IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3007

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

Plaintiff-Appellant,

v.

CENTRAL LAUNDRY, INC.; GEORGE RENGEPES,
Individually and as owner of Central Laundry, Inc.;
and JIMMY RENGEPES, Individually and as owner
of Central Laundry, Inc.,

Defendants-Appellees.

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

BRIEF OF THE SECRETARY OF LABOR

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BRIEF OF THE SECRETARY OF LABOR

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this case pursuant to section 17 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 217. Jurisdiction was also vested in the district court under 28 U.S.C. 1331 (federal question jurisdiction) and 28 U.S.C. 1345 (vesting jurisdiction in the district courts over suits commenced by an agency or officer of the United States).

This Court has jurisdiction pursuant to 28 U.S.C. 1291. The district court entered an order on March 24, 2017 granting partial summary judgment to Plaintiff-Appellant Secretary of Labor ("Secretary"), concluding that Defendants-Appellees Central Laundry, Inc., George Rengepes, and Jimmy Rengepes (collectively "Central Laundry") violated the minimum wage, overtime, and recordkeeping requirements of the FLSA. Appendix ("App.") 70-73. After a bench trial, the district court entered findings of fact and conclusions of law on April 10, 2018 awarding back wages and liquidated damages, as well as injunctive relief. App. 4-22. The court entered judgment on April 10, 2017. App. 23-24. The district court denied the Secretary's motion for reconsideration and to alter the judgment on July 10, 2018. App. 1369. The Secretary filed a timely notice of appeal on September 10, 2017. App. 1-3; *see* Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the district court erred by misapplying the burden-shifting and representative-testimony framework set out in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), when it did not award any back wages to some employees and significantly reduced back wages to others in a case where the employer admitted that it employed the individuals at issue and that it failed to pay employees the minimum wage and overtime compensation required by the FLSA but maintained almost no employment records, and where the Secretary provided

representative testimony and evidence to support a just and reasonable inference of the amount of back wages owed to each employee, which was not refuted.

2. Whether the district court erred in not awarding any back wages to certain employees for two 15-minute rest breaks where there was direct evidence showing that those employees were uncompensated for such breaks in violation of the FLSA.

STATEMENT OF RELATED CASES AND PROCEEDINGS

There is no related case or proceeding pending before this Court.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

On March 25, 2015, the Secretary filed a complaint against Central Laundry alleging minimum wage, overtime, and recordkeeping violations of the FLSA, 29 U.S.C. 206(a), 207(a), and 211(c), during the relevant period of March 27, 2012 to March 14, 2015 ("the back-wage period"). App. 25-32. The Secretary identified 36 employees as being owed back wages. App. 32; *see* 29 U.S.C. 216(c), 217.

On March 24, 2017, the court granted partial summary judgment to the Secretary, concluding that Central Laundry violated the minimum wage, overtime, and recordkeeping requirements of the FLSA. App. 70-73. On April 10, 2018, after a four-day bench trial on damages in which the Secretary presented evidence that Central Laundry owed the 36 employees at issue a total of $637,727.04 in

back wages and an equal amount of liquidated damages, the district court entered findings of fact and conclusions of law awarding $239,269.65 in back wages and an equal amount of liquidated damages. App. 4-22.[1] The court enjoined Central Laundry from violating the minimum wage, overtime, and recordkeeping requirements of the FLSA in the future. App. 21-22. It entered judgment on April 10, 2017. App. 23-24. The Secretary's appeal followed. App. 1-3.

B. Statement of Facts

1. Central Laundry, doing business as Olympic Laundry, is an industrial laundry facility near Philadelphia. App. 4. During the relevant period of March 2012 to March 2015, it operated seven days a week. App. 74-758. Central Laundry employed workers to operate the washing, drying, and ironing machines. App. 5, 34 (¶ 6).

2. Central Laundry failed to keep even the most basic records for 33 of the 36 employees at issue, even though it admitted that it employed these employees. App. 5, 36-38 (¶¶ 27-39), 987-91, 1007-12.[2] For instance, it did not record any of

[1] Back wages and liquidated damages recovered by the Secretary will be paid to the employees.

[2] Of the 36 employees identified as being owed back wages, Central Laundry admitted that it paid 33 of these employees in cash. App. 5, 34 (¶ 11). Unlike these 33 Spanish-speaking employees, Central Laundry paid three English-speaking employees the federal minimum wage and overtime at one and one-half times the minimum wage, i.e., $7.25 per hour and $10.88 per hour for overtime hours, paid them by check rather than in cash, and maintained and kept payroll

the 33 cash-paid employees' last names. App. 36 (¶ 26). Although it required all employees to use time cards to track their hours per week, it lost or discarded most of these records for the cash-paid employees. App. 35-36 (¶¶ 19, 23, 24).

For a small number of these cash-paid employees, Central Laundry retained extremely incomplete records. During discovery in this case, it produced only 255 time cards (each representing one workweek) for the entire three-year period and for only ten of the 33 cash-paid employees.[3] App. 5, 35-36 (¶¶ 19, 25), 74-747 (255 time cards).[4] The time cards did not include employees' last names; only their first names were handwritten at the top of each card. App. 5, 36 (¶ 26), 74-747. Of the 255 time cards, there were significant gaps in the periods they covered. For example, Central Laundry produced 21 time cards for Elvia (last name unknown ("LNU")) that ranged over a three-year period, from October 2011

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records for them. App. 759-914. Throughout this brief (as well as the district court's decision), these three employees are referred to as the "payroll employees." The other 33 employees are referred to as the "cash-paid employees."

[3] Throughout the brief, this subset of the 33 cash-paid employees is referred to as the "time-card employees."

[4] This is a fraction of the total time cards it should have maintained for its employees. *See* 29 C.F.R. 516.2, 516.5 (requiring maintenance of records, including a record of hours worked, for three years for each employee). For example, weekly time cards for 33 employees for three years would have resulted in 5,148 total time cards (52 time cards per year times three years times 33 employees).

to September 2014; 133 time cards were missing for this employee for the three-year period. App. 14 n.7.

Central Laundry also produced a small number of "hand-scanner" records. App. 5, 748-58 (hand-scanner records).[5] These records were for only 11 employees and only covered a two-week period in January 2014.[6] As with the time cards, these records did not include employees' last names. App. 5, 36 (¶ 26), 748-58. The time cards and hand-scanner records, in addition to showing hours worked, also showed the rates of pay in that they included handwritten math calculations indicating the total wages paid for the hours, broken down by straight-time and overtime hours. App. 74-758 (time cards and hand-scanner records).

Roseann Vlassopoulos, who kept Central Laundry's books and was the daughter of George Rengepes (Central Laundry's president), paid the cash-paid employees by distributing wages in cash to these employees in envelopes with only their first names written on them. App. 33-36 (¶¶ 4, 11, 12, 26); 982 (31:6-12),

[5] The hand-scanner records were a type of time card; they showed an employee's start and end times each day. The Secretary only learned about the hand-scanner records by interviewing employees. App. 19. Earlier in the case, Central Laundry admitted to using a hand scanner to record employees' work hours, but produced no records, claiming that the hand-scanner machine was never fully operational. App. 49.

[6] Throughout the brief, this subset of the 33 cash-paid employees is referred to as the "hand-scanner employees."

984 (25:6-16), 985 (44:3-17). Central Laundry did not actually maintain payroll records for any of the cash-paid employees.

