Nos. 17-5995 and 17-6071

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES DEPARTMENT OF LABOR,
R. ALEXANDER ACOSTA, SECRETARY OF LABOR,

Plaintiff – Appellant Cross-Appellee,

v.

OFF DUTY POLICE SERVICES, INC.,
DARRELL SPURGEON, and BONNIE SPURGEON,

Defendants – Appellees Cross-Appellants.

On Appeal from the United States District Court for the Western District of Kentucky (No. 3-13-cv-935-DJH, Honorable David J. Hale)

SECRETARY OF LABOR'S OPENING BRIEF

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Secretary requests that this Court hold oral argument. Ruling in an enforcement action brought by the Secretary that a group of workers were not employees under the Fair Labor Standards Act and were thus outside of the scope of the Act's protections is significant and merits careful review. The district court's ruling that the Secretary failed to prove violations of the Act's recordkeeping obligations is likewise significant as the ruling, which imposes a knowledge requirement to prove such violations, would affect the Secretary's enforcement of those obligations when violated. Accordingly, the Secretary believes that oral argument will ensure that this Court has before it all of the legal arguments that it needs for its review and will assist this Court in reaching a decision.

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SECRETARY OF LABOR'S OPENING BRIEF

The United States Department of Labor, R. Alexander Acosta, Secretary of Labor ("Secretary"), submits this brief in support of his appeal of the district court's rulings that: (1) certain security guards and traffic controllers were not economically dependent on, and thus not employees of, the employer under the Fair Labor Standards Act ("FLSA" or "Act") because they had other employment which was their primary source of income; and (2) he must show that an employer

"knowingly" failed to maintain accurate records to prove a violation of the FLSA's recordkeeping obligations.

STATEMENT OF JURISDICTION

The Secretary brought an enforcement action against Off Duty Police Services, Inc. ("ODPS"), Darrell Spurgeon, and Bonnie Spurgeon (collectively, "Defendants") in the District Court for the Western District of Kentucky pursuant to the FLSA alleging violations of the Act's overtime pay and recordkeeping obligations and seeking, among other remedies, back wages, liquidated damages, and injunctive relief. See Complaint, R. 1, Page ID #1-6. The district court had jurisdiction pursuant to section 17 of the FLSA, 29 U.S.C. 217, as well as 28 U.S.C. 1331 (federal question jurisdiction) and 1345 (jurisdiction over suits by the United States).

This Court has jurisdiction over the Secretary's appeal pursuant to 28 U.S.C. 1291. After a bench trial, the district court ruled that one group of ODPS' workers were employees under the FLSA, a second group of ODPS' workers were not employees, and the Secretary failed to prove that ODPS violated the FLSA's recordkeeping obligations. See June 17, 2016 Memorandum Decision and Order ("Decision on Liability"), R. 62, Page ID # 1878-1899. The district court awarded back wages and liquidated damages to the workers whom it found to be employees, see December 22, 2016 Order ("Order Awarding Damages"), R. 66,

Page ID # 1932-36, and entered judgment on the same day, see Judgment, R. 67, Page ID # 1937. On June 30, 2017, the district court denied in its entirety a motion to alter, amend, or vacate the judgment filed by Defendants pursuant to Federal Rule of Civil Procedure 59(e). See Memorandum Opinion and Order, R. 74, Page ID # 1967-1978. The district court thus fully and finally disposed of the Secretary's claims against Defendants.

On August 28, 2017, the Secretary filed a notice of appeal seeking review by this Court. See Notice of Appeal, R. 76, Page ID # 1980-81. The Secretary's notice of appeal was timely under Federal Rule of Appellate Procedure 4(a)(1)(B). On September 11, 2017, Defendants filed a notice of cross-appeal. See Notice of Cross-Appeal, R. 78, Page ID # 1985-86. Defendants' notice of cross-appeal was timely under Federal Rule of Appellate Procedure 4(a)(3).

STATEMENT OF THE ISSUES

1. Whether the district court erred in ruling that certain security guards and traffic controllers were not economically dependent on, and thus not employees of, ODPS under the FLSA because they had other employment which was their primary source of income, as opposed to relying on the totality of the relevant economic realities of their working relationship with ODPS, which strongly indicated that they were employees.

2. Whether the district court erred by requiring the Secretary to show that ODPS "knowingly" failed to maintain accurate records to prove a violation of the FLSA's recordkeeping obligations.

STATEMENT OF THE CASE

A. Relevant FLSA Provisions

The FLSA affords minimum wage and overtime pay protections to employees of a covered employer. See 29 U.S.C. 206(a), 207(a). Unless exempt, employees must be paid at a premium rate of one and one-half times their regular rate of pay for all hours worked over 40 in a workweek. See 29 U.S.C. 207(a). In addition, a covered employer must make and keep certain records "prescribe[d] by regulation" regarding its employees. 29 U.S.C. 211(c). The records that covered employers generally must make and keep regarding employees subject to the Act's minimum wage and overtime pay protections are prescribed in 29 C.F.R. 516.2. The Secretary (and only the Secretary – not private parties) has authority to investigate employers' compliance with the FLSA's recordkeeping requirements and to seek injunctive relief against an employer who violates those requirements. See 29 U.S.C. 211(a), 215(a)(5), 217.

B. Statement of the Facts

1. ODPS provides traffic control officers and security services to customers in the Louisville, Kentucky area. See Decision on Liability, R. 62, Page ID #

1879. Bonnie and Darrell Spurgeon own ODPS, are its president and vice president, respectively, and are the only two persons that ODPS has ever had on its payroll classified as employees. See id. ODPS and the Spurgeons treat their security guards and traffic controllers as independent contractors and do not pay them premium pay for any overtime hours worked. See id. at Page ID # 1879-1880, 1882. The security guard and traffic control work required "[l]ittle skill," and the workers "often did nothing more than sit in their vehicles with their lights on." Id. at Page ID # 1879. Many of ODPS' workers had no prior experience. See id.

Many of ODPS' workers were "sworn officers," meaning that they were employed by local police or fire departments or otherwise worked in law enforcement (as constables or jailers, for example) in addition to working for ODPS. See Decision on Liability, R. 62, Page ID # 1880. ODPS' other workers were "nonsworn" officers certified by Kentucky to do traffic control. See id. Many of the workers have been with ODPS for years, although they may have worked intermittently. See id. Some workers had set schedules, such as security at a car dealership Mondays through Fridays from 10 p.m. until 6 a.m. See id. at Page ID # 1883. And, some workers were assigned to work with the same ODPS customer for years. See id.

ODPS entered into contracts with customers, who set the rates that they were willing to pay ODPS and provided the qualifications and instructions for the work. See Decision on Liability, R. 62, Page ID # 1880. When a customer requested work, ODPS would contact the workers who met the qualifications. See id. at Page ID # 1881. Darrell Spurgeon and six other ODPS workers scheduled workers. See id. at Page ID # 1882. The additional six schedulers were treated as independent contractors and were paid one dollar for every hour that they scheduled someone to work. See id. Frank Medieros, who was one of the schedulers, worked for ODPS full-time for over 10 years, handled 40 to 50 percent of the scheduling, helped to manage the business, and did some sales work. See id.

2. ODPS told the workers who accepted work the location of the work, the time to report, and the name of the customer contact. See Decision on Liability, R. 62, Page ID # 1881. When the workers arrived, the customer guided the worker on what services were required. See id. After a job, workers sent to ODPS invoices detailing the hours worked. See id. at Page ID # 1880. ODPS usually paid sworn officers $20 per hour and paid nonsworn officers $15 per hour. See id. Sometimes, ODPS paid the workers per project. See id.

Some workers testified that they were disciplined if they refused work. See Decision on Liability, R. 62, Page ID # 1881. They "described being put in 'time-out' or the 'penalty box.'" Id. Darrell Spurgeon "would sometimes make his

displeasure with workers known by hanging up on them in mid-sentence when they refused to work a job." Id. He used a baseball analogy with one worker who turned down work, telling "the offending worker, 'one strike, two strikes, three, you're out.'" Id. Other workers testified that they were not disciplined for refusing work. See id. at Page ID # 1881-82.

ODPS imposed dress requirements on the workers: sworn officers were required to wear their police uniforms, and nonsworn officers were required to wear "blue, police-style uniforms with patches of the ODPS logo and black shoes." See Decision on Liability, R. 62, Page ID # 1884. ODPS also imposed personal grooming rules on the workers: they generally had to be clean-shaven, and beards and goatees typically were not allowed. See id.

