No. 14-2026

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS E. PEREZ,
Secretary of Labor,

Plaintiff-Appellee,

v.

DARRYL HOWES, individually
and d/b/a Darryl Howes Farms,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Michigan Southern Division (1:12-cv-00888)

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT REGARDING ORAL ARGUMENT

Although the Secretary of Labor will gladly participate in any oral argument scheduled by this Court, he does not believe that oral argument is necessary in this case because the issues presented on appeal may be resolved based on the parties' briefs.

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RESPONSE BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction over this case pursuant to section 17 of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 217, section 502(a) of the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”), 29 U.S.C. 1852(a), 28 U.S.C. 1331 (federal question), and 28 U.S.C. 1345 (suits commenced by an agency or officer of the United States). This Court has jurisdiction to review the March 17, 2014 Opinion and Order of United States District Court Judge Gordon J. Quist, 1:12-cv-888, pursuant to 28 U.S.C. 1291 (final decisions of

district courts). R.43, Opinion, Page ID# 800-821; R.44, Order, Page ID# 822-23.[1] The Order was a final judgment that disposed of all claims except for the payment of back wages. R.43, Opinion, Page ID# 801. A timely Notice of Appeal from the district court's Order was filed by Defendant-Appellee Darryl Howes d/b/a Darryl Howes Farms ("Howes") on August 8, 2014. R.52, Notice of Appeal, Page ID# 846.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that the individuals who harvested Howes' 2011 cucumber crop were employees for purposes of the FLSA rather than independent contractors, and were thus entitled to the protections of the Act.

2. Whether, if not considered by this Court to be waived on appeal, the district court correctly concluded that Howes violated the recordkeeping provisions of the FLSA by not keeping daily and weekly records of the harvesters' hours worked, and properly granted the Secretary's request for prospective injunctive relief requiring Howes to comply with those provisions in the future.

[1] Pursuant to Local Rule 30(b), the Secretary of Labor ("Secretary") has included in this brief an addendum designating relevant district court documents, and cites to those documents as "R. (number corresponding to district court docket entry)" and "Page ID# (page number indicated by district court docket)."

3. Whether the district court correctly concluded that Howes exercised control over the "Green Camp" housing provided to the harvesters during the 2011 harvest, and therefore was liable for the MSPA safety and health violations that were found there.

4. Whether the district court correctly concluded that Howes interfered with the Secretary's investigation of the 2011 cucumber harvest in violation of MSPA.

5. Whether, if not considered by this Court to be waived on appeal, the district court correctly granted the Secretary's petition for injunctive relief prospectively enjoining Howes from violating MSPA's housing standards and from future interference with the Secretary's investigations conducted pursuant to that statute.[2]

STATEMENT OF THE CASE

A. Statement of Facts and Course of Proceedings

1. Darryl Howes is the sole owner of Darryl Howes Farms. R.43, Opinion, Page ID# 801. In 2011, Howes grew cucumbers on 40 acres of land, and sold the cucumbers to a company owned by his cousin Ronald Howes for $161,000. *Id.* The cucumbers were

[2] As explained *infra*, because Howes does not identify as issues on appeal or make arguments on appeal that the district court incorrectly concluded that Howes violated the FLSA's recordkeeping provision or abused its discretion in granting injunctive relief under the FLSA and MSPA, those issues are waived on appeal. However, the Secretary addresses those issues in his brief out of an abundance of caution.

eventually used to make pickles. *Id.*[3] Prior to the harvest and prior to engaging farmworkers to harvest the crop, Howes disced and plowed the cucumber fields, planted cucumber seeds, and fertilized the fields. *Id.* Howes paid approximately $10,000 for the cucumber seeds and fertilizer. *Id.* Howes made all of the decisions relevant to the fertilization and irrigation of the fields. *Id.*

Howes employed 38 migrant farmworkers during the 2011 harvest to harvest the cucumbers. R.43, Opinion, Page ID# 801. Twenty-six of those farmworkers had worked for Howes during the previous year's cucumber harvest. *Id.* Defendant generally expected the farmworkers to work exclusively for him during the harvest. *Id.* Of the 38 farmworkers who worked for Howes for the 2011 harvest, six worked additional jobs. *Id.* One of those workers worked and lived on another farm. *Id.* The other five farmworkers worked the night shift at a cherry plant for the first week and one-half of the harvest. *Id.*

Before the 2011 cucumber harvest commenced, Howes required the farmworkers to enter into an employment agreement that described the farmworkers as "independent contractor[s]." R.43, Opinion, Page ID# 801. The agreement stated that Howes and each

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[3] The district court's opinion states alternatively that the harvesters picked "cucumbers" and "pickles," apparently because small cucumbers used to make pickles are referred to as "pickles"; the Secretary's brief does the same. *See, e.g.*, *Elizondo v. Podgorniak*, 70 F. Supp. 2d 758, 761 n.1 (E.D. Mich. 1999).

worker would split the gross proceeds from the sale of the portion of the crop that the worker had picked. *Id.* The prices for the cucumbers, which were set by the buyer, were included as an attachment to the agreement. *Id.* All of the farmworkers accepted the prices provided in the contract without negotiation. *Id.*

Howes supervised the cucumber harvest, and spent two to three hours at the fields every day checking the vines for disease and making sure that the farmworkers were working. R.43, Opinion, Page ID# 802-03. Howes and his employee, Mark Baccaria ("Baccaria"), sprayed chemicals and spread fertilizer, maintained irrigation equipment, repaired vehicles, and loaded cucumbers for transport. *Id.* Howes supplied hoes, buckets, collection boxes for the cucumbers, portable toilets, and hand-washing facilities. *Id.* at 802. Some workers brought their own plastic dishwashing gloves and wheelbarrows. *Id.* Howes transported the collection boxes to the buyer using forklifts and trucks that he owned. *Id.*

The workers used a lottery system to determine which plots they would pick, and each worker decided whether he or she would harvest on a particular day. R.43, Opinion, Page ID# 802. Thus, on rainy days, some farmworkers might decide to harvest while others might decide not to harvest. *Id.*

Each week Howes asked the harvesters how many hours they had worked for the previous week and used this number as the basis for the workers' compensation. R.43, Opinion, Page ID# 803. Howes did not think he had the power to fire workers. *Id.* at 802.

2. In 2010, the Michigan Department of Agriculture fined Howes for providing substandard housing to migrant workers, and as a condition of settling the case, Howes agreed not to provide migrant housing in the future. R.43, Opinion, Page ID# 803. The majority of Howes' cucumber harvesters lived at the "Green Camp," a housing camp owned by Ronald Howes' mother, that was only five miles from the cucumber fields. *Id.* The harvesters' employment contract stated that the Green Camp units were available to the harvesters for $25 per week, payable to Ronald Howes. *Id.; see* R.17-5, Ex. L, Contract, Page ID# 298-301. Prior to the 2011 harvest, Ronald Howes told Howes that the housing units would need to be fixed prior to occupancy, and Howes directed Baccaria to make repairs, which he did, in addition to performing some routine maintenance. R.43, Opinion, Page ID# 803. Howes did not go to the Green Camp either before or during the 2011 harvest season. *Id.*

3. Wage and Hour Division ("WHD") investigators inspected the Green Camp on July 28, 2011. R.43, Opinion, Page ID# 804. The investigators found a number of conditions that violated

MSPA housing standards, including standing waste water, unsanitary toilet facilities, broken showers, active bees' nests, and broken screen doors. *Id.*

WHD investigated Howes' cucumber fields on August 17, 2011. R.43, Opinion, Page ID# 804. The WHD investigators told Howes that they would be conducting an investigation, explained that the investigation process would include interviews of the harvesters in the fields, and commenced the investigation. *Id.* When the investigators were still conducting interviews in the fields three hours later, Howes decided that he wanted to encourage the investigators to leave, and asked his friend, Dan Kilpatrick, to come with his camera and take pictures of the interviews. *Id.* When Howes and Kilpatrick parked 15 feet away from a worker being interviewed and started photographing the interviews, WHD investigator Amanda Enrico ("Enrico"), believing the camera to be a video recorder, informed Howes that he could not record the interview. *Id.* Howes told Enrico that he would continue taking the pictures, and told her that the investigation was slowing down his workers. *Id.*

