**No. 22-1862**

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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TORRI M. HOUSTON, *individually and on behalf of all others similarly situated*,

Plaintiffs-Appellants,

v.

SAINT LUKE'S HEALTH SYSTEM, INC. AND
SAINT LUKE'S NORTHLAND HOSPITAL CORPORATION,

Defendants-Appellees.

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On Appeal from the United States District Court
for the Western District of Missouri

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

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Pursuant to Federal Rule of Appellate Procedure 29(a)(2), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of the Plaintiffs-Appellants ("the Employees"). For the reasons set forth below, the district court incorrectly concluded that the time rounding policy used by Defendants-Appellees, Saint Luke's Health System, et al. (collectively "the Health System"), does not violate the Fair Labor Standards Act ("FLSA"). The Department of Labor's ("Department") FLSA regulation on rounding, 29 C.F.R. 785.48(b), requires a rounding policy to average out so that employees are fully compensated for all

time they actually work. Despite evidence showing that the Health System's rounding policy favored the Health System at the expense of the Employees over a number of years, the district court nevertheless determined that its rounding policy does not violate the rounding regulation. In addition, the district court incorrectly applied the FLSA's de minimis exception. The de minimis exception is not applicable to the work time at issue here, because the time was precisely recorded. Even if it were appropriate to consider the de minimis exception in this case, the facts were insufficient to establish that the compensable time could be disregarded under the de minimis exception.

## STATEMENT OF INTEREST

The Secretary has a substantial interest in the proper judicial interpretation of the FLSA because he administers and enforces the statute. 29 U.S.C. 204, 211(a), 216(c), 217. This case requires this Court to determine the proper interpretation and application of 29 C.F.R. 785.48(b), which permits an employer to implement a rounding policy that is both facially neutral and neutral as applied. The de minimis exception to the FLSA, which is the subject of another Department regulation, 29 C.F.R. 785.47, is also at issue in this case. The regulation allows insubstantial periods of work time that cannot be precisely recorded to be disregarded as de minimis in certain circumstances.

## STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that an employer's rounding policy, which is facially neutral but in practice undercompensates employees over time, complies with the FLSA. (*Aguilar v. Mgmt. & Training Corp.*, 948 F.3d 1270 (10th Cir. 2020); *Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069 (9th Cir. 2016); 29 C.F.R. 785.48(b).)

2. Whether the district court erred in applying the FLSA's de minimis exception to the uncompensated time at issue. (*Lyons v. Conagra Foods Packaged Foods LLC*, 899 F.3d 567 (8th Cir. 2018); *Eddings v. Health Net, Inc.*, No. CV 10-1744-JST (RZX), 2012 WL 994617 (C.D. Cal. Mar. 23, 2012); *Flavie Bondeh Bagoue v. Developmental Pathways, Inc.*, No. 16-CV-01804-PAB-NRN, 2019 WL 4597869 (D. Colo. Sept. 23, 2019); 29 C.F.R. 785.47.)

## STATEMENT OF THE CASE

### A. Factual Background

The Employees are hourly employees who worked for the Health System. App. 237; R. Doc. 159, at 3. Since 2012, the Health System has used a software-based timekeeping system, Kronos Workforce Timekeeper ("Kronos"), which electronically records employee work hours. App. 238; R. Doc. 159, at 4. The Health System's employees use Kronos to clock in or out at the beginning or end

of a shift. *Id.* Kronos records the exact time (accurate to one minute or less) that an employee clocks in and out of work. App. 42; R. Doc. 48, at 6.

The Health System applies a rounding policy to the time that all non-exempt, hourly employees work. App. 238; R. Doc. 159, at 4. Kronos applies this policy automatically. *Id.* Under the policy, which has been in place since 2012, employees who clock in six minutes before or after their scheduled start time receive compensation based on their scheduled start time, and employees who clock out six minutes before or after their scheduled end time receive compensation based on their scheduled end time. *Id.* In other words, Kronos rounds an employee's clock in or clock out time to the nearest tenth of an hour. App. 239; R. Doc. 159, at 5. For example, where an employee clocks in between 7:54 a.m. and 8:06 a.m., the time is rounded to 8:00 a.m. (the nearest tenth of an hour). *Id.* And if an employee clocks out between 4:54 p.m. and 5:06 p.m., the time is rounded to 5:00 p.m. *Id.* Thus, an employee who clocks in at 8:54 a.m. and out at 5:06 p.m. would be paid for eight hours of work, not the eight hours and twelve minutes she in fact performed.

