reasonable belief that it was complying with the FLSA," that is, "'that it acted with both objective and subjective good faith.'" Decision at 17-18 (Bland App. vol. IV, 852-53) (citing 29 U.S.C. 216(b), 260; quoting *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1271 (11th Cir. 2008)). Based on the 1985 letter and Troy Bland's inheritance of the "common knowledge at Bland Farms" that resulted from it, the district court determined that Bland Farms "acted in good faith and with the reasonable belief that it was in compliance with the FLSA from the date it received the [1985] letter from the DOL official until the date [the Secretary] filed this lawsuit." Decision at 19-20 (Bland App. vol. IV, 854-55). Accordingly, the district court exercised its discretion to not award liquidated damages with respect to back wages accrued during that time period (that is, between 2012 and the initiation of this lawsuit). Decision at 21 (Bland App. vol. IV, 856). Once the Secretary filed a complaint and thereby made unquestionably clear that in his view Bland Farms could not properly claim the agricultural exemption, the district court

determined that although Bland Farms still subjectively believed it was not required to pay overtime compensation, its reliance on WHD's support for that understanding was no longer objectively reasonable. Decision at 20 (Bland App. vol. IV, 855). Therefore, the court awarded liquidated damages in the amount of $511,543.19, an amount equal to the back wages accrued after May 29, 2014, the date the Secretary brought this action. Decision at 21 (Bland App. vol. IV, 856); Damages Award at 2 (Bland App. vol. IV, 879).[9]

STANDARD OF REVIEW

After a bench trial, this Court reviews a district court's legal conclusions, and its "application of the law to facts," de novo. *U.S. Commodity Futures Trading Comm'n v. S. Tr. Metals, Inc.*, 880 F.3d 1252, 1259-60 (11th Cir. 2018) (citing *HGI Assocs., Inc. v. Wetmore Printing Co.*, 427 F.3d 867, 873 (11th Cir. 2005); *United States v. Frank*, 599 F.3d 1221, 1228 (11th Cir. 2010)).

As to the district court's factual findings, this Court is "obliged to accept them unless they are clearly erroneous." *Eggers v. Alabama*, 876 F.3d 1086, 1094 (11th Cir. 2017) (citing *Ford v. Haley*, 195 F.3d 603, 617 (11th Cir. 1999)). The

[9] The district court also concluded that Delbert Bland was not individually liable for Bland Farms's FLSA violations, that the agricultural exemption did not apply to time the packing shed employees spent handling onions bought through "spot purchases," and that an injunction prohibiting Bland Farms from violating the Act was not warranted. Decision at 21-25 (Bland App. vol. IV, 856-60). These portions of the opinion are not challenged on appeal.

clear error standard is "highly deferential," and a reviewing court "'may not reverse [the district court's factfinding] even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *Id.* at 1094-95 (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985)).

A district court's authority not to award liquidated damages in an amount equal to back wages owed due to an FLSA violation turns on "'mixed questions of fact and law'" related to the employer's subjective good faith and objective reasonableness. *Dybach v. Fla. Dep't of Corrs.*, 942 F.2d 1562, 1566 (11th Cir. 1991) (quoting *Bratt v. Cty. of L.A.*, 912 F.2d 1066, 1071-72 (9th Cir. 1990)). Therefore, this Court "'review[s] such questions de novo to the extent they involve application of legal principles to established facts, and for clear error to the extent they involve an inquiry that is essentially factual.'" *Id.* (quoting *Bratt*, 912 F.2d at 1071). If an employer establishes that it acted in good faith and with a reasonable belief that it was in compliance with the FLSA, a district court may choose whether to reduce a liquidated damages award, and this Court reviews that "ultimate decision … only for an abuse of discretion." *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1272 (11th Cir. 2008) (citing 29 U.S.C. 260).

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's opinion with respect to both of the issues on appeal.

1. The agricultural exemption does not apply to the packing shed employees in workweeks during which those employees process other Georgia growers' onions. An employer may claim an exemption from the FLSA's overtime compensation requirement if it can show that its employees are "employed in agriculture." 29 U.S.C. 213(b)(12); *see* 29 U.S.C. 203(f) (defining "[a]griculture"). Longstanding precedent makes clear that employees who perform tasks such as drying and packing crops are engaged in "secondary agriculture" only if their employer was a farmer of those crops, or, in other words, only if their employer performed the "primary agriculture" to which the drying and packing is incident. *See, e.g.*, *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 766 n.15 (1949); *Sweetlake Land & Oil Co. v. NLRB*, 334 F.2d 220, 223 (5th Cir. 1964). Caselaw also makes clear that whether an entity is a farmer of particular agricultural commodities depends on factual circumstances such as whether that entity performs or controls the work of growing the crops; pays for supplies and equipment used to grow the crops; owns the crops while they are growing; and bears the risk of loss should the crops fail. *See, e.g.*, *Mitchell v. Huntsville Wholesale Nurseries, Inc.*, 267 F.2d 286, 288 n.2, 291 (5th Cir. 1959).

In this case, the district court found that the growers, not Bland Farms, paid for supplies and equipment; the growers, not Bland Farms, owned the onions until Bland Farms purchased them after harvest; the growers, not Bland Farms, faced the risk of loss because Bland Farms paid only for marketable onions the growers successfully produced; and although Bland Farms provided advice to the growers, the growers, not Bland Farms, controlled the growers' farming operations. Bland Farms asserts that it provided direction rather than advice to the growers and that the district court erred by distinguishing the facts of this case from those in *Tyson's Poultry*, but these arguments should not prevail. First, the court's factual findings—which include several significant facts Bland Farms does not contest in addition to the fact that Cruz's recommendations constituted non-binding advice—are amply supported by the record and therefore are not clearly erroneous. Second, in light of controlling precedent—and consistent with *Tyson's Poultry*—those properly found facts plainly lead to the conclusion that Bland Farms was not a farmer of the growers' sweet onions. A different determination would constitute a novel and inappropriate application of the agricultural exemption.