Darrell Spurgeon sometimes visited work sites and supervised the workers. See Decision on Liability, R. 62, Page ID # 1882. Frank Medieros periodically visited the work sites to inspect the workers' setup, sometimes corrected workers for failing to adhere to ODPS' rules relating to dress and personal grooming, sent home workers for failing to wear the correct uniform, told one worker that he would be terminated if he continued to use his personal GPS device to give directions to coworkers, and carried a duty phone for ODPS-related calls. See id. at Page ID # 1882-83. Some sworn officers testified that they were not supervised or disciplined by Darrell Spurgeon or Frank Medieros. See id. at Page ID # 1883.

However, two sworn officers were disciplined over facial hair or attire, and one was told that he would be fired if he communicated with a certain individual. See id. ODPS required some workers to submit progress reports through its website. See id. at Page ID # 1884.

To work for ODPS, some of the workers purchased police-style vehicles with flashing lights, reflective clothing, and "stop-slow" paddles. See Decision on Liability, R. 62, Page ID # 1883. ODPS provided some workers with those paddles, polo shirts, and badge-style patches and sold them ODPS-branded jackets at a discount. See id. Nonsworn officers spent around $3,000 to $5,000 on equipment for their work. See id.

3. ODPS required the workers to sign "independent contractor agreements." See Decision on Liability, R. 62, Page ID # 1884. The agreements contain non-compete provisions prohibiting the workers from working for ODPS' customers for two years after their work with ODPS ended. See id. ODPS sued to enforce the non-compete provisions. See id.

C. Procedural History

The Secretary brought an enforcement action against Defendants for violations of the FLSA's overtime pay and recordkeeping obligations on behalf of about 76 ODPS workers and sought back wages and liquidated damages for those

workers as well as injunctive relief. See Complaint, R. 1, Page ID # 1-6. The district court held a four-day bench trial in July 2015.

1. District Court's Decision on Liability

On June 17, 2016, the district court issued an order ruling that some of the workers were independent contractors and some were employees under the FLSA. See Decision on Liability, R. 62, Page ID # 1878-1899. The district court applied an economic realities analysis to determine whether the workers were economically dependent on ODPS or in business for themselves. See id. at Page ID # 1885-86. It identified six factors to consider in determining the workers' status: (1) the permanency of the relationship; (2) the degree of skill required for the work; (3) the worker's investment in equipment or materials for the work; (4) the worker's opportunity for profit or loss, depending upon his skill; (5) the degree of the employer's right to control the manner in which the work is performed; and (6) whether the work is an integral part of the employer's business. See id. at Page ID # 1886.

The district court ruled that the Secretary did not show that all of the workers were employees because they were "from two distinct classes: most were sworn law enforcement officers who had a separate income, and only a few were nonsworn individuals who financially depended on ODPS." Decision on Liability, R. 62, Page ID # 1886. The district court found that several of the economic

realities factors favored employee status for all of the workers and that the other factors favored employee status "only in relation to the nonsworn officers." Id. The district court concluded that "the nonsworn officers who are economically dependent on ODPS qualify as employees" but the sworn officers, however, were "not economically dependent on ODPS" and thus were independent contractors. Id. at Page ID # 1886-87.

The district court found a number of the economic realities factors to "heavily support" employee status for all of the workers. Decision on Liability, R. 62, Page ID # 1887.

- The evidence showed that the work performed was "routine security guard and traffic control work." Decision on Liability, R. 62, Page ID # 1888. The district court recognized that the sworn officers had a "great deal" of training and skill in law enforcement, but found that such training and skill was not required to perform the work for ODPS. Id. Indeed, "the most common tasks ODPS called upon its workers to perform—sitting in a car with lights on and toggling between stop and go paddles—themselves required little skill, initiative, or know-how." Id. at Page ID # 1888-89 (internal quotation marks omitted). The lack of skill required for the work indicated that all of the workers were employees. See id.

- The district court found that the workers' lack of a significant capital investment evincing a specialized purpose indicated that they were employees. See Decision on Liability, R. 62, Page ID # 1889-1890. The evidence showed that nonsworn officers spent about $3,000 to $5,000 on equipment to work for ODPS, which "pale[d] in comparison to the amount ODPS spent running its business." Id. at Page ID # 1889. Moreover, the nonsworn officers' primary expenditure was for police-style vehicles, which were not "so specialized" and which many workers testified they drove for personal purposes as well as work purposes. Id. at Page ID # 1889-1890. Their remaining expenditures were minimal – uniforms, boots, and other attire – and "[f]or obvious reasons" did not evince a specialized purpose. Id. at Page ID # 1890. The nonsworn officers' lack of a specialized capital investment indicated that they were employees. See id. Sworn officers used their police vehicles and uniforms – often after paying their departments a fee – when working for ODPS. See id. at Page ID # 1889. "As a result, their expenditures were often minimal compared to the nonsworn officers." Id. The district court nonetheless concluded that "this is a non-factor for sworn officers." Id. at Page ID # 1889-1890.[1]

[1] As explained below, the district court's conclusion that the sworn officers' "minimal" investment was a "non-factor" does not make sense.

- The district court found that the workers were integral to the services provided by ODPS and concluded that this factor "strongly favors" employee status for all of the workers. Decision on Liability, R. 62, Page ID # 1890.

The district court found the remaining economic realities factors to favor employee status only for the nonsworn officers. See Decision on Liability, R. 62, Page ID # 1886-87.

- Regarding the permanency of the workers' relationships with ODPS, the district court found that most of the workers "were sworn officers with other employment and sources of income" and "that alone makes it difficult to contend that the relationship between them and ODPS evidenced an exclusive, durable association fairly categorized as employer-employee." Decision on Liability, R. 62, Page ID # 1892. On the other hand, eight nonsworn workers testified that ODPS was their sole source of income, although a few of those eight were sworn officers for periods of time and others of the eight may have had "multiple employments and income" during the period. Id. at Page ID # 1892-93. The district court concluded that, "[f]raming the issue in terms of whether the workers . . . were 'economically dependent' upon ODPS, . . . the sworn officers were not

economically dependent upon ODPS, but the eight who testified to ODPS being their sole source of income were." Id. at Page ID # 1893.

- Regarding whether the workers had the opportunity for profit or loss depending on their managerial skill, the district court found "ample testimony indicating that ODPS workers could do as much or as little as they pleased. This is, in a sense, a type of managerial action that affected how much the workers profited and reflects a level of independence." Decision on Liability, R. 62, Page ID # 1894 (internal citations omitted). According to the district court, "the sworn officers who did not depend on ODPS as their sole income" were especially independent in this regard. Id. On the other hand, eight witnesses testified that ODPS was their sole source of income, and "numerous witnesses testified that they would not turn down work for fear of not getting work later." Id. The district court concluded that this factor favored employee status for the nonsworn officers but not for the sworn officers. See id.
- The district court concluded that the degree of control exercised by ODPS over the workers "is perhaps the most evenly balanced of all." Decision on Liability, R. 62, Page ID # 1895. It found that ODPS "did not *dictate* the hours the workers worked" and there was "little evidence . . . indicating that ODPS *dictated* when the workers would accept a job or not." Id. (emphases

in original). "However, the evidence did suggest that there was more scrutiny exerted over the nonsworn officers than the sworn officers." Id. at Page ID # 1896. Although there were exceptions, "the sworn officers tended to indicate that they were not supervised closely and not reprimanded or disciplined." Id. The "nonsworn officers typically testified that they faced supervision from either Darrell Spurgeon or Medieros and were more likely to be disciplined on the jobsite or reprimanded for turning down work." Id. According to the district court, "to the extent" that this factor supports employee status, "it does so only for the nonsworn officers." Id.

The district court concluded that the economic realities factors "only support considering the nonsworn officers as employees." Decision on Liability, R. 62, Page ID # 1896. They were "economically dependent on ODPS" and thus employees. Id.; see id. at Page ID # 1897 ("[T]he nonsworn workers who depended on ODPS for their income and who were supervised and disciplined as employees should have been classified as such."). Specifically, the district court identified eight workers and ruled that they "and any other nonsworn officers similarly situated" were "employees during the periods in which they worked for ODPS and relied on [ODPS] for their sole income." Id. at Page ID # 1898. On the other hand, the sworn officers "simply were not economically dependent on ODPS and instead used ODPS to supplement their incomes. As such, under the

prevailing economic realities test, [they] must be considered independent contractors." Id. at Page ID # 1896. Thus, workers who "were sworn officers at the time they provided services for ODPS" were not employees of ODPS. Id.; see id. at Page ID # 1898 ("[T]he sworn officers who testified at trial, and all of those ODPS workers who are similarly situated, were appropriately labeled as independent contractors.").