3. Central Laundry admitted that it paid the 33 cash-paid employees less than the federal minimum wage of $7.25 per hour for the entire back-wage period. App. 5, 35 (¶ 13), 71.[7] In 2012 and for most of 2013, it paid them $5.00 per hour for all hours worked up to 40 in a week ("straight-time hours"); beginning in November 2013, it paid them $6.00 per hour. App. 915-50 (decls. from eight employees to which Central Laundry stipulated), 951-77 (interview statements from six employees to which Central Laundry stipulated), 1037-38 (test. of Mirna Aguilar), 1064 (test. of Guadalupe Pina), 1109-10 (test. of Cleotilde ("Coti") Nolasco), 1134 (test. of Maria Catalina Escobar), 1157 (same).[8] Central Laundry further admitted that it paid these employees less than the lowest permissible overtime rate for overtime hours under the FLSA, i.e., time and one-half the minimum wage, which is $10.88 per hour. App. 5, 35 (¶ 18), 71. In 2012 and for most of 2013, it paid them $7.50 per hour for overtime hours; beginning in November 2013, it paid them $9.00 per hour for overtime hours. App. 915-77

[7] $7.25 has been the federal minimum wage since 2009. *See* 29 U.S.C. 206(a)(1)(C).

[8] At trial, Central Laundry explicitly stipulated to the truth of the information in the employee declarations and statements. App. 1129-33, 1348.

(decls. and interview statements), 1038 (test. of Mirna Aguilar), 1110 (test. of Coti Nolasco), 1134 (test. of Maria Catalina Escobar).

Additionally, Central Laundry did not pay the 33 cash-paid employees or the three payroll employees for two 15-minute rest breaks taken each day. App. 74-758, 851-980, 1030-33, 1061, 1100, 1145-46, 1170-72, 1277-78. Employees did not clock out for breaks. Instead, as indicated on the limited records that it kept, Central Laundry deducted one hour per day from the total hours worked. App. 74-914. This one hour consisted of 30 minutes for a bona fide meal break, for which no compensation is required, *see* 29 C.F.R. 785.19, and two 15-minute rest breaks, for which the FLSA requires compensation, *see* 29 C.F.R. 785.18.

4. The 33 cash-paid employees routinely worked up to 90 hours per workweek, i.e., 50 hours of overtime, as illustrated by employee testimony, statements, and declarations. App. 915-17 (decl. of Coti Nolasco, who averaged 69 hours per week), 929-31 (decl. of Guadalupe Pina, who averaged 90), 935-36 (decl. of Juana Mexica, who averaged 75), 939-40 (decl. of Maria Catalina Escobar, who averaged 86), 943-44 (decl. of Mirna Aguilar, who averaged 75), 977 (statement of Juan Cordova, who averaged 70-80); *see* App. 1023-28 (test. of Mirna Aguilar), 1057-59 (test. of Guadalupe Pina), 1071 (same), 1082-83 (test. of Juana Mexica), 1099-1102 (test. of Coti Nolasco), 1144-45 (test. of Maria Catalina Escobar). Indeed, Central Laundry's records, albeit extremely incomplete, confirm

that these 33 cash-paid employees regularly worked over 40 hours per week, with some averaging 48 hours per week, while others averaged 60, 67, 70, 71, 80, 86, and 97 hours per week. App. 16-19, 74-758 (time cards and hand-scanner records), 998-1006, 1014.

5. The employees also worked under difficult conditions. App. 5-6. One employee stated that Jimmy Rengepes, who is George Rengepes's son and exercised day-to-day control and management of Central Laundry, including assigning and supervising work, hiring and firing employees, and setting work schedules and pay rates and practices, threatened to fire her if she did not agree to work seven days per week. App. 6, 34 (¶¶ 9, 10), 1103 (test. of Coti Nolasco). A different employee stated that Jimmy discouraged her from eating lunch and became angry that she did not work during her lunch break. App. 6, 1060-61 (test. of Guadalupe Pina). Another employee said that Jimmy suspended her for three days because she left work at midnight instead of at 3:00 or 4:00 a.m. after working since 9:00 a.m. App. 6, 1044-45 (test. of Maria Catalina Escobar). Yet another employee stated that the work environment was hot, that she had to stand during her entire shift, and that on one occasion when she was ill and vomited at work and asked permission to leave, Jimmy gave her a Gatorade and had her return to work rather than permitting her to leave. App. 5-6, 1029-30 (test. of Mirna Aguilar).

C. Summary Judgment and Bench Trial

1. Central Laundry stipulated to violating the FLSA's minimum wage, overtime, and recordkeeping requirements. App. 35-36 (¶¶ 13-19), 71. It did not refute that George and Jimmy Rengepes were individually liable as employers under section 3(d) of the FLSA, 29 U.S.C. 203(d). App. 33-34 (¶¶ 4, 8-10), 72. Central Laundry also stipulated that it was liable for liquidated damages because it could not show that it acted in good faith. App. 36 (¶ 20). On March 24, 2017, the district court entered summary judgment for the Secretary on liability and concluded that Central Laundry willfully violated the FLSA, triggering the FLSA's three-year statute of limitations, 29 U.S.C. 255(a), and narrowed the bench trial to the amount of back wages owed and the appropriateness of prospective injunctive relief. App. 70-73.

2. In July and August 2017, the court held a four-day bench trial. At trial, five cash-paid employees testified for the Secretary. App. 1019-52 (Mirna Aguilar), 1053-72 (Guadalupe Pina), 1075-92 (Juana Mexica), 1092-1126 (Coti Nolasco), 1134-58 (Maria Catalina Escobar). Additionally, Central Laundry stipulated to the truth of the information in the interview statements of eight employees (six cash-paid employees and two payroll employees) and the declarations of eight employees (some of these employees overlapped with those who testified). App. 1129-33, 1348. The Secretary submitted as evidence Central

Laundry's incomplete time cards and hand-scanner records, as well as the time-cards and payroll records for the three payroll employees. App. 74-914.

Because of Central Laundry's severely deficient records, the Secretary was forced to reconstruct the dates of employment, hours worked, and rates of pay from the scant records as well as from the employees' testimony, statements, and declarations to determine the back wages owed to the employees. App. 986-1016 (back wage calculations). The Secretary's calculations for different categories of employees, depending on the type of evidence available, are addressed in turn below.[9]

a. Thirteen cash-paid employees who testified or provided statements or declarations. Thirteen cash-paid employees testified at the trial or provided statements or declarations that the Secretary presented at trial to which Central Laundry stipulated to their truthfulness. App. 915-77, 1019-1126, 1129-33, 1348, 1134-58.[10] Central Laundry maintained no records of any of its cash-paid employees' dates of employment, including these 13 employees. App. 36-38 (¶¶

[9] For ease of review, a chart showing the categories and subcategories of employees is attached as an Addendum.

[10] For one of these 13 employees, rather than having the Secretary call her as a witness at trial, Central Laundry stipulated to her dates of employment, rates of pay, and average hours worked per week. App. 1132-33. For ease of review and consistency with the district court's decision, this one employee is included in this group of thirteen employees.

28, 30, 32-35), 987-91, 1007-12. The testimony, statements, and declarations from these employees, however, provided information about their periods of employment, as well as their average hours worked per week and rates of pay (what they were actually paid). App. 915-77, 1019-1126, 1134-58.