Howes then parked five feet from where WHD investigator Jennifer Stewart was interviewing Baccaria. R.43, Opinion, Page ID# 805. Stewart also believed Kilpatrick had a video camera, and told Howes that he could not videotape the interview. *Id.* Howes gave the camera to Baccaria, instructing him to document

the interview, and Baccaria subsequently refused to answer Stewart's questions. *Id.* Stewart terminated the interview. *Id.* Baccaria then drove a forklift to where WHD investigator Joseph Jonaitis was conducting an interview, parked approximately 10 feet away, and started photographing the interview. *Id.* Jonaitis terminated the interview. *Id.* When Jonaitis initiated an interview of another worker, Baccaria followed him in the forklift. *Id.* Jonaitis decided not to complete the interview, and the WHD investigators collectively decided not to initiate any new interviews. *Id.*

4. On October 18, 2012, the Secretary filed a Complaint in the U.S. District Court for the Western District of Michigan against Darryl Howes, individually and d/b/a Darryl Howes Farms, alleging violations of the minimum wage and recordkeeping provisions of the FLSA, MSPA housing standards, and unlawful interference with the Secretary's investigation in violation of MSPA. R.6, First Amended Complaint, Page ID# 32-45.[4] The Secretary sought payment of the FLSA back wages, together with an equal amount of liquidated damages, and sought injunctive relief under the FLSA and MSPA. *Id.*

[4] The Secretary's First Amended Complaint also identified as a defendant in this matter Ronald Howes individually and d/b/a Howes Company. Ronald Howes entered into a Consent Judgment with the Secretary on October 2, 2013. R.27, Consent Judgment, Page ID# 838-45.

On September 3, 2013, the Secretary moved for Partial Summary Judgment against Darryl Howes and Howes moved for Summary Judgment against the Secretary. R.14, Secretary's Motion for Partial Summary Judgment, Page ID# 93-95; R.19, Defendant's Motion for Summary Judgment, Page ID# 342-43. On March 17, 2014, the district court issued an Opinion and Order that granted the Secretary's Motion for Partial Summary Judgment and denied Howes' Motion for Summary Judgment. R.43, Opinion, Page ID# 820; R.44, Order, Page ID# 822-23. On July 9, 2014, the parties entered into a Consent Judgment that, *inter alia*, resolved the last issue, back wages, in the case. R.51, Consent Judgment, Page ID# 838-45. Howes timely appealed the district court's Opinion and Order to this Court. R.52, Notice of Appeal, Page ID# 846.

B. The District Court's Decision

Stating that "[a]lthough the parties disagree about how to characterize the facts, neither has argued that there are facts in dispute that would preclude summary judgment," the district court granted the Secretary's Motion for Partial Summary Judgment and denied Howes' Motion for Summary Judgment. R.43, Opinion, Page ID# 806, 820-21. The district court concluded that the 2011 cucumber harvesters were Howes' employees for purposes of the FLSA; that Howes had violated the FLSA's recordkeeping provisions; that Howes was in control of the Green

Camp housing and was therefore liable for the MSPA housing violations found there; and that Howes interfered with the Secretary's investigation in violation of MSPA. *Id.* at 820-21. The district court also granted the Secretary's request for injunctive relief, directing Howes to keep records in compliance with section 11(c) of the FLSA, 29 U.S.C. 211(c); to only provide housing that complies with MSPA health and safety standards; and to permit WHD to conduct future investigations without interference. R.43, Opinion, Page ID# 820-21.

1. In considering Howes' argument that the cucumber harvesters were independent contractors rather than employees, the district court first noted that the "labels that parties may attach to their relationship" are not dispositive, and that the employment test relies on an analysis of the "economic reality" of the employment relationship. R.43, Opinion, Page ID# 807 (quoting *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 522 (6th Cir. 2011)). Using the six factors considered by this Court in determining whether a worker is an employee or independent contractor, the district court concluded that the cucumber harvesters were employees for purposes of the FLSA. R.43, Opinion, Page ID# 807-08 (citing, *inter alia*, *Donovan v. Brandel*, 736 F.2d 1114, 1117 & n.5 (6th Cir. 1984)).

In considering the first employment factor, permanency and duration of the relationship, the district court noted that

although the cucumber harvest lasted only 45 days, most of the workers worked the entire harvest period, and the vast majority of workers worked only for Howes during that time. R.43, Opinion, Page ID# 809. The district court stated that there was no evidence to suggest that the workers had other full-time jobs during the cucumber harvest or that they used the harvest to supplement their income. Although some cucumber harvesters also worked at a cherry plant during the cucumber harvest, the district court noted that this was for only a short period of time. *Id.* at 810. The district court nevertheless concluded that the first factor did not weigh heavily in favor of either party. *Id.*

Turning to the second employment factor, degree of skill, the district court noted that a number of district courts have concluded that cucumber harvesting does not require special skills, and that although this Court concluded in a pickle harvesting case that this factor was met, it did so under a very specific set of facts that are not present in this case. R.43, Opinion, Page ID# 810 (citing, e.g., *Brandel*, 736 F.2d at 1117-18). The district court pointed to Howes' deposition testimony that he could train a worker to pick pickles in an hour, and the lack of evidence suggesting that the harvesters were responsible for caring for or training the plants, as facts distinguishing the present case from this Court's decision in *Brandel*, where

the harvesters managed the fields on a daily basis and where it was "'uncontroverted'" that the harvesters' work required at least one season of experience. *Id.* at 810-11 (quoting *Brandel*, 736 F.2d at 1118). The district court thus concluded that the second factor weighed in favor of the harvesters being employees. *Id.* at 811.

With respect to the third employment factor, workers' investment, the district court stated that "[t]he record is clear that Defendant's investment dwarfed that of the workers." R.43, Opinion, Page ID# 811. Pointing to evidence that Howes supplied hoes, collection boxes, and a forklift, and that the harvesters were not required to supply any equipment, the district court concluded that this factor weighed in favor of an employment relationship. *Id.* at 811-12.

The district court also concluded that the fourth factor, opportunity for profit or loss, weighed in favor of an employment relationship. R.43, Opinion, Page ID# 812-13. In drawing this conclusion, the district court distinguished the facts of this case from *Brandel*, where the harvesters' management of the fields put them in a position where their labor directly influenced their opportunity for profit. *Id.* at 812. The district court also noted that in the present case, the harvesters were paid only for the number of pickles that

they picked and that they did not have any ability to negotiate a price for the pickles. *Id.*

Regarding the fifth factor, Defendant's control, the district court noted that although each harvester decided the specific days of the week that he or she would harvest and the part of the field he or she would pick, the harvesters did not set the length or timing of the harvest, and were not responsible for the care of the harvest, including pest control, the health of the plants, and the irrigation of the fields. R.43, Opinion, Page ID# 813-14. The district court also stated that Howes monitored the harvesters' work, observing whether they were falling behind schedule, and spent a "significant" amount of time in the fields every day. *Id.* The district court concluded that these facts pointed in favor of an employment relationship. *Id.* at 814.

Lastly, the district court concluded that the final factor, whether the services performed were an integral part of Howes' business, weighed in favor of an employment relationship. R.43, Opinion, Page ID# 814. In drawing this conclusion, the district court noted that Howes derived 84 percent of his 2011 income from pickle farming, and that Howes could not and did not dispute the fact that the harvesters' work was an integral part of his business. *Id.*

The district court therefore concluded that the six factors showed that the cucumber harvesters were economically dependent upon Howes, and thus weighed in favor of the conclusion that the harvesters were Howes' employees rather than independent contractors in business for themselves. R.43, Opinion, Page ID# 814-15.[5]

2. With respect to the Secretary's recordkeeping claim that Howes did not keep specific records of hours worked, as required by section 11(c) of the FLSA, 29 U.S.C. 211(c), and 29 C.F.R. pt. 516, the district court stated that Howes' admission that he did not keep records for the 2011 harvest on a work day basis established a violation of the Act's recordkeeping provision. R.43, Opinion, Page ID# 815 (citing, e.g., 29 C.F.R. 516.2). The district court granted the Secretary's request for injunctive relief requiring Howes to keep such records in the future, concluding that the injunction was warranted particularly where WHD had instructed Howes in a previous investigation to keep accurate records and had provided him with written guidance on the FLSA's recordkeeping requirements, and

[5] The district court stated that it was not addressing the Secretary's claim that the harvesters were entitled to back wages because the Secretary had not moved for summary judgment on his minimum wage claim. R.43, Opinion, Page ID# 815. The Secretary subsequently entered into a Consent Judgment with Howes that addressed that claim. R.51, Consent Judgment, Page ID# 838-45.

where, *inter alia*, there was no indication that Howes would comply in the future. *Id.* at 816.

