No. 17-1187

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Maryam Balbed,

Plaintiff-Appellant,

v.

Eden Park Guest House, LLC, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Maryland

REPLY BRIEF OF APPELLANT MARYAM BALBED

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INTRODUCTION

Defendants' brief argues that when an employer and employee have entered a "reasonable agreement" under 29 C.F.R. § 785.23 the employer need not comply with otherwise mandatory regulations governing recordkeeping and valuation of in-kind wages. As discussed below (in parts I.A., B., and C.), that argument cannot be squared with the text of the regulations and all relevant case law. Thus, like all other employers, defendants are subject to those regulations, and defendants' violations of them entitled Ms. Balbed to partial summary judgment and a determination of past-due wages on her FLSA claims.

Part I.D. shows why, contrary to defendants' arguments, the agreement here was not "reasonable" under section 785.23. For that reason, on remand, Ms. Balbed should be awarded relief for all hours worked.

Defendants also maintain that section 785.23 preempts Ms. Balbed's Maryland-law wage-and-hour claims. Part II explains that application of Maryland law would not present an obstacle to the accomplishment of federal objectives, including the objectives of section 785.23, in light of the FLSA's principal goal: setting minimum standards to ensure that employees receive lawful wages for all hours worked. Ms. Balbed's Maryland-law claims therefore are not preempted.

ARGUMENT

I. Defendants failed to comply with the FLSA and its regulations.

A. Ms. Balbed was entitled to partial summary judgment because of defendants' failure to comply with federal recordkeeping rules regarding in-kind wages.

Ms. Balbed's opening brief explains that her motion for partial summary judgment should have been granted because (1) Ms. Balbed's cash wages were insufficient to meet the applicable minimum wage; (2) FLSA regulations and an unbroken line of authority prohibit an employer from counting in-kind items as wages absent proper recordkeeping; and (3) defendants kept no records regarding the cost of the in-kind items. Balbed Br. 19-22.

Defendants' brief does not contest any of this. It does not (and could not) dispute that Ms. Balbed's cash wages were below the minimum wage. It does not dispute that 29 C.F.R. § 516.27, and all relevant case law, *see* Balbed Br. 20-21 & n. 6, provide that, absent proper recordkeeping, in-kind items may not be counted as wages under the FLSA. And defendants have acknowledged that they kept no records, let alone records that would enable someone to determine the cost to defendants of providing room and board to Ms. Balbed. *See* JA 246-49.

As in the district court, defendants have only one response. They claim that 29 C.F.R. § 785.23 – an interpretive rule governing "hours worked" by certain employees "who reside[] on [their] employer's premises" and enter into "reasonable agreement[s]" with their employers – overrides all other regulatory authority issued

under the FLSA. As defendants put it, section 785.23 is an "all-encompassing" regulation that renders all other provisions of the Act irrelevant. Def. Br. 25. That position is flatly at odds with the regulations themselves, the case law, and common sense.

1. The regulations. Our opening brief (at 23-24) shows that section 785.23's text concerns only one thing: how an employee's on-the-job *hours* may be calculated in certain circumstances. It does not speak to how an employee's *wages* – whether in-kind or cash – are valued.

Defendants ignore section 785.23's language and then make three points. First, defendants turn to 29 C.F.R. § 516.27, the regulation demanding recordkeeping for in-kind wages. Defendants say that section 516.27 involves when and how to provide a "credit" to employees' wages for the "cost" of room and board under section 3(m) of the FLSA (which defines "wage" under the Act, *see* 29 U.S.C. § 203(m)). Def. Br. 24. Defendants then assert that "an employer invoking §785.23 is not seeking a credit toward 'wages' for the 'reasonable cost' of board/lodgings under Section 3(m) but, rather, is seeking to establish the estimated value of the non-compensatory benefits (including room/board)." *Id.* According to defendants, this reasoning renders the FLSA's recordkeeping regulations irrelevant here. *Id.*

This argument makes no sense. As explained, section 785.23 authorizes a method for estimating on-the-job *hours* and does not breathe a word about "seeking to establish the estimated value" of anything, let alone "non-compensatory benefits" (a

term that defendants apparently have made up). Section 785.23, on the one hand, and the regulations concerning valuation of in-kind items, on the other, occupy different spheres, and one does not trump the other. Defendants' argument is thus pure semantics – an attempt to create some legally meaningful distinction between "credits" to (or "deductions" from) wages, *see* Def. Br. 35 n.9, and the purported value of "non-compensatory benefits," where none exists.

