No. 17-1091

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EDWARD C. HUGLER, Acting Secretary of Labor, United States Department of Labor (Wage and Hour Division),

Plaintiff-Appellee,

v.

S&H RESTAURANT, INC., d/b/a Aroma Indian Cuisine; MANDAL ENTERPRISES L.C., d/b/a Aroma Indian Cuisine; TEJAL RESTAURANT, INC., d/b/a Aroma Indian Cuisine; DALJEET SINGH CHHATWAL, Individually; LAMAREE INC., d/b/a Aroma Indian Restaurant of DC; AROMA INDIAN RESTAURANT OF DC, INC., d/b/a Aroma Indian Restaurant of DC; JYOTI BAWA, Individually,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF FOR THE ACTING SECRETARY OF LABOR

NICHOLAS C. GEALE
Acting Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

MARY E. MCDONALD
Senior Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave, NW, N-2716
Washington, DC 20210
Telephone: (202) 693-5693
Email: McDonald.Mary@dol.gov

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION 1

STATEMENT OF THE ISSUES 2

STATEMENT OF THE CASE 3

A. Factual Background 3

B. Procedural History 12

C. Decision of the District Court 15

SUMMARY OF THE ARGUMENT 20

ARGUMENT 22

I. EVEN IF THE ARGUMENT IS PROPERLY BEFORE THIS COURT, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL BECAUSE THE COURT'S DECISION TO LIMIT POTENTIALLY REDUNDANT WITNESS TESTIMONY WAS AN APPROPRIATE EXERCISE OF ITS BROAD TRIAL MANAGEMENT AUTHORITY AND DEFENDANTS WERE NOT PREJUDICED BY THE RULING 22

A. Standard of Review 22

B. Applicable Law Governing Relief Under Federal Rules of Civil Procedure 59 and 60. 24

Page

C. Defendants' Argument that a New Trial Is Warranted Because the Court Limited Potentially Favorable Witness Testimony Is Not Properly Before This Court. 26

D. Even if Defendants Had Properly Objected to the Court's Trial Management Decision Thereby Allowing This Court to Address the Issue on Appeal, the District Court Did Not Abuse Its Discretion By Limiting Potentially Redundant Witness Testimony. 31

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL BECAUSE ITS DECISION PERMITTING COUNSEL FOR THE SECRETARY TO REFERENCE DURING HIS REBUTTAL AN EMAIL THAT HAD NOT BEEN ADMITTED IN EVIDENCE WAS NECESSARY TO REFUTE AN UNTRUE ALLEGATION MADE BY DEFENDANTS' COUNSEL FOR THE FIRST TIME DURING HIS CLOSING ARGUMENT AND DID NOT PREJUDICE DEFENDANTS 35

A. Standard of Review 35

B. The District Court Properly Allowed Counsel for the Secretary to Reference an Email, Which Had Not Been Admitted Into Evidence, During His Rebuttal Argument. 35

C. Defendants Cannot Demonstrate Any Prejudice Resulting From the Court's Decision to Permit the Secretary to Reference an Unadmitted Exhibit During Rebuttal. 41

CONCLUSION 47

STATEMENT REGARDING ORAL ARGUMENT 48

CERTIFICATE OF COMPLIANCE 49

CERTIFICATE OF SERVICE 50

TABLE OF AUTHORITIES

Cases: Page

Aikens v. Ingram,
652 F.3d 496 (4th Cir. 2011) 25

Arnold v. Eastern Air Lines, Inc.,
681 F.2d 186 (4th Cir. 1982) 40

Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.,
99 F.3d 587 (4th Cir. 1996) 24

Boyd v. French,
147 F.3d 319 (4th Cir. 1998) 43

Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.,
41 F.3d 182 (4th Cir. 1994) 23

Bunn v. Oldendorff Carriers GmbH & Co. KG,
723 F.3d 454 (4th Cir. 2013) 23

Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.,
51 F.3d 1229 (4th Cir. 1995) 22-23, 24

Dennis v. Gen. Elec. Corp.,
762 F.2d 365 (4th Cir. 1985) 30

Gentry v. E. W. Partners Club Mgmt. Co.,
816 F.3d 228 (4th Cir. 2016) 23

Gonzalez v. Crosby,
545 U.S. 524 (2005) 25

Huskey v. Ethicon, Inc.,
848 F.3d 151 (4th Cir. 2017) 22

Jones v. Postmaster Gen. of the U.S.,
105 F.3d 647, 1997 WL 5773
(4th Cir. 1997) (table) 31

Cases--Continued: Page

King v. McMillan,
594 F.3d 301 (4th Cir. 2010).....22

Minter v. Wells Fargo Bank, N.A.,
762 F.3d 339 (4th Cir. 2014)..... 16, 24, 41

Mott v. Mott,
203 F.3d 821, 2000 WL 19164
(4th Cir. 2000) (table) 31

Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.,
148 F.3d 396 (4th Cir. 1998)..... 16, 24-25

Schultz v. Capital Int'l Sec., Inc.,
466 F.3d 298 (4th Cir. 2006)..... 23-24

Tobias v. Wal-Mart Stores Inc. Assocs. Health & Welfare Tr.,
461 F. App'x 320 (4th Cir. 2012) 40

United States v. Adams,
335 F. App'x 338 (4th Cir. 2009) 42-43

United States v. Bajoghli,
785 F.3d 957 (4th Cir. 2015).....32

United States v. Baptiste,
596 F.3d 214 (4th Cir. 2010)..... 40, 41

United States v. Beckton,
740 F.3d 303 (4th Cir. 2014).....31

United States v. Green,
599 F.3d 360 (4th Cir. 2010)..... 40, 41

United States v. Liu,
654 F. App'x 149 (4th Cir. 2016) 30

United States v. Scheetz,
293 F.3d 175 (4th Cir. 2002).....41

Cases--Continued: Page

United States v. Smith,
452 F.3d 323 (4th Cir. 2006).....32

United States v. Villarini,
238 F.3d 530 (4th Cir. 2001).....24

United States v. Watts,
453 F. App'x 309 (4th Cir. 2011) 41-42

United States v. Winkle,
587 F.2d 705 (5th Cir. 1979).....30

United States v. Young,
470 U.S. 1 (1985) 42

Williams v. Stevenson,
No. 8:08–1883, 2009 WL 803620 (D.S.C. Feb. 17, 2009).....43

Statutes:

28 U.S.C. 1291.....2
28 U.S.C. 1331.....1
28 U.S.C. 1345.....1

Fair Labor Standards Act,
29 U.S.C. 206 ..... 5, 14
29 U.S.C. 207 14
29 U.S.C. 215(a)(2) 14
29 U.S.C. 216(b) 7
29 U.S.C. 216(c) 13
29 U.S.C. 217 ..... 1, 13

Other Authorities:

Federal Rules of Appellate Procedure:
Rule 32(a)(5) 49
Rule 32(a)(6) 49
Rule 32(a)(7)(B).....49

Other Authorities--Continued: Page

Rule 32(f) 49

Federal Rules of Civil Procedure:
Rule 59..... 18, 24
Rule 59(a)..... 15, 24, 25
Rule 59(a)(1)(A)..... 15, 24
Rule 59(e)..... 15, 16, 24, 25
Rule 60.....24
Rule 60(b).....25
Rule 60(b)(1) 15, 24, 25
Rule 60(b)(3) 15, 24, 25
Rule 60(b)(6) 15, 24, 25

Federal Rules of Evidence:
Rule 103(a)(2) 30
Rule 611(a).....32

Local Rule:
4th Cir. R. 32(b) 49

No. 17-1091

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EDWARD C. HUGLER, Acting Secretary of Labor, United States Department of Labor (Wage and Hour Division),

Plaintiff-Appellee,

v.

S&H RESTAURANT, INC., d/b/a Aroma Indian Cuisine; MANDAL ENTERPRISES L.C., d/b/a Aroma Indian Cuisine; TEJAL RESTAURANT, INC., d/b/a Aroma Indian Cuisine; DALJEET SINGH CHHATWAL, Individually; LAMAREE INC., d/b/a Aroma Indian Restaurant of DC; AROMA INDIAN RESTAURANT OF DC, INC., d/b/a Aroma Indian Restaurant of DC; JYOTI BAWA, Individually,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF FOR THE ACTING SECRETARY OF LABOR

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction over this case pursuant to section 17 of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 217; 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

December 21, 2016 Order of United States District Court Judge Liam O'Grady pursuant to 28 U.S.C. 1291 (final decisions of district courts). *See* Joint Appendix 565-73.[1] The district court's December 21, 2016 Order denying Defendants' motion for a new trial was a final judgment that disposed of all claims. *Id.* Defendants filed a timely Notice of Appeal from that Order on January 19, 2017. *Id.* at 574-75.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by limiting the number of employee witnesses who allegedly would have testified at trial that they were not owed wages from Defendants.

2. Whether the district court abused its discretion by permitting counsel for the U.S. Department of Labor ("DOL") to reference an email, which had not been admitted into evidence at trial, during his rebuttal argument to the jury.