B. Procedural Background

The Employees filed this lawsuit in April 2017, bringing claims for, *inter alia*, violations of the FLSA's minimum wage and overtime provisions, violations of the Missouri Minimum Wage Law, and unjust enrichment/quantum meruit; each

claim arose out of the Health System's rounding policy. App. 236; R. Doc. 159, at 2. On September 6, 2018, the district court conditionally certified two collective action classes: an FLSA Collective, comprised of all hourly employees who worked for Health System entities in the United States between September 6, 2016 and September 6, 2018 who clocked in and out of an automated time clock, for the FLSA overtime claim[1]; and a Missouri Class, comprised of all hourly employees who worked for Health System entities in Missouri between April 10, 2012 and September 6, 2018 who clocked in and out of an automated time clock, for the state law unjust enrichment claim.[2] App. 237; R. Doc. 159, at 3.

The parties then engaged in limited discovery, culminating in the production of expert reports. App. 77. The Employees' and the Health System's respective experts analyzed the time records for all non-exempt, hourly collective/class members to evaluate how the rounding policy impacted compensable time. App. 239; R. Doc. 159, at 5.

The Employees' expert, L. Scott Baggett, Ph.D., analyzed the impact of the rounding policy on the compensable work hours over the six-year period for members of both the FLSA Collective and the Missouri Class. *Id.* He analyzed the

[1] The district court declined to certify an FLSA collective for the Employees' FLSA minimum wage claim.

[2] Although the Missouri Class period is six years and approximately six months, for simplicity, the Secretary refers to it throughout this brief as six years.

records on a shift-by-shift basis, a workweek-by-workweek basis, an employee-by-employee basis, and overall. *Id.*[3] Baggett's analysis shows that the Health System's rounding policy favored employees about 35-38% of the time, favored the Health System about 49-65% of the time, and favored neither about 1-15% of the time. App. 240; R. Doc. 159, at 6. Baggett estimated an overall net loss of 74,282 hours over the six-year period. *Id.* For the Employees who are members of both the FLSA Collective and the Missouri Class, Baggett estimated damages of $117,622.30 (assuming employees took a 30-minute unpaid meal break)[4] and $139,219.26 (assuming no 30-minute meal period). *Id.* For members of the Missouri Class only, Baggett estimated damages of $2,107,753.80 (assuming a 30-minute meal period) and $2,212,425.59 (assuming no 30-minute meal period). App. 241; R. Doc. 159, at 7.

The Health System's expert, Deborah A. Foster, Ph.D, analyzed the payroll data by identifying two "lookback" time periods for the FLSA Collective and one for the Missouri Class, then analyzing each of these time periods on a shift-by-shift basis, on the basis of "shift-by-shift but isolated to employees with total net time

[3] For ease of review, a table setting forth Baggett's calculations is attached as Addendum A.

[4] Baggett's report explained that the Health System allows an employee who works a shift of six hours or longer to take a 30-minute unpaid meal break; however, the Health System did not produce data indicating whether any employee actually did take a 30-minute meal period on any given shift. App. 150; R. Doc. 146-2, at 12.

removed," and an employee-by-employee basis. *Id.* FLSA Lookback 1 consisted of records from September 6, 2016 through September 6, 2018; FLSA Lookback 2 consisted of records from September 6, 2015 through September 6, 2018; and the Missouri Lookback comprised records from April 10, 2012 through September 6, 2018. *Id.*[5] Foster's analysis shows that the Health System's rounding policy favored employees about 29-37% of the time, favored the Health System about 50-66% of the time, and favored neither about 1-15% of the time. App. 242–44; R. Doc. 159, at 8–10. Foster also calculated that the average net effect of rounding for all employees in the respective time periods was about 40 to 85 seconds removed per shift and ranged from three to six hours removed for the average employee over the various time periods (two, three, and six years). *Id.* Among only the employees who had total net time removed, the average uncompensated time for shifts that favored the Health System was about 3.87 minutes per shift over the various time periods. App. 243; R. Doc. 159, at 9.

The parties jointly agreed to postpone the remainder of discovery in order to first seek a ruling from the court as to whether the Health System's rounding policy was permissible as a matter of law. App. 72; R. Doc. 142, at 2. The Health

[5] For ease of review, a table setting forth Foster's calculations is attached as Addendum A.

System moved for summary judgment on all of the Employees' claims, which the district court granted on March 29, 2022. App. 245–55; R. Doc. 159, at 11–21.