2. The district court's award of partial liquidated damages was appropriate. Under the FLSA, liquidated damages in an amount equal to the back wages due are mandatory unless an employer has proved that it acted with both subjective good faith and objective reasonableness in failing to pay its employees in compliance

with the Act. *See* 29 U.S.C. 216(c), 260; *Dybach*, 942 F.2d at 1566-67. If a district court finds that the employer has met this burden, it may but need not reduce the liquidated damages award. *See* 29 U.S.C. 260.

Here, the district court found that Bland Farms's general understanding, which first arose from a letter WHD wrote in 1985, that the company could claim the agricultural exemption when it purchased a full field of onions from another grower was initially sufficient to show subjective good faith and objective reasonableness. Based on that determination, the court exercised its discretion not to award liquidated damages corresponding to unpaid overtime compensation for the 2012, 2013, and early 2014 seasons. The court also found, however, that Bland Farms's position became objectively unreasonable after WHD filed this lawsuit against the company, at which point Bland Farms could no longer reasonably believe that WHD's interpretation supported Bland Farms's reliance on the exemption. Because liquidated damages were therefore mandatory, the court awarded them in an amount equal to unpaid overtime compensation for the remainder of the 2014 season, as well as for the 2015, 2016, and 2017 seasons. The district court's focus on Bland Farms's knowledge of WHD's position was appropriate and consistent with this Court's reasoning in other FLSA cases addressing liquidated damages. *See, e.g.*, *Spires v. Ben Hill Cty.*, 980 F.2d 683, 690 (11th Cir. 1993).

ARGUMENT

I. THE AGRICULTURAL EXEMPTION FROM THE FLSA'S OVERTIME REQUIREMENT DOES NOT APPLY WHEN BLAND FARMS'S EMPLOYEES PROCESSED ONIONS GROWN BY OTHER FARMERS

A. "Agriculture" Does Not Include Work Performed Incident to Another Farmer's Operations, and Facts Including Who Invests in and Owns Crops as They Grow, as Well as Who Faces the Risk of Loss if the Crops Fail, Are Critical to Determining Who is a Farmer.

1. The FLSA sets minimum wage and overtime compensation requirements for "'the prime purpose'" of "'aid[ing] the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.'" *Bailey v. TitleMax of Ga., Inc*., 776 F.3d 797, 800 (11th Cir. 2015) (quoting *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945)). The Act therefore generally applies unless an employer establishes that it can properly claim an exemption from FLSA requirements. *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1156 (11th Cir. 2008) (explaining that the employer "shoulders the burden of establishing that it is entitled to an exemption" (citing *Evans v. McClain of Ga., Inc.*, 131 F.3d 957, 965 (11th Cir. 1997))).

An exemption from the FLSA's overtime requirement applies to "any employee employed in agriculture." 29 U.S.C. 213(b)(12). For purposes of the Act, "agriculture" means "farming in all its branches." 29 U.S.C. 203(f). This

definition includes traditional farming practices such as "the production, cultivation, growing, and harvesting of any agricultural … commodities," *id.*, which courts refer to as the "primary" meaning of the term, *see, e.g.*, *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 763 (1949); 29 C.F.R. 780.105(b). It also includes "any practices … performed by a farmer or on a farm as an incident to or in conjunction with such farming operations," such as "preparation for market." 29 U.S.C. 203(f). Courts call these incidental practices the "'secondary meaning'" of the term. *Ares v. Manual Diaz Farms, Inc.*, 318 F.3d 1054, 1056 (11th Cir. 2003) (quoting *Hodgson v. Idaho Trout Processors Co*., 497 F.2d 58, 59 (9th Cir. 1974)); *see, e.g.*, 29 C.F.R. 780.105(c).[10]

Secondary agriculture does not include work that is incidental to primary agriculture conducted by a different farmer. *See* 29 U.S.C. 203(f) (defining "agriculture" to include "growing, and harvesting … and any practices …

[10] There is no dispute that Bland Farms's packing shed employees were not performing primary agriculture. *See* Decision at 13 (Bland App. vol. IV, 848) ("Bland Farms contends that it was [not required to pay overtime] because the packing-shed employees were engaged in secondary agriculture."); Opening Brief of Bland Farms ("Bland Br.") 30 (arguing that Bland Farms performs primary agriculture because it is a farmer of the growers' onions, not because of work that occurs at the packing shed); *see Holly Farms*, 517 U.S. at 398, 399-400 & n.7 (quoting the statutory language reflecting that "preparation for market" is secondary agriculture, and indicating that raising chickens is primary agriculture but activities that occur after harvesting, including collecting and transporting chickens, is secondary agriculture (quoting 29 U.S.C. 203(f))).

performed by a farmer or on a farm as an incident to or in conjunction with *such* farming operations" (emphasis added)); 29 C.F.R. 780.402 (explaining that the agricultural exemption does not apply to practices that are not "performed by [the farmer] as an incident to or in conjunction with his own farming operations").[11] The Supreme Court first explained this principle in 1949. *See Farmers Reservoir*, 337 U.S. at 766 n.15 (explaining that "processing, on a farm, of commodities produced by other farmers is incidental to or in conjunction with the farming operation of the other farmers" rather than "incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done," meaning that such processing does not constitute agriculture under the FLSA (citing *Bowie v. Gonzalez*, 117 F.2d 11 (1st Cir. 1941))). And this Court has repeatedly affirmed and applied it. *See, e.g.*, *Rodriguez v. Pure Beauty Farms, Inc.*, 503 F. App'x 772, 774-75 (11th Cir. 2013) (unpublished) (explaining that a practice only constitutes secondary agriculture if, among other things, it is performed "in connection with the farmer's own farming operations," that is, not "when employees are engaged in practices performed in connection with the farming operations of *another* farmer" (quoting 29 C.F.R. 780.129; citing

[11] Work that occurs on the same farm as the relevant primary agriculture, even if performed by employees of a different employer, can also constitute secondary agriculture. *See, e.g.*, 29 C.F.R. 780.129; *Sariol v. Fla. Crystals Corp.*, 490 F.3d 1277, 1280 (11th Cir. 2007). Because Bland Farms's packing shed is not located on the growers' farms, this principle is not relevant to this case.