[1] References to the Joint Appendix filed by Defendants are cited as "JA (appendix page number(s))." References to the Supplemental Joint Appendix filed by the Acting Secretary of Labor ("Secretary") along with this brief are cited as "SJA (appendix page number(s))."

STATEMENT OF THE CASE

A. Factual Background[2]

1. Defendants S&H Restaurant, Inc., Mandal Enterprises L.C., Tejal Restaurant, Inc., La Maree Inc., and Aroma Indian Restaurant of DC, Inc. (collectively, "Aroma Indian Cuisine") are a chain of restaurants and a catering service providing Indian food in the Washington, DC area.[3] During all relevant time periods, Defendant Daljeet Chhatwal ("Chhatwal") is or was the owner of the Aroma Arlington, Aroma Lorton, and Aroma DC restaurants (collectively, "the Aroma Restaurants"). *See* SJA 37. Chhatwal's wife, Defendant Jyoti Bawa ("Bawa"), owned several of the corporate entities that operated the Aroma DC restaurant and she served as a partner to Chhatwal in operating that establishment.

---

[2] Although the issues on appeal have little relation to the underlying facts of this case, the Secretary has endeavored to assist this Court in understanding the context in which this appeal has arisen by providing an overview of the factual background. The Secretary notes, however, that the district court did not make factual findings in this case, which ultimately proceeded to a jury trial. Accordingly, although the recitation of facts set forth in this brief is supported by record evidence and citations, the Secretary acknowledges that some of the statements in this section are disputed by Defendants.

[3] Specifically, Defendants S&H Restaurant, Inc. and Mandal Enterprises L.C., which both conduct business as Aroma Indian Cuisine, have owned and operated a restaurant in Arlington, Virginia ("Aroma Arlington") since November 6, 2011. *See* SJA 36. Defendant Tejal Restaurant, Inc., which also conducts business as Aroma Indian Cuisine, owned and operated a restaurant in Lorton, Virginia ("Aroma Lorton") from April 2012 until February 2016. *Id*. Defendants La Maree, Inc. and Aroma Indian Restaurant of DC, Inc., which both conduct business as Aroma Indian Restaurant of DC, owned and operated a restaurant in Washington, DC ("Aroma DC") from 1996 until October 2015. *Id.* at 36-37.

Id. Chhatwal and/or Bawa were responsible for hiring, firing, scheduling, supervising, and determining the pay of employees that worked at the Aroma Restaurants. *See* JA 25; SJA 25. Defendants employed individuals to work as cooks, prep cooks, helpers, managers, servers, and dishwashers at the Aroma Restaurants. *See* JA 24; SJA 38.

2. On August 13, 2013, DOL's Wage and Hour Division ("WHD") commenced an investigation of possible violations of the minimum wage and overtime compensation provisions of the FLSA at Aroma Arlington based on a complaint received from an employee who worked at the restaurant. *See* JA 56-57, 60. On October 25, 2013, WHD's investigation was expanded to include the Aroma Lorton and Aroma DC restaurants. *Id.* at 100-01.

WHD's investigation of the Aroma Restaurants was led by Investigator Jeremy Benjamin Searle ("Searle"). *See* JA 56. Upon arriving at each of the restaurants, Searle would attempt to conduct surveillance, interview employees, and meet with Defendants to generally discuss matters regarding the payroll system, scheduling, and wage payments. *Id.* at 100. During his investigation, Searle also repeatedly requested that Defendants produce certain records regarding their employees' hours worked and wages paid that they were required by the FLSA to create and maintain for each of their restaurants. *Id.* at 64-67, 105-06. In total, Searle estimated that he spent over 400 hours investigating the Aroma

Restaurants. *See* SJA 7-8. As part of his investigation, Searle engaged in more than 100 conversations with current and former employees; conducted written interviews with 18 employees; and reviewed numerous documents, including approximately 3,000 cancelled checks, 100 pages of handwritten timesheets, 450 pages of computer timesheets, 45 employee Point of Sales ("POS") system receipts, and Excel spreadsheets provided by Defendants. *See* JA 69, 180; SJA 7-8. Based on his investigation, Searle determined that Defendants had violated the minimum wage, overtime, and recordkeeping provisions of the FLSA. *See, e.g.*, JA 137-38; 473-542. Each of these alleged violations, as well as Defendants' interference with the investigation itself, is discussed briefly below.

a. *Minimum Wage and Overtime Violations*: After conducting numerous interviews and reviewing all of the documentary evidence that he received from employees as well as Defendants, Investigator Searle concluded that, since 2011, Defendants had not always paid the minimum wage to employees of the Aroma Restaurants. *See* JA 138; SJA 8, 20.[4] Searle concluded that employees at the Aroma Restaurants were routinely paid an hourly wage rate of only $7.00 and sometimes even less. *See, e.g.,* JA 70, 80, 91, 484-86, 494-99, 502-06; *see generally* JA 473-542 (DOL computation of back wages). Indeed, payroll records for Aroma Lorton provided by Defendant Chhatwal himself specifically stated that,

[4] For all relevant time periods, the FLSA hourly minimum wage was $7.25. *See* 29 U.S.C. 206.

for certain pay periods, the regular rate of pay was only $7.00 per hour. *Id.* at 314-18; *see* SJA 19, 42-45.

In addition to concluding that Defendants had not paid the minimum wage to their employees for all hours worked, Investigator Searle also determined that Defendants' employees frequently worked more than 40 hours per week, but did not receive time-and-a-half their regular wage rate for these overtime hours as required by the FLSA. *See, e.g.*, JA 70, 100, 120-21, 138, 479-90; SJA 9. Searle found, for example, that the kitchen staff of the Aroma Restaurants were routinely working more than 60 hours per week but were never paid overtime for their premium hours. *See* JA 70-71, 80, 121, 138; *see generally* JA 473-542. Further, the payroll records for Aroma Lorton provided by Defendant Chhatwal expressly stated that, for certain time periods, the "overtime rate" was only $7 per hour. *Id.* at 314-18; SJA 42-45.

Even after the commencement of the investigation, Aroma failed to come into compliance with the FLSA. *See* JA 138. Indeed, Searle discovered that, after his investigation began, Defendant Chhatwal devised a "two-check scheme" to avoid paying overtime. *Id.* at 131-37; SJA 9. Pursuant to this scheme, Chhatwal instructed his employees not to clock in more than eighty hours in a pay period and to keep track of overtime hours worked on a separate piece of paper. *See* SJA 9. He then would pay straight time for those overtime hours by issuing a check to a

third party, such as a relative of the employee. *Id*. Indeed, shortly after the investigation began, several individuals who did not work at the Aroma Restaurants inexplicably began to receive checks from Defendants. *See* JA 131-32; SJA 18-20.

Based on his investigation, Searle determined that Defendants owed over $200,000 in back wages as a result of these minimum wage and overtime violations to more than 40 former and current employees. *See, e.g.*, JA 137-50, 473-542.[5]

b. *Recordkeeping Violations*: During his investigation, Searle learned that the Aroma Restaurants used a computerized POS system to track the hours worked by employees. *See* JA 107, 229-33. Most of the Aroma Restaurant employees would clock in and out on the computer to keep track of their work hours. *Id.* at 61. Employee time records were stored on Defendants' computer hard drives that supported the restaurants' POS systems. *Id.* at 130-31, 338. Throughout the first few months of his investigation, Searle made repeated requests for Defendants to provide him with copies of these computerized time records, as well as records of

[5] Defendants erroneously state in their opening brief that the Secretary "approximated unpaid wages to be in the $500,000 range." Opening Br. at 3; *see id.* at 2, 3, 4, 9 (repeatedly stating that the Secretary's "claim" for "unpaid wages and penalties" was approximately $500,000). The Secretary sought approximately $258,000 in back wages at trial. *See* JA 138-141, 473-542. The Secretary also sought liquidated damages in an amount equal to the back wages pursuant to 29 U.S.C. 216(b).

pay for all employees. *Id.* at 61, 71-72; SJA 11-15. However, even after considerable delay, Defendants provided only some of the records requested. *See* JA 71-72, 79-80, 99-106; SJA 11-15. Defendant Chhatwal offered several dubious reasons for his delay and/or inability to produce these documents. *See, e.g.,* JA 61. Chhatwal informed Searle, for example, that he could not provide time records for many Aroma Restaurants employees because the computer hard drives that stored this information for both the Aroma DC and Aroma Arlington restaurants "died" shortly after WHD commenced its investigation. *Id.* at 61, 131, 338-39; SJA 12, 15, 26-28.[6]

Investigator Searle determined that, not only was the delay in Defendant Chhatwal's delivery of time and pay records suspicious, the records that he did eventually provide, including handwritten timesheets and Excel spreadsheets, were not credible. Searle concluded, for example, that the handwritten timesheets provided by Chhatwal were unreliable. *See* JA 71-74, 122, 173, 200; SJA 16. Searle was surprised that Defendants had provided him with handwritten