Regarding the Secretary's claim that Defendants violated the FLSA's recordkeeping obligations, the district court acknowledged the Secretary's assertion that ODPS' records were incomplete and noted that "Darrell Spurgeon even admitted at trial that some entries were based on faulty information given to him by workers." Decision on Liability, R. 62, Page ID # 1896-97. The district court ruled, however, that it "cannot conclude from the evidence produced at trial that [Defendants] *knowingly* failed to maintain accurate records." See id. at Page ID # 1897 (emphasis in original).

2. District Court's Order Awarding Damages

After receiving additional briefing from the parties, the district court issued on December 22, 2016 an order awarding back wages and liquidated damages. See Order Awarding Damages, R. 66, Page ID # 1932-36. Consistent with its prior decision, the district court reiterated that "'employees' are considered to be those who were nonsworn officers" and any workers who "were sworn officers during

the relevant time period will not be awarded back wages." Id. at Page ID # 1932-33. Defendants argued that several nonsworn officers should not receive back wages because "they supplemented their income from ODPS with other work." Id. at Page ID # 1933 n.1. The district court rejected this argument:

> While the Court considered the fact that most sworn officers supplemented their incomes with other work and most nonsworn officers were economically dependent on ODPS in its analysis . . . , receiving supplemental income is not enough to disqualify someone as a "nonsworn officer." The ultimate distinction is between "sworn officers" and "nonsworn officers," regardless of supplemental income.

Id. The district court rejected Defendants' additional arguments, awarded 18 workers a total of about $76,000 in back wages and liquidated damages, and entered judgment. See id. at Page ID # 1933-36.[2]

3. District Court's Denial of Defendants' Motion to Alter, Amend, or Vacate the Judgment

Pursuant to Federal Rule of Civil Procedure 59(e), Defendants filed a motion to alter, amend, or vacate the judgment, arguing that the district court's order awarding damages to nonsworn officers was inconsistent with the way its Decision on Liability found some officers to be employees and others to be independent contractors. See Motion to Alter, Amend, or Vacate Judgment, R. 71, Page ID #

[2] The district court found Bonnie and Darrell Spurgeon to be employers under the FLSA jointly and severally liable for the back wages and liquidated damages due. See Decision on Liability, R. 62, Page ID # 1885.

1947-1954. On June 30, 2017, the district court denied the motion. See Memorandum Opinion and Order, R. 74, Page ID # 1967-1978.

The district court acknowledged that it "considered workers' supplemental income throughout" its Decision on Liability, but stated that an economic realities analysis looks at whether the worker is economically dependent upon the employer, not whether the employer is the worker's "sole source of income." Memorandum Opinion and Order, R. 74, Page ID # 1970. "In this case, most of the workers were sworn officers who had separate incomes, while the rest were generally nonsworn officers who relied solely on ODPS for their income." Id. The district court further stated that it was "not a requirement that nonsworn officers have no supplemental income in order to be eligible for back wages," and that "even if a worker had supplemental income, he or she could still be considered economically dependent on ODPS." Id. at Page ID # 1971. According to the district court, its Decision on Liability emphasized that "the relevant distinction is between sworn and nonsworn officers," and it asserted that there were "numerous differences between sworn and nonsworn officers, including pay, discipline, equipment, and uniforms." Id.; see id. at Page ID # 1972 ("[A]s explained earlier, economic dependence does not necessarily mean that a nonsworn officer had no supplemental income. Ultimately, the distinction is between sworn and nonsworn officers.").

SUMMARY OF ARGUMENT

ODPS did not treat its entire workforce – the security guards and traffic controllers who provided the services that comprise its business – as employees under the FLSA as it should have and violated the Act by failing to pay them overtime due and by not keeping the required records for them.

1. The district court correctly ruled that some of the workforce, the nonsworn officers, were economically dependent on, and thus employees of, ODPS under the FLSA. Indeed, the economic realities of the nonsworn officers' working relationship with ODPS overwhelmingly demonstrated that they were employees. The district court, however, ruled that the remainder of the workforce, the sworn officers, were not economically dependent on ODPS under the FLSA and thus were independent contractors. The district court arrived at this result even though sworn officers and nonsworn officers performed essentially the same work for ODPS and any differences between sworn officers' and nonsworn officers' working relationships with ODPS were not meaningful.

But rather than concluding, as it should have, that the sworn officers were also employees under the FLSA, the district court instead relied on the sworn officers' employment by local law enforcement departments and its conclusions that those departments were their primary source of income and that they worked for ODPS to earn supplemental income. By considering economic dependence for

purposes of the FLSA in terms of whether ODPS was the sworn officers' primary employer and source of income, the district court incorrectly ruled that the sworn officers were not ODPS' employees; the district court impermissibly allowed the officers' status as employees *of local law enforcement departments* and their income from that employment to determine whether they were employees *of ODPS* under the FLSA.

It is well settled under the FLSA that a worker is an employee covered by the Act's protections if, as a matter of economic reality, he is economically dependent on the employer; he is, however, an independent contractor outside of the Act's protections if the economic realities show that he is in business for himself. The district court erred by conflating whether the sworn officers were economically dependent on ODPS, the proper inquiry under the FLSA, with whether ODPS was their primary source of income, and by in turn primarily relying on the sworn officers' employment with, and income from, local law enforcement departments to rule that they were not ODPS' employees. The district court's approach has been dismissed by numerous courts and conflicts with the Act's purposes. If adopted, this approach would carve out from the FLSA's protections many worker-employer relationships solely because of the workers' separate employment, income, and/or wealth as opposed to the actual economic realities of the workers' relationships with the employers. Such a result would be

contrary to the broad definition of employment and scope of coverage intended by the Act.

Moreover, the economic realities of the sworn officers' working relationship with ODPS strongly indicate economic dependence: their work required little skill, it was integral to ODPS' business, their investment in equipment was minimal, they were paid a fixed hourly rate set by ODPS, many of them have been working for ODPS for years, and ODPS controlled the economic terms of the relationship. On the evidence presented in this case, both the sworn officers and the nonsworn officers were ODPS' employees under the FLSA.

2. The district court further erred by requiring the Secretary to show that ODPS "knowingly" failed to maintain accurate records to prove a violation of the FLSA's recordkeeping obligations. The district court's imposition of a knowledge requirement lacks support in the Act, is contrary to principles of statutory construction, and has not been adopted by other courts. The Secretary proved that ODPS failed to maintain the records required by the FLSA and therefore proved a violation of the Act's recordkeeping obligations regardless of whether the failure was intentional.

STANDARD OF REVIEW

This Court reviews a district court's factual findings made after a bench trial for clear error and its legal conclusions de novo. See Solis v. Laurelbrook

Sanitarium & Sch., Inc., 642 F.3d 518, 522 (6th Cir. 2011). Whether the sworn officers working for ODPS were its employees under the FLSA is ultimately a question of law, see Fegley v. Higgins, 19 F.3d 1126, 1132 (6th Cir. 1994); therefore, the district court's ruling that they were not ODPS' employees should be reviewed de novo. Likewise, the district court's legal conclusion that the Secretary must show that ODPS "knowingly" failed to maintain accurate records to prove a violation of the FLSA's recordkeeping obligations should be reviewed de novo.