29 C.F.R. 780.137)); *Marshall v. Gulf & W. Indus., Inc.*, 552 F.2d 124, 126 (5th Cir. 1977) (holding that because a company's employees processed "tomatoes grown by independent farmers," the company could not claim the agricultural exemption as to their work); *Chapman v. Durkin*, 214 F.2d 360, 363 (5th Cir. 1954) (holding that employees of a fruit seller were not engaged in agriculture when they hauled fruit away from growers' farms because their employer "was not a farmer or producer" of those crops).[12]

This interpretation of the scope of secondary agriculture imposes a rational and important limit on the meaning of "agriculture" that avoids creating "a rule that anything that aids farming … is within the exemption." *Huntsville*, 267 F.2d at 291 (explicitly rejecting the notion that understanding agriculture to include tasks related to crops grown by another farmer would only be "giv[ing] a broad construction to the statutory exemption" because activities including "furnishing a steady market, certain outlets, [and] general aid and assistance to the farmer" are plainly not farming and therefore are outside of the exemption altogether); *see Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (noting that "courts must take care to assure that exemptions from [coverage under the National Labor Relations Act, which imports the term "agriculture" from the FLSA] are not

[12] As this Court is well aware, all decisions of the former Fifth Circuit issued prior to October 1, 1981 are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

so expansively interpreted as to deny protection to workers the Act was designed to reach" (citing *NLRB v. Cal-Maine Farms, Inc.*, 998 F.2d 1336, 1339 (5th Cir. 1993))); *Farmers Reservoir*, 337 U.S. at 764 (rejecting the argument that "the [agricultural] exemption should include not only the occupation named but also all of those other occupations whose work is necessary to it" because Congress plainly did not intend to "convey that meaning").

2. The fundamental question in this case, therefore, is whether Bland Farms is a farmer of the sweets onions it purchases from the other Georgia-based growers.[13] Controlling caselaw makes clear that various facts about an entity's involvement with the operations of a separate grower are central to this determination.

In *Huntsville*, 267 F.2d 286, the Fifth Circuit concluded that a nursery was not a farmer of roses it purchased from other growers based on facts found by the district court, including that the growers planted, tended, and cared for the roses; hired and paid workers to assist with those tasks; owned or leased the land on which they grew the roses; owned the tractors and other equipment they used to

[13] It is well settled that if the packing shed employees' work processing the growers' sweet onions is non-exempt, the employees must receive overtime compensation for workweeks during which they handled those onions even if they also processed onions grown by Bland Farms. *See, e.g.*, *Gulf & W. Indus.*, 552 F.2d at 126 ("If employees are engaged both in exempt and non-exempt work, the [FLSA] applies to the entirety." (citing *Skipper v. Superior Dairies, Inc.*, 512 F.2d 409, 411 (5th Cir. 1975))).

farm; and received payment from the nursery for "each merchantable plant produced" rather than for their labor or for flowers that failed. *Id.* at 288 n.2, 291. Notably, the facts that the nursery "contribute[d] counsel and advice," sometimes made cash advances to the growers, and otherwise assisted the growers "as the purchaser" did not change the court's determination. *Id.* at 291. Because the roses were the product of "the farming of others," the nursery was not entitled to claim the agricultural exemption as to employees who packed the flowers at its warehouse. *Id.*[14]

The Fifth Circuit reiterated its focus on investment, risk, and ownership in addressing this issue in the years after *Huntsville*. In *Sweetlake Land & Oil Co. v. NLRB*, 334 F.2d 220 (5th Cir. 1964), the Court held that the agricultural exemption did not apply to employees of a landowner who dried rice where that rice "belonged … in every respect" to tenant farmers, even though the landowner "oversees the entire farming operation," "supplies land, seed, water and half the fertilizer in return for half the crop," "determines the varieties of rice to be grown" and "determines the policies with respect to fertilizers, irrigation and the like."

[14] WHD has relied on *Huntsville* in interpreting the agricultural exemption's parameters since 1961. *See* 26 Fed. Reg. 10,377, 10,387 (Nov. 3, 1961) ("Where crops are grown under contract with a person who provides a market, contributes counsel and advice, makes advances and otherwise assists the grower who actually produces the crop, it is the grower and not the person with whom he contracts who is the farmer with respect to that crop." (citing *Huntsville*, 267 F.2d 286)) (currently codified at 29 C.F.R. 780.132).

Id. at 221, 223 (citing *Huntsville*, 267 F.2d at 290). And in *Wirtz v. Osceola Farms Co.*, 372 F.2d 584 (5th Cir. 1967), the Court concluded that a miller of sugar cane could not claim the agricultural exemption with respect to employees who drive sugar cane from growers' fields to the mill. *Id.* at 587. The growers, whose farms were in the same county in which the mill was located, "agreed to plant, cultivate, grow and produce" sugar cane; although mill employees "cut the cane in the fields of the independent growers," the Court concluded that the miller "is not the 'farmer' referred to" in the FLSA's definition of agriculture because the grower paid the costs of labor and equipment and the miller took title to the sugar cane "at the mill," such that "risk of loss or destruction prior to delivery at the mill [was] on the grower." *Id.* at 586, 588.[15]

Cases in which courts, and in particular this Court, have deemed an employer a farmer of the agricultural commodities in question have involved