[6] According to Defendant Chhatwal, BME Business Systems, a third party service provider, replaced the hard drive containing employees' work hours for Aroma Arlington, and then mailed the old hard drive to the restaurant, where it was discarded. *See* JA 338-39; SJA 27-28. Moreover, the computer containing the hours worked at Aroma DC allegedly stopped working shortly after WHD began its investigation. *See* JA 131; SJA 27-28. Chhatwal testified that he had no personal knowledge of what happened to the hard drives. *See* JA 282. An employee informed Investigator Searle, however, that after the investigation began, Chhatwal had bragged to his staff that he had destroyed all of the employees' time records. *See* SJA 9.

timesheets given that they used a sophisticated POS computer system to track employee hours. *See* JA 71-72. Furthermore, based on his experience reviewing manual timesheets in other cases, Searle testified that handwritten timesheets typically have "got all kinds of different times in and times out" and usually "look[] like there ha[ve] been . . . corrections made or scribbles on it." JA 73. However, the timesheets provided for the Aroma Restaurants "looked very, very nice and neat." *Id.* Searle also observed that the time logged in and out for one employee on the timesheet "was just the exact same number every single day, no fluctuation whatsoever." *Id.* at 173. Searle testified that, in his extensive experience as an investigator, he "just had never seen anything like that before" and that such standardization in shift times was "inconsistent with the restaurant industry." *Id*.

Defendant Chhatwal also provided Investigator Searle with Excel spreadsheets purportedly reflecting wage and hour data for his employees at the Aroma Restaurants, but Searle deemed the authenticity of the spreadsheets to be highly suspect. *See* JA 74-75, 95, 543-52. Searle testified that he was "very shocked" to receive such an Excel spreadsheet, *id.* at 74, and that this "is the only time I have ever seen an Excel spreadsheet provided to me as payroll evidence instead of [a] bona fide QuickBooks report or some sort of payroll that was generated from the computer," *id*. at 79.

Searle concluded that the Excel spreadsheets provided by Chhatwal were unreliable records of hours worked and wages paid for several reasons. *See* JA 80. First, the data regarding wages and hours set forth on the spreadsheets, which purported to show that Defendants were generally in compliance with the FLSA, were inconsistent with the information that he had obtained through numerous employee interviews. *Id*. Searle testified that, for example, one employee, Wil Espino, had provided a statement in which he said he received $7/hour for his work at the Aroma Restaurants, but the Excel spreadsheet provided by Chhatwal stated that he was paid $10/hour. *Id.* Moreover, Searle discovered that the wage data on the Excel spreadsheets did not match the wages paid in the actual checks that employees received. *Id.* at 127-29. Searle explained that he simply "could not understand why every single one of the gross totals on the Excel spreadsheet was different than the amount they got on the check." *Id*. at 128. Investigator Searle also observed that, based on the documents' electronic properties, the Excel spreadsheets that were sent to him via email appeared to have been created a few days *after* the WHD investigation commenced rather than in 2001 as Chhatwal claimed. *Id.* at 76-77, 89-90, 333.

Investigator Searle thus concluded that because the Excel spreadsheets did not match other employee records, such as the computer timesheets, computerized POS receipts showing hours worked provided by employees, and the employees'

actual paychecks, the Excel spreadsheets were not reliable reflections of employees' hours worked or wages and likely had been created after the start of the investigation. *See, e.g.*, JA 95; SJA 17-19. Indeed, Searle discovered that the spreadsheets actually relied upon a formula, rather than a manual input of data, to display the hours that employees allegedly worked; he observed that such a function "made no sense to me at all." JA 82, 91-93.

Investigator Searle determined, however, that other documentary evidence he gathered during his investigation was reliable and corroborated the information that he had gathered from interviewing employees. For example, Searle observed that the POS tickets identifying the number of employee work hours per pay period were trustworthy and consistent with the information that he had been provided during employee interviews. *See* JA 129. Searle testified that if you multiplied the number of hours worked as identified on the POS tickets by the wage rates that the employee said they were paid, the total often matched the exact wage amounts paid on the checks that were actually provided to employees. *Id.* at 129-30.

c. *Interference with WHD Investigation and Intimidation of Employees*: Finally, throughout the course of Searle's investigation and the pendency of the subsequent litigation, the Secretary maintained that Defendants repeatedly interfered with the investigation by threatening and intimidating employees who attempted to provide information to DOL or otherwise cooperate with the

investigation. *See, e.g.,* SJA 1-5, 9-10. An employee notified Searle that Chhatwal had directed at least one employee to lie to Defendants' counsel that he was properly paid. *Id*. at 10. An employee also told Searle that Chhatwal had threatened members of his workforce with deportation for cooperating with the Secretary's investigation. *Id.* at 3. The Secretary further maintained throughout these proceedings that Defendants had coerced several of their employees to sign documents purporting to waive their FLSA rights and their participation in the trial. *See, e.g.*, JA 469-72; SJA 4-5. Notably, the court entered a consent order prior to trial prohibiting Defendants from terminating or otherwise retaliating against employees for communicating with DOL and also enjoined them from soliciting waivers from their employees. *See* JA 39-46. Despite that consent order, counsel for the Secretary discovered during trial that Chhatwal had instructed at least two employee witnesses not to appear in court on the day that they were scheduled to testify. The court thus strongly admonished Chhatwal and informed him that, if he further attempted to contact any witnesses or potential witnesses during trial, he would be subject to civil contempt. *See* SJA 46.

B. Procedural History

1. The Secretary filed this lawsuit on September 30, 2015. *See* JA 19-29. His complaint alleged that Defendants had willfully violated the FLSA's minimum wage, overtime, and recordkeeping provisions. *Id*. The Secretary sought to

recover unpaid compensation owed to employees under the FLSA and an equal amount in liquidated damages, as well as a permanent injunction to enjoin Defendants from committing future violations of the FLSA. *Id.*; *see* 29 U.S.C. 216(c), 217. He attached to his complaint a list of 45 current and former employees that he believed were owed back wages based upon these violations. *See* JA 29.

2. The case proceeded to a four-day jury trial from July 11, 2016 through July 14, 2016. The Secretary presented testimony from Investigator Searle; Barbara Pastwa, the owner of the company, BME Systems, that handled the POS system for the Aroma Restaurants; five current and former employees (Wil Espino, Salvador Monterozza, Jose Cruz, Humberto Alvarado, and Jose Orellano) who testified that they had not been paid minimum wage and/or overtime by Defendants; and one non-employee (Marcos Monterozza) who was the recipient of a check from Defendants as part of their "two-check scheme" to avoid paying overtime. Defendants presented testimony from Defendant Chhatwal and six current and former employees (Candida Herrera, Jose Rios, Jagjeet Singh, Kiran Mena, Nirmal Singh, and Sunil Kumar) who testified that they did not believe they were owed back wages.

3. On July 15, 2016, the jury rendered its verdict, finding that Defendants failed to pay minimum wage and/or overtime compensation to their employees in

violation of sections 6, 7, and 15(a)(2) of the FLSA. *See* JA 553-59. For both the minimum wage and overtime violations, the jury found that such violations were willful because it was "proven that the Defendants either knew their conduct was prohibited by the [FLSA] or showed reckless disregard for whether their conduct was prohibited by the [FLSA]." *Id.* at 553, 556. Accordingly, the jury concluded that Defendants were liable for back wages over a three-year period. *Id*. The jury computed and determined back wage awards for the individuals listed on the verdict form. *Id.* at 553-59. In total, the jury awarded $162,984.70 in back wages to 34 former and current employees of Defendants, including non-testifying employees. *Id*. Notably, the jury did not award any back wages to the six employees who had testified in support of Defendants. *Id*.

4. In response to post-trial motions filed by the Secretary, the district court subsequently awarded liquidated damages in an amount equal to the back wage award as well as costs, bringing the final judgment against Defendants to approximately $335,000. *See* JA 560-61.[7] On December 21, 2016, the court also amended the final order to include an award of injunctive relief, permanently enjoining and restraining Defendants from violating the minimum wage, overtime,

[7] Contrary to Defendant Chhatwal's testimony at trial, *see* JA 357 ("I don't want to keep anybody's money. If jury finds -- if jury thinks that I owe somebody some money, it will be taken care of."), Defendants have not yet paid the final judgment, posted a bond, or sought a stay of the judgment as of the date of this brief's filing.

and recordkeeping provisions of the FLSA and from discharging or discriminating against any employees for filing a complaint or engaging in other protected activity under the FLSA. *Id*. at 562-64.[8]

5. On November 7, 2016, Defendants filed a motion for a new trial pursuant to Federal Rules of Civil Procedure 59(a)(1)(A), 59(e), 60(b)(1), 60(b)(3), and 60(b)(6). Defendants asserted that they were entitled to a new trial because the court wrongfully prohibited them from presenting witness testimony during the trial and improperly allowed counsel for the Secretary to present new evidence during closing arguments. *See* JA 16, 565-73.

