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Petition for a Writ of Certiorari. Kirk v. Invesco, Limited, 138 S.Ct. 1164 (2018) (No. 17-762), 2017 U.S. S. Ct. Briefs LEXIS 4618, 2017 WL 5665441

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17-762
No.

In The
Supreme Court of the United States

CHERYL KIRK,

Petitioner,

v.

INVESCO, LIMITED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Labor Standards Act provides that covered employees who work more than 40 hours in a week must generally be paid overtime at a rate one and one-half times their regular rate. To assure compliance with that overtime rule, the Act and governing regulations require employers to maintain records of all hours worked by covered employees. If an employer has failed to keep the legally required records, the burden on the employee under *Anderson v. Mt. Clemens Pottery Co.* is simply to "produce[] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."

The question presented is: Can an employee meet that burden of production by testifying from personal knowledge as to the number of overtime hours he or she worked (the rule in seven circuits and under the decision of one state court of last resort), or is the employee's testimony insufficient unless "substantiate[d]" by additional evidence (the rule in the Fifth Circuit)?

PARTIES

The parties to this proceeding are set forth in the caption.

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Petitioner Cheryl Kirk respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on July 6, 2017.

OPINIONS BELOW

The July 6, 2017, opinion of the court of appeals, which is unofficially reported at 2017 WL 2889502, is set out at pp. 1a-8a of the Appendix. The August 23, 2017 order of the court of appeals denying rehearing and rehearing en banc, which is not reported, is set out at pp. 45a-46a of the Appendix. The August 18, 2016, district court Order Adopting Memorandum and Recommendation, which is unofficially reported at 2016 WL 4394336 (S.D.Tex. August 18, 2016), is set out at pp. 9a-24a. The May 4, 2016, Memorandum and Recommendation of the magistrate judge, which is unofficially reported at 2016 WL 7734644 (S.D.Tex. May 4, 2016), is set out at pp. 25a-44a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on July 6, 2017. A timely petition for rehearing was denied by the court of appeals on August 23, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 7(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 207(a)(1), provides:

> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 11(c) of the Fair Labor Standards Act, 29 U.S.C. § 211(c), provides in pertinent part:

> (c) **Records** Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of times, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of this chapter or the regulations or orders thereunder.

INTRODUCTION

This case presents a circuit conflict that cuts to the heart of the Fair Labor Standards Act ("FLSA"). The key and most frequently invoked provision of the FLSA requires that covered employees who work more than 40 hours in a week ordinarily be paid overtime at an hourly rate one and one-half times their regular rate. 29 U.S.C. § 207(a)(1). That mandatory overtime rate recognizes the special burdens imposed on employees who work more than 40 hours in a week, and encourages employers to hire additional employees rather than overwork their existing workforce. The federal overtime requirement applies to more than 90 million hourly and salaried workers in both private employment and the public sector.[1]

The overtime requirement would be essentially unenforceable in the absence of a practicable way for courts (and the Department of Labor) to determine how many hours a covered employee has worked. For that reason, § 11(c) of the FLSA requires employers to maintain records specified by regulation or order issued by the Administrator of the Wage and Hour Division. 29 U.S.C. § 211(c). Those regulations require employers to maintain for covered workers records of the hours worked each workday and the total hours worked each workweek. 29 C.F.R. § 516.2(a)(7). For a variety of reasons, however, employers frequently fail to keep those legally required records. Their records may be inaccurate, incomplete, or simply non-existent.

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[1] *See* 81 Fed.Reg. 32391, 32454, 32456 (May 23, 2016).

This Court addressed that widespread problem in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). The employer in that case had kept no records of the amount of time devoted to certain activity for which the plaintiffs were entitled to overtime pay. Each of the named plaintiff employees testified as to the average time he or she devoted to the disputed activity, but none of the estimates were "based upon actual clocking of the time." *Mt. Clemens Pottery Co. v. Anderson*, 149 F.2d 461, 463 (6th Cir. 1945). The special master who heard the case declined to award any overtime, reasoning that an award based on that employee testimony would be "speculative, inasmuch as the witnesses ... had kept no record of their time and admitted that ... they could not tell on any particular day [how much additional time they had worked]." *Id.* at 464. The court of appeals dismissed the plaintiffs' claims in their entirety, without deciding whether the activity in question was compensable, reasoning that "[i]t does not suffice for the employee to base his right to recovery on a mere estimated average of overtime worked. To uphold a judgment based on such uncertain and conjectural evidence would be to rest it upon speculation." *Id.* at 465.

This Court reversed, holding that "the Court of Appeals, as well as the special master, imposed upon the employees an improper standard of proof, a standard that has the practical effect of impairing many of the benefits of the Fair Labor Standards Act." 328 U.S. at 686. When an employer has failed to maintain the legally required records, the Court noted, it is unlikely

that the employees would be able to "offer convincing substitutes." *Id.* "Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy." *Id.* at 687. "The remedial nature of this statute and the great public policy which it embodies ... militate against making [the employee's] burden an impossible hurdle for the employee." *Id.* at 686.