But even the semantics do not work in defendants' favor. To use their own language, what else are defendants doing but seeking "board/lodging credits" under section 3(m) of the Act? Def. Br. 23. Indeed, it is *defendants* (more than Ms. Balbed) who need section 3(m). That section alone authorizes an employer to include room and board in an employee's "wage," *see* 29 U.S.C. § 203(m), which otherwise would be limited to payment in cash dollars only, *see id.* § 206(a)(1). And because defendants acknowledge that without counting room and board, they have not paid Ms. Balbed the minimum wage, Def. Br. 40 & n.10; ECF 33, at 6, section 3(m) is essential to *their* defense.

Second, our opening brief (at 25) explains that 29 C.F.R. § 785.46 – entitled "*Applicable* regulations governing keeping of records" (emphasis added) – is, like section 785.23, a part of the "Hours worked" rules contained in 29 C.F.R. part 785. Section 785.46 expressly cross-references the recordkeeping regulations on which Ms. Balbed relies, indicating that an employer operating under section 785.23, like all other employers, must comply with those regulations. *See* Balbed Br. 25.

Defendants respond that some part 785 regulations – for instance, 29 C.F.R. § 785.11, which indicates that employees must be paid for work "suffered or permitted" even if not "requested" by the employer – are inconsistent with section 785.23. *See* Def. Br. 32. This argument is a non sequitur. The question here is not whether all or some of the regulations in part 785 can operate simultaneously, but whether section 785.23 can co-exist with the recordkeeping rules for in-kind wages. It can. Indeed, section 785.46's cross-reference to the recordkeeping rules would be nonsensical if the recordkeeping rules were inapplicable to employees governed by the various work-hour rules in part 785, including section 785.23.

Third, defendants appear to rely on the Department of Labor's December 2015 Field Assistance Bulletin to support their argument that the FLSA's recordkeeping rules do not apply to employees governed by section 785.23 agreements (apparently because those rules are promulgated under section 3(m)). *See* Def. Br. 23. But the Bulletin says just the opposite. The whole point of the Bulletin was to explain how to value the cost of lodging for a category of "domestic service" workers, newly covered by the Act, "who reside[] at the worksite." Dep't of Labor, Wage & Hour Div., Field Assistance Bulletin No. 2015-1, Credit Toward Wages under Section 3(m) of the FLSA for Lodging Provided to Employees (2015), https://www.dol.gov/whd/FieldBulletins/fab2015_1.pdf (reproduced at JA 847, 854 n.1) ("Field Assistance Bulletin"). The Bulletin thus expressly indicates – twice – that these workers may be employed under section 785.23 agreements. JA 854 n.1 (citing

section 785.23), 849 (same). It should go without saying that the Labor Department would not have issued guidance on the requirements of recordkeeping and cost valuation for lodging for employees covered by section 785.23 if those requirements did not apply to those employees.[1]

2. Case law. Consistent with section 785.23's text, all case law of which we are aware supports Ms. Balbed's position that section 785.23 concerns only the number of *hours* that may be counted toward the FLSA's minimum-wage and overtime requirements (and not how to value the cost of in-kind items). This case law encompasses dozens of decisions, most pertinently the two decisions cited in section 785.23 itself, *see* Balbed Br. 24, which defendants have ignored. Suffice it to say that every case addressing the applicability of section 785.23 concerns a dispute over the number of compensable hours. And perhaps more to the point, no case stands for the position taken by defendants here – that section 785.23 overrides all other FLSA regulations concerning recordkeeping and the proper valuation of in-kind wages.

Defendants respond by citing this Court's decisions in *Myers v. Baltimore County*, 50 Fed. App'x 583 (4th Cir. 2002), and *Garofolo v. Donald B. Helsep Association*, 405 F.3d 194 (4th Cir. 2005), apparently because in those cases the Court upheld a section 785.23 agreement and the employees in both were paid, at least in part, in-kind. Def.

[1] Defendants have not responded to the showing in our opening brief that the Bulletin supports Ms. Balbed's position in several respects. *See* Balbed Br. 27, 31, 33.