C. Decision of the District Court

1. On December 21, 2016, the district court issued an order denying Defendants' motion for a new trial. *See* JA 565-73. The court explained that, pursuant to Federal Rule of Civil Procedure 59(a), it must set aside the verdict and grant a new trial if "'(1) the verdict is against the clear weight of evidence, or (2) is

[8] The district court, however, denied the Secretary's request to amend the final judgment with respect to the jury's computation of damages. *See* JA 560-61. The Secretary had argued that the jury committed several errors with respect to its calculation of individual back wage awards. For example, the Secretary sought to amend the verdict to provide back wages to two employees who had signed waivers of their FLSA rights, which the Secretary argued were invalid as a matter of law, as well as to the six employees who testified in support of Defendants because the Secretary believed that such individuals had been coerced and intimidated into giving such testimony. The district court declined to amend the judgment, concluding that "[w]hatever calculation the jury made as to damages was . . . within its authority." *Id*. at 560.

based upon evidence which is false, or (3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.'" JA 565-66 (quoting *Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339, 346 (4th Cir. 2014)). It also stated that this Court has recognized that a judgment may be amended (*see* Fed. R. Civ. P. 59(e)) for the following reasons: "'(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.'" JA 566 (quoting *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998)). The court observed, however, that a new trial is not warranted unless it is "reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done." *Id*. (internal quotation marks omitted).

2. The court first concluded that it had properly limited potentially redundant witness testimony and that Defendants had not objected to this trial management decision. *See* JA 566. The court explained that, as part of their pre-trial disclosures, Defendants had identified a long list of potential witnesses who might testify on their behalf. The court stated that it had discussed this list of potential witnesses with Defendants' counsel at a trial management conference on July 11, 2016 and advised that "'if they're all going to say the same thing, they're not all going to be testifying. So you better start prioritizing.'" *Id.* at 567 (quoting

JA 49-50). In response to this instruction from the court, counsel for Defendants simply replied "Okay. . . . Very well." *Id.* (quoting JA 50). However, in their motion for a new trial, Defendants argued that they should have been allowed to present testimony from all of their proposed witnesses and, if they had been able to present such testimony, the jury verdict would have been substantially reduced because those individuals would have testified that they were owed no back wages.

In rejecting that argument, the court explained that issues of trial management, including decisions to limit overly duplicative trial testimony, are firmly entrusted to the discretion of district courts. *See* JA 567. The court also noted that it is well-established that a new trial will not be granted for reasons that were not brought to the court's attention during the trial "unless the error was so fundamental that gross injustice would result." *Id.* at 568 (internal quotation marks omitted). Accordingly, the court observed that it is "paramount" that the proponent of a piece of evidence makes an offer of proof as to the substance of the evidence sought to be admitted. *Id.* (internal quotation marks omitted).

The court concluded that, pursuant to this standard, it was clear that Defendants were not entitled to a new trial. *See* JA 568. The court observed, as a threshold matter, that Defendants "*did not object to the Court's trial management decision*. . . . If Defendants believed that the testimony was not repetitive, or that it was necessary to mitigate damages, it was their duty to object at that time." *Id.*

(emphasis in original). The court noted that, at the very least, Defendants should have made a proffer, which would have enabled the court to mitigate any potential effects of the trial management decision. *Id.* at 568-69. However, by failing to voice any objection, Defendants "tacitly accepted the Court's observation that the evidence appeared on its face to be redundant and unnecessary." *Id.* at 569.

The court further concluded that Defendants' arguments regarding the alleged exclusion of witness testimony "simply do not fit within the Rule 59 framework" because "their failure to make an offer of proof means that any potential prejudicial effect of the Court's witness limitation is entirely speculative." JA 569. The court noted that Defendants' argument that the excluded witnesses' testimony would have resulted in a reduction in the jury verdict erroneously assumed both that the testimony would have been favorable to Defendants and that the jury would have fully believed such testimony. *Id*. The court also observed that "there is no suggestion that the jury's verdict was based on evidence that was either false or against the clear weight of the evidence." *Id.* at 570. In sum, the court concluded, "Without a proffer or an objection from Defendants . . . the record must take precedence over the assertions that Defendants put forward. On the actual record, there is nothing to support Defendants' motion for a new trial." *Id*.

3. With respect to Defendants' second argument, that a new trial was warranted because the court allowed the Secretary's counsel during his rebuttal to

reference an email that had not been admitted into evidence, the court similarly concluded that Defendants' assertions were unsupported. *See* JA 570-72. The court explained that, during his closing argument, Defendants' counsel strongly insinuated, if not alleged, that Investigator Searle had tampered with an Excel spreadsheet of wage data that he received via email from Defendant Chhatwal. *Id.* at 570-71. Over Defendants' objection, the court allowed counsel for the Secretary to mention during his rebuttal that DOL possessed an email, which had not been admitted into evidence, showing that the spreadsheet at issue was actually sent to Searle *after* the final modification to the document was made. *Id.*

The court observed that the "practical implications of [Defendants'] arguments are concerning." JA 571. It noted that not only was Defendants' allegation that Investigator Searle had tampered with evidence and possibly committed perjury "based entirely on speculation, but it was also demonstrably false" because the email unequivocally proved that the last modification to the spreadsheet had occurred while it was still in Defendants' possession. *Id*. The court also explained that the only reason that the email had not been admitted earlier during the trial was because Defendants had not previously raised their allegation of misconduct and thus the Secretary's attorneys did not have notice that they would need to respond to such an allegation. *Id*. Despite the fact that the email was not admitted into evidence, however, the court noted that "there was no

suggestion that it was not authentic or not admissible." *Id*. The court stated that, in effect, Defendants were arguing that their "mischaracterization of the facts should have gone untouched to the jury." *Id.* at 571-72. The court observed that such an argument was "both unconvincing and unwise." *Id.* at 572.

The court further concluded that Defendants were unable to demonstrate prejudicial error and, in fact, "it is unclear what 'miscarriage of justice' or prejudice Defendants even allege, because the jury was neither misled nor exposed to inadmissible evidence." JA 572. The court determined that no prejudice to the Defendants could have resulted because its ruling to allow counsel for the Secretary to reference the email "only meant that the jury heard the truth: that the DOL investigator did not alter the evidence." *Id*. Accordingly, the court denied Defendants' motion for a new trial.

4. Defendants filed a timely Notice of Appeal of the district court's decision on January 19, 2017. *See* JA 574-75.

SUMMARY OF ARGUMENT

After considering four days of trial testimony and extensive documentary evidence, a jury found that Defendants willfully violated the FLSA by failing to pay their employees at least the minimum wage and/or overtime for the hours that they worked. Defendants now seek a new trial, alleging that the district court improperly excluded relevant witness testimony that would have reduced the jury

verdict and that the court erroneously allowed counsel for the Secretary to make a rebuttal statement at trial referencing an email that had not been admitted into evidence. Both of these arguments are wholly meritless.

Defendants' argument that the district court improperly excluded relevant witness testimony is not properly before this Court because Defendants failed to object to the court's trial management ruling when it was made or at any time throughout the trial. Defendants also failed to make an offer of proof regarding the substance of the allegedly excluded testimony. Even if Defendants had properly preserved the issue for appeal, the court's decision to limit potentially redundant witness testimony was well within its trial management discretion. Moreover, as the district court correctly concluded, Defendants are not entitled to a new trial because they cannot demonstrate that the court's trial management ruling had any prejudicial effect or impacted their substantial rights in any way.

Defendants' second argument, that they are entitled to a new trial because the court allowed counsel for the Secretary during his rebuttal argument to reference an email that was not admitted into evidence, should similarly be rejected. During his closing argument, counsel for Defendants for the first time alleged that the Secretary's lead investigator had engaged in evidence tampering. This accusation was indisputably false and easily disproven by an email in the Secretary's possession. The court's decision to allow counsel for the Secretary to

dispel Defendants' false accusation against the DOL investigator by referencing the email during his rebuttal was entirely appropriate, well within the court's discretion, and, in fact, compelled by the interests of justice and fairness. Further support for the conclusion that the district court acted within its discretion is that Defendants cannot demonstrate that the court's ruling had any prejudicial effect upon their rights sufficient to warrant a new trial.

The Secretary thus urges this Court to affirm the district court's decision, thereby allowing Defendants' employees to receive their duly earned wages that Defendants have wrongfully withheld.

