No. 22-13669

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARIA EUGENIA BLANCO,

Plaintiff-Appellant,

v.

ANAND ADRIAN SAMUEL,
LINDSEY ADAMS FINCH,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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BLANCO v. SAMUEL, *et al*, Case No. 22-13669

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, counsel for the Secretary of Labor certifies that she believes Appellant's Certificate of Interested Persons and Corporate Disclosure Statement filed with this Court on December 28, 2022 is complete.

Date: February 1, 2023

/s/ Katelyn J. Poe
KATELYN J. POE

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SECRETARY'S INTEREST AND AUTHORITY

This appeal presents two issues arising under the Fair Labor Standards Act ("FLSA" or "the Act"). The Secretary of Labor ("Secretary") has a substantial interest in the proper judicial interpretation of the FLSA because the Secretary administers and enforces the Act. 29 U.S.C. 202(a), 204, 211(a), 216(c), 217. The first issue is whether Plaintiff-Appellant was a live-in domestic service employee exempt from the FLSA's overtime pay requirements under section 13(b)(21), 29

U.S.C. 213(b)(21), which turns on whether Plaintiff "resided" in Defendants-Appellees' home within the meaning of that exemption. The Department of Labor ("Department") has promulgated regulations governing domestic service employment generally at 29 C.F.R. Part 552. The Department's regulation at 29 C.F.R. 552.102, governing live-in domestic service employees, is at issue in this case. That regulation cross-references another FLSA regulation, 29 C.F.R. 785.23, which concerns employees who reside on their employer's premises (and applies to any employee residing on their employer's premises, not just domestic service employees). The district court's decision here ignored the plain language of the statute and misconstrued these regulations and the Department's guidance interpreting them to conclude, in error, that Plaintiff was a live-in domestic service employee because she worked five consecutive night shifts caring for the Defendants' children and was allowed to sleep while on shift. The court's decision, if affirmed, would improperly exclude from the Act's overtime protections *any* domestic service employee who works five consecutive day or evening shifts under similar conditions.

The second issue is whether Defendants were Plaintiff's employers under the FLSA. To determine whether an employment relationship exists under the Act, this Court examines the economic realities of the parties' relationship. The district court, however, erroneously accepted Defendants' argument that they avoided an

employment relationship with a nanny caring for their children in their home simply by using an intermediary entity to pay the nanny. This conclusion is contrary to the statute and this Court's precedent, and could create a significant loophole to deny FLSA protections to vulnerable workers.

The Secretary files this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2).

ISSUES PRESENTED

1. Whether a nanny who works five consecutive night shifts and is allowed to sleep while on duty "resides" in the employer's home and is therefore exempt from the FLSA's overtime requirements under section 13(b)(21).

2. Whether individuals who, as a matter of economic reality, have an employment relationship with an employee can use an intermediary to circumvent their status as employers under the FLSA.

STATEMENT OF THE CASE

A. Factual Background[1]

1. Plaintiff was employed as a full-time nanny to work in Defendants' home between January 2019 and August 2021, caring for Defendants' four young children. District Ct. August 25, 2022 Order, Doc. 82, ("Order"), 1-2. Plaintiff worked 79 hours each week, beginning with a 23-hour shift from Sunday at 10:00

[1] These facts are undisputed unless otherwise indicated.

a.m. until Monday at 9:00 a.m., followed by four consecutive 14-hour shifts Monday through Thursday, from 7:00 p.m. until 9:00 a.m. the following day. *Id*. Plaintiff earned between $800 and $880 per week. *Id*. She was paid only her regular, hourly rate for all hours worked. *Id*.

2. Plaintiff performed childcare and housekeeping tasks at Defendants' home, which sometimes required work late into the night, and included changing diapers and feeding the baby in the middle of the night, and staying with and tending to the children throughout the night. District Ct. Oct. 6, 2022 Order, Doc. 95 ("Order II"), 1-2.; Tr., Doc. 92, 8. Defendants instructed Plaintiff and Defendants' other nannies generally on how to care for the children and what tasks to perform, providing regular input through a group text chain. Pl.'s Facts, Doc. 47 ("PF"), 10; Defs.' Facts, Doc. 54 ("DF"), 7. Defendant Samuel was at the home with Plaintiff and the children most nights. DF, 7, 11-12.

3. Plaintiff did not have any private space at Defendants' home. Order, 1-2. While on shift, Plaintiff stayed in the two youngest children's bedroom and used the children's bathroom. *Id*. Plaintiff was permitted to sleep (or to study English) during her shifts, waking to attend to the children as needed. Order II, 2. Plaintiff did not keep any belongings at Defendants' home and brought a bag with a change of clothes to and from each shift. Order, 2. Plaintiff left Defendants' home at the

end of each shift and lived with her aunt elsewhere. *Id*. Plaintiff did not have a key to Defendants' home. DF, 2.