ARGUMENT

I. THE DISTRICT COURT ERRED BY RULING THAT THE SWORN OFFICERS WERE NOT EMPLOYEES UNDER THE FLSA BECAUSE, RATHER THAN FOCUSING ON THEIR RELATIONSHIP WITH ODPS, IT PRIMARILY RELIED ON THEIR EMPLOYMENT WITH AND INCOME FROM LOCAL LAW ENFORCEMENT DEPARTMENTS

A. The Correct Legal Standard under the FLSA for Distinguishing between Employees and Independent Contractors.

The FLSA defines "employee" as "any individual employed by an employer," 29 U.S.C. 203(e)(1), "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. 203(d), and "employ" to "include[ ] to suffer or permit to work," 29 U.S.C. 203(g). In interpreting these definitions, the Supreme Court has noted that "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame," United States v. Rosenwasser, 323 U.S. 360, 362 (1945), and that "the term 'employee' had been given 'the broadest definition that has ever

been included in any one act,'" id. at 363 n.3 (quoting 81 Cong. Rec. 7657 (statement of Senator Black)). The Supreme Court has further noted that the "striking breadth" of the Act's definition of "employ" "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." Nationwide Mut. Ins. v. Darden, 503 U.S. 318, 326 (1992). This Court recognizes the Supreme Court's instruction regarding the FLSA's definitions. See Keller v. Miri Microsystems LLC, 781 F.3d 799, 804 (6th Cir. 2015) (FLSA's definition of "employee" is "strikingly broad") (citing Darden, 503 U.S. at 326); Dunlop v. Carriage Carpet Co., 548 F.2d 139, 143-44 (6th Cir. 1977) (to accomplish the FLSA's remedial purposes, "Congress built into the Act key definitions of great breadth and generality," and it was the "'Congressional intention to include all employees within the scope of the Act unless specifically excluded'") (quoting Rosenwasser, 323 U.S. at 363).

The Supreme Court has made clear that, given the Act's definitions, the test of employment under the FLSA is economic reality. See Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 301 (1985). The economic realities of the worker's relationship with the employer rather than any technical concepts used to characterize that relationship is the test of employment. See Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961). Courts must examine the economic realities of the relationship to determine whether the worker "follows the usual

path of an employee." Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947).

In determining whether a worker is an employee under the FLSA or an independent contractor, this Court looks at whether, as a matter of economic reality, the worker is economically dependent on the business to which he renders service or is in business for himself. For example, in Keller, 781 F.3d at 806-07, this Court stated that it has interpreted the FLSA's definitions, in light of the Act's remedial purpose, to mean that employees are those workers who as a matter of economic reality are dependent on the business to which they render service, as opposed to being independent from the business. See also Imars v. Contractors Mfg. Servs., Inc., 165 F.3d 27, 1998 WL 598778, at *3 (6th Cir. Aug. 24, 1998) (per curiam) (the economic realities analysis looks to whether the worker is economically dependent upon the principal or is instead in business for himself); Donovan v. Brandel, 736 F.2d 1114, 1116 (6th Cir. 1984) (applying the FLSA's definitions and considering the purpose of the Act, "'employees are those who as a matter of economic reality are dependent upon the business to which they render service'") (quoting Dunlop, 548 F.2d at 145).

Other courts of appeals have concluded similarly. For example, the Fourth Circuit determines whether a worker is an employee under the FLSA by looking to the economic realities of the relationship between the worker and the employer and

whether the worker is economically dependent on the business to which he renders service or is, as a matter of economic reality, in business for himself. See McFeeley v. Jackson Street Entm't, LLC, 825 F.3d 235, 241 (4th Cir. 2016). The Eleventh Circuit determines "whether an individual falls into the category of covered 'employee' or exempted 'independent contractor,'" by looking "to the 'economic reality' of the relationship between the alleged employee and alleged employer and whether that relationship demonstrates dependence." Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1311 (11th Cir. 2013). Similarly, the Fifth Circuit "determine[s] if a worker qualifies as an employee" by "focus[ing] on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself." Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008). The Tenth Circuit has noted that the Supreme Court has directed that the economic realities of the relationship govern and accordingly focuses on whether the worker is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself. See Dole v. Snell, 875 F.2d 802, 804 (10th Cir. 1989) (citing Bartels v. Birmingham, 332 U.S. 126, 130 (1947)). Like these other courts of appeals, the Second Circuit recognizes that "[t]he ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business . . .

or are in business for themselves." Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988).[3]

This Court, like other courts of appeals, considers a number of factors when determining under the FLSA whether, as a matter of economic reality, a worker is an employee or is instead an independent contractor: (1) the permanency of the relationship between the parties; (2) the degree of skill required for the rendering of the services; (3) the worker's investment in equipment or materials for the task; (4) the worker's opportunity for profit or loss, depending upon his skill; (5) the degree of the employer's right to control the manner in which the work is performed; and (6) whether the service rendered is an integral part of the employer's business. See Keller, 781 F.3d at 807; Brandel, 736 F.2d at 1117 & n.5. "No one factor is determinative," and this Court considers each factor "with an eye toward the ultimate question—[the worker's] economic dependence on or independence from [the employer]." Keller, 781 F.3d at 807; see Brandel, 736

[3] This Court and others apply the economic realities analysis to determine whether a worker is an employee under the FLSA regardless of any "independent contractor" label given to the relationship. "To effect Congress's broad purpose, we must look to see whether a worker, even when labeled as an 'independent contractor,' is, as a matter of 'economic reality,' an employee." Keller, 781 F.3d at 804 (citing the Supreme Court's statement in Rutherford Food, 331 U.S. at 729, that "[w]here the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act."); see Scantland, 721 F.3d at 1311 (the "inquiry is not governed by the 'label' put on the relationship by the parties or the contract controlling that relationship").

F.2d at 1116 ("[E]conomic dependence may be the ultimate controlling factor in a given situation for finding an employment relationship.").

Indeed, the economic realities factors "serve as guides, and "the overarching focus of the inquiry is economic dependence." Scantland, 721 F.3d at 1312. The economic realities factors are "aids" and "tools to be used to gauge the degree of dependence" of the worker on the employer; "[i]t is dependence that indicates employee status," and each factor "must be applied with that ultimate notion in mind." Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1311 (5th Cir. 1976). As a district court in this circuit held in an action by the Secretary on behalf of workers who were misclassified as independent contractors:

> These factors are to be considered and weighed against one another in each situation, but there is no mechanical formula for using them to arrive at the correct result. Rather, the factors are simply a tool to assist in understanding individual cases, with the ultimate goal of deciding whether it is economically realistic to view a relationship as one of employment or not.

Solis v. Cascom, Inc., No. 3:09-cv-257, 2011 WL 10501391, at *4 (S.D. Ohio Sept. 21, 2011). Although the district court here identified and applied these factors, it failed to understand the ultimate inquiry and the meaning of economic dependence for purposes of the FLSA when determining the sworn officers' employment status. Specifically, it failed to understand that these factors, looked at through the prism of economic dependence under the FLSA, are mainly and necessarily focused on the relationship between the worker and the particular

employer in question, rather than being focused on considerations outside of that relationship.

B. When Determining Whether the Sworn Officers Were Economically Dependent on ODPS under the FLSA, the District Court Erred by Considering Economic Dependence in Terms of Whether ODPS Was the Sworn Officers' Primary Employer and Source of Income.

As described above, the determinative reason for the district court's ruling that the sworn officers were not economically dependent on ODPS and thus not employees under the FLSA was their employment in law enforcement (mainly as police officers) separate from ODPS and the income that they received from that employment. Throughout three decisions in this case and citing no caselaw in support, the district court emphasized the sworn officers' separate employment, income, and distinct status from the nonsworn officers. See Decision on Liability, R. 62, Page ID # 1886 (the workers were "from two distinct classes: most were sworn law enforcement officers who had a separate income, and only a few were nonsworn individuals who financially depended on ODPS"); id. at Page ID # 1892 (most of the workers "were sworn officers with other employment and sources of income"); id. at Page ID # 1896 (the sworn officers "simply were not economically dependent on ODPS and instead used ODPS to supplement their incomes" and "[a]s such, . . . must be considered independent contractors"); id. at Page ID # 1898 (ruling that eight workers "and any other nonsworn officers similarly situated" were "employees during the periods in which they worked for ODPS and relied on

[ODPS] for their sole income"); Order Awarding Damages, R. 66, Page ID # 1933 n.1 ("[M]ost sworn officers supplemented their incomes with other work and most nonsworn officers were economically dependent on ODPS."); Memorandum Opinion and Order, R. 74, Page ID # 1970 ("[M]ost of the workers were sworn officers who had separate incomes, while the rest were generally nonsworn officers who relied solely on ODPS for their income."); id. at Page ID # 1972 ("Ultimately, the distinction is between sworn and nonsworn officers."). The district court's decisions reveal the starkness of its reliance on the sworn officers' outside employment and income to determine their employment status.[4]

The district court's reasoning for ruling that the sworn officers were not employees, however, fails to grasp the meaning of economic dependence for purposes of the FLSA by conflating "economic dependence" with "primary source of income," thereby giving far too much weight to the sworn officers' employment and income separate from ODPS.