ARGUMENT

I. EVEN IF THE ARGUMENT IS PROPERLY BEFORE THIS COURT, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL BECAUSE THE COURT'S DECISION TO LIMIT POTENTIALLY REDUNDANT WITNESS TESTIMONY WAS AN APPROPRIATE EXERCISE OF ITS BROAD TRIAL MANAGEMENT AUTHORITY AND DEFENDANTS WERE NOT PREJUDICED BY THE RULING

A. Standard of Review

The district court's denial of Defendants' motion for a new trial is reviewed for an abuse of discretion. *See Huskey v. Ethicon, Inc.,* 848 F.3d 151, 158 (4th Cir. 2017); *King v. McMillan*, 594 F.3d 301, 314-15 (4th Cir. 2010); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1237 (4th Cir. 1995) ("The decision to grant or deny a motion for a new trial is within the sound

discretion of the district court and will not be disturbed absent a clear showing of abuse of discretion.") (internal quotation marks omitted). As this Court has explained, "'We review for abuse of discretion a district court's denial of a motion for new trial,' and 'will not reverse such a decision save in the most exceptional circumstances.'" *Gentry v. E. W. Partners Club Mgmt. Co.*, 816 F.3d 228, 241 (4th Cir. 2016) (quoting *Bunn v. Oldendorff Carriers GmbH & Co. KG*, 723 F.3d 454, 468 (4th Cir. 2013)).

A district court's denial of a motion for a new trial is firmly committed to the district court "because the district judge is in a position to see and hear the witnesses and is able to view the case from a perspective that an appellate court can never match." *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 186 (4th Cir. 1994) (internal quotation marks omitted). This Court has thus instructed that the "crucial inquiry" in reviewing a district court's denial of a motion for a new trial is "whether an error occurred in the conduct of the trial that was so grievous as to have rendered the trial unfair." *Gentry*, 816 F.3d at 241 (internal quotation marks omitted).

The district court's underlying evidentiary rulings are similarly reviewed for an abuse of discretion. *See Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 310 (4th Cir. 2006). Even if this Court determines that a particular evidentiary ruling constitutes an abuse of discretion, such a ruling "is reversible only if it affects a

party's substantial rights." *Id*.; *see United States v. Villarini*, 238 F.3d 530, 536 (4th Cir. 2001) ("A new trial is required only if the resulting prejudice was so great that it denied any or all the appellants a fair, as distinguished from a perfect, trial.") (internal quotation marks omitted).

B. Applicable Law Governing Relief Under Federal Rules of Civil Procedure 59 and 60

Defendants moved for a new trial pursuant to Federal Rules of Civil Procedure 59(a)(1)(A), 59(e), 60(b)(1), 60(b)(3), and 60(b)(6). A district court may set aside the jury's verdict and grant a new trial under Federal Rule of Civil Procedure 59(a) only if "(1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996) (internal quotation marks omitted); *see Minter*, 762 F.3d at 346; *Chesapeake Paper Prods. Co.*, 51 F.3d at 1237.[9] Although Federal Rule of Civil Procedure 59(e) does not itself provide a standard for relief, this Court has recognized three grounds for amending a judgment: "(1) to

[9] In their opening brief to this Court, Defendants do not identify the specific legal authority upon which they base their request for a new trial. Defendants allege simply that a new trial is warranted to prevent a "miscarriage of justice." Opening Br. at 14. Thus, Defendants have not claimed that the jury's verdict was against the clear weight of the evidence or based on false evidence.

accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Pac. Ins. Co.*, 148 F.3d at 403. This Court has explained, however, that "Rule 59(e) motions may not be used . . . to raise arguments which could have been raised prior to the issuance of the judgment." *Id*.

Finally, Federal Rule of Civil Procedure 60(b)(1), (3), and (6) respectively authorize a district court to grant relief from a final judgment for "mistake, inadvertence, surprise, or excusable neglect," "fraud . . . , misrepresentation, or misconduct by an opposing party," and "any other reason that justifies relief." Fed. R. Civ. P. 60(b). Federal Rule 60(b)(6) has no explicit textual limitations, but this Court has explained that it may be invoked only in "'extraordinary circumstances' when the reason for relief from judgment does not fall within the list of enumerated reasons" set forth in the rule. *Aikens v. Ingram*, 652 F.3d 496, 500 (4th Cir. 2011). The Supreme Court has instructed that "Rule 60(b) proceedings are subject to only limited and deferential appellate review." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).[10]

[10] As noted above, Federal Rule of Civil Procedure 59(a) sets forth the legal standard for motions for a new trial, Rule 59(e) governs motions for alteration or amendment of a judgment, and Rule 60(b) pertains to motions for relief from a final judgment. In their opening brief, Defendants specifically request a "new trial on the merits." Opening Br. at 19. The Secretary thus primarily addresses, as did the district court, the standard for a new trial under Rule 59(a). The arguments set forth in this brief as to why Defendants are not entitled to a new trial, however,

C. Defendants' Argument that a New Trial Is Warranted Because the Court Limited Potentially Favorable Witness Testimony Is Not Properly Before This Court.

Defendants argue that they are entitled to a new trial "in the interests of justice" because the district court allegedly excluded the testimony of a long list of witnesses that would have presented favorable testimony for Defendants. *See* Opening Br. at 15-17. Defendants allege that, because the jury did not award any back wages to the six employees who testified in support of Defendants, the jury award would have been substantially reduced if they had been allowed to present testimony from twenty-five other witnesses who would have similarly testified that they were not owed any back wages.[11]

1. On April 20, 2016, nearly three months prior to trial, Defendants filed a proposed witness list. *See* JA 36-38. That list contained the names of three individuals (Defendant Chhatwal, Defendant Bawa, and their accountant Davinder Goyle) that "Defendants intend to call" and the names of thirty-four employees that "Defendants *may* call . . . *if the need arises*." *Id.* (emphasis added). On July

---

would apply with equal force to any assertions by Defendants that they are entitled to an amendment of the judgment.

[11] It is unclear exactly how many employee witnesses Defendants allege were prevented from testifying by the court's ruling. In their opening brief, Defendants state that they should have been permitted to call "the remaining twenty-five witnesses" on their list. Opening Br. at 16. Defendants' proposed witness list, however, reflects that there were twenty-eight additional employee witnesses that Defendants did not call. *See* JA 36-38.

11, 2016, prior to the commencement of the jury trial later that day, the court discussed several preliminary matters with the attorneys for both sides. In relevant part, the court had the following exchange with counsel for Defendants:

> THE COURT: And no – let's get our key witnesses in. You've identified a lot of witnesses and we'll talk about that, but if they're all going to say the same thing, they're not all going to be testifying. So you better start prioritizing. It's not going to be a parade of witnesses who all say the same thing. Okay?
>
> MR. DHALI: Okay.
>
> THE COURT: All right. So keep that in mind.
>
> MR. DHALI: Very well.

Id. at 49-50.

2. Defendants' argument that a new trial is warranted based on the district court's trial management decision is not properly before this Court because Defendants failed to object to the ruling when it was made. As evidenced by the cited transcript above, Defendants' counsel merely responded "Okay" and "Very well" when the court advised him not to present duplicative testimony the morning before the trial began. JA 49-50. Indeed, as the district court concluded, Defendants "tacitly accepted the Court's observation that the evidence appeared on its face to be redundant and unnecessary." *Id.* at 569.

Moreover, Defendants acquiesced to the court's trial management decision by failing to object to the ruling or its effects *at any point* during the four days of

trial. On several occasions throughout the trial, the court inquired about the number and identity of witnesses that Defendants intended to present. *See, e.g.,* SJA 47-48, 49-50, 51. Each time, Defendants informed the court how many witnesses they intended to call to testify the following day and *the court accepted* Defendants' stated plans for witness testimony. *Id.* The court never actually prohibited Defendants from calling any particular witness. *Id*. At the end of the second day of trial, for example, the following exchange transpired between the court and Defendants' attorneys:

> THE COURT: Okay, great. And we discussed -- so you will be ready [to] put on a defense tomorrow morning?
>
> MR. BROWN: Yes, Your Honor.
>
> THE COURT: And how many witnesses do you believe that you have?
>
> MR. BROWN: Your Honor, we are working on shaving this down to five.
>
> MR. DHALI: Five to six, yeah.
>
> THE COURT: All right, that's fine.

SJA 47. A similar exchange occurred during the afternoon of the third day of trial, *id.* at 49-50, and again at the end of the third day of trial, *id.* at 51-52. Indeed, on the fourth day of trial, after Defendant Chhatwal's testimony, the district court

asked whether Defendants had any other witnesses to present and counsel for Defendants stated that the defense was ready to rest. *See* JA 358.[12]

3. Defendants not only failed to object to the court's trial management decision, but they also failed to make an offer of proof by which they could have notified the court as to the specific testimony that a particular potential witness would have likely presented. By failing to make an offer of proof regarding the intended witness testimony, Defendants denied the court the opportunity to "more fully assess[] the import of the additional witnesses" and, if necessary, to "have taken a number of steps [to] mitigate the effects of the witness limit." JA 568-69. A proffer would have enabled the court to, in its discretion, allow such witnesses to testify or to take ameliorative measures such as allowing the admission of deposition testimony or documentary evidence summarizing their testimony. *Id.* at 569.