4. Plaintiff was first hired as a part-time nanny in 2018. DF, 9, 11. Plaintiff alleges that Defendants hired her, while Defendants allege that an entity called Nannies with Love, run by one of Defendants' former nannies, hired Plaintiff. *Id*., 9. Defendants terminated their relationship with Nannies with Love in late 2018. *Id*., 11. After the split, Plaintiff continued working in Defendants' home. *Id*. When another of Defendants' nannies died unexpectedly in January 2019, Defendants decided to have Plaintiff take over that nanny's night shifts. PF, 9; DF, 11.

5. At first, Nannies with Love issued Plaintiff's paychecks. DF, 5, 9-11. After breaking with Nannies with Love in late 2018, Defendant Finch paid Plaintiff and the other nannies directly. *Id*., 9-11. Around this time, Defendant Samuel researched the FLSA's overtime requirements and determined that Plaintiff was not entitled to overtime compensation. *Id*. After approximately eight weeks, another of Defendants' nannies, Grace Trask, set up Amazing Gracie LLC ("the LLC"). Order, 2-3. From this point forward, the LLC issued Plaintiff's paychecks. *Id*.

6. Plaintiff alleges that Defendants continued to control her rate of pay after the LLC started issuing Plaintiff's paychecks, while Defendants assert that they

just paid one lump sum to the LLC and did not control how it was apportioned among the nannies. Order, 2-3. Defendants admit that they were the LLC's only client and its only source of funding, and that the LLC did not retain any profits. *Id*.

7. Defendants allege that the LLC was solely responsible for scheduling the nannies and all personnel policies; Plaintiff alleges that the LLC lacked any such authority. Order, 2-3. Defendants allege that they paid Ms. Trask for her services running the LLC; Plaintiff denies this. *Id*. Plaintiff alleges that Defendants instructed Ms. Trask to set up the LLC. *Id.* Though Defendants deny this, they admit that they sought to "outsourc[e] all aspects of the nanny operation" to the LLC. *Id.*; DF, 12.

B. Procedural Background and District Court Decisions

1. In October 2021, Plaintiff filed an FLSA complaint against Defendants, alleging that Defendants willfully violated the FLSA's overtime requirements. Compl., Doc. 1, 4. On April 29, 2022, Plaintiff moved for summary judgment on two issues relevant to this appeal—her entitlement to overtime compensation under the FLSA and Defendants' status as Plaintiff's employers. Pl.'s Mot. Summ. J., Doc. 45, 1. Defendants opposed, arguing that Plaintiff was exempt from overtime pay under section 13(b)(21) and that the LLC was Plaintiff's sole employer. Defs.' Opp., Doc. 52, 1-3.

2. On August 5, 2022, the district court denied Plaintiff's motion for summary judgment. Order, 1. In addressing whether the section 13(b)(21) exemption applied to Plaintiff, the court relied almost exclusively on isolated language in the preamble to a 2013 Department final rule amending the domestic service regulations to conclude that Plaintiff resided at Defendants' home and therefore was exempt from overtime under section 13(b)(21). *Id*., 4-9. The court reasoned that an employee "resides" on the employer's premises under the exemption when the employee works "fewer than 120 hours per week, working and sleeping on the employer's premises for five consecutive days or nights." *Id*., 7. Finding that the record demonstrated that Plaintiff worked fewer than 120 hours per week and spent five consecutive nights "working and sleeping" at Defendants' home, the court concluded that Plaintiff had failed to demonstrate she was entitled to overtime. *Id*., 7-9. The court further concluded that Plaintiff failed to present facts to establish that Defendants were her employers, and also that the facts Defendants cited, if true, would demonstrate that the LLC was Plaintiff's sole employer. *Id*., 9-11.

3. After hearing argument, the court entered summary judgment for Defendants on October 6, 2022, holding that Plaintiff was exempt from the FLSA's overtime requirements for the same reasons as set forth in the court's August decision. Order II, 1-4.