3. Concerning the Secretary's MSPA claims, the district court first considered whether Howes had control of the Green Camp housing provided to the cucumber harvesters, defined under the Secretary's regulations to include the "'power or authority to oversee, manage, superintend or administer'" the housing, either personally or through an agent or employee. R.43, Opinion, Page ID# 816-17 (quoting 29 C.F.R. 500.130(c)).[6] The district court concluded that Howes did have such control because he had authorized his employee, Baccaria, to prepare the property for the harvesters and to make necessary repairs, and Baccaria did so within the scope of his employment. *Id.* at 817.

The district court further concluded that Howes had interfered with the Secretary's investigation of the cucumber harvest in violation of MSPA. R.43, Opinion, Page ID# 816. The district court stated that Howes' and Baccaria's behavior at the cucumber fields, repeatedly parking in close proximity to the interviews being conducted by the WHD investigators and using an electronic device to photograph the interviews, constituted interference with the WHD investigation in violation of MSPA. *Id.* at 818.

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[6] Howes did not dispute the fact that there were MSPA violations at the Green Camp; he argued that he was not liable for the violations because he did not own or control the property. R.43, Opinion, Page ID# 817.

Finally, the district court granted the Secretary's petition to enjoin Howes from further violations of MSPA's housing standards and from interfering with future WHD investigations. R.43, Opinion, Page ID# 819. In granting the Secretary's request for injunctive relief, the district court noted that such relief under the FLSA is not punitive, but remedial, requiring the employer to do only that which the law already requires it to do. *Id.*

SUMMARY OF ARGUMENT

The district court correctly concluded that the cucumber harvesters were employees who were economically dependent on Howes, not independent contractors who were in business for themselves. The FLSA's sweeping definitions of "employ," "employee," and "employer" give effect to Congress' intent to create a comprehensive law covering employment relationships that are not covered under common law principles. *See, e.g.*, 29 U.S.C. 203(d), (e)(1), (g); *United States v. Rosenwasser*, 323 U.S. 360, 362-63 (1945). Whether a worker is an employee covered by the FLSA or an independent contractor who is not covered by that Act depends on whether the worker, as a matter of economic reality, is dependent upon the employer who suffers or permits the worker's work (an employee) or is in business for himself (an independent contractor). This Court has applied six factors as a guide in resolving this inquiry.

In this case, the district court correctly concluded that because cucumber harvesting does not require any particular skill, Howes' investment in equipment and materials far exceeded that of the harvesters, the harvesters did not have any opportunity for profit or loss, Howes controlled the harvesters' work, and the work performed by the harvesters was an integral part of Howes' business, the cucumber harvesters were employees for purposes of the FLSA, not independent contractors. The district court properly noted that this case is distinguishable from this Court's decision in *Donovan v. Brandel*, 736 F.2d 1114, 1115-16 (6th Cir. 1984), where *inter alia*, it was undisputed that the harvesters managed the fields and thus controlled their opportunity for profit and loss and their own work. It bears noting that this Court's decision in *Brandel* affirming the district court's conclusion that the migrant pickle farmers were independent contractors was based on "the unique and comprehensive factual record presented in [that] case." 736 F.2d at 1120. The district court correctly concluded through application of the six factors to the particular facts of this case that the harvesters here were economically dependent on Howes and thus were employees for purposes of the FLSA.

The district court also correctly concluded that Howes had control over the Green Camp housing provided to the migrant workers sufficient to establish liability under MSPA for the

health and safety housing violations found there. MSPA provides that each person who controls housing for migrant agricultural workers must ensure that that housing complies with applicable safety and health standards. *See* 29 U.S.C. 1823(a). The Secretary's MSPA regulations define "control" to include the "power or authority to oversee, manage, superintend or administer" the housing, either personally or through an agent or employee, whether or not the individual exercising control receives compensation for his or her efforts. 29 C.F.R. 500.130(c). In this case, Howes had control over the housing pursuant to MSPA because he authorized his employee to prepare the property for the harvesters and to make necessary repairs, and the employee did so within the scope of his employment.

The district court also correctly concluded that Howes' and Baccaria's behavior at the cucumber fields, repeatedly parking a pickup truck and forklift in close proximity to the interviews being conducted by the WHD investigators and using an electronic device to photograph the interviews, constituted interference with the WHD investigation in violation of MSPA. MSPA provides that the Secretary may "investigate, and in connection therewith, enter and inspect such places[,] . . . question such persons and gather such information [necessary] to determine compliance" with that statute. 29 U.S.C. 1862(a). It is a violation of MSPA to "unlawfully resist, oppose, impede,

intimidate, or interfere with" a Department official conducting an investigation of that statute. 29 U.S.C. 1862(c). As the district court noted, Howes admittedly approached the WHD investigators in the field with the intent of getting them to leave his property. And, in fact, his intrusive behavior disrupted the investigative process. The court thus correctly concluded that this constituted interference within the meaning of the statute.

Finally, because Howes does not identify as issues or make arguments on appeal that the district court incorrectly concluded that Howes violated the FLSA's recordkeeping provision or abused its discretion in granting injunctive relief under the FLSA and MSPA, those issues are waived on appeal. However, the Secretary addresses those issues in his brief out of an abundance of caution.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT AS A MATTER OF ECONOMIC REALITY THE CUCUMBER HARVESTERS WERE HOWES' EMPLOYEES, NOT INDEPENDENT CONTRACTORS

A. Standard of Review

This Court reviews a district court's summary judgment decision *de novo*. *See, e.g., Newman v. Township of Hamburg*, -- F.3d --, No. 14-1455, 2014 WL 7003773, at *1 (6th Cir. Dec. 12, 2014). A district court's grant or denial of a permanent injunction is reviewed under several different standards. *See*

Sec'y of Labor v. 3Re.com, Inc., 317 F.3d 534, 537 (6th Cir. 2003). Factual findings are reviewed under a clearly erroneous standard, legal conclusions are considered de novo, and the scope of the injunctive relief awarded is reviewed for an abuse of discretion. *See id.* (citations omitted).

B. The District Court Correctly Concluded that the Cucumber Harvesters Were Employees Who Were Economically Dependent on Howes Rather Than Independent Contractors Who Were in Business for Themselves

1. The FLSA applies to a wide range of employment relationships. The Act provides sweeping definitions for the terms "employ," "employee," and "employer": "employ" is defined to "include[] to suffer or permit to work"; "employee" is defined as "any individual employed by an employer"; and "employer" is defined 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),(e)(1),(g). The Supreme Court has recognized Congress' intent to construe the terms of this remedial legislation broadly, stating, for example, that "[a] broader or more comprehensive coverage of employees . . . would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362-63 (1945); *see Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947)); *Fegley v. Higgins*, 19 F.3d 1126, 1132 n.5 (6th Cir. 1994) (citing *Rosenwasser*, 323 U.S. at 363 n.3).

Accordingly, the courts "'ha[ve] consistently construed the Act liberally to apply to the furthest reaches consistent with congressional direction.'" *Mendel v. City of Gibraltar*, 727 F.3d 565, 569 (6th Cir. 2013) (quoting *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985)).