This Court held that in evaluating overtime claims where an employer has not maintained the legally required records, "[d]ue regard must be given to the fact that it is the employer who has the duty under § 11(c) of the Act to keep proper records of ... hours ... of employment and who is in position to know and to produce the most probative facts concerning the ... amount of work performed." 328 U.S. at 687. Where the employer has failed to keep the required records, "[t]he solution ... is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty." *Id.* "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 §11(c) of the Act." *Id.* at 688.

Mt. Clemens adopted the controlling standard regarding the quantum of evidence an employee must adduce in the absence of accurate employer-maintained records.

> [W]here the employer's records are inaccurate or inadequate[,] ... an employee has carried his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of *just and reasonable inference*. The burden then 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. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Id. at 687-88 (emphasis added). This Court reiterated the *Mt. Clemens* standard in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1047 (2016). "For nearly 70 years, the *Mt. Clemens* framework has been essential to effective enforcement of the FLSA...." Brief for the United States as Amicus Curiae Supporting Respondents, p. 7, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016), available at 2015 WL 5719741.

Faithfully applying *Mt. Clemens*, seven courts of appeals, and one state court of last resort, hold that an employee can meet that burden by testifying from personal knowledge as to the number of overtime hours he or she worked. Those courts reason that to require testifying workers to go further, and substantiate their testimony with records or other additional evidence, would impose on those workers an often impossible

burden, and would create an incentive for employers to violate the record-keeping provision of the FLSA in order to escape liability for violations of the overtime provision of the Act. The Fifth Circuit, however, imposes just such a substantiation requirement, holding in this case, as it has in the past, that employee testimony about how many hours he or she worked is legally insufficient to support an FLSA overtime claim unless that testimony is "substantiate[d]" by other evidence. App. 7a.

STATEMENT OF THE CASE

Plaintiff Cheryl Kirk was employed by Invesco to organize and teach computer classes for its employees. Invesco is an asset management plan that sells investment products, and its employees use a variety of computer programs in their activities. Kirk was paid a fixed salary regardless of how many hours she actually worked. Kirk commenced this action in federal court, alleging that she was in fact working far more than 40 hours a week, and that Invesco knew that she was working substantial amounts of overtime. Kirk asserted that because of the nature of her work, she was covered by the overtime provision of the FLSA, a contention that Invesco disputed. App. 5a, 28a. At the time Kirk commenced this action, she was still employed by Invesco; Kirk was fired seven months subsequent to filing suit.

Invesco moved for summary judgment on a number of grounds. Of relevance here, Invesco asserted that it was entitled to summary judgment on the ground that Kirk could not prove that she had ever worked more than 40 hours in a week. Invesco did not claim that it had conclusive evidence that Kirk had not worked overtime, and did not offer evidence which it contended proved that she had not done so. Instead, Invesco argued that, under controlling Fifth Circuit caselaw, Kirk's own evidence of overtime work was legally insufficient to support a finding that she had ever worked more than 40 hours in a week. Invesco had records for part of the period in question, which indicated that Kirk had worked overtime, but the courts below concluded that those records were too inaccurate to rely on. App. 6a, 18a-19a, 35a-37a.[2] The summary judgment motion turned on, and this appeal concerns, the sufficiency of Kirk's other evidence that she had worked more than 40 hours a week.

In her deposition, Kirk repeatedly and specifically testified that she worked more than forty hours a week. She stated that she worked "more than 60 hours a week on average." Doc. 43-2, p. 71; App. 3a. She explained that she typically came to work between 6:30 and 7:00 a.m., and did not leave until between 4:30 and 8:00 p.m., depending in part on the tasks she had on a

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[2] The parties disagreed as to whether Kirk or Invesco was responsible for those inaccuracies and for the lack of records for certain periods. That dispute, however, was not relevant under the standard applied by the courts below, and would not be relevant under the standard applied in other circuits.

particular day. Doc. 43-2, p. 66; App. 3a. Kirk summarized the primary tasks she engaged in, and how long each took. She testified that she spent seven to ten hours a day enrolling people in classes, and that this type of activity was between 70 and 80 percent of her workload. Doc. 43-2, pp. 19-20; Doc. 48-4, p. 3. About 20 percent of her work was devoted to actually training people, the amount of which varied between one and three hours a day. Doc. 43-2, pp. 19-20. She described the other activities on which she worked during the remaining time, including preparing training materials. Doc. 43-2, p. 55. At the time that Kirk was deposed, she was still employed at Invesco, so this summary of her work hours was a contemporaneous account of her activity, not a reconstruction of events in the distant past.

Invesco argued, however, that under Fifth Circuit precedents such testimony by a worker regarding how many hours she worked is legally insufficient to support a finding that she had worked overtime. Doc. 43, pp. 15-16; Doc. 55, p. 4. The magistrate judge to whom the summary judgment motion had been referred agreed, holding that such employee testimony, unless corroborated by other evidence, is legally insufficient. Citing several Fifth Circuit decisions, including *Ihegword v. Harris Cty. Hosp. Dist.*, 555 Fed.Appx. 372, 375 (5th Cir. 2014), the magistrate judge concluded that "'unsubstantiated assertions speculated from memory' were not enough to sustain an overtime claim." App. 34a (quoting *Fairchild v. All Am. Check Cashing, Inc.*, 815 F.3d 959, 963 (5th Cir. 2016), quoting *Ihegword*,

555 Fed.Appx. at 375)); *see* App. 34a ("an unsubstantiated and speculative estimate of uncompensated overtime does not constitute evidence sufficient to show the amount and extent of that work as a matter of just and reasonable inference.") (quoting *Ihegword*, 555 Fed.Appx. at 375).