SUMMARY OF ARGUMENT

Since 1974, domestic service employees such as nannies have been explicitly covered under the FLSA. The FLSA provides an exemption from the Act's overtime pay requirements for domestic service employees who "reside" in the household in which they work. Under the plain language of the statute, as well as the FLSA's legislative history and the Department's regulations and guidance, whether an employee "resides" on the premises within the meaning of the exemption depends on multiple facts, such as the amount of time spent on the employer's premises, whether the employee has periods of both on- and off-duty time, and whether the employee has appropriate space in which to spend off-duty time. This inquiry does *not*, as the district court concluded, turn simply on whether the employee is allowed to sleep during work time or whether the employee works five consecutive shifts. The undisputed facts here demonstrate that Plaintiff did not "reside" at Defendants' home within the meaning of this exemption. The district court erred in concluding otherwise.

In addition, the FLSA's overtime requirements apply only to "employer[s]." The statute defines the term "employer" broadly. This Court examines the economic realities of the parties' relationship to consider whether an individual or entity is an "employer" of an employee under the Act. Here, the facts as presented by Defendants themselves demonstrate that Defendants were Plaintiff's employers

as a matter of economic reality, even though Defendants elected to pay Plaintiff through an LLC. Defendants may not delegate away their responsibilities as employers to an intermediary, and the district court's seeming acceptance of their attempt to do so was in error.

ARGUMENT

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT PLAINTIFF IS EXEMPT FROM THE FLSA'S OVERTIME REQUIREMENTS UNDER THE LIVE-IN DOMESTIC SERVICE EMPLOYEE EXEMPTION BECAUSE SHE DID NOT RESIDE IN DEFENDANTS' HOME.

A. The Live-In Domestic Service Employee Exemption Applies Only to Employees who "Reside" on the Premises Permanently or for "Extended Periods of Time."

1. The FLSA generally requires that domestic service employees be paid at least the minimum wage for all hours worked and one and one-half times the employee's regular rate of pay for all overtime hours worked. 29 U.S.C. 202(a), 206(f), 207(l). The Act contains an exemption from overtime compensation for "any employee who is employed in domestic service in a household and who resides in such household." *Id.* 213(b)(21). This issue here is whether Plaintiff "reside[d]" in Defendants' household within the meaning of section 13(b)(21).

Neither the Act nor the Department's regulations explicitly define the term "reside." As commonly used, the term "reside" means "[t]o dwell permanently or for a considerable time, to have one's settled or usual home in or at a particular

place." Oxford Eng. Dictionary (Dec. 2022) (online version), Addendum A; *see* Am. Heritage Dictionary (2022) (online version) (defining "reside" as "[t]o live in a place permanently or for an extended period"). Both the FLSA's legislative history regarding the exemption and the Department's longstanding regulations and guidance are consistent with and apply this commonly understood meaning of "reside." These authorities contemplate an employee who "resides" on the employer's premises as one who enjoys periods of time off duty while there—in other words, who "settles" or "dwells" there—and not one who is simply working at all times.

2. In 1974, Congress explicitly extended FLSA coverage to domestic service employees employed in private households. Fair Lab. Standards Amends. Act of 1974, Pub. L. 93-259 § 7, 88 Stat. 55, 62 (1974). However, Congress was cognizant of the "difficult[y]" of determining actual hours worked for "a domestic service employee [who] resides on the employer's premises" because "[o]rdinarily such an employee engages in normal private pursuits such as eating, sleeping, and entertaining, and has other periods of complete freedom." S.R. Rep. No. 93-690, at 20-21 (1974). To alleviate these concerns, Congress noted that the Department's existing regulation at 29 C.F.R. 785.23, which (then and still) permits reasonable agreements for compensable hours worked for employees who "reside" on their employer's premises permanently or "for extended periods of

time," would apply to live-in domestic service employees. S.R. Rep. No. 93-690, at 20-21. To further alleviate these concerns, Congress also enacted the overtime exemption at section 13(b)(21) for "any employee who is employed in domestic service in a household and who resides in such household." § 7(B)(4), 88 Stat 55, 62; S. Rep. No. 93-690, at 20-21.

Pursuant to its congressionally delegated authority, the Department has issued regulations governing domestic service employment at 29 C.F.R. Part 552. As relevant here, section 552.102 specifically addresses "[d]omestic service employees who reside in the household where they are employed." 29 C.F.R. 552.102.[2] The regulation reflects that such employees will have, in addition to on-duty time, "sleeping time, meal time and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits[,]" and allows that "the employee and the employer may exclude, by agreement between themselves," such periods of time from the employee's hours worked. *Id*. Section 552.102 explicitly cross-references 29 C.F.R. 785.23.

3. Section 785.23, which concerns compensable hours worked for all employees residing on their employer's premises, in turn provides:

[2] 29 C.F.R. 552.109(c) provides that a family or individual that employs or jointly employs a live-in domestic service employee may claim the live-in exemption, but third-party employers may not.