[4] In its Order Awarding Damages, the district court acknowledged that "receiving supplemental income is not enough to disqualify someone as a 'nonsworn officer'" and stated that "[t]he ultimate distinction is between 'sworn officers' and 'nonsworn officers,' regardless of supplemental income." Order Awarding Damages, R. 66, Page ID # 1933 n.1. However, this discussion related solely to nonsworn officers, and the district court ruled that each worker asserted by ODPS to be a sworn officer, except for two who could not remember their dates of employment as sworn officers, were not employees under the FLSA. See Decision on Liability, R. 62, Page ID # 1896-98; Order Awarding Damages, R. 66, Page ID # 1933. A fair reading of the district court's decisions reveals, as the Secretary has shown, the extent to which the district court relied on the sworn officers' outside employment and income to conclude that they were not employees.

This Court correctly recognized in Keller that the fact that a worker works for others besides the employer at issue is but "one factor of many to consider in determining whether a worker is economically dependent upon the [employer]." 781 F.3d at 808. In Keller, the Sixth Circuit considered the number of other companies for whom the worker worked as relevant to evaluating the permanence of the worker's relationship with the employer at issue – one of the applicable economic realities factors. See id. at 807 ("If a worker has multiple jobs for different companies, then that weighs in favor of finding that the worker is an independent contractor.") (citing Brandel, 736 F.2d at 1117).[5] Significantly, this Court stated its agreement with the Second Circuit's decision in Superior Care and affirmed that "'employees may work for more than one employer without losing their benefits under the FLSA.'" Id. at 808 (quoting Superior Care, 840 F.2d at 1060). Thus, a worker's employment with others is one piece of relevant evidence but is in no way determinative as there are "many" other factors to consider when evaluating the worker's economic dependence on the employer at issue. Id.

Numerous courts of appeals have concurred. For example, the Second Circuit in Superior Care, after describing the "transient" nature of the workers,

[5] In Keller, the worker was allowed to work for other companies in his industry but, according to him, did not have the time because of his full-time work for the employer at issue. See 781 F.3d at 807-09. This Court concluded, contrary to the district court's finding for the employer in that case, that there was a genuine dispute of material fact regarding the permanency of the relationship between the worker and the employer. See id. at 809.

stated, as noted above, that "[n]evertheless, these facts are not dispositive of independent contractor status," and that "employees may work for more than one employer without losing their benefits under the FLSA." 840 F.2d at 1060. Likewise, the Second Circuit rejected the proposition that a worker cannot be an employee of an employer if the employer is not his primary source of income. See id. ("Nor has the fact that the worker does not rely on the employer for his primary source of income require a finding of independent contractor status."). The Second Circuit concluded that the transient nature of the workers reflected the nature of their profession as opposed to their economic independence, and that the economic realities in their totality demonstrated that they were employees. See id. at 1061.

The Fifth Circuit has rejected the argument that workers whose employer is not their primary source of income cannot be economically dependent on that employer under the FLSA. In Halferty v. Pulse Drug Co., 821 F.2d 261, 267-68 (5th Cir. 1987), the Fifth Circuit rejected the employer's argument that the worker "did not economically depend on the wages paid by [the employer] for her survival" because she had other, greater income – primarily "benefits from the federal government." According to the Fifth Circuit, the employer essentially argued that it "paid her so little that she could not possibly have established the requisite economic dependency under the FLSA." Id. at 267. The Fifth Circuit

ruled that the employer "misconstrues the meaning of this court's inquiry into economic dependence":

> Thus, it is not dependence in the sense that one could not survive without the income from the job that we examine, but dependence for continued employment. Under [the employer's] interpretation, wealthy persons could never be employees under the FLSA, and employers could avoid liability to workers simply by paying them so low a wage that the workers are forced to live on other sources of income. We conclude that as a matter of economic reality [the worker] is an employee and not an independent contractor.

Id. at 267-68.

Similarly, in Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1054 (5th Cir. 1987), the Fifth Circuit ruled that the district court's conclusion that workers who worked for an employer to make extra money in their spare time and who did not make their living from that work were not economically dependent on that employer was "wrong as a matter of law." In reversing the district court's judgment that the workers were independent contractors, the Fifth Circuit stated that "the court's understanding of the meaning of 'economic dependence' is itself flawed. Economic dependence is *not* conditioned on reliance on an alleged employer for one's primary source of income, for the necessities of life." Id. (emphasis in original). Instead, the correct test of economic dependence under the FLSA requires consideration of all of the economic realities factors and examines whether the workers are dependent on a particular employer for their continued employment in that line of business. See id.

The Third Circuit has ruled that a district court "clearly misinterpreted and misapplied" the economic dependence analysis under the FLSA when it reasoned that workers who worked for an employer to earn "a secondary source of income for their households" were not economically dependent on that employer. Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1385 (3d Cir. 1985). In reversing the district court's judgment that the workers were independent contractors, the Third Circuit stated:

> There is no legal basis for [the district court's] position. The economic-dependence aspect of the [economic realities analysis] does not concern whether the workers at issue depend on the money they earn for obtaining the necessities of life, as the district court suggests. Rather, it examines whether the workers are dependent on a particular business or organization for their continued employment.

Id. The Third Circuit persuasively explained why economic dependence under the FLSA cannot literally refer to the worker's financial dependence or the worker's dependence on the employer as his primary source of income:

> Although the district court's interpretation of "economic dependence" may appear to be reasonable on the surface, it would lead to senseless results if carried to its logical conclusion. Consider the following example. Two persons do exactly the same work for the same organization. The first worker, who relies on the job as a primary source of income, would be considered "economically dependent" on the organization and thus an "employee" subject to the minimum-wage provisions of the FLSA. The other worker, whose spouse provides the primary source of family income, would not be considered "economically dependent" and thus would not necessarily be entitled to receive the minimum wage. Moreover, upon the first worker's subsequent marriage to a spouse who would provide the primary source of family income, he or she might then lose the status as an "employee," resulting in a possible reduction in wage rate.

Id. at 1385 n.11.[6]

Thus, as these courts have explained, a worker can be economically dependent on an employer for purposes of the FLSA even if that employer is the worker's "second" employer and not his primary source of income. Indeed, according to the Department's Bureau of Labor Statistics, more than 7.4 million workers in the United States work multiple jobs.[7] If the fact that a worker is already employed by one employer means that he would necessarily be an independent contractor with respect to a job taken with the second employer, then millions of workers would be outside of the FLSA's protections for their second jobs. Similarly, if the fact that a worker does not depend on his employer as his

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[6] Similarly, a district court recently rejected an employer's argument that workers classified by it as volunteers "cannot be employees because they all have other primary sources of income." Rhea Lana, Inc. v. U.S. Dep't of Labor, --- F. Supp.3d ----, No. 1:14-cv-00017 (CRC), 2017 WL 4286178, at *7 (D.D.C. Sept. 26, 2017), appeal docketed, No. 17-5259 (D.C. Cir. Nov. 18, 2017). The district court responded to the argument: "But under that theory, independently wealthy individuals or those who worked multiple jobs (and thereby had other primary sources of income too) could not be employees, an outcome inconsistent with the broad and remedial purposes of the FLSA." Id. And in Hallissey v. Am. Online, Inc., No. 99-CIV-3785 (KTD), 2006 U.S. Dist. LEXIS 12964, at *19 (S.D.N.Y. Mar. 10, 2006), the district court rejected the proposition that workers could not be economically dependent on the employer because none of them relied on the employer "for their needs such as food, clothing and shelter." As the court reasoned, "[i]f that were the law, no employer of part-time employees or of independently wealthy persons who choose to work would ever be bound by the FLSA." Id.

[7] The data is for October 2017. See www.bls.gov/news.release/empsit.t16.htm (last viewed on November 21, 2017).

primary source of income means that he necessarily would be an independent contractor, then any worker who is independently wealthy, receives government benefits or a pension, or has a spouse who earns more could fall outside of the FLSA's protections based on that other income as opposed to the economic realities of his working relationship with the employer.