Applying *Ihegword* and *Fairchild*, the magistrate judge put aside Kirk's own testimony, and proceeded to assess whether Kirk's additional evidence – certain records and testimony by her mother – was sufficient to establish that Kirk had worked overtime. App. 39a. That other evidence, the magistrate judge concluded, "does not lead to a just and reasonable inference that Plaintiff worked more than forty hours during any week of her employment." App. 43a. Having concluded that Kirk could not show that she ever worked any overtime, the magistrate judge recommended that summary judgment should be granted, without addressing the merits of Kirk's contention that she was covered by the overtime provision of the FLSA. App. 44a.

Kirk sought review of the magistrate judge's recommendation by the District Court. In her objections to the magistrate judge's report, Kirk sought to distinguish the Fifth Circuit precedents at issue, and pointed out that in other circuits plaintiffs in FLSA cases can rely on their own testimony to establish that they worked overtime, without the necessity of adducing additional corroborating evidence. Doc. 64, pp. 5-9. Invesco, on the other hand, argued that "binding" Fifth Circuit precedent precluded an FLSA plaintiff from relying on her own "unsubstantiated" testimony. Doc. 67,

pp. 4-5, 6, 7, 9-10 n.3. The company pointed out that precedents in other circuits were "not binding in the Fifth Circuit." *Id.* at 8 n.3.

The district court concluded that Fifth Circuit precedent precluded Kirk from relying on her "unsubstantiated" testimony.

> Kirk argues that the Magistrate Judge incorrectly found that Kirk's testimony was insufficient to establish that she worked overtime hours.... Kirk contends that, in an FLSA misclassification case, an employee's *mere testimony* of overtime hours worked is sufficient evidence to defeat an employer's motion for summary judgment.... [Although plaintiff argues] that an employee's unsubstantiated testimony is sufficient to survive summary judgment, the court finds that the weight of authority does not support this position.... [T]he court finds that Kirk's testimony that she worked sixty hours per week, unless properly substantiated by other evidence, is insufficient to establish that she performed overtime work for which she was not compensated.

App. 20a-21a (emphasis added). The Fifth Circuit authority that precluded reliance on "mere testimony," the district court explained, was *Ihegword*.

> In *Ihegword* the Fifth Circuit ... agreed ... that "an unsubstantiated and speculative estimate of uncompensated overtime does not constitute evidence sufficient to show the amount and extent of that work as a matter of just and

> reasonable inference." ... Other courts have similarly held that a plaintiff's unsubstantiated assertion that she worked overtime hours is insufficient to satisfy her evidentiary burden at the summary judgment stage.

App. 20a-21a. The district court noted that several lower court opinions in the Fifth Circuit had applied this rule in *Ihegword* under similar circumstances. App. 21a. The district court proceeded to examine Kirk's other evidence, and concluded that it was "insufficient to substantiate her testimony that she worked overtime hours." App. 23a. Because it concluded that Kirk could not prove that she had ever worked any overtime, the district court declined to decide whether the FLSA overtime provisions applied to her. *Id.*

On appeal, Kirk insisted that a worker's testimony can be sufficient, without independent corroboration, to establish that she worked more than 40 hours in a week. Brief of Appellant Cheryl Kirk, pp. 32-41, available at 2016 WL 6574231. Kirk pointed out that "[c]ourts around the country regularly rely on plaintiffs'/employees' testimony to create a fact question of hours worked, especially ... where accurate time records are not maintained" (*id.* at 34), citing decisions in the Second, Sixth, Seventh and Tenth Circuits. Invesco, on the other hand, repeatedly insisted that Fifth Circuit precedent to the contrary was "binding," "controlling," and "prevailing authority." Brief of Appellee Invesco, Limited, pp. 13, 18, 24, 25, 27-28, 29, 30, 32, available at 2016 WL 7157278. "[M]ere testimony alone will not suffice to establish a 'just and reasonable inference' in the Fifth Circuit...." *Id.* at 22-23; *see id.*

at 25 ("In light of the position taken by and within the Fifth Circuit, ... Kirk's mere testimony that she worked sixty hours per week is insufficient to establish that she performed overtime work for which she was not compensated."). Invesco criticized as "anathema" Kirk's citation of decisions in other circuits (*id.* at 27 n.5), arguing that "Kirk's reliance on non-binding decisions outside the jurisdiction of the Fifth Circuit carries no weight in this matter.... Not only are these cases not controlling in this jurisdiction, but the Fifth Circuit has already spoken on the issue Kirk challenges here." *Id.* at 27.

The court of appeals reiterated and applied the well-established Fifth Circuit rule that the unsubstantiated testimony of an FLSA plaintiff is legally insufficient to show that she worked any overtime.

> In order to raise a "just and reasonable inference" as to the amount and extent of her work, an employee ... must provide more than mere "unsubstantiated assertions." *Harvill*, 433 F.3d at 411; *see Ihegword v. Harris Cty. Hosp. Dist.*, 555 Fed.Appx. 372, 375 (5th Cir. 2014). Even though Kirk presented the district court with more than just her own assertions, we agree with the district court's conclusion that this "additional evidence is insufficient to substantiate her testimony that she worked overtime."