[15] The Second Circuit applied similar reasoning in *Wirtz v. Jackson & Perkins*, 312 F.2d 48 (2d Cir. 1963), holding that a nursery could not claim the agricultural exemption as to work its employees performed on plants the nursery purchased from other growers. *Id.* at 51. The court considered the facts that the growers planted and cultivated the plants, "provided the land, labor and equipment," "bore any losses due to crop failures," and were paid by the nursery "at a price calculated per saleable plant." *Id.* That the nursery provided roots to the growers and that the vast majority of the nursery's stock was plants of which it was plainly the farmer—the plants at issue represented less than two percent of the nursery's sales in two relevant seasons, and less than three percent in a third—did not change the court's view. *Id*.

markedly different arrangements. In *Wirtz v. Tyson's Poultry, Inc.*, 355 F.2d 255 (8th Cir. 1966), the Eighth Circuit concluded that an egg processor was the farmer of eggs produced by other growers. The processor provided "hens, food, litter, medication and nest pads" to the growers, "controlled and made all important decisions regarding the production of eggs," and assumed all of the risk involved, including any loss resulting from changes to the price of eggs, the health of the chickens, or "the cost of feed or medication." *Id*. at 256-57. The growers "followed instructions" from the processor in addition to "furnish[ing] the house [and] utilities" and "perform[ing] the day-to-day labor such as feeding and watering the flocks, cleaning the pens, and gathering the eggs." *Id*.[16]

The Fifth Circuit relied on *Tyson's Poultry* when it determined in *NLRB v. Strain Poultry Farms, Inc*., 405 F.2d 1025 (5th Cir. 1969), that a poultry

[16] The court noted six facts that distinguished the case before it from *Huntsville*: (1) who bore the risk of loss; (2) whether the growers were agents of the employer (in *Huntsville*, the growers sold plants to entities other than the nursery, but in *Tyson's Poultry*, the growers "are clearly agents … through whom [the processor] operated their egg producing business"); (3) who paid for farming supplies; (4) whether the growers and employer were physically distant (in *Huntsville*, the rosebushes were located 500 miles from the warehouse, but in *Tyson's Poultry*, "there was no geographic distance factor involved"); (5) whether the employer purchased the fully grown agricultural commodities or instead "owned [them] from the beginning"; and (6) who owned the material in which the commodity grew (in *Huntsville*, the nursery did not own the soil, but in *Tysons' Poultry*, the egg processor owned the chickens). *Tyson's Poultry*, 355 F.2d at 259-60 (citing *Huntsville*, 267 F.2d at 289 & n.2).

company's truck drivers were "engaged in agriculture" when they transported chickens largely raised by other growers but at all times owned and partially cared for by the company. *Id.* at 1026-27. In that case, the growers "supply the henhouses" and "feed, water and generally look after the birds," but the poultry company supplied the birds, bought feed and medicine, "retains ownership" of the chickens, employed workers who "provide specialized services such as debeaking and vaccinations," and paid the growers a minimum guarantee per pound such that "[t]he risk of market loss remains at all times with" the poultry company. *Id.*; *see id.* at 1031, 1033 (noting that the growers had "a similar relationship to" this poultry company as the egg producers had to the egg processor in *Tyson's Poultry*, and distinguishing *Hunstville*, in which the nursery purchased the plants, because the poultry company owned the chickens the growers raised rather than buying them upon delivery).

B. The District Court's Factual Findings—Specifically, That the Growers Rather than Bland Farms Owned the Growing Onions, Faced the Risk of Loss, Paid for Labor and Supplies, and Controlled The Farming Operations—Were Not Clearly Erroneous.

In this case, the district court's conclusion that Bland Farms was not a farmer of the growers' onions was based on several factual findings: (1) the growers, not Bland Farms, owned the onions while they were growing in the fields; (2) the growers, not Bland Farms, faced the risk of loss; (3) the growers, not Bland Farms, paid for labor and supplies; and (4) through Omar Cruz, Bland Farms gave

advice regarding, rather than exercised control over, the growers' farming operations. Decision at 4-6, 16 (Bland App. vol. IV, 839-41, 851). As explained above, this Court reviews factual findings for clear error. *See Eggers*, 876 F.3d at 1094. The district court's findings here far exceed the threshold for satisfying this "highly deferential" standard of review. *Id.*

1. Bland Farms does not dispute that the growers, not Bland Farms, owned the growing onions. *See generally* Bland Br. Moreover, this finding is supported by the testimony of several growers who directly stated that the onions belonged to them. Tr. 29, 64, 123, 144-45, 270-71 (Bland App. vol. II, 250, 285, 344, 365-66; vol. III, 491-92). Although Bland Farms arranged to buy the onions early in the season, it did not take possession of them or determine the amount owed to the growers until the onions were hauled to the packing shed to be assessed for marketability and weighed. Tr. 26, 30 (Bland App. vol. II, 247, 251); *see* JE 45 at 2 (DOL App. 5) (sample written agreement between Bland Farms and a grower providing that the grower is "the sole and lawful owner of all the Onions" until title to them is transferred to Bland Farms).

2. That the growers faced the risk of loss is shown by the uncontested fact, to which growers testified, that Bland Farms almost always paid the growers based on the number of onions they grew that met standards for marketability. Tr. 107, 110, 187, 204, 231-32, 269 (Bland App. vol. II, 328, 331, 408, 425, 452-53; vol.

III, 490). The growers hoped each season that their income from Bland Farms would exceed their investment in the onions. *See, e.g.*, Tr. 203 (Bland App. vol. II, 424). If the crop failed—whether because of weather, disease, or mistakes the growers made—Bland Farms would not pay the growers; indeed, the growers carried crop insurance to protect themselves from that very possibility. *See, e.g.*, Tr. 104-05, 161, 186, 293 (Bland App. vol. II, 325-26, 382, 407; vol. III, 514).