Because this subset of cash-paid employees provided specific information about their dates of employment, the Secretary calculated back wages covering those dates for each of these employees. App. 987-91, 1007-12. Similarly, the Secretary used each employee's stated average hours worked per week to calculate back wages for that particular employee. For example, because Mirna Aguilar worked an average of 75.42 hours per week, the Secretary calculated her back wages using 75.42 hours per week, App. 987, whereas because Maria Catalina Escobar worked an average of 86 hours per week, the Secretary calculated her back wages using 86 hours per week, App. 990.

b. Nine time-card and 11 hand-scanner cash-paid employees. The Secretary calculated back wages for these two subsets of cash-paid employees in largely the same manner. App. 998-1006, 1014. As noted, Central Laundry maintained no records of its cash-paid employees' dates of employment. From the information obtained through testimony, statements, and declarations from nine of the 13 employees discussed above (in subsection a) regarding their periods of employment, the Secretary determined that the average period of employment with

Central Laundry was three years. App. 1016, 1215-19 (Wage and Hour investigator's testimony regarding the three-year average length of employment).[11] Given Central Laundry's failure to make and keep records of its employees' dates of employment, the Secretary relied on this information as representative, supporting a just and reasonable inference that each of the time-card and hand-scanner employee's average period of employment was three years, and calculated damages for the full three-year back-wage period for these employees.[12]

Additionally, given the lack of complete records of hours worked per workweek and rates of pay for these employees, the Secretary relied on information obtained from the scant time-card and hand-scanner records that Central Laundry provided to reconstruct each of these employee's hours worked and rates of pay (what they were actually paid). For each employee for whom Central Laundry provided time cards or hand-scanner records, albeit incomplete,

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[11] The Secretary used only nine of the 13 employees because the other four were still working at Central Laundry when an investigator with the Department of Labor's Wage and Hour Division ("Wage and Hour") interviewed them. Thus, for those four employees, there was no known end date of employment to use in calculating their length of employment. For the nine employees, the average period of employment was six years. App. 1016. However, to ensure that the average was as representative as possible, the Secretary removed as "outliers" the three employees with the longest periods of employment (over 14 years, nearly 14 years, and over 8 years). This brought the average length of employment down to three years. *Id.*

[12] Because Central Laundry willfully violated the FLSA, App. 72, the three-year statute of limitations applied. *See* 29 U.S.C. 255(a).

the Secretary calculated the average hours worked from that employee's existing time cards or hand-scanner records and applied that average to the entire back-wage period for that particular employee. App. 987-91, 1007-12, 1014. For example, the 21 time cards that Central Laundry retained for Elvia LNU, which spanned nearly three years, showed that Elvia worked an average of 59.72 hours per week; the Secretary thus calculated the back wages owed to Elvia using 59.72 hours for every week for the three-year back-wage period. App. 999. Similarly, the two time cards that Central Laundry retained for Florencia LNU, which spanned two weeks, showed that Florencia worked an average of 69.88 hours per week; the Secretary thus calculated the back wages owed to Florencia using 69.88 hours for every week for the three-year back-wage period. App. 1004.

c. Three payroll employees. The back wages owed to the three payroll employees were significantly less than those owed to the 33 cash-paid employees. App. 986, 992-97. Central Laundry maintained time cards and payroll records for these employees. App. 759-914. It paid them the federal minimum wage and overtime compensation at one and one-half times the minimum wage. It did not, however, pay them for two 15-minute rest breaks taken each day (it likewise did not pay the 33 cash-paid employees for these two 15-minute breaks), which is contrary to the requirements of the FLSA. *See* 29 C.F.R. 785.18. Specifically, the time cards for these three employees showed the total hours worked each day, from

which Central Laundry deducted one hour (30 minutes for a bona fide meal break and two 15-minute rest breaks). App. 851-914; *see* App. 978-80 (statements from two of the three payroll employees that they took two 15-minute breaks per day). The Secretary calculated the back wages owed to each of the three payroll employees from this information. App. 992-97.[13]

d. Total Back Wages Owed. The Secretary calculated that Central Laundry owed a total of $637,727.04 in back wages to the 36 employees. App. 986. He sought that amount of back wages and an equal amount of liquidated damages, for a total of $1,275,454.08 in damages. App. 986. The Secretary also sought a permanent injunction against Central Laundry prohibiting future violations of the FLSA.[14]

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[13] The Secretary's back wage calculations for the 33 cash-paid employees included back wages for these two 15-minute breaks.

[14] In January 2018, the Secretary filed a second FLSA complaint against Central Laundry. *See* Complaint, *Acosta v. Cent. Laundry, Inc., George Rengepes, & Jimmy Rengepes*, No. 18-190 (E.D. Pa. Jan. 16, 2018). In that case, the Secretary alleged that Central Laundry willfully violated the FLSA's minimum wage, overtime, and recordkeeping requirements. These violations stemmed from Central Laundry's payroll checks repeatedly bouncing, resulting in its employees not timely receiving their wages when they were due and, in some instances, not at all. Most employees' pay rates were ostensibly at least $7.25 for straight-time hours and $10.88 for overtime, according to payroll records. There were subsets of employees, however, who were not on the payroll and were paid in cash, and some who received less than minimum wage and the statutorily-mandated overtime amount due. In this new case, the Secretary also alleged violations of the child labor, hot goods, and retaliation provisions of the FLSA. *See id.* (alleging violations of 29 U.S.C. 212(c) (child labor prohibitions), 215(a)(1) (prohibition

D. District Court's Findings of Fact and Conclusions of Law

On April 10, 2018, the district court awarded $239,269.65 in back wages and an equal amount in liquidated damages. App. 20-21. The court also granted injunctive relief by enjoining Central Laundry under section 17 of the FLSA, 29 U.S.C. 217, from violating the FLSA's minimum wage, overtime, and recordkeeping provisions in the future. App. 21-22; *see also* 29 U.S.C. 206(a), 207(a), and 211(c).

Citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, Pub.

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against shipping hot goods), 215(c)(3) (prohibition against retaliation)). Employees informed the Secretary of incidents of physical and verbal intimidation by George and Jimmy Rengepes, including the brandishing of a gun when employees inquired about the bounced paychecks. *See id.* After an investigator from Wage and Hour went to the establishment to serve Central Laundry with notice of the upcoming preliminary injunction hearing, Jimmy fired an employee he had observed speaking to the Wage and Hour investigator. The court granted full preliminary injunctive relief enjoining Central Laundry's minimum wage, overtime, recordkeeping, retaliation, child labor, and hot goods violations. *See* Order, No. 18-190 (E.D. Pa. Feb. 2, 2018). Dispositive motions are due in this action on February 25, 2019. *See* Order, No. 18-190 (E.D. Pa. Dec. 20, 2018). It is the Secretary's understanding, which he intends to outline in his dispositive motion, that, notwithstanding the February 2, 2018 preliminary injunction, Central Laundry has continued to violate the FLSA by failing to pay the minimum wage and overtime compensation to its employees, employing minors in violation of the FLSA's child labor provisions, and failing to keep adequate time and payroll records. It is also the Secretary's understanding that Roseanne Vlassopoulos (George Rengepes' daughter) has formed a new business, Charter Linen and Laundry Service, operating out of the same location and with George and Jimmy still handling the day-to-day business operations.

L. No. 80-49, §4, 61 Stat. 86 (May 4, 1947), *as stated in IBP, Inc. v. Alvarez,* 546 U.S. 21, 41 (2005), and *Martin v. Selker Brothers, Inc.*, 949 F.2d 1286 (3d Cir. 1991), the district court noted that, where the employer's records are incomplete, once the plaintiff proves that work was performed for which the employees were not properly compensated, the plaintiff may prove the amount of back wages owed by producing "'sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference[,]'" at which point the burden shifts to the employer to provide evidence of the amount actually paid or to negate with evidence the plaintiff's reasonable inference. App. 7-8 (quoting *Selker Bros.*, 949 F.2d at 1297).