> An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted.

29 C.F.R. 785.23.

The Department first issued the interpretation now found at 29 C.F.R. 785.23 in 1940. Dep't of Lab., Wage & Hour Div., "Interpretive Bull. No. 13: Hours Worked" (Nov. 1940) ("IB No. 13"), Addendum B, 5. As the Department explained, such guidance was needed because, "in the ordinary course of events," the employee will have a "normal night's sleep, . . . ample time in which to eat [ ] meals, and . . . a certain amount of time for relaxation and entirely private pursuits" and thus will not be "necessarily working" at all times on the employer's premises. *Id*. Thus, the basic tenet underpinning the Department's longstanding guidance for live-in employees, both within and beyond domestic service, is the understanding that such employees will have periods of on-duty and off-duty time while residing on the employer's premises, during the latter of which the employee may engage in purely private pursuits. The Department reiterated these principles in 1961 when it revised and recodified the guidance in IB No. 13 in the Code of Federal Regulations. 26 Fed. Reg. 190, 193 (Jan. 11, 1961) (codified at 29 C.F.R. 785.23).

4. Since then, the Department has issued extensive guidance under 29 C.F.R. 785.23 interpreting "resides . . . for extended periods of time" that applies the commonly understood meaning of the term "reside."[3] In a 1981 Opinion Letter, for example, the Department's Wage and Hour Division ("WHD") explained that a group-home residential-care employee who maintained a separate residence may still qualify as an employee who "resides" on the employer's premises for an "extended period of time" within the meaning of section 785.23 as long as "the facilities offered by the employer provide a home-like environment with private quarters separate from the residents of the group home," and the employee resides on the employer's premises for most of the week—five consecutive days or nights. WHD Opinion Letter WH-505, 1981 WL 179033, at *1-2 (Feb. 3, 1981) ("1981 Opinion Letter"). The letter provided a number of examples to illustrate this point:

> [E]mployees who are on duty from 9 a.m. Monday until 5 p.m. Friday would also be considered to reside on the employer's premises. Even though on duty for less than 120 hours, they are on duty for five consecutive days (Monday through Friday). The fact that they sleep over only four nights does not alter this conclusion. Similarly, employees who are on duty from 9 p.m. Monday until 9 a.m. Saturday would also be considered to reside on their employer's premises since they are on duty for five consecutive nights (Monday night through Friday night).

[3] Neither party alleges that Plaintiff resided in Defendants' home on "a permanent basis." 29 C.F.R. 785.23.

Id. at *2. "In light of the amount of time" such employees spend at the group home, WHD explained, "it is in effect a second residence." *Id*. at *1. Also in 1981, WHD revised its Field Operation Handbook ("FOH") to comport with the 1981 Opinion Letter, reiterating the examples included in that letter. FOH § 31b20.[4]

In 1988, WHD issue an Enforcement Policy reiterating and expanding on the guidance in the 1981 Opinion Letter, explaining "[WHD] will consider an employee who sleeps in private quarters, in a homelike environment, to reside on the premises for an extended period of time within the meaning of [29 C.F.R.] 785.23 if the employee resides on the premises for a period of at least 120 hours in a workweek," and defining "private quarters" to mean "living quarters" in which, among other requirements, "the employee is able to leave his or her belongings during on- and off-duty periods." 1988 WL 614199, at *2 (June 30, 1988). *See* Br. of Sec'y of Labor, *Dep't of Labor v. Jasmine Hall Care Homes, Inc.*, 2008 WL 5010952 (9th Cir. Sept. 25, 2008) (section 785.23 available only where residential care employer provides home-like environment with private quarters, which includes bedrooms separate from co-workers and residents).

[4] Available at https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-31.

In 2013, the Department engaged in rulemaking pursuant to delegated congressional authorization to revise its domestic service employee regulations at 29 C.F.R. Part 552. "Application of the [FLSA] to Domestic Service," 78 Fed. Reg. 60,454 (Oct. 1, 2013) ("2013 Final Rule"). The rule provided, among other things, that third-party employers may not claim section 13(b)(21)'s live-in domestic service employee exemption. *Id.* at 60,557; *see* 29 C.F.R. 552.109(c). In the preamble section, the Department made clear that it "did not propose any changes to the definition of live-in domestic service employee or otherwise discuss the requirements for meeting the live-in domestic service exemption." 78 Fed. Reg. at 60,474. The Department stated its "intention to continue to apply its existing definition of live-in domestic service employees." *Id*. The Department nonetheless discussed its longstanding regulations and guidance surrounding the live-in exemption in response to comments received on the third-party employer proposal. *Id*.