App. 6a-7a. Kirk filed a timely petition for rehearing en banc, pointing out that the Fifth Circuit rule conflicted with the rule in several other circuits. Appellant's Petition for Rehearing En Banc, pp. 8-9. The

court of appeals denied the petition for rehearing. App. 45a-46a.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit decision in the instant case deepens a straightforward conflict regarding the Fair Labor Standards Act. The Fifth Circuit in this case held, as that circuit has in previous decisions, that an FLSA plaintiff cannot establish that she worked more than 40 hours in a week merely by testifying from personal knowledge that she did so. Rather, that circuit requires the plaintiff to also produce additional evidence to "substantiate" her testimony. Seven circuits, and one state court of last resort, reject that requirement. As was true of the similar rule rejected by this Court decades ago in *Mt. Clemens*, the Fifth Circuit rule substantially limits the enforceability of the substantive rights created by the FLSA, and provides a powerful incentive for employers to violate the record-keeping requirements of the FLSA and its implementing regulations.

I. THE FIFTH CIRCUIT SUBSTANTIATION REQUIREMENT CONFLICTS WITH THE STANDARD IN SEVEN CIRCUITS AND ONE STATE COURT OF LAST RESORT

A. The Fifth Circuit Requires That Employee Testimony Regarding Overtime Hours Be Substantiated by Other Evidence

The appellate decision in this case applies and reiterates a well-established Fifth Circuit rule that unsubstantiated employee testimony is insufficient as a matter of law to establish that the employee worked overtime. The rule in that circuit originated in the seminal decision in *Harvill v. Westward Communications, LLC*, 433 F.3d 428 (5th Cir. 2005), relied on in the instant case by both the court of appeals and the magistrate judge. App. 7a, 32a. The plaintiff in *Harvill* stated in support of her overtime claim that her supervisor had "required her to turn in false time sheets." 433 F.3d at 441; *see Harvill v. Westward Communications, LLC*, 311 F.Supp.2d 573, 584 (E.D.Tex. 2004) (describing deposition). The Fifth Circuit held that the plaintiff's testimony was insufficient to defeat a motion for summary judgment, because it was an "unsubstantiated assertion[]." 433 F.3d at 441. Since *Harvill*, decisions in that circuit have repeatedly held that "unsubstantiated" testimony is inadequate to support an overtime claim under the FLSA.

The Fifth Circuit applied *Harvill* in the oft-cited decision in *Ihegword v. Harris County Hospital Dist.*, 555 Fed.Appx. 372, 375 (5th Cir. 2014), relied on and

quoted by the court of appeals and district court below. App. 7a, 20a. The plaintiff in *Ihegword* testified that she had "worked approximately twelve hours of overtime each week." *Ihegword v. Harris Cty. Hospital Dist.*, 929 F.Supp.2d 635, 667 (S.D.Tex. 2013). Citing *Harvill*, the district court in *Ihegword* held that the plaintiff's own testimony, because not corroborated, was insufficient to prevent summary judgment.[3] Also citing *Harvill*, the Fifth Circuit affirmed that application of its precedent.

> [T]he district judge noted the complete lack of evidence, other than Ihegword's unsubstantiated assertions speculated from memory, to prove that she actually worked overtime for which she was not compensated.... As noted by the district judge, "an unsubstantiated and speculative estimate of uncompensated overtime does not constitute evidence sufficient to show the amount and extent of that work as a matter of just and reasonable inference."

55 Fed.Appx. at 375. Two years later, in the officially reported decision in *Fairchild v. All Am. Check Cashing, Inc.*, 815 F.3d 959, 964 (5th Cir. 2016), relied on by the magistrate judge in the instant case (App. 33a), the Fifth Circuit cited *Ihegword* for the proposition that an FLSA overtime claim was properly rejected "where the employee's only evidence was her 'unsubstantiated

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[3] 929 F.Supp.2d at 668 ("Because plaintiff has not submitted any evidence other than her own unsubstantiated assertions that she worked an estimated twelve hours of unpaid overtime per week, plaintiff has failed to raise a genuine issue of material fact for trial.").

assertions speculated from memory ... that she actually worked overtime for which she was not compensated.'" 815 F.3d at 964 (quoting *Ihegword*).

Harvill,[4] *Ihegword*, and *Fairchild* have in turn spawned a series of district court decisions in the Fifth Circuit rejecting FLSA overtime claims on the ground that the key employee testimony regarding having worked more than 40 hours a week was "unsubstantiated." In *Oti v. Green Oaks CSS, LLC*, 2015 WL 329216 (N.D.Tex. Jan. 23, 2015), the plaintiff testified in her deposition as to the number of overtime hours she had worked during the period in question. 2015 WL 329216 at *2. The district court, citing *Harvill*, rejected that evidence as insufficient, because the plaintiff had failed to "substantiate" her testimony and could point to no "records" that supported it. *Id.* at *2-*3. In *Miller v. Texoma Medical Center, Inc.*, 2015 WL 5604676 (E.D.Tex. Sept. 23, 2015), the plaintiff testified that he worked five overtime hours a day for 90 percent of the time over a 45-day period. 2015 WL 5604676 at *4. Citing *Harvill* and *Ihegword*, the district court rejected that testimony because it was "unsubstantiated." *Id.* at *6. In *Dixon v. First Choice Messengers, Inc.*, 2016 WL 774680 (S.D.Tex. Feb. 29, 2016), the plaintiff submitted