The district court reviewed the Secretary's evidence for the four categories of employees: (1) 13 "interviewed" employees (i.e., those who testified and/or provided statements or declarations); (2) nine "time-record" employees (i.e., those for whom there were some time cards); (3) 11 hand-scanner employees; and (4) three payroll employees. One employee overlapped among the categories (i.e., she testified and there were some incomplete time cards for her); the court counted her as one of the 13 interviewed employees. App. 14 n.6.[15]

[15] For this reason, there are only nine employees among the time-record employees, despite the fact that Central Laundry produced time cards for ten employees.

1. 13 interviewed employees. The district court awarded 11 of the 13 interviewed employees back wages in amounts that, for the most part, were the same amounts that the Secretary had calculated for these employees. App. 8-12, 986-991, 1007-12. The district court credited these employees' testimony, statements, and declarations as to their dates of employment, their average hours worked per week, and their rates of pay. App. 8-12. The court significantly reduced the back-wage amount for one of the thirteen and awarded no back wages to another on the basis that there were inconsistencies in the declarations and statements regarding these two employees' dates of employment and average hours worked. App. 9-10, 12-13.[16] Excluding the one employee for whom the court awarded no back wages, the back-wage awards for these 12 employees ranged from $2,624 to $30,411 per person, App. 8-12; the average for this group was $12,089 per person.

2. Nine time-record employees (time-card employees). The district court awarded back wages to the nine time-card employees – but awarded the full amount sought to only four of the nine employees and awarded a significantly reduced amount to the other five. App. 13-19. The court noted that Central Laundry had produced only 255 time cards for ten employees for the three-year

[16] The Secretary does not appeal the district court's decision on back wages for any of these 13 employees.

period and that, as a result of Central Laundry's "severely deficient recordkeeping, the Secretary had to reconstruct their average hours worked per week and the dates of employment to calculate the appropriate minimum wage and overtime compensation owed." App. 13.

The district court nonetheless concluded that there were enough time cards in evidence for each of four employees that showed a relatively long period of employment such that it was reasonable to infer that each of these four employees worked for the entire three-year back-wage period. App. 13-17 & n.7 (Alejandra LNU's 35 time cards spanned ten months; Elvia LNU's 21 time cards spanned almost three years; Gilberto LNU's 54 time cards spanned two and one-half years; and Miguel LNU's 68 time cards spanned two years). To support the inference that these employees worked for the entire three-year back-wage period, the court noted Central Laundry's failure to produce a complete set of time cards and that representative testimony can be used to show the amount of back wages owed, pointing to the Secretary's determination that the average period of employment at Central Laundry was three years. App. 14-16. The court further noted that Central Laundry had not produced any evidence to negate the reasonable inference that these four employees worked for the entire three-year back-wage period. App. 15-16. Thus, the district court awarded these four employees the full amount of back wages for the three-year back-wage period that the Secretary had calculated. App.

16-17. The amounts ranged from $17,670 to $28,650 per person, *id.*; the average for these four employees was $23,094.

The district court reached the opposite conclusion, however, with regard to the remaining five time-card employees. App. 17-18. Because Central Laundry had preserved only a few of these employees' time cards, the court concluded, without utilizing representative testimony as it did with regard to the four time-card employees, that there was no basis for an inference that these employees worked for the full three-year back-wage period. App. 17-18 & n.10 (Carmen LNU's eight time cards spanned approximately three months; Florencia LNU's two time cards spanned two weeks; and Florenta LNU's, Marco LNU's, and Victoria LNU's respective time cards covered one week for each). The court awarded back wages to these five employees for only the short periods covered by their respective time cards, resulting in significantly reduced back-wage awards compared to the amount calculated by the Secretary for the full three-year period that was utilized by the court for the four time-card employees. App. 18-19, 986. The amount of back wages awarded to these five employee ranged from $65 to $911 per person, App. 18-19; the average was $366 per person.

3. Hand-scanner employees. The court awarded no back wages at all to any of the 11 hand-scanner employees because, the court concluded, there was no basis to infer that these employees were entitled to any back wages. App. 19-20. First,

the court noted that the hand-scanner records spanned only two weeks (in January 2014) and reasoned that this was not long enough to justify inferring that these employees worked for the three-year back-wage period. App. 19. Second, the court said that the Wage and Hour investigator did not testify that these employees were paid in cash or even that they worked at Central Laundry. *Id.*

4. Payroll employees. Lastly, the court awarded no back wages to the three payroll employees. App. 13. The court concluded that there was no factual basis from which to infer that these three employees were uncompensated for their two 15-minute rest periods each workday. *Id.* Further, the court pointed to the statements by two of the payroll employees that their paychecks were "right" and "never wrong." *Id.*

SUMMARY OF ARGUMENT

1. As a threshold matter, the district court erred as a matter of law in denying any back wages to the 11 hand-scanner employees. Central Laundry admitted that it employed these 11 individuals and that it violated the minimum wage and overtime provisions of the FLSA. Thus, the fact that these employees were denied compensation to which they were statutorily entitled, in some amount, is certain. It was therefore clear error to deny them any back wages whatsoever.

2. The district court misapplied the *Mt. Clemens* burden-shifting and representative-testimony framework when it awarded the 11 hand-scanner

employees no back wages at all and significantly reduced the back-wage awards to five of the time-card employees. While the district court acknowledged the correct legal standards under *Mt. Clemens*, it applied those standards in a manner that was overly restrictive. Specifically, in light of Central Laundry's egregious recordkeeping violations, which are undisputed, the court erred in refusing to apply the representative testimony and evidence that the average period of employment at Central Laundry was three years – a conservative figure reached only after the Secretary removed from the average calculation the three employees with the longest periods of employment. In so doing, the court's decision failed to recognize that, where the employer has violated its statutory recordkeeping obligations, approximation of damages based on representative testimony is appropriate. Instead, the court erroneously required individualized proof of damages as a prerequisite to awarding full back wages to these 11 hand-scanner and five time-card employees, despite the fact that the court utilized representative testimony and evidence for four of the time-card employees to award them back wages for three years of employment. The district court gave no good reason why the same representative testimony and evidence should not apply to the 11 hand-scanner and five time-card employees as it did for the four. The court's reliance on there having been more records for the four employees to whom the district court applied representative testimony ignores the fact that the lack of sufficient records

for the 11 hand-scanner and five time-card employees is the very reason for the applicability of *Mt. Clemens* and the use of representative testimony.

The district court's decision thus punishes vulnerable employees for Central Laundry's failure to make and keep employment records, and provides employers with a strong incentive to violate the FLSA's recordkeeping duties and retain the economic benefit of their employees' work without paying the employees their statutorily-required wages. Further, it provides employers that violate the law with an unfair competitive advantage over those employers that comply with the law. *See* 29 U.S.C. 202(a) (existence of labor conditions insufficient to maintain a minimum standard of living is an unfair method of competition). This case illustrates the point: Allowing Central Laundry to retain its unlawfully obtained profits would enable this employer, with a clear pattern and practice of improper compensation and willful violation of the law, to gain an unfair competitive advantage over its law-abiding competitors.

3. This Court should award back wages to these 11 hand-scanner employees and five time-card employees for the full three-year back-wage period, as it did with the four time-card employees. In the alternative, however, if the Court does not award the full back wages to these employees, it should remand the case to the district court to determine the appropriate amount of back wages to award these

employees based on the principles enunciated by the Supreme Court in *Mt. Clemens*.