4. Defendants' failure to object to the court's trial management decision or to make an offer of proof regarding the excluded testimony is fatal to their

[12] Notably, Defendants have not identified a *single moment at trial* when they actually sought to introduce a specific witness that the district court excluded. Indeed, Defendants' lack of objection to the court's trial management decision is consistent with the fact that they never were actually affected by the court's ruling. The fact that Defendants were permitted to call every single witness that they specifically sought to have testify further supports the conclusion that they cannot actually demonstrate that their substantial rights were affected by the court's trial management decision, as explained in greater detail below.

argument on appeal. This Court has stated that, absent extraordinary circumstances, a "motion for a new trial should not be granted . . . where the moving party has failed to timely object to the alleged impropriety giving rise to the motion." *Dennis v. Gen. Elec. Corp.*, 762 F.2d 365, 367 (4th Cir. 1985). Specifically with respect to a decision to exclude potentially relevant evidence, a "party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and . . . *if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.*" Fed. R. Evid. 103(a)(2) (emphasis added). This Court has accordingly explained that:

> [I]t is paramount that the proponent [of evidence] inform the court in an offer of proof the substance of the evidence sought to be admitted, unless that substance is apparent from the context of the request. Fed. R. Evid. 103(a)(2). The purpose behind this requirement is twofold. First, an offer of proof informs the trial court of the content of the evidence and of its relevance to the case, which enables the court to make an informed evidentiary ruling. . . . Second, the offer of proof permits the appellate court to evaluate whether the exclusion of evidence affected the substantial rights of the party seeking its admission.

United States v. Liu, 654 F. App'x 149, 154 (4th Cir. 2016); *see also United States v. Winkle*, 587 F.2d 705, 710 (5th Cir. 1979) ("[T]his circuit will not even consider the propriety of the decision to exclude the evidence at issue, if no offer of proof

was made at trial.").[13] Here, the substance of the proposed witness testimony was not contextually apparent and Defendants neglected their duty to make an offer of proof of such testimony to the court. Accordingly, Defendants are now foreclosed from arguing on appeal that such a ruling was error.

D. Even if Defendants Had Properly Objected to the Court's Trial Management Decision Thereby Allowing This Court to Address the Issue on Appeal, the District Court Did Not Abuse Its Discretion By Limiting Potentially Redundant Witness Testimony.

1. Even if Defendants' argument that a new trial is warranted because the district court excluded potentially relevant witness testimony is properly on appeal, it is wholly meritless. District courts "enjoy broad latitude" in making trial management decisions "because questions of trial management are quintessentially their province." *United States v. Beckton*, 740 F.3d 303, 306 (4th Cir. 2014) (internal quotation marks omitted). This Court has expressly recognized that "district courts have an affirmative duty to prevent trials from becoming protracted

[13] This Court has consistently held that parties may not prevail in an appeal based on excluded testimony where they have failed to proffer the substance of such testimony to the trial court. *See, e.g.*, *Mott v. Mott*, 203 F.3d 821, 2000 WL 19164, at *1 (4th Cir. 2000) (table) (per curiam) ("We find that Appellant Mott did not properly preserve the issue of whether the court erred in failing to admit taped prior inconsistent statements and party admissions because he failed to make an offer of proof at trial."); *Jones v. Postmaster Gen. of the U.S.*, 105 F.3d 647, 1997 WL 5773, at *1 (4th Cir. 1997) (table) (per curiam) ("We conclude, however, that because Jones failed to proffer the substance of the witnesses' proposed testimony, she may not prevail on appeal. . . . In the absence of a proffer of their testimony, we are unable to conclude that Jones' substantial rights were impacted by the refusal of the district court to permit the testimony of the witnesses.").

and costly affairs." *United States v. Smith*, 452 F.3d 323, 332 (4th Cir. 2006). Indeed, as this Court has stated:

> [District courts] must manage litigation to "avoid needless consumption of time." Fed. R. Evid. 611(a). . . . And even when testimony is limited to relevant areas, they have the further obligation to ensure that the presentation of evidence does not become rambling and repetitious. Judicial resources are not limitless, and drawn-out trials make jury service increasingly incompatible with normal family and employment obligations. Trial judges are thus entirely within their right to keep trial proceedings moving, and, if necessary, to ask counsel to pick up the pace.

Id. This Court has specifically noted that, as part of their "broad-ranging discretion to manage trials," district courts may "limit proof that is, for instance, overly duplicative." *United States v. Bajoghli*, 785 F.3d 957, 963-64 (4th Cir. 2015). The court here thus acted entirely within its discretion by generally instructing the parties prior to the commencement of trial to avoid presenting unnecessarily duplicative testimony.

2. Further support for the conclusion that the district court acted within its discretion is that Defendants cannot demonstrate any prejudicial error or manifest injustice affecting their rights. As the district court correctly noted, Defendants' "failure to make an offer of proof means that any potential prejudicial effect of the Court's witness limitation is entirely speculative." JA 569.

a. Defendants assert that, because the jury did not award back wages to the six employees who testified in support of Defendants, it is reasonable to assume the jury would have similarly declined to award back wages to the rest of the

employee witnesses on their list. Defendants' argument that the jury verdict would have been "reduced drastically," Opening Br. at 16, if they had been permitted to call all thirty-four employees identified on their proposed witness list, however, is entirely speculative. Such an argument would require this Court to accept three significant, unsupported assumptions: (1) that all of the individuals listed on Defendants' proposed witness list submitted months before trial would have actually been available and willing to testify at trial; (2) that such testimony would have been favorable to Defendants; and (3) that the jury would have fully believed this testimony and, as a result, determined that such individuals were not owed back wages.

b. In addition to the fact that such an argument is completely speculative, it is also wholly unsupported by the record. In their brief, Defendants assert that they had "already spoken to a majority of these 33 witnesses either in person or over the phone, and they had agreed to testify on behalf of the defense and that no regular or overtime wages were owed to them." Opening Br. at 15. The record reflects, however, that Defendants' witness list remained in flux throughout trial. For example, Defendants specifically stated during trial—*and the court accepted*—that they might call one of the proposed witnesses identified on their list (Madan Lal) the following day, *see* SJA 49-50, but for unknown reasons, Defendants never actually called that employee to the stand. Similarly, Defendants' counsel

informed the court during trial that it intended to call Defendants' accountant, *id.* at 49-50, 52, and Defendant Bawa, *id.* at 49-50, but neither of those individuals actually testified.[14] Notably, Defendants' proposed witness list also included two employees who actually *did* testify at trial, but did so on behalf of the Secretary (Salvador Monterozza and Jose Orellano).

c. Finally, while it is true that the jury did not award back wages to the six employees who testified in support of Defendants, there is no basis to believe that it would have similarly declined to award back wages to the other employees listed on Defendants' proposed witness list. The jury received documentary evidence of hours and wages for both testifying and non-testifying employees. The jury also heard testimony from employees who alleged that they had been paid appropriately as well as from employees who claimed that they were owed back wages from Defendants. The jury considered this information, evaluated the credibility of the

[14] Defendants assert that they were prejudiced by the court's ruling because the excluded witnesses' testimony would have resulted in an approximately $60,000 reduction in the jury verdict. *See* Opening Br. at 13, 14, 16, 17. It is unclear how Defendants have reached such a conclusion, particularly given the fact that the jury did not actually award back wages to several of the individuals listed on Defendants' proposed witness list. Defendants' proposed list of witnesses included the following individuals who were *not* awarded back wages: the six employees who testified in support of Defendants; two employees who signed waivers of their FLSA rights (Jaspal Singh and Anukanpa Pajuja); and three individuals who were not listed on the jury verdict form at all (Sandeep Lamba, Gyatri Kotian, and Shalinder Jyoshi). *Compare* JA 36-38 (Defendants' proposed witness list) *with id.* at 553-59 (jury verdict form). Accordingly, it is unclear how Defendants could possibly have been prejudiced with respect to the alleged exclusion of these particular witnesses given that the jury did not award back wages to them.

evidence, and determined that Defendants had willfully violated the FLSA's minimum wage and overtime provisions. The jury then made its own conclusions regarding which employees were owed back wages and the amount of such wages. For example, the jury awarded a lower back wage amount than the Secretary had calculated to one of the employees (Humberto Alvarado) who testified in support of the Secretary. In another instance, the jury actually awarded *more* back wages to a non-testifying employee (Elida Marquez) than the Secretary had even sought. It is impossible to know what testimony the allegedly excluded employee witnesses would have provided or what effect such testimony would have had on the jury.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL BECAUSE ITS DECISION PERMITTING COUNSEL FOR THE SECRETARY TO REFERENCE DURING HIS REBUTTAL AN EMAIL THAT HAD NOT BEEN ADMITTED IN EVIDENCE WAS NECESSARY TO REFUTE AN UNTRUE ALLEGATION MADE BY DEFENDANTS' COUNSEL FOR THE FIRST TIME DURING HIS CLOSING ARGUMENT AND DID NOT PREJUDICE DEFENDANTS

A. Standard of Review

The applicable standard of review is explained above in section I.A.

B. The District Court Properly Allowed Counsel for the Secretary to Reference an Email, Which Had Not Been Admitted Into Evidence, During His Rebuttal Argument.