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[4] Relying on *Harvill*, the district court in *Ihegword* held that the plaintiff's testimony "that 'to the best of her memory' she worked an average of twelve hours per week of overtime" was insufficient to prove she had worked any overtime at all, because the plaintiff "ha[d] not submitted any evidence other than her own unsubstantiated assertions that she worked an estimated twelve hours of unpaid overtime per week." *Ihegword v. Harris Cty. Hosp. Dist.*, 929 F.Supp.2d 635, 668 (S.D.Tex. 2013).

a sworn declaration that she had worked approximately 55 hours per week. Citing and quoting *Harvill* and *Ihegword*, the district court held that summary judgment was warranted because "[s]imply put, the plaintiff has not produced any evidence ... apart from her *own* unsubstantiated guesswork." *Id.* at *3. (Emphasis in original). "Since the plaintiff has not submitted any evidence other than her own unsubstantiated assertions that she worked an estimated fifteen hours of unpaid overtime per week, the plaintiff has failed to raise a genuine issue of material fact for trial." *Id.* In *Pickney v. Express Automotive Group, Inc.*, 2014 WL 4794587 (S.D.Tex. Sept. 25, 2014), the plaintiff asserted in both a deposition and a declaration that he was required to work through his lunch hour, time for which he thus should have been paid. 2014 WL 4794587 at *2. The district court rejected that testimony because it was "unsupported." *Id.* at *4-*5. In *Powell v. KB Healthcare Inc.*, 2014 WL 12531187 (N.D.Tex. Oct. 14, 2014), the plaintiff submitted an affidavit swearing that she had regularly been docked for 30 minutes of break when she in fact continued working. The district court granted summary judgment, objecting that the plaintiff's affidavit was the "sole source of evidence" and that she had failed to "substantiate her claim." 2014 WL 12531187 at *2. In the proceedings below, the district court relied on *Oti* and *Dixon* (App. 21a), and Invesco cited *Dixon*, *Miller*, *Oti*, *Pickney* and *Powell*. Brief of Appellee Invesco, Limited, pp. 24-30.

The Fifth Circuit decision in the instant case applies binding circuit precedent, and reflects established practice in that Circuit. State courts within the Fifth Circuit follow that circuit's interpretation of the FLSA. In *Tooker v. Alief Ind. Sch. Dist.*, 522 S.W.3d 545 (Tex.Ct.App. 2017), the plaintiff asserting an overtime claim under the FLSA filed an affidavit stating that every day she had to remain on the job after her nominal quitting time in order to take calls and then lock up. 522 S.W.3d at 561. Citing *Ihegword*, the state court rejected that claim, reasoning that an "unsubstantiated and speculative estimate of uncompensated overtime does not raise a genuine issue to prelude summary judgment as to Tooker's overtime-compensation claim...." *Id.*

B. The Substantiation Requirement Is Rejected by Seven Circuits and One State Court of Last Resort

The Fifth Circuit's substantiation requirement has been rejected by seven circuits and by one state court of last resort. *See Dominguez v. Quigley's Irish Pub, Inc.*, 790 F.Supp.2d 803, 815 (N.D.Ill. 2011) ("the cases are uniform in holding that an employee may satisfy his burden of proof under the Act by relying on his recollection alone") (citing decisions in the Sixth and Eighth Circuits); *Tomei v. Corix Utilities (U.S.), Inc.*, 2009 WL 2982775 at *15 (D.Mass. Sept. 14, 2009) ("federal courts interpreting ... the FLSA have consistently held that an employee may recover unpaid overtime wages even where the only evidence of the hours

worked is the employee's personal recollection.") (citing decisions in the Fourth Circuit and several district courts).

In *Moran v. Al Basit LLC*, 788 F.3d 201 (6th Cir. 2015), the plaintiff offered testimony similar to that in the instant case, stating that he worked an average of 65 to 68 hours a week, and spelling out when he arrived and left work. 788 F.3d at 203. The court of appeals overturned a district court decision that had held such evidence was legally insufficient.

> This appeal raises one simple question: Where Plaintiff has presented no other evidence, is Plaintiff's testimony sufficient to defeat Defendant's motion for summary judgment. We hold that it is. Plaintiff's testimony coherently describes his weekly work schedule, including typical start and end times which he used to estimate a standard work week of sixty-five to sixty-eight hours.... [W]hile Plaintiff's testimony may lack precision, we do not require employees to recall their schedules with perfect accuracy in order to survive a motion for summary judgment.

788 F.3d at 205; *see id.* at 206 ("Despite the lack of corroborating evidence, Plaintiff's testimony is sufficient to create a genuine dispute of material fact that forecloses summary judgment."). The defendant in *Moran* argued that other circuits reject such unsubstantiated employee testimony, citing specifically the

Fifth Circuit decision in *Harvill*.[5] 788 F.3d at 206. The Sixth Circuit declined to adopt the approach in *Harvill*, explaining that it was inconsistent with prior Sixth Circuit precedent.