Citing to both 29 C.F.R. 785.23 and the FOH, the preamble to the 2013 Final Rule reiterated that an employee will be considered a live-in domestic service employee under section 552.102 if the employee "(1) [m]eets the definition of domestic service employment under § 552.3 and provides services in a 'private home' pursuant to § 552.101; and (2) resides on his or her employer's premises on a 'permanent basis' or for 'extended periods of time.'" 78 Fed. Reg. at 60,474.

The Department included in the preamble a near-replication of language in prior guidance:

> If less than 120 hours per week is spent working and sleeping on the employer's premises, five consecutive days or nights would also qualify as residing on the premises for extended periods of time. For example, employees who reside on the employer's premises five consecutive days from 9:00 a.m. Monday until 5:00 p.m. Friday (sleeping four straight nights on the premises) would be considered to reside on the employer's premises for an extended period of time. Similarly, employees who reside on an employer's premises five consecutive nights from 9:00 p.m. Monday until 9:00 a.m. Saturday would also be considered to reside on their employer's premises for an extended period of time.

Id. (citations omitted). The Department also emphasized the statutory requirement that a live-in employee must actually *reside* in the household. *Id*.

5. As all of the above guidance reflects, the determination of whether an employee "resides" on the employer's premises within the meaning of section 13(b)(21) requires a common sense examination of all of the relevant facts, such as the amount of time spent on the employer's premises; whether the employee has periods of off-duty time in which to eat, sleep, and pursue private pursuits; and whether the employee is given appropriate quarters in which to spend such time. This examination does not turn simply on whether the employee works five consecutive shifts, during which shifts she may sleep.

B. Plaintiff Did Not "Reside" on Defendants' Premises within the Meaning of Section 13(b)(21).

Applying the plain language of the statute and the Department's longstanding regulations and guidance to the undisputed facts demonstrates that Plaintiff did not reside in Defendants' home as required under section 13(b)(21).

1. Plaintiff did not "reside" at Defendants' home within the commonly applied meaning of that term. She did not have a "settled or usual home in or at" Defendants' home, nor "dwell" there. Oxford Eng. Dictionary (emphases omitted), Addendum A. Plaintiff did not have her own space in the home and brought her personal effects with her to use at the beginning and end of each shift. Order, 1-2. She shared a room and bathroom with Defendants' young children. *Id*.[5]

Significantly, Plaintiff did spend any leisure or off-duty time at Defendants' home. As discussed above, the regulations at 29 C.F.R. 552.102 and 785.23 contemplate an employee spending time performing work and additionally spending non-work time sleeping, eating meals, and enjoying leisure hours at the

[5] While the provision of private quarters is not strictly required for the live-in exemption to apply, whether such quarters are provided is still a relevant consideration. *See* 29 C.F.R. 552.102 (cross-referencing section 785.23); 1988 Enforcement Policy (interpreting section 785.23's provision for an employee residing for an "extended period of time" as requiring that the employee have private quarters, in a home-like environment, in which to spend off-duty time); 1981 Opinion Letter (same).

employer's premises in order to be "resid[ing]" there. Indeed, these are the circumstances giving rise to the need for the live-in exemption in the first place. *See, e.g.,* S.R. 98-390, at 18. But this is plainly not what occurred here. Plaintiff arrived at the beginning of her set shift and left as soon as that shift ended, living elsewhere with her aunt. Order, 2. There is no evidence that Plaintiff was ever completely relieved from duty to pursue private pursuits at Defendants' residence, nor spent any leisure time there whatsoever. *Id*. Plaintiff did not have a key, curtailing any ability to come and go freely during any off-duty time as contemplated under the regulations. DF, 2. Nor did Plaintiff have any off-duty time at Defendants' home in which to get a "normal night's sleep." IB No. 13, 5.

There is no question that Plaintiff was *working* at all times while on the premises, even when sleeping, despite the district court's erroneous assertion that Plaintiff "may not have been actually working" for all 79 hours she was at Defendants' home. Order, 1, 7-8. It is undisputed that Plaintiff was required to be on the premises, with the children, for the entirety of her shifts. *Id*. Even if the children or Plaintiff were sleeping, she was "engaged to wait" in that she was required to be available to respond to the children should they wake or need something throughout the night— "waiting [was] an integral part of the job"—and therefore these were compensable hours worked. 29 C.F.R. 785.15 ("on duty" regulation explaining that such waiting time "belongs to and is controlled by the

employer"); *see* 29 C.F.R. 785.21 (when an employee is required to work a shift of less than 24 hours (as here), all time on shift is compensable hours worked, even if the employee is permitted to sleep or engage in other personal activities when not busy). Accordingly, that Plaintiff was permitted to sleep while on duty, i.e., while engaged to wait, does not establish that Plaintiff resided in Defendants' home.