Moreover, a worker may work part time for an employer for a period of time and may have full-time employment for another employer during some of that same period and no other employment at other times during that same period (as three ODPS officers testified, see Decision on Liability, R. 62, Page ID # 1892-93 n.2). By the district court's reasoning, that worker would be an employee of his part-time employer for some periods (when that was his only employment) and an independent contractor for other periods (when he also had full-time employment) – without any change in the economic realities of his working relationship with his part-time employer. Such results would not only be "senseless," but also contrary to the broad scope and coverage of the FLSA as explained above. Instead, a worker is economically dependent on an employer (and thus is its employee) when, as a matter of economic reality, it relies on the employer's business for continued work; on the other hand, if the worker relies on his own independent business to work, he is not economically dependent on the employer. See Scantland, 721 F.3d at 1312 ("Ultimately, in considering economic dependence, the court focuses on

whether an individual is 'in business for himself' or is 'dependent upon finding employment in the business of others.'") (quoting Mednick v. Albert Enters., Inc., 508 F.2d 297, 301–02 (5th Cir. 1975)).

For the above reasons, the district court erred by relying primarily on the sworn officers' separate employment as police officers and in other law enforcement positions and their income from that employment to determine that they were not employees of ODPS under the FLSA.[8]

C. Viewing the Evidence under the Correct Legal Standard, the Sworn Officers Were ODPS' Employees under the FLSA.

Consistent with the caselaw described above, the economic realities of the sworn officers' working relationship with ODPS, not whether they had employment and income separate from ODPS, determine whether they were employees under the FLSA. The applicable economic realities factors indicate that the sworn officers – like the nonsworn officers – were economically dependent on ODPS and thus were its employees under the FLSA. Moreover, any differences between the sworn and nonsworn officers in terms of "pay, discipline, equipment,

[8] The district court's reliance on the sworn officers' primary source of income as coming from their employment in law enforcement is not only legally wrong, but may also be factually incorrect for some of the sworn officers. One of the sworn officers testified that he sometimes was paid more for his work for ODPS than for his work as a police officer and characterized his income from ODPS as a main source of income. See Transcript of Bench Trial, Volume 3, R. 54, Page ID # 1500. Another sworn officer was a county constable who testified that being a constable "wasn't actually a full-time job" and that he worked at least 50 hours per week for ODPS. See Transcript of Bench Trial, Volume 1, R. 52, Page ID # 1029.

and uniforms" identified by the district court[9] were not significant and do not, especially when considered as part of the totality of the economic realities, indicate that the sworn officers were in business for themselves. Although some of ODPS' customers preferred sworn officers, work as a sworn officer and as a nonsworn officer was "[p]retty much the same thing." Transcript of Bench Trial, Volume 4, R. 55, Page ID # 1673.

Degree of Skill Required. The district court found that ODPS' officers performed "routine security guard and traffic control work," Decision on Liability, R. 62, Page ID # 1888, and that "the most common tasks" performed by the officers involved "sitting in a car with lights on and toggling between 'stop' and 'go' paddles," id. at Page ID # 1888-89. According to the district court, these tasks "required little skill, initiative, or know-how." Id. at Page ID # 1889. The district court acknowledged that the sworn officers had a "great deal" of training and skill in law enforcement, but this skill and "extraneous" training was not relevant to their actual work for ODPS. Id. Correctly "[a]dhering to the Sixth Circuit's directive to compare the skill required relative to the task performed," the district

[9] Having primarily relied on the sworn officers' employment and income separate from ODPS to distinguish them in terms of employee status from the nonsworn officers, the district court proceeded to state in its order denying Defendants' motion to alter, amend, or vacate the judgment that there were "numerous differences between sworn and nonsworn officers, including pay, discipline, equipment, and uniforms." Memorandum Opinion and Order, R. 74, Page ID # 1971.

court necessarily and properly concluded that the lack of skill required for the work performed for ODPS indicates that the officers, sworn and nonsworn, were employees under the FLSA. Id. at Page ID # 1888 (citing Brandel, 736 F.2d at 1118).

Whether the Service Rendered Was an Integral Part of ODPS' Business. The district court stated that when a worker is an integral part of the services provided by an employer it is more likely that the worker is its employee. See Decision on Liability, R. 62, Page ID # 1890 (citing Keller, 781 F.3d at 815). As the district court found, see id., ODPS did not provide, nor could it, any persuasive evidence or argument that the officers, sworn and nonsworn, were not an integral part of the services provided by ODPS. The district court correctly concluded that this factor "strongly favors" employee status for the officers. Id.

Investment in Equipment. The district court found that, when working for ODPS, the sworn officers "were often allowed to use their department equipment—to wear their department uniforms and drive their police cruisers—after they paid their departments a fee." Decision on Liability, R. 62, Page ID # 1889. "As a result, their expenditures were often minimal compared to the nonsworn officers." Id.[10] The district court found that the nonsworn officers spent

[10] The evidence supports the conclusion that the sworn officers' investment in equipment was very minimal. Darrell Spurgeon testified that the sworn officers had their own car and equipment from their police departments (which charged

about $3,000 to $5,000 on equipment to work for ODPS, which "pale[d] in comparison to the amount ODPS spent running its business" and was not a significant capital investment evincing a specialized purpose, thereby indicating that they were employees. Id. at Page ID # 1889-1890.

Inexplicably, however, the district court concluded that the sworn officers' minimal investment was a "non-factor." Decision on Liability, R. 62, Page ID # 1890. This conclusion simply makes no sense. The district court found that the nonsworn officers' investment was not significant and indicated that they were employees. See id. at Page ID # 1889-1890. If the sworn officers' investment was "often minimal compared to the nonsworn officers," id. at Page ID # 1889, then the sworn officers' investment must have been even more insignificant and more

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them a fee) and therefore did not incur expenses working for ODPS. See Transcript of Bench Trial, Volume 2, R. 53, Page ID # 1321-22. Testimony from the sworn officers confirms their lack of investment. See, e.g., Transcript of Bench Trial, Volume 4, R. 55, Page ID # 1682, 1686 (sworn officer did not have to buy any equipment or supplies to work for ODPS and used his police car for which he paid $200 per month to his department); Transcript of Bench Trial, Volume 3, R. 54, Page ID # 1492-93, 1507 (sworn officer did not have to buy any equipment or supplies to work for ODPS, ODPS gave him a stop-and-go sign, and the "rest of the equipment" was from his police department to whom he paid a $50 fee per month); Transcript of Bench Trial, Volume 1, R. 52, Page ID # 1062-63 (sworn officer used police department car and uniform, Darrell Spurgeon gave him patches with ODPS logo to put on his uniform, and he bought only "gloves" and "stuff to put on your neck"). While the sworn officers could wear their police uniforms, the nonsworn officers had to wear "blue, police-style uniforms" and "black shoes." Decision on Liability, R. 62, Page ID # 1884.

strongly indicative of employee status. Thus, there was no basis for the district court's conclusion that this was a "non-factor" for them.

The district court's subsequent assertion, see Memorandum Opinion and Order, R. 74, Page ID # 1971, that the difference in the level of investment in equipment and uniforms between the sworn and nonsworn officers supports its ruling that the sworn officers were not employees, is equally confounding. There was a difference; however, that difference provides no basis for treating the sworn officers as independent contractors given that their investment was "often minimal" compared to the investment of the nonsworn officers (who were found by the district court to be employees) and did not indicate that the sworn officers were in business for themselves.

Permanency of the Relationship. The district court noted the sworn officers' "other employment and sources of income" and concluded: "[T]hat alone makes it difficult to contend that the relationship between them and ODPS evidenced an exclusive, durable association fairly categorized as employer-employee." Decision on Liability, R. 62, Page ID # 1892. As explained above, however, the district court's reliance on the sworn officers' other employment and income to determine that they were not economically dependent on ODPS was erroneous.

Focusing on the sworn officers' relationship with *ODPS*, the evidence indicates a degree of permanence. One sworn officer testified that he had been

working for ODPS for five or six years and worked 20 to 25 hours per week. See Transcript of Bench Trial, Volume 3, R. 54, Page ID # 1504. Another sworn officer testified that he had "been with" ODPS since 2000, had not "work[ed] any other off-duty" work since then, and performed services for ODPS on a regular basis. Transcript of Bench Trial, Volume 4, R. 55, Page ID # 1609. A third sworn officer testified that he had been working for ODPS for about 20 years. See id. at Page ID # 1651. A fourth sworn officer testified that he had worked for ODPS for about 13 years. See id. at Page ID # 1681. A fifth sworn officer testified that he had been working for ODPS for about six or seven years. See id. at Page ID # 1633. Moreover, the Secretary's claim here is for violations of the FLSA's overtime pay, as opposed to minimum wage, requirements. See Complaint, R. 1, Page ID # 4. In other words, each of the 60 or so sworn officers on whose behalf the Secretary sought relief worked more than 40 hours for ODPS in at least one week, and most worked overtime hours in more than one week. All of this evidence shows that there was a degree of permanence to the sworn officers' working relationship with ODPS, indicating that they were its employees.