> Defendants cite no Sixth Circuit precedent for the opposite conclusion; rather, they rely on ... a handful of opinions from other circuits. None of these cases counsel in favor of ignoring clearly applicable Sixth Circuit caselaw.... [T]he out-of-circuit cases cited by Defendants [do not] belie the applicability of our own Circuit's on-point precedent....

788 F.3d at 206; *see Keller v. Miri Microsystems LLC*, 781 F.3d 799, 816 (6th Cir. 2015) ("Keller has not introduced records that definitively establish the hours he worked, but he has testified that he worked more than forty hours a week. In the absence of those employer records, ... a plaintiff's testimony is enough to create a genuine issue of fact.").

In the Second Circuit it has long been settled law that unsubstantiated employee testimony is sufficient to meet a plaintiff's burden.

> Consistent with [*Mt. Clemens*], an employee's burden in this regard is not high.... It is well settled among the district courts of this Circuit, and we agree, that it is possible for a plaintiff to meet this burden through estimates based on his own recollection.... Because Keubel could not prove his damages

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[5] Defendants-Appellees' Brief on Appeal, p. 21, available at 2015 WL 502464.

> with precision, the district court concluded that summary judgment was appropriate. We disagree with this approach.... [O]nce an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation simply because the employee failed to properly record or claim his overtime hours.

Kuebel v. Black & Decker, Inc., 643 F.3d 352, 362 (2d Cir. 2011). In *Aponte v. Modern Furniture Mfg. Company, LLC*, 2016 WL 5372799 (E.D.N.Y. Sept. 24, 2016), the employer asked the district court to apply the Fifth Circuit decisions in *Harvill* and *Ihegword*. The district judge, citing *Kuebel*, refused to do so, explaining that those "out-of-circuit ... cases are not binding on this Court." 2016 WL 5372799 at *13-*14. The rule in *Kuebel* has been applied in dozens of district court decisions in the Second Circuit.

The Seventh, Eighth, and Ninth Circuits hold that a finding that an employee worked overtime, and as to the amount of that overtime, can be based simply on the employee's testimony about his or her recollection of those hours. *Melton v. Tippecanoe County*, 838 F.3d 814, 819 (7th Cir. 2016) ("Relying on the employee's recollection is permissible given the unlikelihood that an employee would keep his own records of his work hours."); *Espenscheid v. Directsat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) ("The unreported time for each employee could be reconstructed from memory...."); *Mumbower v. H.R. Callicott*, 526 F.3d 1183, 1186 (8th Cir. 1975) ("The District Court relied primarily upon

plaintiff's own recollections to determine the number of hours she worked.... To do so was proper, as defendants maintained none of the employment records required by the FLSA, ... and will not be permitted to benefit from their failure to do so."); *Clark v. A & B Automotive & Towing Service, Inc.*, 1996 WL 311487 at *1 (9th Cir. June 7, 1996) ("A & B ... argues that the district court erred by finding that plaintiffs ... were entitled to compensation for sixteen-and-a-half hours per week [of overtime]. [The plaintiffs'] testimony, however, would have allowed the district court to award even more compensable ... time.... Since the district court was entitled to credit [the plaintiffs'] testimony, its finding was not clearly erroneous.").

When the Secretary of Labor sues to obtain overtime pay on behalf of workers whose FLSA rights have been violated, he or she often relies on the testimony of the worker or workers involved to demonstrate that they worked more than 40 hours a week, and to show how many hours of work occurred. In the Fourth and Tenth Circuits, the courts of appeals have applied the majority rule at the behest of the Secretary. In *Wirtz v. Durham Sandwich Co.*, 367 F.2d 810, 812 (4th Cir. 1966),

> [t]he District Court found that [the employee worked] ... a work week of 59 1/2 hours ... Durham ... maintains that [the employee] worked only an average of 45 hours per week. No documentary evidence was produced, and the District Court's finding was based upon [the employee's] credited testimony.... Durham

> failed to keep any records of the time Davis worked.... The[] [*Mt. Clemens*] standard was satisfied on trial.

367 F.3d at 812; *see McFeeley v. Jackson Street Entertainment, LLC*, 825 F.3d 235, 247 (4th Cir. 2016) (in the absence of reliable records "the best evidence available came from plaintiffs' own recollection [about how long each one worked,] which the jury duly considered along with defendants' objections to its accuracy."). In *Hodgson v. Humphries*, 454 F.2d 1279 (10th Cir. 1972), the Tenth Circuit explained that

> [t]he trial court's judgment ... is based upon the testimony of the affected employees who testified concerning the approximate dates of their employment [and] the number of hours they generally worked.... The testimony of the former employees, standing alone, made out the Secretary's prima facie case.