3. Evidence also plainly supports the district court's finding—which Bland Farms does not contest—that the growers paid for the labor, supplies, and equipment used to grow the onions. The growers testified that they purchased seeds, *see, e.g.*, Tr. 15, 92, 177 (Bland App. vol. II, 236, 313, 398), purchased fertilizer, *see, e.g.*, Tr. 153, 220, 290 (Bland App. vol. II, 374, 441; vol. III, 511), purchased pesticides, *see, e.g.*, Tr. 13, 180, 264 (Bland App. vol. II, 234, 401; vol. III, 485), paid for the assistance of farmworkers, *see, e.g.*, Tr. 180, 214, 344 (Bland App. vol. II, 401, 439; vol. III, 565), and used their own tools and equipment, *see, e.g.*, Tr. 17, 23, 181, 262, 290 (Bland App. vol. II, 238, 244, 402; vol. III, 483, 511).

4. Finally, the district court's finding that Cruz provided the growers with guidance rather than mandatory direction is amply supported by evidence presented at trial. The growers testified that they or their employees planted seeds, applied fertilizer and pesticide, moved young plants from seed beds to fields, and

harvested onions, and that they were not required to perform any of those tasks pursuant to Cruz's recommendations. Tr. 16-18, 23, 64, 74-75, 76, 79, 81-82, 92, 94-100, 144-45, 153, 177-82, 186, 214-20, 270, 290-92 (Bland App. vol. II, 237-39, 244, 285, 295-96, 297, 300, 302-03, 313, 315-21, 365-66, 374, 398-403, 407, 435-41; vol. III, 491, 511-13). Nevertheless, although Bland Farms generally does not dispute that the growers performed these farming tasks,[17] it does contest the district court's finding regarding Cruz's role, arguing that Cruz "directed" the growers' operations rather than providing "'input' and 'advice.'" Bland Br. 32, 34-35. Bland cites to trial testimony from Cruz and some growers that it asserts supports a finding that Cruz had a "supervisory" role over the growers. *Id.* at 35.

But the evidence to which Bland Farms points does not call the court's sound factual finding that Cruz did not control the growers' operations into serious question, because nothing in the record contradicts several growers' testimony that

[17] Bland Farms does note that in some relevant years its employees harvested onions on behalf of up to three growers. Bland Br. 21, 34. But Bland Farms charged the growers for its assistance with harvesting. *See* Decision at 4-5 (Bland App. vol. IV, 839-40) (district court findings that "Bland Farms would occasionally provide labor to the contract growers" but that "Bland Farms always charged the contract growers for any assistance it provided"); Tr. 158-59, 223, 227, 341 (Bland App. vol. II, 379-80, 444, 448; vol. III, 562) (grower testimony that Bland Farms recouped the costs of assisting growers with harvesting). This activity therefore plainly does not convert Bland Farms into a farmer. *See Osceola Farms*, 372 F.2d at 586, 588 (noting that a sugar cane miller "cut the cane in the fields of the independent growers, and the labor and equipment costs are assessed to the grower" in determining that the miller was not a farmer of the cane).

in practice they did not always follow Cruz's advice, and Bland Farms's own witnesses testified that there were no consequences for such deviations from Cruz's recommendations. Tr. 20-21, 121-26, 190, 196, 307, 422-23, 483-84 (Bland App. vol. I, 241-42, 342-47, 411, 417; vol. III, 528, 643-44, 704-05). Moreover, even if some testimony regarding Cruz's authority could have supported a finding that Cruz directed the farmers' work, that circumstance is insufficient to show clear error where other evidence plainly supports the finding the district court made, that is, that Cruz provided useful but non-binding advice. *See Eggers*, 876 F.3d at 1095 ("[W]e cannot substitute our interpretation of the evidence for that of the trial court simply because we 'might give the facts another construction [or] resolve the ambiguities differently.'" (quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 857 (1982))); *see Anderson*, 470 U.S. at 573-74 ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it …." (citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949))).

C. The Facts of This Case Can Lead Only to the Conclusion that Bland Farms Was Not a Farmer of the Growers' Onions.

1. The district court correctly applied the law to the facts of this case in concluding that Bland Farms is not a farmer of the growers' onions. Contrary to Bland Farms's suggestion that this case raises an issue of first impression, Bland Br. 27, the circumstances here are similar to those in which this Court has

concluded that the agricultural exemption did not apply: the growers own the sweet onions while they are in the fields; pay for supplies, equipment, and labor; and bear the risk of crop failure because Bland Farms pays only for marketable onions produced; for its part, Bland Farms provides advice to help the growers produce as many healthy sweet onions as possible, but it does not control the growers' operations. *See Huntsville*, 267 F.2d at 288 n.2, 291 (holding that a nursery was not a farmer where the growers planted and tended roses; arranged and paid for farm labor; owned or leased the fields; owned the equipment used for farming; and were paid per marketable plant, even though the nursery "contribute[d] counsel and advice," sometimes made cash advances to the growers, and otherwise assisted the growers); *Osceola Farms*, 372 F.2d at 586-88 (holding that a miller of sugar cane was not a farmer even though the miller's employees' "cut the cane in the fields of the independent growers," because the growers "agreed to plant, cultivate, grow and produce" sugar cane and paid the costs of labor and equipment, and the miller took title to the sugar cane "at the mill," such that "risk of loss or destruction prior to delivery at the mill [was] on the grower"); *see also Wirtz v. Jackson & Perkins*, 312 F.2d 48, 51 (2d Cir. 1963) (holding that a nursery was not a farmer, even though it provided roots to other growers, where those growers planted and cultivated the plants, "provided the land, labor and equipment," "bore any losses due to crop failures," and were paid by the nursery "at a price calculated per

saleable plant"); 29 C.F.R. 780.132 (WHD's interpretive regulation agreeing with *Huntsville*).