2. The Act's expansive view of employment must be considered when determining whether an individual is an employee or an independent contractor. An entity "suffers or permits" an individual to work if, as a matter of economic reality, the individual is dependent upon the employer, as opposed to being in business for himself or herself. *See, e.g., Donovan v. Brandel*, 736 F.2d 1114, 1115-16 (6th Cir. 1984) ("'[E]mployees are those who as a matter of economic reality are dependent upon the business to which they render service.'")(quoting *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 143-45 (6th Cir. 1977)). The economic realities factors applied by the district court serve as an aid in measuring a worker's economic dependence on his or her employer, and are viewed "qualitatively to assess the evidence of economic dependence." *Antenor v. D & S Farms*, 88 F.3d 925, 932-33 (11th Cir. 1996). This Court has applied these economic realities factors to determine whether cucumbers harvesters were employees or independent contractors, *see Brandel*, 736 F.2d at 1117, while noting that different panels of this Court have somewhat different points of emphasis. *See*

Brandel, 736 F.2d at 1116 (citing *Carriage Carpet*, 548 F.2d at 143-45 (economic dependence can be the ultimate factor in finding an employment relationship) and *Dunlop v. Dr. Pepper-Pepsi Bottling Co.*, 529 F.2d 298 (6th Cir. 1976) (employment relationships must be determined by looking at the circumstances of the whole business activity)).

3. The Secretary, before analyzing the applicable economic realities factors seriatim, addresses several overarching points raised by Howes in his opening brief. Howes argues on appeal that the district court erred when it concluded that the cucumber harvesters were employees rather than independent contractors because the harvesters had entered into "independent contractor" agreements with Howes and their work was performed pursuant to and in conformance with that agreement. R.12-1, Appellant's Opening Brief, Page ID# 8. As the district court correctly noted, however, "'the labels that parties may attach to their relationship'" are not dispositive, and the nature of the employment relationship in this case turns on the "economic reality" of that arrangement. R.43, Opinion, Page ID# 807 (quoting *Solis v. Laurelbrook Sanitarium & Sch., Inc.,* 642 F.3d 518, 522 (6th Cir. 2011)); *see Rutherford Food Corp.*, 331 U.S. at 729; *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013).

Howes' brief on appeal also challenges a number of the Secretary's Undisputed Material Facts submitted to the district court. Howes asserts, for example, that he was not solely responsible for the health of the crop but shared responsibility for monitoring the vines for disease with the harvesters. R.12-1, Appellant's Opening Brief, Page ID# 17. Howes also disputes the Secretary's statement in his Undisputed Material Fact 7 that Howes would check on the workers' progress, stating that the Secretary mischaracterized Howes' deposition testimony and that Howes actually said only that he saw the harvesters in the field. *Id.* at 17-18. As the district court concluded, however, while the Secretary and Howes disagreed about the characterization of certain facts, Howes did not argue before the district court that there were facts in dispute that would preclude entry of summary judgment. R.43, Opinion, Page ID# 806. Moreover, as the district court's decision aptly notes, summary judgment is precluded only if the facts in dispute are material facts necessary to apply the law; disputes over trivial facts are insufficient to prevent a grant of summary judgment. *See id.* at 805 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)); *see also Cavazos v. Foster*, 822 F. Supp. 438, 440 (W.D. Mich. 1993) (citation omitted). Thus, it was proper for the district court to grant the Secretary's Motion for Partial Summary Judgment on the issue of the pickle harvesters'

employment status based on his determination that there were no disputed issues of material fact and that the Secretary was entitled to relief as a matter of law. R.43, Opinion, Page ID# 806.

Howes further argues that the way the cucumber harvesters conducted the harvest in this case is factually indistinguishable from the pickle harvesters in *Brandel*, who were found by this Court to be independent contractors. R.43, Opinion, Page ID# 30-31. District courts have observed post-*Brandel*, however, that this Court took pains in that decision to stress that its conclusion was based on the specific facts of that case. *See, e.g., Elizondo v. Podgorniak*, 70 F. Supp. 2d 758, 766 (E.D. Mich. 1999) ("[T]he *Brandel* court appears to have discouraged . . . a blanket reliance on its holding [and] emphasized that each case must be examined individually."); *see also Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1536 (7th Cir. 1987) ("Even in its own circuit . . . [*Brandel*] has been narrowed and distinguished."). As the district court concluded, and as explained further *infra* in the course of discussing the relevant factors, the facts of this case are distinguishable from those in *Brandel*, and are more akin to the facts in other post-*Brandel* district court decisions concluding that pickle harvesters were employees for purposes of the FLSA. *See* R.43, Opinion, Page ID# 808 (citing *Cavazos*, 822 F. Supp. at 441;

Elizondo, 70 F. Supp. 2d 758).[7] The Secretary proceeds to address each of the relevant factors for determining whether a worker is an employee or an independent contractor.

a. Permanency and Duration of the Relationship

The district court concluded that the first factor of the economic realities test, which measures the degree of permanency and duration of the working relationship, did not weigh in favor of either party. R.43, Opinion, Page ID# 810-11. As a general matter, a worker who is in business for himself eschews a permanent or indefinite relationship with an employer and the dependence that comes with it. *See, e.g., Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1384-85 (3d Cir. 1985). However, a lack of permanence does not automatically suggest an independent contractor relationship. The key is whether the lack of permanence is due to "operational characteristics intrinsic to the industry" or the worker's "own business initiative." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060-61 (2d Cir. 1988).

In determining the permanency of the relationship for seasonal workers, this Court has examined the length of the

[7] Howes also argues that even if the harvesters were Howes' employees, they received the minimum wage for all hours worked. R.12-1, Appellant's Opening Brief, Page ID# 8. As noted *supra*, Howes and the Secretary entered into a consent judgment that resolved the Secretary's minimum wage claim. *See* R.51, Consent Judgment, Page ID# 838-45.

harvesters' participation in the harvest, whether the same employees returned every year, and whether the harvesters held other full-time employment during that time. *See Brandel*, 736 F.2d 1117; *cf. Lauritzen*, 835 F.2d at 1537 (an exclusive season-long relationship is an indicator of permanency for seasonal workers). The district court noted Howes' deposition testimony that most harvesters merely showed up looking for work, rather than returning every year as a matter of course, but also noted that the majority of the harvesters worked only for Howes during the cucumber harvest and worked for the duration of the 45-day harvest season. R.43, Opinion, Page ID# 809-10.

In reaching its conclusion that this factor did not favor either party, the district court noted that the facts of this case fall somewhere between the facts in *Brandel*, where this Court concluded that the seasonal workers had only a temporary relationship with the grower because, *inter alia*, only 40 to 50 percent of the harvesters returned to the farm every year and several of the harvesters held full-time jobs elsewhere, and other cases concluding that pickle harvesters had a permanent relationship with the grower because, e.g., 70 percent of the harvesters returned every year and stayed for the majority of the 120-day harvesting season. R.43, Opinion, Page ID# 809 (*citing, e.g.*, *Cavazos,* 822 F. Supp. at 443).

Howes states that the district court erred by concluding that this factor did not support either party, and specifically disputes the district court's statement that "most of the [cucumber harvesters] worked for the entire harvest." R.12-1, Appellant's Opening Brief, Page ID# 24. Howes states that only 29 of the 38 harvesters worked the first week of the harvest, and only 13 harvesters worked through the end of the 45-day harvest. *Id.* Howes asserts that these numbers make this case analogous to this Court's decision in *Brandel,* where the Court concluded that the harvesters had only a temporary relationship with the grower during the 30- to 40-day harvest.

As the district court correctly stated in its decision, however, the record reflects that Howes paid 32 harvesters for the first week of the harvest and 30 workers on the last week, and that the harvesters did not use the cucumber harvest only to supplement their income. *See* R.43, Opinion, Page ID# 810 n.3, 811. Therefore, the record supports the district court's conclusion that a significant number of harvesters worked exclusively for Howes during the harvest and stayed for the entire 45-day harvest, and does not support the numbers put forth by Howes. *See id.*, *see also* R.30, Secretary's Response Brief in Opposition to Defendant's Motion for Summary Judgment, Page ID# 565-66 (responding to this same argument before the district court). Nevertheless, despite the fact that

application of this factor lends support to the existence of an employment relationship, the Secretary, like the district court, does not rely on it to argue for that conclusion.

b. Degree of Skill

Howes asserts that the district court erred when it concluded that pickle harvesting does not require a high degree of skill, and argues that there were disputed issues of material fact on this factor. R.12-1, Appellant's Opening Brief, Page ID# 25. Specifically, Howes contends that "[i]t takes more skill to harvest pickles than it does other crops[,]" that it takes "a few days" "to simply tell someone how to pick pickles[,]" that it takes "five or six weeks" to "learn how to pick the right sized cucumber and train the vines, as well as to be efficient[,]" and that it takes a season to figure out what size cucumber to pick, and "the times and way [the harvesters should] pick." *Id.* at 20, 25. Howes thus posits that the facts of this case are akin to those in *Brandel*. *Id.* at 25.