4. Lastly, the district court erred in not awarding any back wages to the three payroll employees for their two uncompensated 15-minute rest breaks each day. There is direct undisputed evidence establishing that these employees were not paid for their two 15-minute breaks for which they were required to be paid. The fact that two of these three employees stated that their pay was "right" does not negate their right to recover back wages for these violations because it is unclear if they even knew that they were statutorily entitled to be paid for such breaks. And even if they did know, employees cannot waive their rights under the FLSA.

STANDARD OF REVIEW

This Court applies a clearly erroneous standard when reviewing a district court's findings of fact, including those underlying a district court's computation of back wages under the FLSA. *See Selker Bros.*, 949 F.2d at 1292. By contrast, the district court's application of the legal standard and burden of proof in a claim for unpaid wages under the FLSA is a question of law, reviewed de novo. *See Brock v. Seto,* 790 F.2d 1446, 1447 (9th Cir. 1986). Because the district court here misapprehended, or at least failed to consistently apply, the *Mt. Clemens*

framework of shifting burdens and representative testimony, this Court should largely review the district court's decision de novo.

ARGUMENT

MT. CLEMENS BURDEN-SHIFTING AND REPRESENTATIVE-TESTIMONY FRAMEWORK

1. The FLSA requires employers to make and keep employment records for each employee. *See* 29 U.S.C. 211(c); 29 C.F.R. Part 516. When an employer fails to comply with its statutory recordkeeping obligation and "employees thereby have no way to establish the time spent doing uncompensated work, the 'remedial nature of [the FLSA] and the great public policy which it embodies . . . militate against making' the burden of proving uncompensated work 'an impossible hurdle for the employee.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016) (quoting *Mt. Clemens*, 328 U.S. at 687).[17] The Supreme Court explained that employees should not be penalized by denying them recovery of back wages to which they are statutorily entitled on the ground that the precise extent of their uncompensated work cannot be established due to the employer's failure to maintain statutorily-required records. *See Mt. Clemens*, 328 U.S. at 687; *see also*

[17] Significantly, the majority opinion in the Supreme Court's relatively recent decision in *Tyson Foods*, in a class action context, refers favorably to *Mt. Clemens* in discussing the burden-shifting and representative-testimony framework that is applicable when the employer has failed to keep proper records in accordance with the FLSA. *See Tyson Foods*, 136 S. Ct. at 1047-49.

Reich v. S. New England Telecomm. Corp., 121 F.3d 58, 69 (2d Cir. 1997); *Selker Bros.*, 949 F.2d at 1297.

2. Therefore, when the fact of damages is "certain" and "[t]he uncertainty only lies in the amount of damages" and that uncertainty is due to the employer's failure to keep records, the Supreme Court uses a burden-shifting framework to determine the amount of back wages to award. *Mt. Clemens*, 328 U.S. at 687-88. An employee need only produce "sufficient evidence to show the amount and extent of [uncompensated] work as a matter of just and reasonable inference." *Id.* Once the employee does so, the burden shifts to the employer "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 687-88. If the employer fails to meet this burden, the court may award damages to the employee "even though the result be only approximate." *Id.* at 688; *see Selker Bros.*, 949 F.2d at 1297; *see generally Acosta v. Off Duty Police Servs., Inc.*, -- F.3d --, 2019 WL 545124, at *11 (Feb. 12, 2019) (discussing shifting burdens and noting that the burden falls upon the employer for any imprecision in the amount of back wages resulting from the employer's failure to keep adequate records).

Thus, the initial burden under *Mt. Clemens* "is a minimal one" and tolerates uncertainty. *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 792 (1st Cir. 1991); *see Seto*,

790 F.2d at 1448 ("In view of the remedial purpose of the FLSA and the employer's statutory obligation 'to keep proper records of wages, hours and other conditions and practices of employment,' this burden is not to be 'an impossible hurdle for the employee.'") (quoting *Mt. Clemens*, 328 U.S. at 687). This Court explained that the plaintiff's burden in such a case "is merely to present a prima facie case." *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994). Once the plaintiff satisfies that minimal burden, the burden to come forward with more precise estimates then shifts to the employer, who "bear[s] the lion's share of the burden[.]" *DeSisto*, 929 F.2d at 792. This is because the employer's recordkeeping violation created the uncertainty in the first place and the employer is best positioned to offer evidence of the "amount of work performed." *Mt. Clemens*, 328 U.S. at 687. Unless the employer can satisfy its burden, "it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence[.]" *Id.* at 693 (emphasis added).

3. Moreover, to establish the amount of improperly compensated work, a plaintiff may rely on representative testimony and evidence. Since the Supreme Court's decision in *Mt. Clemens* in 1946, courts, including this Court, have consistently held that, where an employer failed to maintain accurate records, employees need not offer individualized proof of improperly compensated working time, but may instead rely on inferences based on representative evidence about

and testimony from employees who performed comparable work. *See, e.g.*, *Gateway Press*, 13 F.3d at 701-02; *Selker Bros.*, 949 F.2d at 1298. Plaintiffs need only produce sufficient representative evidence to approximate back wages for testifying and non-testifying employees as a matter of just and reasonable inference. *See, e.g.*, *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1278 (11th Cir. 2008) (citing cases).[18]

I. THE DISTRICT COURT FAILED TO PROPERLY APPLY THE *MT. CLEMENS* BURDEN-SHIFTING AND REPRESENTATIVE-TESTIMONY FRAMEWORK TO THE 11 HAND-SCANNER AND FIVE TIME-CARD EMPLOYEES

A. In Light of the Fact that Central Laundry Admitted to Employing the 11 Hand-Scanner Employees and to Underpaying Them in Violation of the FLSA, the District Court Erred as a Matter of Law in Awarding No Back Wages to Any of These 11 Employees.

1. As an initial matter, the district court's decision denying any back wages to the 11 hand-scanner employees is directly contrary to *Mt. Clemens*. Although the district court noted that there were hand-scanner records for these employees, it denied any back wages to them because, it said, the Wage and Hour investigator "could not definitely testify whether the hand-scanner employees were paid in cash

[18] In addition to establishing damages, the *Mt. Clemens* burden-shifting and representative-testimony framework can also be used to prove violations of the FLSA. *See, e.g.*, *Tyson*, 136 S. Ct. at 1046-47. That is not at issue here, however, because Central Laundry has admitted that it violated the minimum wage and overtime provisions of the FLSA, as well as its recordkeeping requirements, and the district court entered partial summary judgment in favor of the Secretary to that effect. App. 70-73.

or even worked at Central Laundry." App. 19. This, however, is flatly inconsistent with Central Laundry's admission that it employed all 11 hand-scanner employees and that it paid employees in cash. App. 34-35, 38 (¶¶ 11, 39).[19] Central Laundry further admitted to not paying its cash-paid employees minimum wage and overtime required by the FLSA and to not maintaining records as required by the FLSA. App. 35-36 (¶¶ 13, 18-19), 71.

That these employees suffered damages is a matter of fact; thus, all 11 employees are necessarily owed some amount of back wages by Central Laundry. The only uncertainty is the amount of back wages they are owed given that, other than two weeks of hand-scanner records, Central Laundry maintained no records at all for these 11 employees. When the damages are certain and the only uncertainty lies in the amount of damages arising from the employer's statutory recordkeeping violations, "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." *Mt. Clemens*, 328 U.S. at 688 (internal quotation marks omitted); *see Seto*, 790 F.2d at 1448 (citing *Mt. Clemens*, 328 U.S. at 688).