2. The district court erroneously dismissed the relevance of the statute's plain language and the Department's longstanding regulations and guidance, relying instead on a misreading of preamble language from the 2013 Final Rule, which did not amend the regulations at 29 C.F.R. 552.102 or 785.23. Order, 6-9. However, the Department reiterated in the preamble its longstanding guidance regarding the meaning of "reside . . . for extended periods of time" under these regulations. 78 Fed. Reg. at 60,474. That discussion plainly contemplated that an employee who "resides" on the employer's premises will have periods of on-duty time, as well as off-duty time in which to pursue personal pursuits, such as sleeping. *Id*. The Department further explained that a domestic service employee "resides" in the household for purposes of the live-in domestic service employee exemption "[i]f less than 120 hours per week is spent working and sleeping on the employer's premises, five consecutive days or nights." *Id*.

The district court viewed this sentence, in isolation, to constitute a "rule" setting forth a "straight forward definition of 'reside'" under which an employee

who "(1) works fewer than 120 hours per week; and (2) both works and sleeps on the employer's premises; (3) for five consecutive days *or* nights . . . reside[s] on the premises for an extended period and to thus fall[s] under the overtime exemption." Order, 7, 9. This approach is flawed.

First, the district court interpreted the phrase "working and sleeping" to mean effectively "sleeping *while* working," resulting in the court's almost singular focus on whether Plaintiff slept while at Defendants' home. Order, 7; Order II, 3-5. In context, however, the use of the phrase "working and sleeping" in the preamble is, consistent with the statute, referring to an employee who actually resides on the premises for the workweek, both working and sleeping *at different times*. Nothing in this sentence, nor anywhere in the preamble to the 2013 Final Rule or the Department's other guidance, suggests that time in which an employee is on duty but permitted to sleep converts that employee into a live-in employee.

The two examples that immediately follow the "working and sleeping" language in the preamble (which originated in the 1981 Opinion Letter) further bear this out, though the district court ignored their import. These examples—in which an employee resides on the premises from early Monday morning until the end of the day on Friday for 104 hours, or from Monday evening until Saturday morning for 108 hours—clearly contemplate an employee residing at the employer's premises for the workweek and sleeping when off-duty, not that an

employee happens to complete five defined shifts in a row during which she may sleep, as occurred here.[6]

Second, the district court erred in interpreting the use of the disjunctive in describing "five consecutive days or nights" to "unambiguously" encompass an employee who works five consecutive night shifts, regardless of where the employee spends their off-duty time. Order, 7. This language, and the pertinent examples, originally appeared in the 1981 Opinion Letter to address whether 29 C.F.R. 785.23 could be applied to workers in group residential homes. 1981 WL 179033, at *2. Such workers often begin their workweeks in the evenings; similarly, home care workers (the focus of the 2013 Final Rule in which those examples were repeated) also often begin their workweeks in the evening due to staffing needs. Accordingly, the first example—early Monday morning until the end of the day on Friday—is of five consecutive days, but only four nights. The second example—Monday evening until Saturday morning—is of five consecutive

[6] In 2013 the Department issued WHD Fact Sheet 79B, "Live-in Domestic Service Workers Under the Fair Labor Standards Act (FLSA)" (Sept. 2013), *available at* https://www.dol.gov/agencies/whd/fact-sheets/79b-flsa-live-in-domestic-workers. This fact sheet—upon which Defendants allege they relied in determining that Plaintiff was exempt from overtime, DF, 10—provides even further context to these examples, explaining that "[a]worker who resides on the employer's premises five consecutive nights from 9:00 p.m. Monday until 9:00 a.m. Saturday (*sleeping four straight days on the premises*) is considered to reside on the employer's premises for an extended period of time." (Emphasis added). These examples make plain that the exemption encompasses a night-shift worker who then sleeps during the day (when off duty) at the premises.

nights, but only four days. Thus, the disjunctive "days or nights" language simply reflects that residing on an employer's premises for an extended period of time can consist of five consecutive days even if it is only four consecutive nights, and vice versa. It does not encompass an employee who simply works five consecutive day- or night-shifts, arriving at the beginning of each shift and departing the premises at the end of each shift.