Defendants further assert that they are entitled to a new trial because the district court permitted counsel for the Secretary to mention an email, which was

not admitted into evidence, during his rebuttal. As explained below, however, the court's decision to allow the Secretary to reference the email was well within its discretion, entirely appropriate, and indeed compelled by the interests of justice.

1. Throughout the pendency of the WHD investigation and this litigation, Defendants relied heavily on their assertion that the Excel spreadsheets provided to Investigator Searle by Defendant Chhatwal were accurate and reliable records of employees' hours and wages. As explained above, Searle testified at trial that there were many reasons that he doubted the authenticity and reliability of those spreadsheets. *See* JA 76-77, 89-90, 127-29, 543-52.[15]

2. Defendants focused much of their time and efforts at trial criticizing the factual findings made by Investigator Searle. At no point during opening arguments or witness testimony, however, did Defendants allege or even imply that

[15] One of the reasons that Investigator Searle questioned the reliability of the employee hours and wages listed on the Excel spreadsheets was that the documents' electronic properties showed that the files were created *after* WHD commenced its investigation. *See* JA 76-77, 89-90, 543-52. Defendants thus spent time at trial, including during their cross-examination of Searle, attempting to explain away this problematic fact. Defendants argued that the "created by" date of an Excel spreadsheet may be changed if a document is moved from one folder to another. In other words, they endeavored to convince the jury that, rather than creating the records from scratch after WHD's investigation had begun, Defendant Chhatwal had merely relocated the documents on his computer. *Id.* at 178. Defendants similarly devote a large portion of their opening brief to this Court relitigating this same point. *See* Opening Br. at 5-10. To be clear, however, the issue of when the Excel spreadsheets were *created* is wholly irrelevant to this appeal. The issue on appeal pertains solely to Defendants' assertion during closing arguments that Investigator Searle modified or tampered with the spreadsheets once they were in his possession.

they believed Searle had tampered with any records. Towards the end of his closing argument, counsel for Defendants made the following statements regarding the Excel spreadsheets that had been emailed from Chhatwal to Searle:

> This document that they have was last modified on September 3. Who modified it? Did Ben Searle modify it? That would be pretty speculative, wouldn't it? Pretty circumstantial. I wouldn't pour hundreds of man hours and a team of lawyers if I was going to speculate about my accusation that Ben Searle received an e-mail from my client and altered the document somehow? That would be bizarre. That would be a little speculative, right? I would never do that. But this is what they have done to my client.

JA 427-28. A few moments later, counsel for Defendants concluded his argument by stating, "What I am asking is, everything else is no different than me accusing Ben Searle of modifying the document after receiving it. Thank you." *Id*. at 428.

In his rebuttal, counsel for the Secretary attempted to respond to this serious allegation of evidence tampering that had just been made against Investigator Searle, but counsel for Defendants objected. *See* JA 428-29. The court excused the jury and engaged in a lengthy discussion with the attorneys for both sides. *Id.* at 429-42. Counsel for the Secretary informed the court that this unsubstantiated accusation against Searle was indisputably false because the Excel spreadsheet had been last modified on September 3 at 3:13 pm and Chhatwal did not email the document to Searle until 3:52 pm on that same date. *Id.* The Secretary's attorneys informed the court that they had a copy of the email containing the Excel spreadsheet that had been sent from Chhatwal to Searle, which bore the clear

timestamp of 3:52 pm. *Id.* at 432. *This email indisputably proved that Searle did not modify the document.* Counsel for Defendants, however, objected to permitting the Secretary's counsel to reference the email during his rebuttal on the grounds that the email had not been admitted into evidence. *Id.* at 435-36.

The court carefully considered the parties' arguments and concluded that Defendants' decision to accuse the government's lead investigator of such serious misconduct, given the existence of the email wholly disproving such a claim, was patently "unfair" and "totally incorrect." JA 430, 440. The court also expressed incredulity that counsel for Defendants would have made such a grave yet easily disproven allegation, observing that the "whole suggestion that this document was modified at some stage after the government received it, is incorrect" and "hogwash." *Id.* at 435-36. The court concluded that it simply "can't leave the jury with [the] impression" that Investigator Searle may have modified the Excel spreadsheet. *Id*. at 436. The court emphasized, "This is a big deal. And this needs to be corrected." *Id.* at 437.[16]

The court then reviewed the email and decided to allow counsel for the Secretary to inform the jury during his rebuttal that, based on an email in DOL's

[16] The court also acknowledged that counsel for Defendants had "used a trojan horse" in his closing argument, JA 430, and that counsel for the Secretary could not have been expected to have admitted the email into evidence earlier in the trial because they had no notice that Defendants would accuse Investigator Searle of evidence tampering, *id.* at 437-38.

possession, the spreadsheet in question was last modified before it was sent to Searle. *See* JA 438. At Defendants' request, the court also agreed to mention that Defendants objected to the reference to the email. Consistent with this ruling, the following remarks were made to the jury:

> THE COURT: All right. So we spent a few minutes talking about an exhibit which was not introduced during the trial which the Department of Labor believed became relevant. And I have ruled, and of course defense counsel takes exception to that because it was not introduced during the trial, but I have ruled that Mr. McCracken can testify as to that exhibit because it's important or it's relevant to information that you received in the closing argument. So go ahead, sir.
>
> MR. McCRACKEN: We have an e-mail which was sent on September 3 which contained the Excel spreadsheet for Wil Espino that was just shown to you, it was sent after the last modified date on that spreadsheet. Okay. I make that clear, it was sent after the last modified date on that spreadsheet.

Id. at 442-43.[17]

3. The district court here simply permitted counsel for the Secretary to make a rebuttal statement countering a very serious allegation that Defendants had made for the first time during their closing argument; the court even informed the jury of Defendants' objection to such a statement. *See* JA 442-43. It is well-

[17] This Court should be aware that Defendants misquote this important portion of the trial transcript in their opening brief. *Compare* Opening Br. at 12 (quoting the Secretary's counsel as informing the jury that the Excel spreadsheet "was sent *on* the last modified date") *with* JA 443 (counsel for the Secretary actually informed the jury that the spreadsheet "was sent *after* the last modified date") (emphases added). Defendants also omit a critical statement made by the Secretary's counsel ("I make that clear, it was sent after the last modified date on that spreadsheet.") from their quote of the transcript. *Id.*

established in this Circuit that the "district court is afforded broad discretion in controlling closing arguments and is only to be reversed when there is a clear abuse of its discretion." *United States v. Baptiste*, 596 F.3d 214, 226 (4th Cir. 2010) (internal quotation marks omitted); *see Tobias v. Wal-Mart Stores Inc. Assocs. Health & Welfare Tr.*, 461 F. App'x 320, 321 (4th Cir. 2012) (per curiam); *United States v. Green*, 599 F.3d 360, 379 (4th Cir. 2010). As this Court has explained:

> When reviewing whether a district court abused its discretion in handling inappropriate conduct and comments by trial counsel [in closing arguments], "the question is simply one of judgment to be exercised in review with great deference for the superior vantage point of the trial judge and with a close eye to the particular context of the trial under review rather than to any general formulations of principle or to assessments of comparable comments in other cases." *Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 197 (4th Cir. 1982). "Of course if the conduct challenged is not by applicable standards improper in the first place, then there can be no abuse of judicial discretion in failing to take any, or particular, action to correct it." *Id.* at 195.

Tobias, 461 F. App'x at 321. Here, the rebuttal statement made by counsel for the Secretary was neither inappropriate nor improper; it merely advised the jury of the truth: that an email existed indisputably proving that Defendant Chhatwal sent the Excel spreadsheet to Investigator Searle *after* the document was last modified.

4. As the district court aptly observed in its decision denying Defendants' motion for a new trial, the "practical implications" of Defendants' argument are deeply "concerning." JA 571. In effect, Defendants are arguing that their serious

yet indisputably false allegation that Investigator Searle had engaged in evidence tampering (and, consequently, perjury) "should have gone untouched to the jury"; indeed, Defendants are claiming that they are entitled to a new trial because the court allowed the Secretary to tell the truth to the jury. *Id*. at 571-72. The district court's decision to allow such a statement during rebuttal was well within its discretion and, indeed, compelled by the interests of fairness and justice.

C. Defendants Cannot Demonstrate Any Prejudice Resulting From the Court's Decision to Permit the Secretary to Reference an Unadmitted Exhibit During Rebuttal.