[19] Additionally, the district court mischaracterized the Wage and Hour investigator's testimony. She testified that other employees who gave statements referred to working with several if not all of the 11 hand-scanner employees and stated that all were paid in cash. App. 1220-21. Throughout the Wage and Hour investigator's testimony, she repeatedly referred to these 11 workers as Central Laundry employees, which is consistent with Central Laundry's stipulation that it employed all 11 of these individuals. App. 1170, 1219-23, 1260-65, 1274-76.

The district court's order does exactly that, however; it denies any relief whatsoever to these 11 hand-scanner employees who incurred damages and relieves Central Laundry from fairly compensating those employees for its willful FLSA violations. Awarding no back wages when damage is certain and evidence is presented from which a just and reasonable inference may be made regarding the amount of damages, as was the case here, constitutes legal error. *See Seto*, 790 F.2d at 1448 (concluding that the district court erred as a matter of law in awarding no back wages to 16 employees when "the fact of damage is certain" and the Secretary presented representative evidence in the form of testimony from four employees from which the amount of back wages could be reasonably inferred).[20]

B. The Eleven Hand-Scanner Employees and Five Time-Card Employees Should Be Awarded Three Years of Back Wages.

1. The 11 hand-scanner employees and the five time-card employees should be awarded back wages for the full three-year back-wage period based on the representative testimony and evidence that the average period of employment was three years. The court misapplied *Mt. Clemens* in refusing to apply this representative testimony and evidence to determine back-wage awards for these employees. To establish each employee's damages, the Secretary provided as

[20] As discussed below, the 11 hand-scanner employees should each be awarded back wages for the full three-year back-wage period. In the alternative, as discussed in section C below, this Court should remand the case for the district court to determine the proper amount of back wages to award.

much evidence as was available under the circumstances given Central Laundry's severely deficient recordkeeping. In this regard, the Secretary submitted the incomplete sets of time cards and hand-scanner records. App. 74-758. The Secretary also presented testimony from five employees, and submitted statements from six employees and declarations from eight employees (none of whose back wage award is on appeal). App. 915-77, 1019-1126, 1134-58. Central Laundry stipulated to the substance of these statements and declarations. App. 1129-33, 1348. These employees all gave information about their dates of employment, their average hours worked per week, and their rates of pay. App. 915-77 (decls. & statements), 1020-39 (test. of Mirna Aguilar), 1054-72 (test. of Guadalupe Pina), 1075-88 (test. of Juana Mexica), 1093-1112 (test. of Coti Nolasco), 1132-33 (stipulation regarding Reina Gutierrez), 1144-58 (test. of Maria Catalina Escobar). As outlined below, they also provided information about working with some of the individual time-card and hand-scanner employees.

The testimony, statements, and declarations, together with the actual time cards and hand-scanner records, showed that all of the cash-paid employees routinely worked overtime hours, were paid $5-6 per hour for straight-time and $7.50-9 per hour for overtime hours, and were paid in cash. They performed similar work and were all subject to the same working conditions and pay practices. Thus, the testimony, statements, declarations, and incomplete sets of

records constitute representative testimony and evidence. This representative testimony and evidence further showed that, on average, the cash-paid employees worked for Central Laundry for three years.

The district court, however, failed to apply this representative testimony and evidence regarding the three-year average period of employment to the 11 hand-scanner employees and five time-card employees despite the scant records kept by Central Laundry for these employees (with no records at all of their dates of employment). Notably, the district court correctly applied the representative testimony and evidence regarding the average length of employment to four of the nine time-card employees, inferring that they worked at Central Laundry for the entire three-year back-wage period. App. 13-17. Yet the court inexplicably refused to infer from this same representative testimony and evidence that the 11 hand-scanner and five time-card employees also worked for the entire three-year back-wage period. App. 13-19. This was error. The court gave no reason to treat the three-year average as any less applicable to the 11 hand-scanner and five time-card employees other than to state that Central Laundry's recordkeeping failures were particularly egregious as to those employees. But the fact that the district court relied, in part, on this average in inferring three years of employment for the four time-card employees demonstrates that the court found it representative and reasonable, and the particular egregiousness of Central Laundry's recordkeeping

with respect to the 11 hand-scanner and five time-card employees counsels even more for the use of representative testimony as it is that very severe lack of adequate recordkeeping that necessitates the use of representative testimony and evidence in the first place.

There is additional evidence in the record that further supports the reasonableness of treating the three-year average as representative of the periods of employment of the 11 hand-scanner and five time-card employees. As outlined below, some of the interviewed employees (i.e., employees who testified and provided statements and declarations) referenced working with several of the 11 hand-scanner and five time-card employees outside of the time periods covered by their respective hand-scanner and time-card records.

- Lourdes LNU, for whom Central Laundry had only one hand-scanner record from January 2014, App. 752: Mirna Aguilar testified that the entire time that she worked at Central Laundry from 2007 to August 2012, she worked with Lourdes. App. 944, 1023, 1046.

- Marco LNU, for whom Central Laundry had only one time card from July 2013, App. 18 n.10: Mirna Aguilar, who worked at Central Laundry from 2007 to August 2012, testified that she worked with Marco, App. 1049; Guadalupe Pina, who worked at Central Laundry from September 2013 until August 2014, stated that she worked with Marco, App. 930; Juana Mexica testified that the entire time that she worked at Central Laundry, from June to November 2012 and June to November 2013, she worked with Marco, App.1089-90; and Julia Aide Cruz Vargas stated in February 2014 that she worked with Marco "right now" (i.e., February 2014), App. 958.

- Roberto LNU, for whom Central Laundry had only one hand-scanner record from January 2014, App. 756: Mirna Aguilar, who worked at

Central Laundry from 2007 to August 2012, testified that she worked with Roberto. App. 1049.[21]

- Florencia LNU, for whom there were time cards from June and July 2013, App. 18 n.10: Guadalupe Pina, who worked at Central Laundry from September 2013 until August 2014, stated that she worked with Florencia. App. 931.

Moreover, there are January 2014 hand-scanner records for two of the five time-card employees whose time-cards covered periods other than January 2014.

- There is a January 2014 hand-scanner record for Florencia, for whom there were time cards from June and July 2013. App. 18 n.10, 751.

- There is also a January 2014 hand-scanner record for Florenta ("Flor") LNU, for whom there was only one time-card from July 2014. App. 18 n.10, 750-51.

All of this further demonstrates the reasonableness of inferring that these employees' periods of employment were not limited to the periods covered by their admittedly incomplete records.

2. In establishing damages under *Mt. Clemens*, courts have approved of applying averages derived from a representative sample of employees to all employees who performed similar work. *See Monroe v. FTS USA, LLC*, 860 F.3d

[21] The Secretary notes that two employees said that Roberto stopped working at Central Laundry sometime around mid-2014. App. 951, 959. Therefore, for this particular employee, the Secretary seeks back wages only from March 27, 2012 through June 30, 2014. Other than this single employee, however, there is no evidence to negate the reasonable inference from the representative testimony and evidence that the other ten hand-scanner employees, as well as the five time-card employees, worked for Central Laundry for the full three-year back-wage period.