As a threshold matter, "the fact that workers are skilled is not itself indicative of independent contractor status." *Superior Care*, 840 F.2d at 1060; *see Lauritzen*, 835 F.2d at 1537 ("Skills are not the monopoly of independent contractors."). In any event, in this case, the district court correctly noted that a number of district courts have concluded that cucumber harvesting does not require special skills, and that although

this Court concluded in *Brandel* that the cucumber harvesters in that case did have special skills, it did so under a very specific set of facts that are not present in this case. R.43, Opinion, Page ID# 810 (*citing*, *e.g.*, *Brandel*, 736 F.2d at 1117-18, *Elizondo*, 70 F. Supp. 2d at 768, *Cavazos*, 822 F. Supp. at 443). The district court pointed to Howes' deposition testimony that he could train a worker to pick pickles in an hour; the court also noted the lack of evidence suggesting that the harvesters were wholly responsible for caring for or training the cucumber plants, which distinguishes the present case from *Brandel*, where the harvesters were solely responsible for making day-to-day decisions about the proper management of the fields and where it was "'uncontroverted'" that the harvesters' "'productive[] manage[ment of] the harvesting of the pickles'" required judgment that could only be developed over one full season of experience. *Id.* at 810-11 (quoting *Brandel*, 736 F.2d at 1117-18); *see* R.14-1, Darryl Howes Deposition, Page ID# 152 ("Q. [Y]ou can give [the harvesters] sufficient knowledge to start picking and be on their own in one hour? A. Yeah. They can get started."; *see also* R.14-1, Darryl Howes Deposition, Page ID# 151 (Howes did not require harvesters to have previous experience in pickle picking). In this case, the cucumber harvesters were simply not demonstrating the independent day-to-day management of the fields shown by the *Brandel* harvesters in

managing the crop and maximizing production. *See Brandel*, 736 F.2d at 1118.

The district court also correctly noted that although Howes argued that the harvesters would become more efficient at picking after they had spent some time in the fields, "that fact does not indicate that it required a high degree of skill[,]" because "[a] worker will become more efficient at almost any job with experience." R.43, Opinion, Page ID# 811; *see* R.14-1, Darryl Howes Deposition, Page ID# 153 ("Q. Is there anything else that . . . the worker learns over time to be more efficient? A. Just going through the – they go through quick, the longer they pick the quicker they go."). Indeed, the courts have recognized that "'initiative, not efficiency, determines independence'" sufficient to indicate independent contractor status. *See Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 305 (5th Cir. 1998) (quoting *Brock v. Mr. W. Fireworks*, 814 F.2d 1042, 1053 (5th Cir. 1987)). There is nothing in the record to suggest that the harvesters' skills in this case equaled those of the pickers in *Brandel*, where the harvesters demonstrated "a mastery of the methods of rowing, blocking, and picking for the smaller grades of pickles." 736 F.2d at 1118. The district court thus correctly concluded that the second factor weighed in favor of the harvesters being employees. R.43, Opinion, Page ID# 811.

c. Investment in Equipment or Materials

This factor analyzes the relative investments of the worker and the employer in order to determine whether the worker is in business for himself or herself. *See, e.g., Lauritzen*, 835 F.2d at 1537 (workers' "disproportionately small stake" in employer's operation indicates that their work is not independent of the employer). In *Elizondo*, for example, the district court compared the harvesters' investment in five dollar hoes to the farm owners' expenditures to run the entire pickle farming operation, or in the alternative, to materials and equipment supplied by the farmer owners during the pickle harvest, and concluded that under either analysis the farmer's relative investments far outweighed that of the harvesters. *See* 70 F. Supp. 2d at 769-70 (noting that this Court utilized the second, more limited method of measuring relative investment in *Brandel*); *see also Brandel*, 736 F.2d 1118-19 (concluding that this factor was not determinative of employment because no heavy equipment was needed exclusively for the pickle harvest and therefore little capital investment was made by either party). In fact, a worker's investment in tools and equipment is not necessarily a business investment or a capital expenditure that indicates the worker in is business for himself or herself,

because the tools may be necessary to perform the employer's specific work. *See, e.g.*, *Lauritzen*, 835 F.2d at 1537.

In this case, the district court correctly concluded that the record was clear that the Defendant's investment in equipment and material, which included hoes, collection boxes, and forklifts, far exceeded the harvesters' investment in dishwashing gloves and the occasional wheelbarrow, and thus weighed in favor of an employment relationship. R.43, Opinion, Page ID# 811-12; *see Lauritzen*, 835 F.2d at 1537 ("Gloves do not constitute a capital investment."). In fact, Howes appears to concede his "capital investment . . . in the crop was substantially greater than that of the agricultural workers." R.12-1, Appellant's Opening Brief, Page ID# 26. Howes asserts that the district court erred when it concluded that the grower's investment outweighed that of the harvesters because it discounted the significant investment made by the harvesters to travel across the country "in hopes of finding work harvesting a crop," including the cost of living away from home, fuel, food, and childcare. *Id*. However, as the district court noted, even if this were an appropriate measure of capital investment, which as a general investment not directly tied to the employer's operation it does not appear to be, the record does not contain any evidence of any "personal capital" expended by the harvesters. R.43, Opinion, Page ID# 812.

d. Opportunity for Profit or Loss

The district court also correctly concluded that the fourth factor, opportunity for profit or loss depending on managerial skill, weighed in favor of an employment relationship. R.43, Opinion, Page ID# 812-13. Howes argues that the facts of this case as they relate to opportunity for profit or loss are indistinguishable from those in *Brandel*, where the harvesters could earn more because they were solely responsible for the management of the fields and the harvesting process. Appellant's Opening Brief, R.12-1, Page ID# 26-27. In *Brandel*, however, the court specifically found that the pickers had the opportunity to achieve greater earnings through effective management of the fields, over which they had sole control. 736 F.2d at 1119.

Although the harvesters in this case could increase their earnings by picking more pickles, this is not the sort of profit envisioned by this factor, which is intended to measure whether the profit can be influenced by the "'initiative, judgment or foresight of the typical independent contractor.'" *Donovan v. Gillmor,* 535 F. Supp. 154, 162 (N.D. Ohio 1982) (quoting *Rutherford*, 331 U.S. at 730). It is not intended to measure profit gained by working longer hours, which is not really profit but "wages paid for pickles picked," or a loss from a poor pickle crop, which given the harvesters' minimal investment

in the harvest is really a loss of wages rather than a loss in investment. *Id.; see Lauritzen*, 835 F.2d at 1536. As the district court noted, the harvesters in this case did not have the sort of control over the harvest enjoyed by the sharecroppers in *Brandel* and therefore did not have the same opportunity to influence their profit from the harvest. R.43, Opinion, Page ID# 812-13.

e. Nature and Degree of Howes' Control

The control factor is intended to show whether the worker exerts control over meaningful aspects of the work performed, so that it is possible to view the worker as a person who is conducting his or her own business. *See, e.g., Hopkins v. Cornerstone Am.,* 545 F.3d 338, 343 (5th Cir. 2008) (citation omitted). The district court correctly concluded in this case that this factor weighed in favor of an employment relationship, noting that although each harvester decided the specific days of the week that he or she would harvest and the part of the field he or she would pick, the harvesters did not set the length or timing of the harvest, and were not responsible for the care of the harvest, including the health of the plants, and the irrigation of the fields, factors that this Court found in *Brandel* to be significant. R.43, Opinion, Page ID# 813-14. The district court also stated that Howes monitored the harvesters' work, observing whether they were falling behind schedule, and

spent a "significant" amount of time in the fields every day. *Id.*

Howes argues that the district court erred in its conclusion that he controlled the harvesters' work because the facts of this case as they relate to control of the manner in which work is performed are similar to those in *Brandel*, where "[t]he parties negotiated for a particular parcel, [and] Brandel did not appear to supervise the day-to-day operations and did not dictate the hours or methods by which the harvesters went about their work." R.12-1, Appellant's Opening Brief, Page ID# 27-28. Howes also disputes what he characterizes as findings of fact by the district court relating to his control over the harvest, particularly the court's conclusions that the workers did not negotiate with Howes for particular parcels of land and that Howes was responsible for the health of the vines and determined when it was necessary to irrigate and apply pesticides. *Id.* at 28.