454 F.3d at 1283; *see Doty v. Elias*, 733 F.3d 720, 725 (10th Cir. 1984) ("[A]t the time of trial the [plaintiffs] apparently recalled the number of weeks they worked ... and approximately how many hours per week they worked.... Each plaintiff in the instant case testified regarding the approximate number of hours he or she worked ... [The employer] offered testimony that at least some of plaintiffs' figures were exaggerations. It is the job of the trial court to ... resolve conflicting testimony."); *Porter v. Poindexter*, 158 F.2d 759, 761 (10th Cir. 1947) ("The evidence sustains the court's findings as to the number of hours worked. The employee testified that he worked from 7 o'clock in the evening until

5 o'clock in the morning, with the exception of Saturdays and Sundays when he left work at 6 o'clock, and that he worked seven additional hours each week collecting accounts. The employer's objection to the sufficiency of this evidence is fully answered in *Anderson v. Mt. Clemens Pottery Co.....*").

The majority rule in the federal courts of appeals is followed by the Supreme Court of South Dakota. *Graham v. Babinski Properties*, 562 N.W.2d 395, 398 (S.D. 1997) ("An employee's recollection of hours worked may establish a prima facie case.") (citing *Mumbower*).

II. THE FIFTH CIRCUIT SUBSTANTIATION REQUIREMENT SERIOUSLY UNDERMINES THE FLSA OVERTIME AND RECORD-KEEPING REQUIREMENTS

In *Mt. Clemens*, the government advised this Court that the stringent proof standard at issue in that case posed a grave threat to the viability of the Fair Labor Standards Act. "[T]he standard of proof which the master imposed on the employees, and which the circuit court of appeals confirmed, may so substantially impair the efficacy of the [statutory] remedy as seriously to affect the administration and enforcement of the Act generally." Brief for L. Metcalf Walling, Administrator of the Wage and Hour Division, United States Department of Labor, as Amicus Curiae, No. 342, October Term 1945, p. 9. "[T]hat standard of proof ... was too strict and would only encourage employers

to evade the Act and deny employees the protections intended by Congress." *Id.* at 12. The standard of proof imposed by the Fifth Circuit, which bears a decided resemblance to the standard rejected by this Court in *Mt. Clemens*, presents the same obstacle to compliance with the FLSA.

Both standards of proof create a powerful incentive for employers to violate the record-keeping requirements of the Act and its implementing regulations. This Court recognized in *Mt. Clemens* that a rule that makes it difficult for an employee to prove an overtime violation in the absence of the required employer-maintained records places "a premium" on violating the FLSA record-keeping requirements. 328 U.S. at 687. A violation of the record-keeping requirements creates an affirmative defense to a violation of the overtime requirement whenever an employee cannot meet such a stringent standard. The Fifth Circuit substantiation requirement "undermine[s] the remedial goals of the FLSA, as it would permit an employer to ... have its managers ... not ... record overtime, and then, when an employee sues for unpaid overtime, assert that his claim fails because his timesheets do not show overtime." *Kuebel*, 643 F.3d at 364.

The Fifth Circuit's rule also encourages employers to disregard the overtime requirement itself. As this Court noted in the context of Title VII,

> [i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is

> the reasonably certain prospect of a backpay award that "provide(s) the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (quoting *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)). The Fifth Circuit substantiation requirement eliminates in many situations any "reasonably certain prospect" that a meritorious FLSA overtime claim will succeed and result in a back pay award. Most employees are unlikely to have access to a convincing method of corroborating their own testimony as to the hours they worked. The slight possibility that an occasional employee may happen to have such evidence will have little deterrent effect. The incentive for unlawful employer practices is particularly great with regard to FLSA overtime claims, because employers actually make money by violating the FLSA, which is not usually true for Title VII violations. Illegality aside, if an employer can increase its bottom line by denying a worker $10,000 in required overtime, and then avoid liability by violating the record-keeping requirements, that double violation of federal law makes economic sense. The remedial provision of the FLSA, unlike Title VII, does not permit aggrieved employees to obtain injunctive relief.

The Fifth Circuit requirement that employees produce evidence substantiating their testimony "improperly transfer[s] the burden of record-keeping from [the employer] to the Plaintiffs, a result that is plainly contrary to the FLSA...." *Aponte v. Modern Furniture Mfg. Company, LLC*, 2016 WL 5372799 at *13 (E.D.N.Y. Sept. 24, 2016). This Court noted in *Mt. Clemens* that employees themselves rarely create their own records of hours worked, and that informal records may well be less accurate than, for example, a time clock. 328 U.S. at 687. It would often be impracticable for an employee to create convincing records, and at best considerable ingenuity could be required. Ms. Kirk might have tried to document her daily arrival and departure time at work by taking a selfie, while holding a copy of each day's newspaper, as she entered and later left her office, and then immediately emailing the photograph to herself to establish the date and time it was taken. An employee would not even consider such taking extraordinary measures until and unless she had concluded that her job was covered by the FLSA overtime requirement. Even that might not have been sufficient here, however, because Invesco argued, and the magistrate judge held, that Kirk also had to establish, and subtract from each period she was at work, the amount of time that was devoted to "breaks, lunch, doctor appointments, and any other period when she was not working...." App. 42a. With regard to work she did from home, Kirk attempted to establish those hours through testimony by her mother, but the courts below objected that her mother, quite understandably, had no specific memory of the hours Kirk worked at home on

particular days over a period of several years. App. 7a-8a, 22a-23a. Most spouses or roommates might be unable or unwilling to function as a human time clock. An employer could structure its operations in a manner that made it harder for employees to corroborate their testimony. In the instant case, for example, the software on Kirk's office computer recorded only when she logged on in the morning, but not when she logged off at night, so the magistrate judge concluded that the computer records that did exist could not substantiate Kirk's testimony. App. 13a.