C. The District Court Decision

The district court granted summary judgment to the Health System on the FLSA claim because it concluded that the Health System's rounding policy did not violate the rounding regulation at 29 C.F.R. 785.48(b). App. 245–49; R. Doc. 159, at 11–15. The Employees conceded that the Health System's rounding policy is facially neutral, but argued that Baggett's report showed that it is not neutral as applied. The district court rejected this argument, concluding that the Health System's rounding policy "on average favors neither overpayment nor underpayment," and thus is neutral as applied and does not violate 29 C.F.R. 785.48(b). App. 247–49; R. Doc. 159, at 13–15. The court rejected the Employees' reliance on *Corbin*, 821 F.3d at 1069, which interpreted the rounding regulation, and dismissed the relevance of Baggett's conclusions because they showed that the Employees were not compensated for only small amounts of time. It also reasoned that even if a majority of employees worked time for which they were not compensated, "this conclusion does not necessarily equate to systematic undercompensation because the rounding policy at issue both adds and subtracts time," and speculated that an analysis of a different timeframe could produce a different result. App. 247–49; R. Doc. 159, at 13–15.

The district court granted summary judgment to the Health System on the Employees' unjust enrichment claim on the basis that the Employees failed to show that the Health System's retention of the benefit would be inequitable, which is one of the elements of an unjust enrichment claim. App. 250–53; R. Doc. 159, at 16–19. In reaching that conclusion, the court relied on the FLSA's de minimis exception, set out at 29 C.F.R. 785.47, which permits employers to disregard small periods of compensable work time if the time "cannot as a practical administrative matter be precisely recorded for payroll purposes." Analyzing factors identified by the Eighth Circuit for evaluating whether certain work time is de minimis under the regulation, the district court concluded that the time here was de minimis because, in the court's view, the administrative burden on the Health System to calculate actual time worked would not be minimal, the record did not suggest the Employees regularly had to clock in early, and the rounding policy "is consistent" with the FLSA and rounding regulation. App. 251–53; R. Doc. 159, at 17–19 (citing *Lyons*, 899 F.3d at 584).

## SUMMARY OF ARGUMENT

The district court erred in granting summary judgment to the Health System on the basis that its rounding policy does not violate the Department's rounding regulation, 29 C.F.R. 785.48(b). Under the FLSA, employees must be compensated for all the time they actually work. Accordingly, the regulation permits rounding,

but only if employees are ultimately paid for all time worked. The Employees provided years' worth of evidence to show that over time, the Health System's policy favors the Health System at the expense of its employees, resulting in the under-compensation of the Employees and in the Health System's unjust retention of hundreds of thousands of dollars of wages owed to the Employees. But the district court refused to grapple with this evidence, instead essentially choosing to disregard it.

Furthermore, the district court incorrectly determined that the de minimis exception applies to the time at issue. The de minimis exception should not apply when the employer has records indicating the precise amount of uncompensated time, such as time lost due to a rounding policy. Even if it were proper to consider the de minimis exception in this case, however, there was not sufficient evidence to show that the Health System was entitled to summary judgment on this basis.

## ARGUMENT

### I. THE HEALTH SYSTEM'S ROUNDING POLICY VIOLATES THE DEPARTMENT'S ROUNDING REGULATION BECAUSE IT IS NOT NEUTRAL AS APPLIED.

#### A. Under the Rounding Regulation, Employers May Use a Rounding Policy Only if Employees Are Paid for All Time Worked.

The FLSA requires, *inter alia*, that an employer pay at least the federal minimum wage for all hours worked, plus one and a half times an employee's regular rate of pay for all hours worked beyond forty per workweek. 29 U.S.C.

206(a), 207(a)(1). In 1955, the Department promulgated an Interpretive Bulletin that, in relevant part, permitted employers, for their own convenience, to pay employees based on hours worked as calculated after rounding their start and end times for each shift to a pre-determined increment, but only if the policy does not ultimately result in employees working time for which they are not compensated. Interpretative Bulletin, Part 785, Hours Worked, Section 785.4 (Dec. 1955) (Addendum B). The Department codified this interpretation in 1961 in the rounding regulation at 29 C.F.R. 785.48(b), 26 Fed. Reg. 190 (Jan. 11, 1961), and it has remained unchanged since. The regulation requires a rounding policy to be neutral both on its face and in practice, explaining that a neutral rounding policy "[p]resumably . . . averages out so that the employees are fully compensated for all the time they actually work." 29 C.F.R. 785.48(b). Thus, a rounding policy "will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." *Id.*

The regulation is consistent with the well-established FLSA principle that "[w]ork not requested but suffered or permitted is work time." 29 C.F.R. 785.11. If an employer knows or has reason to believe that an employee is working, the

employer must include that work time in the total compensable hours worked. *Id.*[6] Thus, although an employer is not required to use a rounding policy, if it chooses to do so, the employer bears the burden of ensuring that the policy compensates employees for all hours worked.