Opportunity for Profit or Loss Depending on Skill. The district court found that the workers could work as many or as few hours as they wanted and that "[t]his is, in a sense, a type of managerial action that affected how much the workers profited and reflects a level of independence." Decision on Liability, R.

62, Page ID # 1894. Ultimately, however, the district court based its determination as to whether the officers had an opportunity for profit or loss squarely on whether they were sworn officers "who did not depend on ODPS as their sole income" or nonsworn officers who "testified to ODPS being their sole income." Id. The district court concluded that, "[a]lthough it is a close call, this factor splits and breaks for the Department regarding the nonsworn officers but against the Department concerning the sworn officers." Id. Again, the officers' status as sworn or nonsworn and particularly whether they had income outside of their work for ODPS was determinative for the district court. See id. As explained above, however, the district court erred by relying on this distinction and in turn failing to rely on evidence of the sworn officers' relationship with ODPS.

Focusing on the sworn officers' relationship with ODPS, the evidence, as discussed above, showed that their investment to perform work for ODPS was minimal. See Decision on Liability, R. 62, Page ID # 1889. There was thus no indication that they could suffer a loss by working for ODPS. The officers were usually paid at fixed hourly rates set by ODPS. See id. at Page ID # 1880; Transcript of Bench Trial, Volume 2, R. 53, Page ID # 1304-05. There was no evidence that the officers could negotiate or otherwise use skills to influence the hourly rate. Because they were paid hourly rates, the officers could not increase their earnings by being more efficient. See Solis v. Int'l Detective & Protective

Serv., Ltd., 819 F. Supp.2d 740, 751 (N.D. Ill. 2011) (security guards paid by the hour "had no opportunity, by performing their tasks efficiently and skillfully, to earn additional profit," and "[s]imply put, [their] performance had no correlation to the amount they earned"); cf. Keller, 781 F.3d at 813 (suggesting that the ability to work more efficiently to complete more jobs could be an example of using managerial skills to affect profit).

The officers could earn more from ODPS by working additional hours (assuming more work from ODPS was available). However, a worker's ability to work additional hours and the amount of work available from the employer have nothing to do with the worker's managerial skill and do little to separate employees from independent contractors, both of whom are likely to earn more if there is more work available and they work more. See Scantland, 721 F.3d at 1316-17 ("Plaintiffs' opportunity for profit was largely limited to their ability to complete more jobs than assigned, which is analogous to an employee's ability to take on overtime work or an efficient piece-rate worker's ability to produce more pieces."); Dole, 875 F.2d at 810 (cake decorators' "earnings did not depend upon their judgment or initiative, but on the [employer's] need for their work"); Cascom, 2011 WL 10501391, at *6 (there was no opportunity for increased profit depending on the workers' managerial skills; although they could work additional hours to increase their income, they made no decisions regarding routes, acquisition of

materials, or any facet normally associated with operating an independent business); Int'l Detective & Protective Serv., 819 F. Supp.2d at 751. The ability of a worker paid a fixed hourly rate to earn more by working additional hours is no different for an independent contractor than it is for an employee and thus is not a managerial skill indicating that a worker is an independent contractor.[11]

Right to Control. The district court found that, although there were exceptions, "the sworn officers tended to indicate that they were not supervised closely and not reprimanded or disciplined"; the nonsworn officers, on the other hand, "faced supervision" and "were more likely to be disciplined on the jobsite or reprimanded for turning down work." Decision on Liability, R. 62, Page ID # 1896. It thus concluded that, "to the extent" that this factor supports employee status, "it does so only for the nonsworn officers." Id.

The district court, however, overlooked the degree to which ODPS controlled the economic terms of the relationship. The customers were ODPS'

[11] The district court's assertion, see Memorandum Opinion and Order, R. 74, Page ID # 1971, that the difference in pay between the sworn and nonsworn officers supports its ruling that the sworn officers were not employees is unpersuasive. As a general matter, ODPS paid sworn officers $20 per hour and paid nonsworn officers $15 per hour. See Decision on Liability, R. 62, Page ID # 1881. This difference, however, is irrelevant as there is no basis to suggest that the sworn officers' higher hourly rate is more indicative of their being in business for themselves. Moreover, both the sworn and nonsworn officers were paid a fixed hourly rate even if the rates were different. Accordingly, as discussed above, none of the officers had the opportunity to use managerial skill to affect their opportunity for profit or loss, which would indicate that they were in business for themselves.

customers. See Transcript of Bench Trial, Volume 2, R. 53, Page ID # 1306-08. The officers had to agree to non-compete clauses prohibiting them from working for ODPS' customers for two years after their work for ODPS ended. See Decision on Liability, R. 62, Page ID # 1884. ODPS offered the work to the officers and assigned and scheduled them to work with its customers. See id. at Page ID # 1881. A sworn officer who responded that he was not available for assignments was not offered work for a period of time thereafter (i.e., he was put in "time-out"). See Transcript of Bench Trial, Volume 1, R. 52, Page ID # 1038-39. And most significantly, ODPS set the rates at which the officers were paid. See Transcript of Bench Trial, Volume 2, R. 53, Page ID # 1304-05 (Darrell Spurgeon testifying that he set the pay rates for the officers); see also Transcript of Bench Trial, Volume 1, R. 52, Page ID # 927-28, 959-960; Transcript of Bench Trial, Volume 2, R. 53, Page ID # 1100; Transcript of Bench Trial, Volume 3, R. 54, Page ID # 1507.

Moreover, ODPS maintained a policies and procedures document stating that non-compliance with any of the policies and procedures "will result in immediate termination" and that "Darrell Spurgeon has sole discretion of any actions deemed necessary in the hiring and termination" of any officer. Secretary of Labor's Appendix ("App."), 35-37. ODPS provided officers working for certain customers with lists of specific duties and responsibilities for them to follow. See

App. at 33-34, 39-40. Additionally, ODPS repeatedly promised its customers that it would supervise its officers' performance of their duties. See App. at 20 (promising that ODPS' "supervisory personnel will regularly inspect the premises and monitor the work done by [its] employees and will exercise complete authority over all these employees"); 14 (promising that ODPS will "provide fully trained and supervised police personnel" and "be responsible for the training and supervision of all personnel performing" the work, and that the work will be performed by officers who are "fully trained and supervised, certified, qualified, efficient and trustworthy personnel in strict accordance with the recognized best practices of protective services personnel performing similar tasks"); 17 (same); 30 (same).[12]

ODPS exercised its right to control by visiting the job sites, where sworn officers were assigned, to check on their work and by otherwise directing their work. See Transcript of Bench Trial, Volume 1, R. 52, Page ID # 1032 (sworn officer testifying that Darrell Spurgeon come to job sites occasionally and Frank Medieros came more often); Transcript of Bench Trial, Volume 2, R. 53, Page ID

[12] Darrell Spurgeon testified that ODPS did not necessarily fulfill these promises, described one of the promises as "a good marketing tool," and asserted that he "never went out and supervised anyone." Transcript of Bench Trial, Volume 2, R. 53, Page ID # 1347-1350. Regardless of this testimony, ODPS' contractual promises are evidence of its right to control the officers and, as described below, numerous officers testified that Spurgeon and Frank Medieros went to job sites and otherwise supervised their work.

1129-1131 (sworn officer testifying that Spurgeon came to job sites once or twice "and checked on us," Medieros came more often, and Medieros showed officer "how Darrell expected us to do the job"); Transcript of Bench Trial, Volume 3, R. 54, Page ID # 1488 (sworn officer testifying that Medieros occasionally came to job sites and checked on work); App. at 11 (Medieros stating generally that "[a]s a supervisor, I go out at the sites and make sure the guys are doing what they are supposed to do"); Transcript of Bench Trial, Volume 3, R. 54, Page ID # 1537, 1541-42 (sworn officer testifying that "Darrell would tell me what the customers want me to do," and that Spurgeon held a meeting with officers telling them about changes in what customers wanted).