As the district court correctly concluded with respect to its decision to allow counsel for the Secretary to make a rebuttal statement regarding the email, Defendants cannot demonstrate that the ruling had any prejudicial effect sufficient to warrant a new trial. *See Minter,* 762 F.3d at 346.[18] As the court here observed,

[18] This Court has held that a new trial and/or reversal of a conviction based on improper prosecutorial conduct during closing arguments is only warranted where such improper remarks or conduct "prejudicially affected [the defendant's] substantial rights so as to deprive [the defendant] of a fair trial." *United States v. Scheetz*, 293 F.3d 175, 185 (4th Cir. 2002); *Baptiste*, 596 F.3d at 226 (same); *Green*, 599 F.3d at 379 (reversal of a conviction only appropriate if abuse of discretion in addressing closing argument objections "constitutes prejudicial error"). For example, in *United States v. Watts*, 453 F. App'x 309 (4th Cir. 2011), the defendants moved for a mistrial on the grounds that, during closing arguments, the prosecutor had improperly referenced a statement that one of the defendants had made to the Drug Enforcement Administration that was not admitted into evidence at trial. *Id.* at 314. This Court first acknowledged the general rule that arguments at trial are limited to the facts in evidence. *Id.* However, this Court then noted that, even though the statement may not have been admitted into evidence, it was relevant and "straightforwardly admissible" and that the

"it is unclear what 'miscarriage of justice' or prejudice Defendants even allege, because the jury was neither misled nor exposed to inadmissible evidence. . . . Instead, the Court's ruling to allow the testimony only meant that the jury heard the truth: that the DOL investigator did not alter the evidence." JA 572.

1. It is instructive that in the criminal context the Supreme Court has affirmed courts' application of the "invited response" or "invited reply" doctrine in evaluating whether improper remarks made during a prosecutor's rebuttal have unfairly prejudiced the rights of a defendant. *United States v. Young*, 470 U.S. 1, 10-14 (1985). Pursuant to this rule, a "reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo." *Id*. at 12. As the Supreme Court has explained, "[I]f the prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction." *Id.* at 12-13. In other words, the Supreme Court has instructed that even improper prosecutorial comments made during a rebuttal must be viewed in context. In *United States v. Adams*, 335 F. App'x 338 (4th Cir. 2009) (per curiam), this Court applied the "invited response" doctrine enunciated by the Supreme Court to conclude that arguably improper rebuttal statements made by the

---

prosecutor had "mentioned only one fact" from the statement that was not testified to at trial. *Id*. Under such circumstances, this Court determined that it could not conclude that the prosecutor's closing arguments were improper "much less that they prejudicially affected appellants' substantial rights." *Id.*

government did not unfairly prejudice the defendant where such statements were made in response to a defense counsel's assertions during his closing argument calling into question the integrity of FBI agents, government witnesses, and prosecutors. *Id.* at 348-49; *see Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998); *Williams v. Stevenson*, No. 8:08–1883, 2009 WL 803620, at *12 (D.S.C. Feb. 17, 2009) ("A defendant is not entitled to relief based upon an error he invited."). Such general equitable principles should apply with equal weight in this case.

2. Defendants spend a considerable portion of their opening brief explaining that their trial strategy had been to discredit Investigator Searle's "investigatory methods." Opening Br. at 18.[19] Although it is somewhat unclear, it appears that Defendants believe that their trial strategy is relevant on appeal because: (1) their closing argument accusing Searle of fabricating evidence was "simply an extension" of this trial strategy and thus counsel for the Secretary should have anticipated the need to admit the email into evidence earlier in the trial, and (2)

[19] In their opening brief, Defendants repeatedly state that their "strategy to be critical of Searle's investigative methods worked" because "the jury deemed Searle not to be fully credible." Opening Br. at 4 n.2; *see id.* at 12-13 (stating that "the jury clearly did not find Searle all that credible"); *id.* at 18 (asserting that the jury "did not accept," nor was it "comfortable with," Searle's testimony). Although not relevant to the issues on appeal, the Secretary notes that such an assertion lacks any factual foundation. The jury found that Defendants had willfully violated the FLSA's minimum wage and overtime provisions. Moreover, for many of employees listed on the verdict form, the jury awarded the precise amount of back wages calculated by Searle. *Compare* JA 473-542 *with id.* at 553-59.

they were prejudiced by the court's ruling to allow reference to the email because the jury was already skeptical of Searle's credibility and perhaps would have been even more unwilling to credit his testimony if they believed that he had tampered with evidence. *See* Opening Br. at 18-19. Neither of these arguments has any merit.

a. As to the first argument, there is a fundamental difference between Defendants' purported strategy during trial to criticize Searle's "investigative methods" and their decision during closing argument to effectively accuse Searle of having committed federal crimes (e.g., evidence tampering, perjury).[20] Defendants never even hinted during their cross-examination of Searle that they intended to levy such a serious allegation against him, and thus counsel for the Secretary could not have anticipated that the email at issue would be relevant in any way. In any event, Defendants do not dispute the admissibility or authenticity of the email or the truthfulness of the statement that counsel for the Secretary was

[20] Interestingly, Defendants explain in their opening brief to this Court that their allegation against Investigator Searle during closing arguments was a deliberate part of their trial strategy to undermine Searle's credibility. *See, e.g.*, Opening Br. at 18-19. At trial, however, counsel for Defendants *repeatedly* denied that he had actually accused Searle of misconduct and instead asserted that he was merely trying to argue that the Secretary's claims against his clients were just as "bizarre" and "speculative" as it would be for him to accuse Searle of fabricating evidence. *See* JA 427-28, 431, 433, 440-41.

permitted to make during his rebuttal.[21] Accordingly, if Defendants had raised their argument that Searle tampered with evidence earlier in the trial, counsel for the Secretary "could have easily and without objection entered the email as counter-evidence." JA 571. Defendants seem to suggest that, rather than allowing the statement to be made during closing argument, the court should have reopened the case to allow Defendants to question Searle and Chhatwal about the email. *See* Opening Br. at 18. It is unclear, however, how such questioning would have affected the jury's verdict in any way given that the email, on its face, proved that the Excel spreadsheet had been last modified while still in Defendants' possession and thus that Searle could not have altered the records.

b. Defendants' second argument, that the court's decision to allow reference to the email "had a sever[e] prejudicial effect," Opening Br. at 18, because it prevented them from undermining the credibility of Investigator Searle before the jury, is deeply troubling and meritless. As noted above, such an argument, in

[21] Indeed, during the sidebar discussion with the court, Defendants seem to have acknowledged the authenticity of the email. *See, e.g.,* JA 436 (in response to the court's statement that "Well, look, I mean, [counsel for the Secretary are] not lying to me," counsel for Defendants states, "Of course they're not. Right."). In their opening brief to this Court, Defendants argue that they never had the opportunity to "authenticate, examine or enquire" about the email, Opening Br. at 18, but they do not actually dispute the authenticity or admissibility of the document. As the district court pointed out, Defendants' argument focuses "on the procedural form in which the evidence was admitted." JA 572. The court correctly noted, however, that there are actually many different "procedural vehicles" by which the email could have potentially gone to the jury, such as the court taking judicial notice of the fact of its existence. *Id*. at 572 n.1.

effect, asks this Court to award a new trial because the district court allowed the jury to hear the truth; Defendants essentially argue that they were prejudiced by not being allowed to lie to the jury.[22]

Moreover, this argument simply does not make sense. The Excel spreadsheets at issue were documents created by Defendant Chhatwal that purportedly showed that he had properly paid his employees minimum wage and overtime; indeed, Chhatwal provided these documents to Investigator Searle for this very reason. At trial, Defendants continued to assert that these spreadsheets proved that they were in compliance with the FLSA. Indeed, if the jury had believed that the Excel spreadsheets were credible and reliable, it would have been forced to conclude that Defendants did not violate the law. Accordingly, it is unclear how Defendants can now simultaneously allege both that (i) the spreadsheets are accurate and reliable records of employees' hours and wages, and (ii) Searle tampered with the spreadsheets; it is even more unclear how Defendants could have been prejudiced by being prevented from fully making this illogical argument to the jury.

[22] Indeed, to continue the boxing analogy used by Defendants, *see* Opening Br. at 19 (arguing that they "had Searle on the ropes"), Defendants essentially argue that they should have been allowed to hit Investigator Searle with a baseball bat in the final moments of the boxing match without their being disqualified.

CONCLUSION

For the foregoing reasons, the district court's decision denying Defendants' motion for a new trial should be affirmed.

Respectfully submitted,

NICHOLAS C. GEALE
Acting Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

s/ Mary E. McDonald
MARY E. MCDONALD
Senior Attorney

U.S. Department of Labor
Office of the Solicitor
Suite N-2716
200 Constitution Avenue, N.W.
Washington, DC 20210
(202) 693-5693

STATEMENT REGARDING ORAL ARGUMENT

Although the Acting 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 filed with this Court.

s/ Mary E. McDonald
MARY E. MCDONALD
Senior Attorney

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), and Local Rule 32(b), because it contains 12,157 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in proportionally spaced typeface, using Microsoft Word 2010 utilizing Times New Roman, in 14-point font in text and 14-point font in footnotes.

s/ Mary E. McDonald
MARY E. MCDONALD
Senior Attorney

CERTIFICATE OF SERVICE

I certify that the brief for the Acting Secretary of Labor was served electronically through this Court's CM/ECF filing system to all counsel of record on this 18th day of April, 2017.

s/ Mary E. McDonald
Mary E. McDonald
Senior Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2716
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5693
mcdonald.mary@dol.gov