There are only two court of appeals decisions that squarely address the Department's rounding regulation, both of which make clear that a rounding policy violates the FLSA if it fails, in the long term, to compensate employees for all time worked. *Aguilar v. Mgmt. & Training Corp.*, 948 F.3d 1270, 1287–89 (10th Cir. 2020); *Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069, 1075–79 (9th Cir. 2016). Both courts interpreted this regulation to require a rounding policy "be 'neutral, both facially and as applied.'" *Aguilar*, 948 F.3d at 1288 (quoting *Corbin*, 821 F.3d at 1076). *Aguilar* concerned a rounding policy where employees were paid based on their scheduled shift time, unless an employee clocked in or out more than ten minutes before or after the scheduled shift time, in which case the employer would pay the employee based on the time clock rather than the scheduled shift time. *Aguilar*, 948 F.3d at 1288. Although the policy was neutral on its face, the plaintiffs presented evidence that the policy was not neutral as applied; rather, plaintiffs' evidence indicated that rounding worked

[6] This is true even if the work is not requested by the employer. An employer may set rules to prevent employees from working additional time, but it cannot permit an employee to work without pay.

in the employer's favor 94% of the time. *Id.* The Tenth Circuit held that the district court erroneously granted summary judgment to the employer on the issue of whether the rounding policy systematically undercompensated the employees, explaining that "if the ten-minute adjustment rule routinely rounds off that compensable overtime, as the officers' evidence suggests, then the officers' rounding theory remains viable." *Id.* at 1289. Accordingly, under *Aguilar*, a facially neutral rounding policy could nevertheless violate the regulation if the result systematically disfavors employees.

In *Corbin*, the plaintiff challenged a facially neutral rounding policy that rounded time to the nearest quarter hour. *Corbin*, 821 F.3d at 1073–74. The plaintiff gained compensation or broke even in 58% of his shifts and lost $15.02 in aggregate pay over the course of 13 months. *Id.* at 1074. However, he argued that "unless every employee gains or breaks even over *every* pay period or set of pay periods analyzed, an employer's rounding policy violates the federal rounding regulation." *Id.* at 1076–77. The Ninth Circuit rejected that argument, explaining that a rounding policy "is meant to average out *in the long-term*," and concluding that the rounding policy was neutral as applied. *Id.* at 1077–79.

B. The Health System's Rounding Policy Is Not Neutral as Applied.

Applying the plain terms of the regulation and the relevant case law, the Health System's rounding policy, as applied, violates the FLSA. Both parties

experts' analysis of years of payroll data demonstrated that the rounding policy systematically underpays employees. Thus, the policy does *not* "average[] out so that the employees are fully compensated for all the time they actually work." 29 C.F.R. 785.48(b). It is not neutral as applied; on average, it favors underpayment. *See Aguilar*, 948 F.3d at 1288; *Corbin*, 821 F.3d at 1076.

The Employees' expert found that on a workweek-by-workweek basis, 55.9% of workweeks had time removed, and on an employee-by-employee basis, 64.4% of employees had time removed.[7] App. 240; R. Doc. 159, at 6. This evidence must be credited for purposes of summary judgment. Moreover, the Health System's own expert agreed that on an employee-by-employee basis, 62.8-

[7] On a shift-by-shift basis, 48.5% of shifts had time removed, 36.6% of shifts had time added, and 14.9% of shifts were not impacted. Because the "no impact" shifts do not accrue to employees' benefit, they should not be combined with the shifts that had time added for the purposes of assessing whether the rounding policy averages out to fully compensate employees. Rather, to evaluate the overall impact of the rounding policy, the court should only consider that 48.5% of shifts had time removed, while 36.6% of shifts had time added. *See Shiferaw v. Sunrise Senior Living Mgmt., Inc.*, No. LACV1302171JAKPLAX, 2016 WL 6571270, at *29–30 (C.D. Cal. Mar. 21, 2016) (noting that 53.3% of employees lost time (i.e., had time removed), 44% gained time (i.e., had time added), and 2.7% had no loss or gain, but comparing only time that disadvantaged employees with time that advantaged them). This is why the Health System's own expert found that, even on a shift-by-shift basis, the average employee *lost* time (39 to 83 seconds per shift, depending on the lookback period and subset of employees), despite the fact that the combined total of shifts that added time and shifts that had no impact was greater than the shifts that removed time. App. 242; R. Doc. 159, at 8.

66.1% of employees had net time removed, depending on the lookback period. App. 242–43; R. Doc. 159, at 8–9.