389, 411-12 (6th Cir. 2017) (citing cases), *petition for cert. denied* 138 S. Ct. 980 (2018); *see also Tyson*, 136 S. Ct. at 1047 (consistent with *Mt. Clemens*, plaintiffs may use a representative sample to fill an evidentiary gap). Here, the average three-year period of employment adduced by the Secretary was based on information obtained from nine of the 13 interviewed employees; these nine employees represent 27 percent of the 33 cash-paid employees. Indeed, the reasonableness of the three-year average is underscored by the manner in which the Secretary calculated that average. The average length of employment for the nine employees for whom the Secretary knew their start and end dates was six years. App. 1016. To ensure that the average was as representative as possible, however, the Secretary removed from the calculation the three employees with the longest periods of employment (over 14 years, nearly 14 years, and over 8 years), which brought the average length of employment down from six years to three years. App. 1016, 1215-19.

Significantly, Central Laundry did not dispute the periods of employment that these nine employees testified to or stated in their statements and declarations. Likewise, Central Laundry did not present any evidence to dispute that the five time-card and 11 hand-scanner employees worked at Central Laundry during the entire three-year back-wage period (just as it did not present evidence to refute that the four time-card employees who were awarded the full three-years of back wages

worked at Central Laundry during the entire back-wage period). Central Laundry had the opportunity to dispute such evidence through the testimony of Jimmy Rengepes or Dimitrios Karagiannis, who worked with Jimmy overseeing and managing the floor workers (i.e., the employees at issue in this case). App. 1283-1347 (test. of Jimmy Rengepes), 1351-68 (test. of Dimitrios Karagiannis). Despite this opportunity, neither of these witnesses for Central Laundry testified to anything that called into question or undermined the Secretary's just and reasonable inference that all the time-card and hand-scanner employees worked the entire three-year back-wage period.

Under these particular circumstances, where Central Laundry did not keep even basic records for its employees, such as their full names and their dates of employment, and the representative testimony and evidence showed that the average period of employment at Central Laundry was three years and Central Laundry presented no contrary evidence, it was reasonable to infer that these 11 hand-scanner employees and five time-card employees worked for the entire three-year back-wage period. The court erred in rejecting this reasonable inference.[22]

[22] It is not common in the Secretary's experience to encounter an employer whose records are so deficient that they do not even include employees' start and end dates of employment. For this reason, we are not aware of a case such as the present one in which the Secretary used representative testimony and evidence to show periods of employment for purposes of calculating back wages. Given Central Laundry's egregious recordkeeping violations, however, there was no method available other than averaging periods of employment based on

This case is akin to *Seto*. In *Seto*, the district court awarded no back wages despite the established fact that the employer had violated the FLSA. *See* 790 F.2d at 1447. The Ninth Circuit reversed, explaining that the district court had erred as a matter of law in concluding that the evidence was too speculative to support an inference of the amount of damages where "the fact of damage [was] certain" and the only uncertainty was the amount of damages. *Id.* at 1448. As in *Seto*, the court here erred in concluding that the relatively small number of records for the 11 hand-scanner and five time-card employees was dispositive. This is precisely the conclusion that *Mt. Clemens* was meant to counter – that the small number of records should not redound to the benefit of the employer, whose responsibility it is under the FLSA to keep complete records; conversely the employer's failure to keep such records should not disadvantage the recovery by the employees.[23]

3. The district court's decision has precisely the effect that *Mt. Clemens* sought to avoid. The district court demanded an individualized showing for the 11 hand-scanner and five time-card employees and thereby "placed a premium on an

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information that Wage and Hour had gathered and using that as representative for employees whom the employer undisputedly employed and undercompensated but could not provide any information about their dates of employment. The district court did not question the use of representative testimony and evidence to prove length of employment.

[23] Notably, the district court in this case reduced the back-wage award by 62 percent – from $637,727.04, as calculated by the Secretary, to $239,269.65.

employer's failure to keep proper records in conformity with his statutory duty," and "penalize[d] the employee" for the employer's failure "by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work." *Mt. Clemens*, 328 U.S. at 687. In concluding that the small number of records for these particular employees was not enough from which to infer that they worked for three years, and by failing to rely on the very representative testimony and evidence if found sufficient to support an award of three years of back wages for the four time-card employees, the court's decision effectively required individual proof for each of these employees to establish their respective periods of employment. App. 18-20.

Similar to the court here, the court of appeals in *Mt. Clemens* had insisted on individualized proof rather than permitting employees to rely on an "estimated average of overtime worked." *Mt. Clemens Pottery Co. v. Anderson*, 149 F.2d 461, 462-65 (6th Cir. 1945). The Supreme Court emphatically disapproved of that "improper standard of proof," explaining that it would thwart enforcement of the FLSA and impermissibly penalize employees for the employer's recordkeeping violations. *Mt. Clemens*, 328 U.S. at 686. The Court's recent statement in *Tyson* is apposite:

> In this suit, as in *Mt. Clemens*, [the employees] sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records. . . . Rather than absolving the employees from proving individual injury, the

> representative evidence here was a permissible means of making that very showing.

136 S. Ct. at 1047. As in *Tyson*, the Secretary relied on a representative sample in the absence of the employer having kept proper records – here, to estimate the average period of employment at Central Laundry to fill the evidentiary gap created by Central Laundry when it did not keep records of its employees' dates of employment. Central Laundry presented no evidence to refute the reasonable inference from this representative sample.

4. One of *Mt. Clemens*' central principles is that approximation in calculating back wages, which necessarily encompasses a degree of imprecision, is acceptable when there are no records due to the employer's failure to comply with its statutory recordkeeping requirements. While the representative testimony and evidence here do not prove with exactness that these employees worked the full three years, the only way to make such a showing would be by reference to Central Laundry's records, which do not exist in a complete form. Thus, denying the employees a full measure of back wages in such circumstances, where a just and reasonable inference as to the amount of back wages is necessitated by the employer's lack of recordkeeping, ignores this central principle of *Mt. Clemens*. As the Supreme Court in *Mt. Clemens* explained: "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that

would be possible had he kept records in accordance with the requirements of [the FLSA]." 328 U.S. at 688.

To the extent that applying the three-year average period of employment to these employees is an approximation that might result in paying them more than they would receive had Central Laundry kept accurate records (which the Secretary does not believe is the case here), that is the legal consequence of Central Laundry violating its statutory recordkeeping obligations. *See S. New England Telecomm.*, 121 F.3d at 70 (when an employer does not have accurate records and the court is forced to choose between the Secretary's over-inclusive damage calculation based on a reasonable inference from available evidence and the employer's under-inclusive calculation, the court properly followed *Mt. Clemens* in choosing the Secretary's calculation and placing the burden on the employer to prove otherwise).[24]

Furthermore, the fact that the Secretary may be unable to locate some employees (given Central Laundry's inadequate records) does not vitiate the

[24] It bears noting that there were other workers at Central Laundry with whom several of the 13 interviewed employees said they worked, but for whom the Secretary did not seek any back wages due to the lack of any Central Laundry records for those individual workers or Wage and Hour contact with them. For example, eight employees said they worked with "Olga," App. 916, 922, 930, 936, 940, 948, 958, 959, 1046, 1056, 1097, 1156; three employees said they worked with "Blanca," App. 922, 940, 1046, 1153; two employees said they worked with "Luis," App. 916, 930-31, 970, 975; and two employees said they worked with "Erica," App. 930, 970.

propriety of awarding back wages to such employees. Indeed, the statute specifically contemplates that this might occur; it states that sums recovered by the Secretary "not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts." 29 U.S.C. 216(c). This outcome is consistent with the underpinnings of *Mt. Clemens* in that it prevents an employer that has violated the FLSA's recordkeeping requirements and underpaid its employees from retaining as profits the wages that it should have paid, and thereby prevents the employer from gaining an unfair competitive advantage over employers who comply with the law. *Cf. Am. Waste Removal Co. v. Donovan*, 748 F.2d 1406, 1410 (10th Cir. 1984) ("Allowing an offending employer to retain back wages and benefits solely because the Secretary cannot name or locate an aggrieved employee would frustrate the purposes of the Service Contract Act [which the Secretary interprets consistent with the FLSA], and would reduce an employer's incentive to comply with its spirit and provisions."). Indeed, if this were a legitimate reason to not award back wages, it would create perverse incentives for employers to not keep records and pay employees in accordance with the FLSA because they would not suffer any consequences as a result of those violations.