2. Bland Farms argues that this case is distinguishable from *Huntsville*. Bland Br. 32-34. In particular, the company asserts that because it is located near the growers' farms, Cruz could regularly communicate with the growers and visit their fields to take soil and tissue samples, and therefore Cruz provided more intensive advice to the growers than could possibly have been at issue in *Huntsville*, where the nursery was hundreds of miles from the relevant farms. *Id.* at 34, 36.[18]

This argument should fail. As a preliminary matter, the decision in *Huntsville* does not describe the content of the "counsel and advice" or the "other ways," beyond offering cash advances and purchasing roses, in which the nursery

[18] Bland Farms also notes that its packing shed employees handle "a small minority" of onions that originate in the growers', as opposed to Bland Farms's, fields. Bland Br. 34. Leaving aside the question whether such a characterization is fair, given that 16, 28, and 39 percent of onions processed in the first three seasons at issue in this case were the growers', Stipulations at 4-7 (Bland App. vol. I, 179-82), the proportion of onions farmed by others processed at the packing shed is not significant. *See, e.g.*, *Jackson & Perkins*, 312 F.2d at 51 (noting that a very small percentage of the nursery's sales—below two percent in two relevant seasons, and below three percent in a third—were of plants the nursery did not grow itself, but nevertheless concluding that the agricultural exemption did not apply).

"assist[ed] the growers." *Huntsville*, 267 F.2d at 288 n.2, 291.[19] It is therefore not possible to meaningfully evaluate the difference between the advice provided in that case and in this one.[20] And, significantly, the district court found that the growers were not required to, and in fact did not always, follow Cruz's recommendations. Decision at 6 (Bland App. vol. IV, 841). Nothing in *Huntsville* indicates that Bland Farms's non-binding suggestions were more significant than the "counsel and advice" provided to the rosebush growers. *Huntsville*, 267 F.2d at 288 n.2. Moreover, even if Bland Farms's advice to the growers was particularly intensive, that fact does not convert Bland Farms into a farmer of the onions. *See, e.g.*, *Sweetlake Land & Oil*, 334 F.2d at 221, 223 (concluding that the

[19] *Huntsville*'s note that the nursery's agreement with the growers (which was in some important ways not consistent with actual practice) contemplated that the growers would farm "under [the nursery's] supervision as to the best methods of planting, production, digging, grading, packing and shipping" arguably suggests, however, that the advice provided to the rosebush growers was, contrary to Bland Farms's assumption, extensive. *Huntsville*, 267 F.2d at 288 n.2.

[20] Bland Farms's focus on the distance between the company and the growers' farms, though in fact a difference between *Huntsville* and this case, is misplaced. Proximity is not sufficiently significant in and of itself to outweigh other facts, such as who owns the crops in question. *See, e.g.*, *Osceola Farms*, 372 F.2d at 586-88 (holding that a sugar cane miller could not claim the agricultural exemption as to employees who drove cane from the growers' fields to the mill even though the farms and mill were located in the same county); *Sweetlake Land & Oil*, 334 F.2d at 223 (noting that the absence of distance between the growers' fields and the employer's operations "makes no difference" to the determination that the employer was not a farmer).

agricultural exemption did not apply to work drying rice because the tenant farmers who grew the rice owned it, even though the employer exercised considerable control over the farmers' operations, including by providing supplies and determining which crops to grow, and all of the activity occurred on the employer's land).

Here, the growers owned the onions while they were in the fields, paid all of the costs of farming, and faced the risk of loss; they were therefore the farmers of the onions. Bland Farms was merely an involved purchaser.[21] Concluding otherwise would constitute a novel and inappropriate interpretation of the agricultural exemption. *Cf. Farmers Reservoir*, 337 U.S. at 764 (declining to read

[21] Additional facts about this case on which the district court did not explicitly rely but that are reflected in the record further support the conclusion that Bland Farms was not a farmer of the growers' onions. Several growers testified that they began farming sweet onions years before selling them to Bland Farms, *see, e.g.*, Tr. 13-14, 149, 151, 209, 318 (Bland App. vol. II, 234-35, 370, 372, 430; vol. III, 539), and that Bland Farms's contracts for purchasing onions explicitly provided that the grower was not a partner or agent of Bland Farms, JE 45 at 7 (DOL App. 10), facts that indicate that the growers were independent rather than agents of Bland Farms, *see Huntsville*, 267 F.2d at 288 n.2 (noting, before concluding that the nursery was not a farmer, that the growers had grown rosebushes "for years" and had sold roses to other companies); *Tyson's Poultry*, 355 F.2d at 259-60 (noting as a relevant distinction from *Huntsville* that the contractors only began producing eggs at the egg processor's request, which was a sign that the growers were "clearly agents" of the egg processor). Moreover, the growers rather than Bland Farms rented or owned the land on which the growers farmed their onions. *See, e.g.*, Tr. 22, 197 (Bland App. vol. II, 243, 418); *Tyson's Poultry*, 355 F.2d at 259-60 (noting as a relevant distinction that the nursey in *Huntsville* did not own the soil in which the plants were grown whereas the egg processor in *Tyson's Poultry* owned the chickens from which the eggs were hatched).

the agricultural exemption as encompassing work related to agricultural commodities grown by another farmer because such an interpretation would be inconsistent with congressional intent); *Huntsville*, 267 F.2d at 291 (explaining that the processing of agricultural commodities grown by another farmer is outside the scope of the agricultural exemption).

3. Bland Farms also argues that the district court "committed an error of law" by reasoning that Bland Farms could only be a farmer of the growers' onions if it was "completely integrated" with the growers like the egg processor was with the egg producers in *Tyson's Poultry*. Bland Br. at 37-41. But it is readily apparent from the district court's opinion that the court did not hold Bland Farms to such a standard. Instead, the court rejected Bland Farms's argument that Cruz's involvement with the growers' operations was sufficient to make Bland Farms a farmer of the growers' onions by comparing Bland Farms's arrangement with the growers to the facts of *Huntsville* and distinguishing the markedly different facts of *Tyson's Poultry*. Decision at 15-16 (Bland App. vol. IV, 850-51).