Several courts have indicated that a rounding policy that demonstrably disfavors employees over time is not neutral as applied, and thus violates the regulation's requirement that a rounding policy "not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked," 29 C.F.R. 785.48. *See Aguilar*, 948 F.3d at 1288 (opining that "a rounding policy that works in the employer's favor 94% of the time is probably not neutrally applied"); *Wey v. City of St. Petersburg*, No. 8:19-CV-1314-T-60JSS, 2020 WL 7229752, at *4 (M.D. Fla. Dec. 8, 2020) (explaining that plaintiff "appears to have a strong argument" that rounding policy that worked in favor of employer 96% of the time violated rounding regulation, citing *Aguilar*, 948 F.3d at 1288–89, but determining that there were issues of material fact precluding summary judgment regarding whether the pre-shift meetings that employees claimed they frequently attended after clocking in early were compensable activities)[8]; *Shiferaw*, 2016 WL 6571270, at *29–30 (in applying federal rounding regulation to state law claims, concluding that because plaintiffs' expert's evidence showed rounding policy resulted in 53.3% of employees losing time and 44% of

[8] Here, the parties do not appear to dispute that the Employees started working immediately after clocking in and worked until clocking out.

employees gaining time (and 2.7% was neutral), which was contrary to the employer's expert's evidence, there was a triable issue of fact as to whether policy resulted in systematic under-compensation and thereby violated regulation).

### C. The District Court Erred in Concluding that the Health System's Rounding Policy Does Not Violate the Rounding Regulation.

In determining that the rounding policy did not, over a period of time, systematically undercompensate the Employees, the district court provided three reasons for reaching this conclusion, all of which were incorrect.

First, the court rejected the Employees' argument that their expert's analysis was different from the analysis and underlying presumption that the Ninth Circuit found problematic in *Corbin*. But the district court was wrong; the evidence presented in this case avoids the concerns raised by the Ninth Circuit in *Corbin*. App. 247–48; R. Doc. 159, at 13–14. In *Corbin*, the plaintiff argued that the rounding policy must break even or benefit *every* individual employee, an argument the court rejected. *Corbin*, 821 F.3d at 1077. In contrast, here, the Employees' expert calculated the impact on an aggregate basis, including the employee-by-employee analysis, which showed that in the aggregate, 64.4% of employees were undercompensated. App. 240; R. Doc. 159, at 6. Furthermore, the *Corbin* plaintiff argued that the rounding policy must break even or benefit employees in the short term (i.e., *every* pay period). 821 F.3d at 1077. But here, the Employees produced evidence showing that the Health System's policy

systematically disfavors the employees over a period of years. Indeed, although the FLSA liability period would be either two or three years (depending on whether the employer's violations were willful), the Employees' expert evaluated data over six years (corresponding to their state law claim period of liability), which only strengthens the reliability of their expert's conclusions. *See Shiferaw*, 2016 WL 6571270, at *28 ("The [regulation's] phrase 'over a period of time' shows that the significant issue is the aggregate or net effect of the policy over time. In determining whether a rounding policy results in systematic under compensation, there is a correlation between the longer the period of time assessed and accuracy.").

Despite these significant differences from *Corbin*, the district court appears to have rejected the Employees' argument that *Corbin* supported their case. Although the Employees accurately noted that *Corbin* stands for the proposition that the rounding regulation does not require that every employee break even or gain in every pay period, but instead looks to whether the rounding policy "averages out in the long term," the district court opined that their citation to *Corbin* was "taken out of context." App. 247–48; R. Doc. 159, at 13–14. The court did not explain how they were taking *Corbin*'s interpretation of the regulation out of context. Contrary to the court's unsupported statement, the Employees did not take *Corbin*'s interpretation of the regulation's requirements out of context.

The *Corbin* court also expressed a concern that plaintiffs could potentially engage in strategic pleading by cherry-picking only certain time periods to challenge. *Corbin*, 821 F.3d at 1077. In this case, however, the Employees took precisely the opposite approach, evaluating the data for the entire time period covered by their claims, the maximum of which was six years. Accordingly, there is no indication that they engaged in any kind of strategic pleading to capture a particular interval of time that was more favorable to them. And when the Health System's expert analyzed the timekeeping records for the FLSA Collective for a period of two and three years, as well as for the six-year period for the state law claim, she notably concluded that the Health System's rounding policy favored the Health System a majority of the time for all bases of analysis, *regardless* of the time period at issue. App. 241–44; R. Doc. 159, at 7–10. The facts of this case stand in stark contrast to those of *Corbin*. The Employees have shown that the Health System's rounding policy is not neutral as applied, when viewed over an extended period of time, regardless of the specific time period analyzed (two, three, or six years).

Second, the district court reasoned that the Employees also took Baggett's conclusions "out of context" because the amount of lost time alleged by the Employees "equates to less than 5.5 hours per employee, with this 5.5 net hours lost distributed among all shifts worked between April 2012 and September 2018."