The manifest consequences of the Fifth Circuit's substantiation requirement sharply restrict the ability of the Secretary of Labor, as well as that of individual workers, to enforce the FLSA overtime provisions. The government must establish that any employee for whom it seeks relief worked more than 40 hours a week, and must demonstrate how many overtime hours were worked. In Labor Department actions, the testimony of the employee or employees concerned is often the only evidence which the Secretary has; the government has regularly relied on employee testimony in its overtime cases.[6]

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[6] *See, e.g., Solis v. Tally Young Cosmetics, LLC,* 2011 WL 1240341 at *3 (E.D.N.Y. March 4, 2011); *McLaughlin v. Tony and Susan Alamo Foundation,* 1989 WL 90560 at *3 (W.D.Ark. April 25, 1989); *Brock v. Seto,* 790 F.2d 1446, 1449 (9th Cir. 1986); *Donovan v. Kentwood Development Co., Inc.*, 549 F.Supp. 480, 485 (D.Md. 1982); *Marshall v. I.L. Van Matre,* 634 F.2d 1115, 1118-19 (8th Cir. 1980); *Brennan v. Carl Roessler, Inc.*, 361 F.Supp. 229, 233-34 (D.Ct. 1973); *Hodgson v. Humphries*, 454 F.2d 1279, 1283 (10th Cir. 1972); *Wirtz v. Durham Sandwich Co.*, 367 F.2d 810, 812

The district court aptly depicted the substance of, and attitude underlying, the Fifth Circuit substantiation requirement when it dismissed Kirk's sworn statement, despite being based on personal knowledge of her contemporaneous working hours, as "mere testimony." App. 20a. Except for the two witness requirement of the Treason Clause of Article III, the testimony of a witness based on personal knowledge is generally sufficient to demonstrate a disputed fact.

> In most contexts, testimony standing alone, if believed, will be sufficient to carry the day. Indeed, a defendant in a criminal case may, consistent with proof beyond a reasonable doubt, lose his liberty (or his life) on the uncorroborated testimony of an admitted perjurer, a convicted felon, or an accomplice.... In any kind of case, a party's uncorroborated testimony can suffice to create an issue of fact and defeat summary judgment.... It would be odd, to say the least, if an FLSA plaintiff could not, as a matter of law, prevail unless there were evidence corroborating his or her rendition of events.

Dominguez v. Quigley's Irish Pub, Inc., 790 F.Supp.2d 803, 805 n.6 (N.D.Ill. 2011). In an FLSA overtime case, the *defendant* could of course rely on unsubstantiated exculpatory employee testimony. In *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016), the defendant itself repeatedly invoked unsubstantiated employee

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(4th Cir. 1966); *Goldberg v. Anderson-Brown Patrol, Inc.*, 199 F.Supp. 722, 724 (W.D.N.C. 1961).

testimony which it contended supported its position[7]; at oral argument, counsel for the defendant described that unsubstantiated employee testimony as "the best evidence" of how long workers had spent on the activities at issue.[8] Similarly, Justice Thomas, in his dissenting opinion, relied on employee testimony which was favorable to the defendant.[9]

In *Tyson Foods*, this Court granted review to determine whether an unduly lax Eighth Circuit

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[7] Brief of Petitioner, No. 14-1146, at *10 ("the few class members who testified admitted that Tyson required employees to wear different personal protective equipment.... In fact, each testifying class member indicated that he was personally required to wear different equipment.... Additionally, these employees testified that they don and doff these pieces of equipment in a different order.... Mr. Lovan testified that it took him eight minutes to don his protective equipment"), *34 ("One class member ... testified that it took him just over two minutes to don his equipment").

[8] Oral Argument, No. 14-1146, available at 2015 WL 8491824 at *25 ("[I]f you take the testimony of the four named plaintiffs, they – they were significantly different than the – than the 18 and 21 minutes times [in the Mericle study]. And so the – the best evidence was, is that Mericle['s study contained] ... wildly extravagant numbers....").

[9] 136 S.Ct. at 1057 ("Even testifying class members would seem unable to use Mericle's averages.... [E]mployee Donald Brown testified that [donning equipment] took him around 2 minutes. Others also testified to donning and doffing times that diverged markedly from Mericle's estimates"; "this disparity between average times and individual times"), 1060 ("Testifying class members attested to spending less time on donning and doffing than Mericle's averages would suggest. Had Tyson been able to cross-examine more than four of them, it may have incurred far less liability.") (dissenting opinion).

standard had imposed on an employer – whose violation of the FLSA was undisputed – liability to some class members who had not been injured.[10] In the instant case, the indefensibly stringent Fifth Circuit standard – like the harsh standard rejected by this Court in *Mt. Clemens* – often immunizes employers from liability for violations of the FLSA. Protecting workers from violations of the Fair Labor Standards Act is no less important than protecting proven violators from unwarranted monetary awards.

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[10] Petition for Writ of Certiorari, No. 14-1146, p. i ("II. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages").

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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