In *Tyson's Poultry*, the growers "followed [the egg processor's] instructions" in caring for chickens, but other facts were also determinative of the outcome: the egg processor provided supplies, including the chickens and their food and medication; owned the chickens at all times; and faced the risk of loss should any of its costs, or the price of eggs, change. *Tyson's Poultry*, 355 F.2d at

256-60. Similarly, in *Strain Poultry Farms*, the poultry company provided growers with chickens, feed, and medicine; sent workers to the growers' farms to participate in the chickens' care; owned the chickens even while they were in the growers' possession; and faced the risk of market fluctuation. *Strain Poultry Farms*, 405 F.2d at 1026-27. Regardless of the significance of Cruz's advice to the growers, no analogous facts about investment, ownership, or risk are true of Bland Farms with respect to the other Georgia growers' onions.

Because Bland Farms is not a farmer of the sweet onions it purchases from the growers, its packing shed employees are not engaged in agriculture when they handle those onions. *See Farmers Reservoir*, 337 U.S. at 766 n.15; *Pure Beauty Farms*, 503 F. App'x at 775. Therefore, the agricultural exemption from the FLSA's overtime requirements at 29 U.S.C. 213(b)(12) does not apply.[22]

[22] None of the arguments presented in the amicus brief filed by the Georgia Fruit and Vegetable Growers Association, et al. ("Ass'n Br.") should sway this Court. To the extent the amici have policy concerns about the agricultural exemption, *see* Ass'n Br. 5, 24 (expressing concern about the effects on small farmers and the modernization of agriculture of the exemption's different application to farmers and non-farmers), those are issues for Congress to address. To the extent the amici disagree with how courts have interpreted the statutory text, *see* Ass'n Br. 7-18 (arguing that the agricultural exemption is meant to be read broadly, that who bears the risk of loss should not be part of the analysis of who is a farmer, and that "on a farm" should mean any farm regardless of whose employees perform the work), they seek to overturn precedent that controls in this Court. Moreover, the amici's non-policy arguments were not presented to the district court and are therefore not appropriately raised here. *Cf. Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) (arguments not raised in the district court, but rather for the first time on appeal, are waived).

II. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S PARTIAL AWARD OF LIQUIDATED DAMAGES

A. A District Court Has Authority Not to Award Liquidated Damages Under the FLSA Only if the Employer Proves it Acted in Good Faith and Reasonably Believed it Was Not Violating the Act.

The FLSA permits the Secretary to bring federal civil actions to recover unpaid overtime compensation "and an equal amount as liquidated damages." 29 U.S.C. 216(c). It also provides that "if the employer shows to the satisfaction of the court that" its violation of the FLSA was (1) "in good faith" and (2) based on "reasonable grounds for believing that [the] act or omission was not a violation of the [Act]," then "the court may, in its sound discretion," award a reduced amount of, or no, liquidated damages. 29 U.S.C. 260.

In other words, liquidated damages "'are mandatory,'" *Dybach*, 942 F.2d at 1566-67 (quoting *EEOC v. First Citizens Bank of Billings*, 758 F.2d 397, 403 (9th Cir. 1985)), unless the employer can meet its burden of showing that "it acted with both objective and subjective good faith," *Farm Stores Grocery*, 518 F.3d at 1272 (citing *Joiner v. City of Macon*, 814 F.2d 1537, 1539 (11th Cir. 1987); *Dybach*, 942 F.2d at 1566-67). Subjective good faith is "an honest intention to ascertain what [the Act] requires and to act in accordance with it." *Dybach*, 942 F.2d at 1566 (quoting *Brock v. Shirk*, 833 F.2d 1326, 1330 (9th Cir. 1987), *vacated on other grounds*, 488 U.S. 806 (1988)) (internal quotation marks omitted). Even if an employer can demonstrate such an intention, however, if it

cannot also meet the "'additional requirement' of showing reasonable grounds for believing that its conduct comported with the Act," then "as a matter of law" the court must award liquidated damages. *Dybach*, 942 F.2d at 1567 (citing *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982)). This framework is consistent with the principle that liquidated damages are not punitive, but rather compensatory for the delay in paying proper wages. *See Snapp v. Unlimited Concepts, Inc*., 208 F.3d 928, 934 (11th Cir. 2000) (citing *Brooklyn Sav. Bank*, 324 U.S. at 707).

B. The District Court's Award of Liquidated Damages Was Required in This Case Given Its Finding That Bland Farms's Reliance on WHD's Interpretation Was Not Objectively Reasonable After the Secretary Filed This Action.

In this case, the district court found that Bland Farms honestly believed it was complying with the FLSA based on the understanding it derived from WHD's 1985 letter. Decision at 19 (Bland App. vol. IV, 854). The court also determined that Bland Farms's understanding of WHD's position was objectively reasonable until the date the Secretary filed this case against the company, at which point Bland Farms could no longer reasonably believe that under WHD's interpretation the packing shed employees were engaged in agriculture. Decision at 20 (Bland App. vol. IV, 855). Accordingly, the district court exercised its discretion not to award liquidated damages corresponding to back wages owed for work performed from 2012 until the date the Secretary initiated this case, but—as required where the employer has not shown objective reasonableness—the court did award

liquidated damages equal to back wages accrued after that date. *Id.*; Damages Award at 2 (Bland App. vol. IV, 879).