App. 248; R. Doc. 159, at 14. However, the question of whether the rounding policy is neutral as applied is separate and distinct from the question of whether the amount of time lost need not be compensated under the de minimis exception.[9] Indeed, the district court appeared to have recognized this distinction itself, as it separately conducted a de minimis analysis in evaluating the unjust enrichment claim. App. 251–53; R. Doc. 159, at 17–19.

The rounding regulation does not state or imply that a small amount of under-compensation is acceptable. To the contrary: it explains that employees must be "*fully* compensated for *all* the time they actually work," and a rounding policy may "not result, over a period of time, in failure to compensate the employees properly for *all* the time they have actually worked." 29 C.F.R. 785.48(b) (emphases added). Nothing in this regulation permits a court to simply shrug at the fact that employees have been under-compensated due to an employer's rounding policy when the court views the amount of uncompensated time as minimal. Accordingly, the district court erred in concluding that the rounding regulation itself permits an ostensibly neutral rounding policy to nevertheless undercompensate employees.

[9] Application of the de minimis exception is the subject of a separate Department regulation, 29 C.F.R. 785.47, discussed *infra*.

Third, the court asserted that, even assuming the Employees' expert was correct that "64.4% of employees had time removed from shifts performed during the relevant time period, this conclusion does not necessarily equate to systematic undercompensation because the rounding policy at issue both adds and subtracts time," and an "[e]mployee by employee analysis of a slightly different timeframe could produce a result in which a majority of employees had time added through rounding." App. 248–49; R. Doc. 159, at 14–15. This reasoning disregards the evidence the Employees presented that the Health System's rounding policy systematically undercompensates employees. As to the court's first statement, the fact that the rounding policy both adds and subtracts time shows only that it is a facially neutral policy. The fact that it is a facially neutral policy is distinct from whether it is neutral as applied, and the Employees' expert's conclusion that "64.4% of employees had time removed from shifts performed during the relevant time period" shows that it was not neutral as applied. The court erred by conflating the question of whether a rounding policy is facially neutral with whether it is neutral as applied.[10]

[10] In this case, there is no evidence that indicates why the policy benefits the Health System at the employees' expense. However, the reason why the policy generates certain results is ultimately irrelevant; the requirements of the FLSA apply regardless of the reason that an employee is working unpaid time. 29 C.F.R. 785.11. Moreover, like any employer, the Health System, not its employees, selected the method of recording time, set all time, attendance, and disciplinary policies, and possessed all of the data showing how the rounding policy works in

Next, the court's speculation that analysis of a slightly different timeframe could lead to a different result is both baseless and entirely inconsistent with the evidence. As discussed *supra*, both parties' experts examined two, three, and six years' worth of data—the entire period covered by the Employees' claims—and determined that the Health System's rounding policy favored the Health System more often than it benefitted the Employees, regardless of the time period at issue. The court did not explain why the Employees should have analyzed a different time period to prove their claim, nor did it explain exactly which years (beyond those that are the subject of the suit) that it would expect the Employees to consider. While it may be possible that a hypothetical plaintiff in another case could cherry-pick certain favorable time periods to analyze, that is the opposite of what happened here. Furthermore, it was improper for the district court to grant summary judgment to the Health System on the basis of hypothetical facts that were not part of the record before it (i.e., the speculation that an analysis of a different time period could have yielded different results). Accordingly, because the Employees' evidence demonstrates that the Health System's rounding policy

practice. Given the Health System's use of the Kronos timekeeping system, which records clock in and out time to the minute, the Health System seemingly could have chosen to compensate its Employees for the exact amount of time they work each day.

was not neutral as applied, and because the court was required to credit that evidence, granting summary judgment in the Health System's favor was error.

## II. THE DE MINIMIS EXCEPTION DOES NOT APPLY HERE.[11]

### A. It Is Not Appropriate to Apply the De Minimis Exception Where the Employer Has a Precise Record of the Uncompensated Time Worked.

The FLSA's de minimis regulation permits employers to disregard small periods of compensable work time in certain circumstances. 29 C.F.R. 785.47. The regulation does not permit an employer to disregard time when the employer has records of the precise hours worked, which is usually the case, as it was here, when the employer uses a rounding policy. The de minimis exception only applies to "insubstantial or insignificant periods of time beyond [an employee's] scheduled working hours, which cannot as a practical administrative matter be *precisely* recorded for payroll purposes." 29 C.F.R. 785.47 (emphasis added). "This rule applies only where there are *uncertain* and indefinite periods of time involved of a few seconds or minutes duration . . . ." *Id*. (emphasis added). Here, the time at