This Court's decision in *Brandel* stating that Brandel lacked the right to control the details of the harvesting, however, was based on the trial court's specific findings of fact that the sharecropping agreement at issue in that case "effectively relinquish[ed] control of the harvesting operation from Brandel to the migrant workers"; that both the migrant workers and Brandel negotiated over the specific parcel of land

to be planted and the time of year to harvest; and that Brandel had no presence in the fields. *Brandel*, 736 F.2d at 1119. Such factors are not present here, where Howes picked the parcel of land to plant and planted the land, arranged for irrigation of the crop, and did have a presence in the fields. In other words, in *Brandel*, the harvesters had considerable input into the land that would be planted, *see id.*; in this case, the harvesters chose the *plots* of already-planted land that each harvester would *pick* by lottery, rather than negotiating which parcel of land would be planted. R.43, Opinion, Page ID# 802.

Howes also asserts that there is no evidence in the record that he controlled the timing of the harvest. What is significant, however, is that there is no evidence that the harvesters negotiated with Howes over the timing of the harvest to accommodate their schedules, which the harvesters did do in *Brandel*, a factor that this Court found significant in showing the harvesters' control. *See* R.43, Opinion, Page ID# 813-14. Likewise, the district court's statement that Howes "was responsible for the health of the vines, and determined the need for irrigation and insecticide" is not diminished by the fact that Baccaria and the harvesters informed Howes when the plants needed to be tended to. *Id.* at 814. In fact, Howes admitted that he was in charge of "the [harvesting] operation." R.14-1, Darryl Howes Deposition, Page ID# 119 ("Q. Did you oversee the

operation? You're the person in charge, right? A. Yes. I was there every day."). Howes also admitted that if migrant workers told him or Baccaria that the vines were not healthy, they would "check [the vines] out." *Id.* at 123-24.[8]

Moreover, the district court did not mischaracterize the testimony in this case when it stated that "[d]efendant spent significant time in the fields each day, and while he may not have closely monitored the workers' progress, he did observe whether they were falling behind." R.43, Opinion, Page ID# 813-14. Thus, in his deposition, Howes was asked "When you're out there working, do you observe the workers to see whether they're working?", to which Howes responded, "Yes." R.14-1, Darryl Howes Deposition, Page ID# 127. Howes was also asked, "Would you ever talk [to the harvesters] about the cucumber harvest?,"

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[8] Howes also suggests that it is significant in evaluating his control that he "did not perform irrigation." R.12-1, Appellant's Opening Brief, Page ID# 28. While the statement that Howes did not personally perform the irrigation appears to be technically true, Howes admitted that he was the person who decided when the fields needed to be irrigated. *See* R.14-1, Darryl Howes Deposition, Page ID# 122 ("Q. [Y]ou told [the land owner] when you wanted the field irrigated? A. Yes. Q. You made that determination? A. Yes."). Howes also objected to the district court's statement that he determined the need to apply insecticide. Howes, however, admitted in his deposition that he was generally responsible for the health of the vines and that he would apply *fungicides* (though not insecticides), when he determined that it was necessary, which is an indicator of control. *See* R.12-1, Appellant's Opening Brief, Page ID# 28; R.14-1, Darryl Howes Deposition, Page ID# 124-25, 128; *see also* *Cavazos*, 822 F. Supp. at 442 (concluding that it was significant under the control factor that the farmer was responsible for irrigation and the overall health of the cucumber vines).

to which he responded, “Just ask them how their pickles are doing, and they’d tell me if they were behind or if they were okay.” *Id.; see id.* at 126-27 (“Q. Okay. So they would let you know how the progress of the harvest was? A. Yes.”) and 132-33.

In sum, the district court correctly concluded that the facts of this case differ significantly from *Brandel*, where the sharecropper agreement unquestionably bestowed full control over crop management to the harvesters; on the other hand, the facts of this case show that Howes exercised significant control over the harvest.

f. Services as an Integral Part of Howes’ Business

The district court correctly concluded that the final factor, whether the services were an integral part of Howes’ business, also weighed in favor of an employment relationship because Howes derived 84 percent of his 2011 income from pickle farming, and Howes could not and did not dispute the fact that the harvesters’ work was an integral part of his business. R.43, Opinion, Page ID# 814. Howes appears to concede that this factor is met, consistent with this Court’s holding in *Brandel*, although he argues that the *Brandel* court also considered whether the harvesters were economically dependent upon the grower. Appellant’s Opening Brief, R.12-1, Page ID# 29. As the district court correctly stated, however, the *Brandel* court first concluded that this factor was met because the harvesters’

services were an integral part of Brandel's business before turning back to the "central question" of the case, which is the workers' economic dependence on the grower. R.43, Opinion, Page ID# 814 (citing *Brandel*, 736 F.2d at 1120).

In sum, the district court correctly concluded that because the economic reality factors, as applied on the whole to the undisputed material facts in this case, show that the pickle harvesting did not require any particular skill, that the harvesters had invested very little in the pickle crop, that the workers had no opportunity for profit or loss, that Howes had control over the pickle harvesting, and that the services provided by the harvesters were an integral part of Howes' business, the pickle harvesters in this case were economically dependent on Howes and his business rather than being in business for themselves. R.43, Opinion, Page ID# 814.

II. SHOULD THIS COURT DEEM THAT THESE ISSUES ARE NOT WAIVED FOR PURPOSES OF THE APPEAL, AS IT SHOULD, THE DISTRICT COURT CORRECTLY CONCLUDED THAT HOWES' FAILURE TO KEEP RECORDS OF THE HARVESTERS' HOURS WORKED VIOLATED THE FLSA'S RECORDKEEPING PROVISION, AND THE COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE SECRETARY'S REQUEST FOR INJUNCTIVE RELIEF WHERE THERE WAS A HIGH LIKELIHOOD OF FUTURE VIOLATIONS REGARDING RECORDKEEPING

Howes' opening brief does not identify as issues on appeal whether the district court correctly concluded that Howes violated the recordkeeping provisions of the FLSA or abused its discretion when it granted the Secretary's request for injunctive relief prohibiting Howes from further violations of

that statutory provision. *See* R.43, Opinion, Page ID# 815-16; R.12-1, Appellant's Opening Brief, Statement of Issues, Page ID# 5. Because these issues are not identified by Howes in his opening brief as issues for this Court to address on appeal, and because the opening brief does not argue in any meaningful way that the district court's decision on these issues was in error or that the court abused its discretion, they are waived on appeal. *See Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1063 (6th Cir. 2014) ("perfunctory and undeveloped arguments" are waived on appeal) (citation omitted); *Brindley v. McCullen*, 61 F.3d 507, 509 (6th Cir. 1995); *see also United States v. Kalymon*, 541 F.3d 624, 632 (6th Cir. 2008) (issues raised for first time in reply brief are waived on appeal). However, the Secretary addresses the recordkeeping issue here, including the injunctive relief granted, out of an abundance of caution.

The district court's conclusion that Howes violated the Act's recordkeeping provisions was based on Howes' admission that he did not keep records for the 2011 harvest on a work day basis as required by the regulations. *See* 29 C.F.R. 516.2(a)(7); R.43, Opinion, Page ID# 815. Howes restates in his opening brief that he determined the amount to pay the harvesters by asking each worker on a weekly basis how many hours they had worked the previous week. Appellant's Opening Brief, R.12-1, Page ID# 11-12. As the district court correctly

concluded, however, Howes' method of determining hours worked was plainly insufficient to satisfy the regulatory requirement that employers keep records of employee hours worked on a daily and weekly basis. R.43, Opinion, Page ID# 815. The district court thus correctly concluded that Howes had committed a recordkeeping violation.