The district court's focus on the reasonableness of Bland Farms's reliance on WHD's interpretation of the agricultural exemption in evaluating whether liquidated damages were mandatory is consistent with this Court's approach in other cases. For example, this Court has found relevant to whether an employer could demonstrate reasonableness that a WHD investigator had told the employer during the course of an investigation—even before higher-level WHD officials expressed their views on the case and where the Secretary had not filed a lawsuit—that its overtime policy violated the FLSA. *See Spires v. Ben Hill Cty.*, 980 F.2d 683, 690 (11th Cir. 1993) (holding that "it was simply unreasonable for [the employer] to have delayed in making back overtime pay" over a certain period of time in part because a WHD investigator had alerted the employer of a violation, and explicitly rejecting the employer's argument "that it was awaiting a final determination from the Department of Labor's investigation"); *see also Meeks v. Pasco Cty. Sheriff*, 688 F. App'x 714, 718 (11th Cir. 2017) (unpublished) (noting in affirming a district court's determination that an employer could not avoid liquidated damages that the employer "was aware that the Department of Labor was investigating [the relevant] compensation practice"); *Joiner*, 814 F.2d at 1539 (concluding that an employer could no longer claim that it acted in good faith or

reasonably beginning on the date WHD amended public guidance about an exemption on which the employer relied). Here, the filing of this lawsuit made the Department's interpretation clear.[23]

In challenging the district court's damages award, Bland Farms argues that the district court's opinion "contradicts itself" by finding both that Bland Farms could not reasonably rely on the 1985 letter after this lawsuit commenced and that Bland Farms continued to honestly believe that it was not required to pay overtime to its packing shed employees while litigating the case. Bland Br. 44-46. But there are two distinct elements of the defense against liquidated damages, and it was entirely appropriate for the district court to find that Bland Farms had subjective good faith based on the legal position its attorneys were advancing in court but nevertheless lacked an objectively reasonable belief because its initial understanding was based, the district court found, on advice from the very entity now litigating against it.

[23] Although the district court did not explicitly comment on how many years had passed between Bland Farms's receipt of the 1985 letter and the filing of this case in 2014, the length of time since an employer sought advice or information about FLSA requirements is also an appropriate part of a liquidated damages assessment. *See Friedman v. S. Fla. Psychiatric Assocs., Inc*., 139 F. App'x 183, 186 (11th Cir. 2005) (unpublished) (affirming a district court's finding that an employer did not have "an objectively reasonable basis for believing [his] conduct comport[ed] with the FLSA" where he had "looked into the issue" of whether an overtime exemption applied to a particular type of employee "20 years ago").

Bland Farms also asserts that the district court did not adequately consider its decision with respect to liquidated damages given that it should have recognized that Bland Farms had in fact acted with objective reasonableness. Bland Br. 46. But the court found that Bland Farms's subjective belief that WHD's interpretation permitted the company to claim the agricultural exemption when it purchased other growers' marketable onions became objectively unreasonable when WHD sued Bland Farms, and this Court should rely on that finding, which is based on the district court's consideration of the trial testimony and is fundamentally logical. *See Farm Stores Grocery*, 518 F.3d at 1273 (noting that because the district court heard testimony related to the employer's objective reasonableness, "it was in a much better position than we are to decide this fact-intensive issue"). Because Bland Farms failed to show to the satisfaction of the district court that it acted with objective reasonableness after May 29, 2014 (when the Secretary filed this action), the district court had no discretion to reduce liquidated damages as to that time period. Decision at 19-20 (Bland App. vol. IV, 854-55); 29 U.S.C. 260. To the extent the district court had discretion to exercise, it did so—in Bland Farms's favor—by choosing not to award any liquidated damages for the period before this lawsuit began.

Therefore, this Court should uphold the district court's partial award of liquidated damages.[24]

CONCLUSION

For the foregoing reasons, this Court should affirm both the district court's conclusion that Bland Farms's packing shed employees were not engaged in agriculture during the Georgia Vidalia onion season and the court's award of partial liquidated damages.

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[24] Even if the district court had determined that Bland Farms met its burden of showing objective reasonableness after the Secretary initiated this suit, the court would have had full discretion to nevertheless award liquidated damages for that time period. *See* 29 U.S.C. 260 (permitting but not requiring district courts to reduce liquidated damages awards if employers show good faith and reasonableness); *Quarles v. Hamler*, 652 F. App'x 792, 795 (11th Cir. 2016) (unpublished) (affirming a district court's award of liquidated damages in part because "even if [the employer] had proved" liquidated damages were not mandatory, "the court still would have been within its discretion to award liquidated damages"); *Mumby v. Pure Energy Servs. (USA), Inc*., 636 F.3d 1266, 1272 (10th Cir. 2011) (noting in affirming a liquidated damages award that "even if the district court had found [that the employer that violated the FLSA] acted reasonably, it retained discretion to award liquidated damages" (citing *Dep't of Labor v. City of Sapulpa*, 30 F.3d 1285, 1289 (10th Cir. 1994))); *Bernard v. IBP, Inc. of Neb.*, 154 F.3d 259, 267 (5th Cir. 1998) (noting in affirming a liquidated damages award that "[e]ven if [the employer] acted in good faith based upon a reasonable belief that it did not violate the FLSA, the district court still had discretion to award liquidated damages" (citing 29 U.S.C. 260)); *see also Broad. Music, Inc. v. Evie's Tavern Ellenton, Inc*., 772 F.3d 1254, 1257 (11th Cir. 2014) ("'[T]he abuse of discretion standard allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment.'" (quoting *In re Rasbury*, 24 F.3d 159, 168 (11th Cir. 1994))).

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

SARAH KAY MARCUS
Senior Attorney
U.S. Department of Labor
Office of the Solicitor, Room N-2716
200 Constitution Avenue, NW
Washington, D.C. 20210
(202) 693-5696

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a), the undersigned certifies that this brief complies with the length limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it is 12,960 words long (excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii)).

s/ Sarah Marcus
Sarah Kay Marcus
Senior Attorney

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Sarah Marcus
Sarah Kay Marcus
Senior Attorney