Two officers who were sworn officers at times during the relevant period (but who were awarded back wages because it was unclear exactly when they were sworn officers) described the on-site supervision and testified that they were reprimanded. See Transcript of Bench Trial, Volume 1, R. 52, Page ID # 957 (Medieros showed up to job sites and reprimanded officer for not being clean shaven and not wearing ODPS jacket), Page ID # 1057-58 (ODPS supervisor came to job site and reprimanded officer for wearing unapproved uniform). ODPS thus maintained the right to control, and indeed did control, how the sworn officers performed their work even if it exercised that right more frequently with respect to the nonsworn officers. Moreover, especially when workers are working at

customers' job sites, "[a]n employer does not need to look over his workers' shoulders every day in order to exercise control." Superior Care, 840 F.3d at 1060 (citing DialAmerica Mktg., 757 F.2d at 1383-84). ODPS' control over the economic terms of the working relationship and its right to supervise and supervision of the sworn officers' performance of the work indicate that the sworn officers were ODPS' employees.

In sum, the district court erred by relying primarily on the sworn officers' employment and income *separate from ODPS* to conclude that they were not economically dependent on ODPS for purposes of the FLSA. In fact, the totality of the economic realities of the sworn officers' working relationship *with ODPS* demonstrate that they – like the nonsworn officers – were economically dependent on ODPS and thus its employees under the FLSA. To rule otherwise would ignore the fact that the sworn officers' and nonsworn officers' work for ODPS was essentially the same.

II. THE DISTRICT COURT ERRED BY REQUIRING THE SECRETARY TO SHOW THAT DEFENDANTS KNOWINGLY FAILED TO MAINTAIN ACCURATE RECORDS TO PROVE THAT THEY VIOLATED THE FLSA'S RECORDKEEPING OBLIGATIONS

Under the FLSA, employers must "make, keep, and preserve" certain records regarding their employees, including records of their hours worked, as prescribed by regulation, 29 U.S.C. 211(c), and "it shall be unlawful" for any person "to violate" those obligations, 29 U.S.C. 215(a)(5). The Department's

recordkeeping regulations obligate employers to keep specific records regarding their employees' hours worked. See 29 C.F.R. 516.2(a)(7). The Secretary presented evidence that Defendants did not keep accurate records of the hours worked by their officers. See Transcript of Bench Trial, Volume 3, R. 54, Page ID # 1417-1428. Specifically, there were no reliable records of their hours worked for a 12-month period. See id. at Page ID # 1418-1421. For the period thereafter, the records of their hours worked were not complete. See id. at Page ID # 1421-24. In addition, Darrell Spurgeon did not require the officers to submit their hours worked until after the Department began to investigate ODPS and admitted that some of the submissions of hours worked were incomplete or inaccurate. See Transcript of Bench Trial, Volume 2, R. 53, Page ID # 1339-1342.

Nonetheless, the district court ruled that Defendants did not violate the FLSA's recordkeeping obligations because it "cannot conclude from the evidence produced at trial that [they] *knowingly* failed to maintain accurate records." Decision on Liability, R. 62, Page ID # 1897 (emphasis in original). The district court cited no authority to support imposing a knowledge requirement to prove recordkeeping violations. See id. And to be sure, there is no basis in the Act or its regulations to impose a "knowledge" requirement to prove violations of the recordkeeping obligations. See 29 U.S.C. 211(c), 215(a)(5); 29 C.F.R. 516.2(a).

Significantly, other provisions in the FLSA do specify a requisite state of mind to prove a violation of those provisions. For example, the FLSA prohibits "knowing[ly]" making materially false records, 29 U.S.C. 215(a)(5); provides for the possibility of civil monetary penalties and criminal sanctions when employers "willfully" violate certain sections of the Act, 29 U.S.C. 216(a), 216(e)(2); and allows employees to recover back wages and liquidated damages for three – as opposed to two – years for a "willful violation," 29 U.S.C. 255(a). In light of the FLSA's statutory text specifying a "knowledge" requirement elsewhere, the district court's incorporation of a knowledge requirement into 29 U.S.C. 211(c) "runs afoul of the usual rule that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46:06, p. 194 (6th rev. ed. 2000)); see Russello v. United States, 464 U.S. 16, 23 (1983) (where Congress omits particular language in one section of a statute but includes that language in another section of the statute, courts generally presume that Congress acted intentionally and purposely).[13]

[13] A federal criminal statute should normally be construed to apply only to "knowing" violations, even if the statute's text does not specify a *mens rea*, because criminal prohibitions should be construed "in light of the background rules of the common law, . . . in which the requirement of some *mens rea* for a crime is firmly embedded." Staples v. United States, 511 U.S. 600, 605 (1994). However,

Consistent with the absence of a "knowledge" requirement in the statutory text, courts have held that employers violated the FLSA's recordkeeping obligations when they lost records due to a flood or sewer backup. See Hugler v. Legend of Asia, LLC, No. 4:16-CV-00549-DGK, 2017 WL 2703577, at *5 (E.D. Mo. Jun. 22, 2017) ("Defendants' own statements about losing the employee time logbooks and work schedules when the basement flooded establishes they failed to preserve the relevant records, thus violating the [FLSA]. Further, Defendants do not cite, and the Court is unable to find, any authority that grants an excuse to the recordkeeping requirement for destroyed records."); Perez v. Oak Grove Cinemas, Inc., 68 F. Supp.3d 1234, 1246 (D. Or. 2014) ("Even if unintentional, the reason for the loss of records is not a defense to a recordkeeping violation."); Chao v. Me & Lou's Rest., No. CV07–385–E–EJL, 2008 WL 4832880, at *3 (D. Idaho Nov. 5, 2008) (notwithstanding the employer's assertion that the records were destroyed by a flood, it had "a duty to maintain and make available specific records as required by the FLSA and the failure to do so is a violation of the FLSA"). These decisions support the conclusion that there is no "knowledge" requirement to prove a violation of the FLSA's recordkeeping obligations.

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that principle does not hold true for civil prohibitions, like the FLSA's recordkeeping obligations in 29 U.S.C. 211(c), because no similar common-law tradition applies in the civil context.

For these reasons, the district court erred by requiring the Secretary to show that Defendants "knowingly" failed to maintain accurate records to prove a violation of the FLSA's recordkeeping obligations, and by thus ruling that Defendants did not violate those obligations. The Secretary is entitled to entry of an injunction for Defendants' violations.

CONCLUSION

For the foregoing reasons, the Secretary requests that this Court reverse the district court's rulings that the sworn officers were not employees under the FLSA and that the Secretary did not prove that Defendants violated the Act's recordkeeping obligations and remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that the foregoing Secretary of Labor's Opening Brief:

(1) complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font; and

(2) complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(A) because it contains 12,632 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b)(1).

/s/ Dean A. Romhilt
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Secretary of Labor's Opening Brief was served this 21st day of November, 2017, via this Court's ECF system and by pre-paid overnight delivery, on the following:

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rules 28(b)(1)(A)(i) and 30(g)(1), the Secretary designates the following documents from the district court's electronic record as relevant to his appeal:

R. 1, Complaint, Page ID #1-6 (Sept. 30, 2013)

R. 52, Transcript of Bench Trial, Volume 1, Page ID # 831-1082 (for July 21, 2015 proceedings)

R. 53, Transcript of Bench Trial, Volume 2, Page ID # 1083-1389 (for July 22, 2015 proceedings)

R. 54, Transcript of Bench Trial, Volume 3, Page ID # 1390-1590 (for July 23, 2015 proceedings)

R. 55, Transcript of Bench Trial, Volume 4, Page ID # 1591-1776 (for July 24, 2015 proceedings)

R. 57, Exhibit Inventory, Page ID # 1780 (Aug. 20, 2015)

R. 62, Decision on Liability, Page ID # 1878-1899 (Jun. 17, 2016)

R. 66, Order Awarding Damages, Page ID # 1932-36 (Dec. 22, 2016)

R. 67, Judgment, Page ID # 1937 (Dec. 22, 2016)

R. 71, Defendants' Motion to Alter, Amend, or Vacate Judgment, Page ID # 1947-1954 (Jan. 19, 2017)

R. 74, Memorandum Opinion and Order, Page ID # 1967-1978 (Jun. 30, 2017)

R. 76, Notice of Appeal, Page ID # 1980-81 (Aug. 28, 2017)

R. 78, Notice of Cross-Appeal, Page ID # 1985-86 (Sept. 11, 2017)