Moreover, the district court did not abuse its discretion when it granted the Secretary's request for injunctive relief requiring Howes to comply with the FLSA's recordkeeping provisions. R.43, Opinion, Page ID# 816. In considering whether to grant injunctive relief under the FLSA, a court considers "(1) the previous conduct of the employer; (2) the current conduct of the employer; and (3) the dependability of the employer's promises for future compliance." *Reich v. Petroleum Sales, Inc.*, 30 F.3d 654, 657 (6th Cir. 1994). The district court correctly concluded that the injunction was warranted particularly where WHD had instructed Howes in a previous investigation to keep accurate records and provided him with written guidance on the FLSA's recordkeeping requirements, and where there was no indication that Howes would comply in the future. R.43, Opinion, Page ID# 816; *see* R.16-2, Declaration of Amanda Enrico, Page ID# 269; R.14-1, Darryl Howes Deposition, Page ID# 138. As the district court noted, "'[t]he imposition of an injunction [under the FLSA] is not punitive, nor does it

impose a hardship on the employer since it requires him to do what the Act requires anyway -- to comply with the law.'" R.43, Opinion, Page ID# 815 (quoting *Martin v. Funtime, Inc.*, 963 F.2d 110, 114 (6th Cir. 1992)). As the district court also correctly observed, injunctions under the FLSA are particularly appropriate when an employer has previously violated the Act and has not made a "dependable effort" to comply or to prevent repeated violations, suggesting that future violations are likely. *Id.* at 815-16. The district court thus did not abuse its discretion when it concluded that injunctive relief was warranted where Howes had "previously violated the FLSA [and] did not respond to the government's efforts to remedy this violation without legal action." *Id.* at 816

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT HOWES HAD "CONTROL" OVER THE "GREEN CAMP" HOUSING RENTED TO THE CUCUMBER HARVESTERS AND THUS WAS LIABLE FOR THE SAFETY AND HEALTH VIOLATIONS FOUND THERE

Enacted "to make agricultural employers and farm labor contractors responsible for the fair treatment of migrant workers," *Castillo v. Case Farms of Ohio, Inc.*, 96 F. Supp. 2d 578, 615 n.43 (W.D. Tex. 1999), MSPA requires "each person who owns or *controls* a facility or real property which is used as housing for migrant agricultural workers" to ensure that the housing facility complies with applicable safety and health standards. 29 U.S.C. 1823(a) (emphasis added). Applicable safety and health standards include those related to fire

prevention, water quality, plumbing maintenance, building construction and maintenance, and pest control. *See* 29 C.F.R. 500.133.

It is well established that MSPA, enacted against the backdrop of historically exploitive labor practices in the migrant agricultural labor market, is "a remedial statute that should be construed broadly to effect its humanitarian purpose." *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1505 (11th Cir. 1993) (citation omitted); *see Becerra Hernandez v. Flor*, No. CIV-01-183, 2002 WL 31689440, at *9 (D. Minn. Nov. 29, 2002) (unpubl'd). To that end, Congress intended the term "control" to be interpreted in accordance "with the broadest possible meaning" to ensure that the housing facilities for migrant workers are properly maintained. H.R. Rep. No. 97-885 at 17-18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4563-64, 1982 WL 25163. The Secretary's MSPA regulations define "control" to include the "power or authority to oversee, manage, superintend or administer" the housing, either personally or through an agent or employee, whether or not the individual exercising control receives compensation for his or her efforts. 29 C.F.R. 500.130(c). If more than one person is involved in providing the housing, both are responsible for ensuring compliance with the housing standards. *See* 29 C.F.R. 500.130(a). The courts have recognized that the regulations'

expansive definition of control "sweeps in more activities than those traditionally relegated to a landlord" in order to give effect to congressional intent. *Castillo*, 96 F. Supp. 2d at 614; *see Howard v. Malcolm*, 629 F. Supp. 952, 954 (E.D.N.C. 1986) (any ambiguity in the word "control" should be decided in the migrant workers' favor).

Howes argues on appeal that the district court erred in holding him responsible for the MSPA violations at the Green Camp because he did not own and did not have any control over the housing facility where the harvesters lived during the 2011 pickle harvest, which at that time was owned by Lucille Howes. Appellant's Opening Brief, R.12-1, Page ID# 13.[9] Howes states that Ronald Howes applied for the camp license in 2011, and that Howes "had nothing to do with the property" other than authorizing one of his employees to help get the housing units ready for occupancy in 2011 and to take care of some repairs during the season. *Id.* at 13-14, 31-32. Howes also asserts that the district court erred in its conclusion that Howes' authorization of his employee to prepare the property for the

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[9] As the district court noted, Howes did not dispute the MSPA violations before the district court, but argued that he was not liable for the MSPA violations because he did not own or control the property. R.43, Opinion, Page ID# 817. As noted *supra,* although the Secretary found nine separate housing violations at the Green Camp, appeals of MSPA violations and/or assessment of MSPA civil money penalties are initially handled through administrative proceedings. *See generally* 29 C.F.R. 500.212, 500.224.

2011 season and to make certain repairs was sufficient to establish that Howes had control of the property under the relevant MSPA regulations. *Id.* at 32, 34.

Given the breadth of the MSPA regulation's definition of "control," which specifically includes the "power or authority to oversee, manage, superintend or administer" the housing facility "through an authorized agent or employee," however, it is evident that the district court correctly concluded that Howes did have such control of the facility. 29 C.F.R. 500.130(c). As an initial matter, Howes arranged for his harvesters to live at the Green Camp for $25 a week, and this housing offer was specifically referenced in the employment contract. R.14-1, Darryl Howes Deposition, Page ID# 127; R.17-5, Contract, Page ID# 301. Moreover, a person "controls" a housing facility if he or she has the authority to correct housing violations. *See Renteria-Marin v. Ag-Mart Prod., Inc.*, 537 F.3d 1321, 1327 (11th Cir. 2008); *see also Castillo*, 96 F. Supp. 2d at 615-16. In this case, Howes had control over the housing pursuant to MSPA because he authorized his employee, Baccaria, to prepare the property for the harvesters and to make necessary repairs, and Baccaria did so within the scope of his employment. R.43, Opinion, Page ID# 817.[10] Thus, the district

[10] Howes argues that a question of fact exists regarding whether the activities of Mark Baccaria constituted "overseeing, managing, superintending, or administering the property in

court properly concluded as a matter of law that Howes had control over the Green Camp sufficient to establish liability under MSPA. *Id.* at 806.

IV. HOWES INTERFERED WITH THE SECRETARY'S INVESTIGATION IN VIOLATION OF MSPA

The district court also correctly concluded that Howes' and Baccaria's behavior at the cucumber fields, repeatedly parking in close proximity to the interviews being conducted by the WHD investigators and using an electronic device to photograph the interviews, constituted interference with the WHD investigation in violation of MSPA. R.43, Opinion, Page ID# 818.

MSPA provides that the Secretary may "investigate, and in connection therewith, enter and inspect such places[,] . . . question such persons and gather such information [necessary] to determine compliance" with that statute. 29 U.S.C. 1862(a). The statute thus permits WHD investigators to enter open fields for purposes of conducting a MSPA investigation without a warrant. *See McLaughlin v. Elsberry*, 868 F.2d 1525, 1530-31 (11th Cir. 1988).