Finally, all of the cases cited by the district court for support in applying its formulaic "criteria" are inapposite to the facts here. Order, 6. Even if these cases purported to apply a three-part test based on the preamble the 2013 Final Rule, none involved a worker who stayed on the premises only for their predetermined shifts and were found to qualify for the live-in exemption. *See, e.g., Romero v. Diaz-Fox*, No. 18-civ-21218, 2021 WL 3619677, at *5 (S.D. Fla. Aug. 16, 2021) (not applying exemption to shift worker); *Manrique v. Schoenbaum*, No. 19-cv-3212, 2011 WL 13269434, at *7 (N.D. Ga. Aug. 12, 2011) (applying exemption where nanny "dwelled for a considerable time" at defendants' residence, had private quarters in home-like environment, and produced employment contract referencing residential arrangement).

In sum, the court's reading of the 2013 Final Rule's preamble takes one sentence out of context, such that the court lost sight of the most important statutory element of the exemption—that the employee *reside* on the employer's

premises. The district court's approach, if adopted by this Court, would exclude from the Act's overtime protections any domestic service employee who works five consecutive shifts—whether day or night—and sleeps during that shift, e.g., a day-shift nanny who works Monday through Friday and is permitted to nap while the children she cares for sleeps, or a night-shift home health aide who works five consecutive nights and occasionally sleeps while the individual he cares for sleeps. This result is plainly inconsistent with the statute and the Department's longstanding regulations and guidance implementing the exemption.[7] Instead, when considering the statutory text and the totality of the Department's regulations and guidance, the undisputed facts here demonstrate that Plaintiff did not reside at Defendants' home as required under section 13(b)(21).[8]

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[7] The district court did not cite to the Supreme Court's decision in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018), in its orders. To the extent the parties and this Court find *Encino* relevant to consideration of this appeal, the Department's position in this case is entirely consistent with a fair reading of section 13(b)(21), as required by *Encino*.

[8] The Department's interpretations of the FLSA in its part 785 regulations and related sub-regulatory guidance, as well as an amicus brief, should be given deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (Department's rulings, interpretations, and opinions, "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"); *see also Gelber v. Akal Sec., Inc.*, 14 F.4th 1279, 1281 & n.1 (11th Cir. 2021) (FLSA interpretive regulations in

IV. DEFENDANTS WERE PLAINTIFF'S EMPLOYERS UNDER THE FLSA AS A MATTER OF ECONOMIC REALITY.

The district court further erred in concluding that Plaintiff failed to demonstrate that Defendants were her employers. In its August decision, the court concluded that Plaintiff failed to present facts to establish an employment relationship between Defendants and Plaintiff, and that the facts Defendants cited, if true, would show that the LLC was Plaintiff's employer and Defendants were not joint employers along with the LLC. Order, 9-11. These conclusions were in error, particularly as they reflect the court's seeming acceptance of Defendants' underlying premise that they can negate the existence of an employment relationship by delegating certain tasks to the LLC.

1. The FLSA defines "employ" and "employer" with "striking breadth." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). "'[E]mploy' includes to suffer or permit to work." 29 U.S.C. 203(g); *see Antenor v. D & S Farms*, 88 F.3d 925, 929 n.5 (11th Cir. 1996) ("The 'suffer or permit to work' standard derives from state child-labor laws designed to reach businesses that used middlemen to illegally hire and supervise children."). "'[E]mployer' includes any

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29 C.F.R. Part 785 concerning hours worked "are entitled to *Skidmore* deference") (citing *Skidmore*, 323 U.S. at 140); *Klinedinst v. Swift Invs., Inc.*, 260 F.3d 1251, 1255 (11th Cir. 2001) (finding WHD's FOH "persuasive").

person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. 203(d).

To determine whether an entity or individual fits within the definition of "employer," this Court looks at the "economic reality" of the relationship between the parties, considering factors such as whether the alleged employer determined the rate and method of payment, had the power to hire and fire the employee, supervised and controlled the employee's work schedule or conditions of employment, or maintained employment records. *Villarreal v. Woodham*, 113 F.3d 202, 205 (11th Cir. 1997).

Following from the broad definition of "employer," this Court recognizes that multiple individuals or entities may be treated as an "employer" of an employee, and that paying an employee through a corporate form does not circumvent an otherwise existing employment relationship with the employee. In *Lamonica v. Safe Hurricane Shutters, Inc.*, for example, this Court recognized that it is appropriate "to impose liability [under the FLSA] upon those [individuals] who control a corporation's financial affairs and can cause the corporation to compensate (or not to compensate) employees." 711 F.3d 1299, 1313 (11th Cir. 2013) (internal quotation marks omitted).