C. In the Alternative, This Court Should Remand to the District Court to Determine, Consistent with *Mt. Clemens*, the Appropriate Amount of Back Wages to Award the 11 Hand-Scanner and Five Time-Card Employees.

If this Court does not adopt the Secretary's back wage calculations relying on the three-year average period of employment (which the Secretary strongly believes it should), the Court should nevertheless reject the district court's erroneous conclusion to award no back wages or very few back wages to the 11 hand-scanner and five time-card employees and should, at a minimum, remand the case for the district court to explore alternative ways, consistent with *Mt. Clemens*, to approximate the amount of back wages owed to these employees. As noted above, the district court erred in not awarding any back wages to the 11 hand-scanner employees given that Central Laundry admitted to employing all of these individuals and to underpaying them in violation of the FLSA. Similarly, the court erred in awarding such small amounts of back wages to the five time-card employees, which was inconsistent with its award of a full three years of back wages to the other four time-card employees. The court placed unwarranted and excessive emphasis on the time-cards and hand-scanner records (or the lack thereof) in determining the back wages, if any, to award these employees. On remand, the district court should pay greater heed to the fact that Central Laundry stipulated to employing all of these employees and to underpaying them in violation of the FLSA. It should also adhere to the central teaching of *Mt.*

Clemens, which is that employees should not be penalized and an employer should not in turn benefit vis-à-vis the amount of back wages owed as a result of the employer's failure to keep records as it is mandated to do by the FLSA.

II. THE DISTRICT COURT ERRED IN NOT AWARDING BACK WAGES TO THE THREE PAYROLL EMPLOYEES FOR THEIR UNCOMPENSATED 15-MINUTE REST BREAKS

The district court erred in denying any back wages to the three payroll employees. The court concluded that the Secretary had not identified any factual basis that these employees were uncompensated for two 15-minute rest breaks each day, and pointed to statements by two of the three that their paychecks were "always right" and "never wrong." App. 13.

It is simply incorrect that there was no evidence that the three payroll employees were not compensated for two 15-minute breaks each day. The time cards and payroll records for the three payroll employees showed that Central Laundry deducted one hour per day from the total hours worked (it did the same for the 33 cash-paid employees). App. 74-747 (time cards for cash-paid employees), 748-58 (hand-scanner records), 759-850 (payroll records for three payroll employees), 851-914 (time cards for three payroll employees). This one hour consisted of 30 minutes for a bona fide meal break, for which no compensation is required, *see* 29 C.F.R. 785.19, and two 15-minute breaks, for which the FLSA requires compensation, *see* 29 C.F.R. 785.18; *Sec'y U.S. Dep't of*

Labor v. Am. Future Sys., Inc., 873 F.3d 420, 423 (3d Cir. 2017), *petition for cert. denied* 138 S. Ct. 2621 (2018). Specifically, the time cards for the three payroll employees showed their start and end times each day, but the total hours worked on the time cards revealed one hour less than if the total hours had been calculated using the start and end times. The Wage and Hour investigator testified that the three payroll employees (as well as the cash-paid employees) were not paid for two 15-minute rest breaks. App. 1170-77, 1277-78. Indeed, Central Laundry did not refute this point.

This constitutes direct evidence specific to each of these three employees that Central Laundry deducted one hour from their total hours worked per day and consequently deducted one hour of pay from their compensation. Thus, not only is the fact of damage certain, but given this evidence (which is unique for the three payroll employees for whom time cards and payroll records were kept), the amount of damages can be calculated with certainty.

There was no basis to rely, as the district court did, on the statements by two of these employees that their paychecks were "right" as a reason to deny them any back wages. First, it is unclear from the evidence whether these employees knew, when making these declarations, that they were statutorily entitled to be paid for short breaks, such as the two 15-minute rest breaks. App. 978-80 (interview statements of two of the three payroll employees). Second, even if they thought

the paychecks were correct, employees cannot waive their rights under the FLSA. *See Barrentine v. Arkansas–Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981); *Wicker v. Consol. Rail Corp.*, 142 F.3d 690, 698 n.6 (3d Cir. 1998). Therefore, the fact that they said that their paychecks were correct is of no import. Simply put, the three payroll employees were entitled to be compensated for their two 15-minute non-meal breaks, and the district court erred in not finding back wages owed for this time.[25]

CONCLUSION

For the foregoing reasons, this Court should vacate the portion of the district court's decision that did not award any damages to the 11 hand-scanner employees and significantly reduced damages to the five time-card employees. The Court should award these employees back wages covering the full three-year back-wage period (and an equal amount of liquidated damages). Alternatively, this Court should remand the case to the district court to calculate damages for these workers consistent with the Supreme Court's decision in *Mt. Clemens*. Moreover, the Court should vacate the portion of the district court's decision that did not award the three payroll employees compensation for their two 15-minute rest breaks; it

[25] Indeed, the district court's back wage awards for the cash-paid employees included compensation for these two 15-minute breaks. Thus, the court implicitly recognized that all employees were not paid for the two 15-minute breaks. Its decision not to award any back wages to these three payroll employees is inconsistent with its award of back wages to the cash-paid employees.

should in turn award back wages to these employees for this time (and an equal amount of liquidated damages).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and (7). This document is proportionally spaced in 14-point font, and contains 11,054 words, based on the word count provided by my word processor and Microsoft software.

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Counsel hereby certifies as follows:

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Counsel hereby certifies, pursuant to 3d Cir. L.A.R. 31.1(c), that a virus check, using McAfee Security VirusScan and AntiSpyware Enterprise 8.8, was performed on this file, and no viruses were detected.

Dated: February 20, 2019

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned counsel certifies that she is a member in good standing of the District of Columbia Bar, No. 53351. As an attorney representing an agency of the United States, she is not required to be a member of the bar of this Court. *See* 3d Cir. L.A.R. 28.3, Committee Comments.

Dated: February 20, 2019

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CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor, which the Secretary has filed electronically with the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system, was served on Appellants on February 20, 2019 at the addresses listed below via U.S. Priority Mail:

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ADDENDUM

36 Central Laundry Employees on Whose Behalf the Secretary Sought Back Wages

I. Cash-paid employees (33 employees)

1. Interviewed employees (13)[1]

i. Employees who testified (5)

ii. Employees who provided statements (6) and declarations (8)

2. Time-card ("time-record") employees (10)[2]

i. Time-card employees awarded back wages for full three-year back-wage period (4)

ii. Time-card employees awarded back wages for significantly less than three-year back-wage period (5)

3. Hand-scanner employees (11)

II. Payroll employees (3)

[1] There is some overlap among the 13 interviewed employees; some both testified and provided a statement and/or a declaration.

[2] One of the time-card employees also testified and provided a statement and declaration. The district court counted her as one of the interviewed employees. For this reason, the two time-card subcategories total only nine employees rather than ten.