It is a violation of MSPA to "unlawfully resist, oppose, impede, intimidate, or interfere with" a Department official

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question," so that summary judgment was inappropriately granted on this issue; the underlying facts concerning what Baccaria actually did are not in dispute. R.12-1, Appellant's Opening Brief, Page ID# 31-32. Whether the facts in this case establish that Howes had control over the Green Camp within the meaning of MSPA is ultimately a question of law, not fact.

conducting an investigation of that statute. 29 U.S.C. 1862(c). The legislative history of MSPA indicates that this prohibition is intended to prevent "any person [from] interfer[ing] in any manner with an official during the performance of his investigation or law enforcement function under the Act." H.R. Rep. No. 97-885, at 33, *reprinted in* 1982 U.S.C.C.A.N. at 4579; *see Elsberry*, 868 F.2d at 1528 (statutory prohibitions against interference with federal investigations typically not limited to forceful resistance). Thus, as one district court recently held, the videotaping of interviews, as well as the presence of supervisors during the interviews, interfered with the Secretary's ability to interview migrant workers as part of a MSPA investigation. *See Perez v. Blue Mountain Farms*, 961 F. Supp. 2d 1164, 1172 (E.D. Wash. 2013). As the courts have generally recognized, an employer's recording of employee protected activity, whether it is by camera or videorecorder, "has a tendency to intimidate." *California Acrylic Indus., Inc. v. NLRB*, 150 F.3d 1095, 1099-1100 (9th Cir. 1998) (collecting cases); *see generally* 29 U.S.C. 1855(a) (MSPA anti-discrimination provision).

Howes argues that "he did not interfere with any investigation other than to attempt to document the activities of the multiple agents of the [Secretary], who, in his opinion, far exceeded their investigative authority after several hours

of interrupting Howes' operations." R.12-1, Appellant's Opening Brief, Page ID# 15. He states that he decided to "document[] the activities of the 'investigators'" only after his employee informed him that the WHD investigators were interfering with *his* work. *Id.* at 34. Howes stated that he felt these actions were necessary because of the length of the interview and a statement that WHD investigator Enrico allegedly made to Howes during a December 2010 investigation suggesting that WHD would "come after" Howes if he did not sign something agreeing that his harvesters were FLSA employees. *Id.* Howes also disputes the idea that *photographing* the interviews constituted "interference" with the investigation under MSPA, distinguishing the taking of photographs from videotaping the interviews. *Id.* at 34-36. Finally, Howes argues that because the Secretary did not attempt to shield the identity of the individuals being interviewed in the fields, photographing the interviews that were being conducted in plain view of Howes could not constitute interference within the meaning of the statutory provision. *Id.* at 35-36.

As the district court correctly concluded, however, Howes admittedly approached the WHD investigators in the field with the intent of getting them to leave his property. R.43, Opinion, Page ID# 818; *see* R.14-1, Darryl Howes Deposition, Page ID# 175. The photographing of employee interviews, as well as

Howes' and Baccaria's physical presence in close proximity to the interviews in a pickup truck and forklift, clearly disrupted the investigation being conducted in the fields. As the court stated, Howes in the end "attained his goal – the WH[D investigators] concluded that they could not successfully complete the interviews and they cut their investigation short." R.43, Opinion, Page ID# 818. That Howes was somehow displeased with the investigation is beside the point; the decision to investigate and the scope of the investigation are within the purview of Wage and Hour to determine, not Howes'. The court thus correctly concluded that Howes' activity constituted interference within the meaning of the statute. *Id.*[11]

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE SECRETARY'S PETITION FOR INJUNCTIVE RELIEF TO PREVENT FUTURE VIOLATIONS OF MSPA'S HOUSING STANDARDS AND PREVENT FUTURE INTERFERENCE WITH THE SECRETARY'S INVESTIGATIONS[12]

To the extent this Court deems this issue not to have been waived, the district court did not abuse its discretion when it granted the Secretary's petition to enjoin Howes from further

[11] The court dismissed Howes' argument that the interviewees did not have any confidentiality to start with since the interviews took place in plain view, stating that in this case it was the content of the interviews that the WHD investigators was attempting to keep confidential rather than the identity of the interviewees, and that Howes came so close to the employees being interviewed that it was "inevitabl[e]" that he would hear what was being said. R.43, Opinion, Page ID# 818-19.

[12] As Howes does not address the district court's grant of injunctive relief pursuant to MSPA in his opening brief, it is waived. *See Boegh*, 772 F.3d at 1063-64. However, the Secretary addresses that issue out of an abundance of caution.

violations of MSPA's housing standards and from interfering with future WHD investigations. R.43, Opinion, Page ID# 819. Section 503(a) of MSPA provides that "[t]he Secretary may petition any appropriate district court of the United States for temporary or permanent injunctive relief if the Secretary determines that [MSPA] . . . has been violated." 29 U.S.C. 1852(a).

MSPA's specific provision for injunctive relief permits the courts to enjoin violations of MSPA where a statutory violation has occurred, because "[t]he standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief." *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 869 (9th Cir. 1983) (citations omitted); *see United States v. Stone*, No. 1:06-CV-157, 2006 WL 2265436, at *1 (W.D. Mich. Aug. 7, 2006) (unpubl'd) (*citing, e.g.*, *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1098 (9th Cir. 2000)). The legislative history to MSPA makes clear that Congress intended to grant the Secretary authority to "petition any appropriate district court for temporary or permanent injunctive relief if the Secretary determine[s] that this Act, or any regulation, has been violated." H.R. Rep. No. 97-885, at 31, *reprinted in* 1982 U.S.C.C.A.N. at 4577. In light of the fact that the Secretary determined that MSPA violations

occurred at the Green Camp, this standard for injunctive relief has been met.

However, the Secretary prevails even under the traditional four-part test applied by the district court in determining whether to grant the Secretary's request for injunctive relief. R.43, Opinion, Page ID# 819-20. Under the four-part test, courts examine the following factors: (1) whether the Secretary has shown that he is likely to prevail on the merits; (2) whether the Secretary will likely suffer irreparable injury if the injunctive relief is not granted; (3) whether granting the injunction will cause substantial harm to others; and (4) where the public interest lies. *Id.* at 819 (citing, *e.g.*, *Jolivette v. Husted,* 694 F.3d 760, 765 (6th Cir. 2012)).

As the district court correctly concluded, the first and second factors assessing the need for injunctive relief were met in this case because the Secretary established both that Howes had "control" over the Green Camp sufficient to establish liability under that Act and that Howes had interfered with the Secretary's investigation; further, the Secretary established that he would suffer irreparable injury if Howes did not comply with the applicable MSPA provisions because the workers would suffer palpable harm if housing is not safe and investigations as to MSPA violations are impeded. R. 43, Opinion, Page ID# 819-20. The district court also correctly observed that the

third factor was met in this case because injunctive relief sought by the Secretary is not punitive, but remedial, and although the Secretary's investigation might "cause some delays in [Howes'] farming operation," requiring Howes to provide housing that complies with health and safety standards and to refrain from interfering with the Secretary's investigations requires Howes to do only what MSPA already requires it to do. *Id.* Finally, the district court correctly concluded that requiring Howes to comply with MSPA health and safety standards, and permitting the Secretary to conduct lawful investigations in furtherance of ensuring MSPA compliance, certainly serves the public interest. *Id.* Therefore, the district court correctly concluded that injunctive relief was warranted in this case. *Id.*

CONCLUSION

For the foregoing reasons, this Court should affirm the opinion and order of the district court.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 28, I certify the following with respect to the foregoing brief of the plaintiff-appellant Secretary of Labor:

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because this brief contains 11,863 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5)(B) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface of 10.5 characters per inch, in Courier New 12-point type style. The brief was prepared using Microsoft Office Word 2003.

JANUARY 22, 2015

/s/ Maria Van Buren

MARIA VAN BUREN
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of January, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

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

/s/ Maria Van Buren
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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS PURSUANT TO LOCAL RULES 30(b) and 30(f)(1)

R. 6, First Amended Complaint, Page ID# 32-45

R. 14, Secretary's Motion for Partial Summary Judgment, Page ID# 93-95

R. 14-1, Darryl Howes Deposition, Page ID# 96-186

R. 16-2, Declaration of Amanda Enrico, Page ID# 269

R. 17-5, Contract, Page ID# 301

R. 19, Defendant's Motion for Summary Judgment, Page ID# 342-43

R. 30, Secretary's Response Brief in Opposition to Defendant's Motion for Summary Judgment, Page ID# 565-66

R. 43, Order, Page ID# 822-23,

R. 44, Opinion, Page ID# 800-21

R. 51, Consent Judgment, Page ID# 838-45

R. 52, Notice of Appeal, Page ID# 846