[11] The district court granted summary judgment to the Health System on the Employees' unjust enrichment claim on the basis that the time in question was de minimis under the FLSA's de minimis exception, and therefore the Employees failed to show that the Health System's retention of the benefit would be inequitable, which is one element of an unjust enrichment claim. App. 250–53; R. Doc. 159, at 16–19. The Secretary's brief is limited to providing guidance as to the proper interpretation of the FLSA and Departmental regulations; he takes no position on questions of state law (such as whether an unjust enrichment claim incorporates the FLSA's de minimis exception).

issue is not an "uncertain" amount of time—to the contrary, Kronos already records the *exact* time that employees clock in and out. The rationale for applying the de minimis exception does not apply if an employer tracks the exact time worked, but fails to compensate for all the time worked due to the employer's use of a rounding policy. But here, the Health System "as a practical administrative matter" *does* "precisely record[]" all time worked, and any "uncertain and indefinite periods" stem only from the Health System's rounding policy. 29 C.F.R. 785.47. The district court erred in failing to take account of this regulatory language when determining if the de minimis exception applied to the time at issue here.

By contrast, several district courts have, consistent with the regulation, determined that the de minimis exception does not apply to time lost due to use of a rounding policy where the timekeeping system records the actual time worked. For example, a California district court explained that the de minimis exception should not apply "when time is rounded away due to a rounding policy, particularly when employees record their exact time and it is that *precise* time that is then made *imprecise* through rounding." *Eddings v. Health Net, Inc.*, No. CV 10-1744-JST (RZX), 2012 WL 994617, at *5 (C.D. Cal. Mar. 23, 2012). Rather, "courts apply the de minimis exception because of the realities of the industrial world," but "the reality is that the [employer] had a record of exact time and then

used a rounded time for purposes of compensation." *Id.* The court added that "[t]he de minimis exception is not a broad rule granting employees some number of free minutes of labor per day." *Id.* An Ohio district court agreed with this reasoning. *Lacy v. Reddy Elec. Co.*, No. 3:11-CV-52, 2013 WL 3580309, at *14 (S.D. Ohio July 11, 2013) ("[T]here is no de minimis exception to excuse non-payment in connection with a rounding policy."). Likewise, a Colorado district court expressed skepticism that the de minimis doctrine could apply to time lost due to a rounding policy that systematically disfavors employees. *Flavie Bondeh Bagoue v. Developmental Pathways, Inc.*, No. 16-CV-01804-PAB-NRN, 2019 WL 4597869, at *9 (D. Colo. Sept. 23, 2019) ("[I]t is unclear to the Court that the de minimis exception applies given that defendants use electronic time clocks to record employees' comings and goings.").

### B. The Evidence Was Insufficient to Show that the De Minimis Exception Applies to the Uncompensated Time at Issue.

Even if the de minimis exception were potentially applicable in this type of case, there was insufficient evidence here for the court to grant summary judgment to the Health System based on the FLSA's de minimis exception. Because the Health System moved for summary judgment before discovery was complete, there are gaps in the evidence that should have precluded the court from determining that the time at issue need not be compensated under the de minimis exception. To evaluate whether time worked is de minimis under the FLSA, the Eighth Circuit

considers the following factors: "[1] the amount of time spent on the extra work, [2] the practical administrative difficulties of recording additional time, [3] the regularity with which the additional work is performed, and [4] the aggregate amount of compensable time." *Lyons*, 899 F.3d at 584 (internal quotation marks omitted).

Several of the de minimis factors require further evidentiary development before the court (or a factfinder) could conclude that the de minimis exception relieves the Health System of its obligation to compensate the employees for the time at issue here. For example, as to the regularity with which the additional work is performed, the district court acknowledged a lack of evidence, noting that "[t]he record does not suggest [the Employees] must regularly clock in early to prepare for their shift." App. 253; R. Doc. 159, at 19. However, because the summary judgment motion was filed before discovery was complete, there was simply no evidence before the court on this point; there is no indication whether the Employees were required to clock in early, whether they were subject to discipline if they were late,[12] or anything else relating to the Health System's attendance policies.

[12] Some district courts have held that the regulation does not permit an employer to implement a disciplinary policy in conjunction with a rounding policy that results in the rounding policy systematically favoring the employer (for example, where an employer flags employees who clock in a few minutes late for discipline). *See,*

Additionally, the Health System did not produce any evidence concerning the practical administrative difficulties of compensating the employees for the additional time worked. The district court reasoned that the Health System "would have to individually assess each employee's actual time worked for every pay period." App. 252; R. Doc. 159, at 18. But there was simply no evidence in the record to support this assertion. The Health System did not produce any evidence or factual detail whatsoever concerning what effort, if any, would be required to calculate the exact amount of time worked by each employee and pay them accordingly. In contrast to the district court's approach, appellate courts do not automatically weigh this factor in the employer's favor simply because it may take some additional effort by the employer to compensate the employees for that additional time. Indeed, courts have required an employer to modify a timekeeping system or estimate the amount of uncompensated work time. *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 375 (4th Cir. 2014) (employer could modify existing timekeeping system to record time at issue); *Peterson v. Nelnet Diversified Sols., LLC*, 15 F.4th 1033, 1044 (10th Cir. 2021) (employer could "simply estimate the amount of time at issue"). Since the Health System already has a record of the exact time worked, and uses an automated system to record that information, that