2. Applying these standards here, the facts put forth by Defendants themselves demonstrate that Defendants were Plaintiff's employers under the Act.

First, Defendants exercised significant control over Plaintiff's rate and method of payment, including the lack of overtime compensation. *Lamonica*, 711 F.3d at 1314. Although the LLC generally issued Plaintiff's paychecks, it is undisputed that the LLC was entirely funded by Defendants and that it had no other clients. Order, 2-3. The LLC did not retain any profits. *Id*. Moreover, Defendants admit that they researched the FLSA's overtime requirements and determined that Plaintiff was exempt. DF, 10. This determination, as well as Plaintiff's rate of pay generally, were in place well before the initiation of the LLC. *Id.*, 10-11. Moreover, for a time before the "arrange[ment]" of the LLC, Defendants paid Plaintiff directly until Defendants could "delegate[e]" this task to the LLC. *Id*., 11-12.

Second, Defendants had authority to hire and fire Plaintiff. *Cf. Rodriguez v. Jones Boat Yard, Inc.*, 435 F. App'x 885, 886-88 (11th Cir. 2011) (live-in caregiver for elderly women was not employed by son and son's company even though company paid caregiver because neither son nor company hired or fired caregiver). Defendants argue that Nannies with Love first hired Plaintiff. DF, 3. However, it is undisputed that Plaintiff continued to work in Defendants' home even after Defendants terminated their working relationship with Nannies with Love. *Id*., 7; PF, 9.

Third, Defendants controlled Plaintiff's work schedule and conditions of employment. *Lamonica*, 711 F.3d at 1314. After one of Defendants' other nannies died unexpectedly, Defendants decided that Plaintiff would take over her night shifts. PF, 9; DF, 7. Defendants also told the nannies how to care for the children and what tasks to perform, providing regular input through a group text chain. PF, 10; DF, 7, 12. Defendant Samuel was at the home with Plaintiff and the children most nights. DF, 3. Plaintiff cared for Defendants' children, in Defendants' home. Order, 1; *Cf. Rodriguez*, 435 F. App'x at 886-88 (neither son nor son's company were caregiver's employer where no indication that they controlled caregiver's schedule or caregiving duties). Thus, Defendants exercised significant control over the day-to-day aspects of Plaintiff's employment, even if Defendants allegedly did not specify which particular nanny should perform which exact task (e.g., giving the children a bath or feeding them). *Lamonica*, 711 F.3d at 1313-14.

The totality of these facts demonstrates that as a matter of "economic reality," *Villarreal*, 113 F.3d at 205, Defendants were "acting directly or indirectly in the interest of an employer in relation to" Plaintiff, 29 U.S.C. 203(d).[9]

[9] Notably, Defendants' primary argument below was assertion of the live-in domestic service employee exemption, which is available only to individuals or families that employ the worker. 29 C.F.R. 552.109(c).

3. In the alternative, these same facts demonstrate that Defendants were Plaintiff's joint employers with the LLC as a matter of economic reality. *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1294 (11th Cir. 2016) (discussing considerations relevant to examining whether, as a matter of economic reality, employee is economically dependent on alleged joint employer).[10] Defendants cannot contract away or "outsource" their employment relationship with Plaintiff to the LLC. DF, 12. It is well established that employers may not delegate away their responsibilities under the Act. *Reich v. Dep't of Conservation & Nat. Res*., 28 F.3d 1076, 1083 (11th Cir. 1994); *see Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013) (employment relationship "is not governed by the 'label' put on the relationship by the parties or the contract controlling that relationship, but rather focuses on whether the work done, in its essence, follows the usual path of an employee") (internal quotation marks omitted).

Accordingly, the district court erred in concluding that Plaintiff failed to establish that Defendants were her employers.

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[10] In their opposition to summary judgment, Defendants referenced the Department's rule, "Joint Employer Status Under the [FLSA]," 85 Fed. Reg. 2820 (January 16, 2020). However, after a district court vacated that rule as contrary to law, *New York v. Scalia*, 490 F. Supp. 3d 748, 795 (S.D.N.Y 2020), the Department rescinded it, 86 Fed. Reg. 40,939 (July 30, 2021). Therefore, the rule should not be relied upon.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court reverse the district court's decisions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g), I certify that the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant:

(1) was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font; and

(2) complies with the length limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,498 words excluding the items listed in Federal Rule of Appellate Procedure 32(f).

/s/ Katelyn J. Poe
KATELYN J. POE

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant was served this 1st day of February, 2023, via the Court's ECF system on each attorney who has appeared in this case and is registered for electronic filing.

/s/ Katelyn J. Poe
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