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*e.g., Austin v. Amazon.com, Inc.*, No. C09-1679JLR, 2010 WL 1875811, at *3 (W.D. Wash. May 10, 2010).

effort may be minimal. Regardless, it was inappropriate for the court to grant summary judgment based on speculation.

With regard to the aggregate amount of compensable time at issue, courts ordinarily consider both the aggregate amount for each individual employee, as well as for all employees combined. *Aguilar*, 948 F.3d at 1285. Here, the parties did not calculate an aggregate amount for each individual employee, and thus, the court lacked a key piece of information. *See Mountaire Farms*, 650 F.3d at 374 (explaining that lost compensation of $425 per employee per year was significant to an employee earning ten dollars per hour). The district court's determination that the de minimis exception applies was based in part on its own speculation, because the factual record was not sufficiently developed to support a grant of summary judgment in the Health System's favor based on the FLSA's de minimis exception.

## CONCLUSION

For the foregoing reasons, the district court erred in holding that the Health System's rounding policy does not violate the Department's rounding regulation, and further erred in concluding that the de minimis exception to the FLSA applies to the uncompensated time at issue.

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,491 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word 365.

3. This brief complies with 8th Cir. R. 28A(h) because it has been scanned for viruses and is virus-free.

s/ Sarah M. Roberts
SARAH M. ROBERTS

## CERTIFICATE OF SERVICE

I hereby certify that, on September 7, 2022, I electronically filed the foregoing Brief of the Secretary of Labor as *Amicus Curiae* via the Court's CM/ECF Electronic Filing System. All participants in the case are registered CM/ECF users and service on them will be accomplished by the CM/ECF system.

s/ Sarah M. Roberts
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# ADDENDUM A

## Plaintiffs' Expert Baggett

| | Favor Employee | Favor Employer | Neither |
|---|---|---|---|
| Shift-by-shift (approximately 7 million shifts) | 36.6% | 48.5% | 14.9% |
| Week-by-week (approximately 1.8 million weeks) | 37.9% | 55.9% | 6.2% |
| Employee-by-employee (nearly 14,000 employees) | 34.7% | 64.4% | 0.9% |
| Overall net loss | 74,282 hours over 6-year period | | |

Back wage damages for FLSA Collective (1,430 employees) for 3 years: $117,622 (with 30-minute meal break) or $139,219 (without).

Back wage damages for Missouri Class only (12,440 employees) for 6 years: $2,107,754 (with 30-minute meal break) or $2,212,426 (without).

## The Health System's Expert Foster

FLSA Lookback 1 (2 years) – Calculations for members of the FLSA Collective.

| | Favor Employee | Favor Employer | Neither | Net time lost |
|---|---|---|---|---|
| Shift-by-shift | 36.5% | 49.2% | 14.2% | 39 seconds per shift |
| Shift-by-shift for employees with total net time removed (572 employees) | 28.8% | 57.5% | 13.7% | 87 seconds per shift |
| Employee-by-employee | 36.0% | 62.8% | 1.2% | 2.87 hours per employee over 2 years |

FLSA Lookback 2 (3 years) – Calculations for members of the FLSA Collective.

| | Favor Employee | Favor Employer | Neither | Net time lost |
|---|---|---|---|---|
| Shift-by-shift | 36.3% | 49.4% | 14.3% | 40 seconds per shift |
| Shift-by-shift for employees with total net time removed (717 employees) | 29.1% | 57.1% | 13.8% | 85 seconds per shift |
| Employee-by-employee | 34.3% | 65.4% | 0.4% | 3.98 hours per employee over 3 years |

Missouri Lookback (6 years) – Calculations for members of the Missouri Class.

| | Favor Employee | Favor Employer | Neither | Net time lost |
|---|---|---|---|---|
| Shift-by-shift | 36% | 49.2% | 14.8% | 42 seconds per shift |
| Shift-by-shift for employees with total net time removed (9,046 employees) | 29.4% | 56.3% | 14.3% | 83 seconds per shift |
| Employee-by-employee | 32.9% | 66.1% | 0.9% | 5.65 hours per employee over 6 years |

Over the three lookback periods, for the shifts with time removed, employees were uncompensated for between 3.59 and 3.89 minutes per shift on average.