Br. 26. This, too, is a non sequitur. In neither case did plaintiffs even contest the value of the in-kind items, and no one challenged the applicability of the Act's recordkeeping and in-kind-wage valuation regulations. Rather, in both, the only question was whether the agreement was valid under section 785.23 as a reasonable approximation of the employees' *hours*. *Myers*, 50 Fed. App'x at 586, 592-93 (plaintiffs argued only that they were entitled to "compensation for every *hour* that they were required to be present") (emphasis added); *Garofolo*, 405 F.3d at 200 (describing plaintiffs' sole contention "that the agreement was unreasonable because they regularly worked more than 40 *hours* per week") (emphasis added). As relevant here, then, these cases stand for the proposition – *our* proposition – that section 785.23 governs agreements about work hours.[2]

Our opening brief (at 26) cites two cases involving employees working on their employers' premises under part 785 agreements in which courts independently considered whether the employer had kept proper records and proved costs for room and board under 29 C.F.R. §§ 516.27 and 531.1. Defendants' efforts to distinguish these decisions fail.

[2] In *Garofolo*, the employees' cash wage of $900 per month, 405 F.3d at 197, was sufficient on its own to meet the minimum wage for the 40 weekly hours provided in the parties' agreement during the relevant period (1998-2003), when the minimum wage was $5.15 per hour. *See* History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938 – 2009, https://www.dol.gov/whd/minwage/chart.htm. The employees simply wanted to be paid for more hours.

Defendants say that *Maldonado v. Alta Healthcare Group*, 17 F. Supp. 3d 1181 (M.D. Fla. 2014), is "entirely distinguish[able]" because it involved "specific regulations applicable only to nursing homes." Def. Br. 33. That is false. In fact, in *Maldonado*, the employer relied on section 785.23, and the court found the employment agreement "unreasonable as a matter of law" because the employer had violated the recordkeeping and substantiation requirements for in-kind items under sections 516.27 and 531.3, *see Maldonado*, 17 F. Supp. 3d at 1192, just as occurred here. (For what it's worth, *Maldonado* cited 29 C.F.R. §§ 785.21 and 785.22 – governing compensability of sleep and/or meal time – and noted that the parties did "*not* present argument" as to them, 17 F. Supp. 3d at 1191 (emphasis added). Those regulations do not mention nursing homes.)

Defendants do not deny that *Herman v. Palo Group Foster Home, Inc.*, 976 F. Supp. 696 (W.D. Mich. 1997), held that the FLSA's recordkeeping requirements applied to an employment relationship governed by 29 C.F.R. § 785.22, which, as just noted, authorizes agreements to exclude employees' sleep and meal hours. The court explained that employers wishing to count as wages "board, lodging, or other facilities" must "maintain records 'substantiating the cost of furnishing each class of facility' [to their employees]," *id.* at 701 (quoting 29 C.F.R. § 516.27(a)), and found "patently wrong" the employers' contention that they were "not required to provide documentation of meal and lodging costs." *Id.* at 701 n.3. Defendants' only response is that *Herman* involved an agreement under section 785.22 not 785.23. Def. Br. 33-34.

But that distinction cannot possibly matter. Both regulations govern work-hour agreements, and both are contained in part 785, which, according to *defendants*, is not subject to the Act's recordkeeping requirements. Def. Br. 31-32. *Herman* is flatly at odds with that position.

3. Common sense. Ms. Balbed's position – based on section 785.23's text and all relevant case law – dovetails with common sense. Section 785.23 "offers a methodology for calculating how many hours the employees actually worked within the meaning of the FLSA." *Garofolo v. Donald B. Helsep Ass'n*, 405 F.3d 194, 199 n.6 (4th Cir. 2005) (quotation marks omitted) (quoting *Leever v. Carson City*, 360 F.3d 1014, 1018 n.2 (9th Cir. 2004)). It does so because in some circumstances when an employee works and lives on the employer's premises it may be "difficult to determine the exact hours worked." 29 C.F.R. § 785.23. This difficulty arises because the employee needs sleep and may desire time for personal activities and the employer may be unable to monitor the employee at all times. It is a method for regulating hours that may be, at least in part, within the *employee's* control.

Properly understood, then, no rational legislator or rule maker would want section 785.23 to override regulations having nothing to do with calculating an employee's hours, particularly regulations concerning recordkeeping and calculation of the cost of in-kind items, which often are within the *employer's* purview. For instance, nothing about the employee's presence on the employer's premises makes it more or

less "difficult to determine" the cost, if any, to the *employer* of providing an employee a room in an unpermitted cellar.

* * *

For these reasons, the district court should have entered partial summary judgment for Ms. Balbed.

B. The purported value of the cellar room should not have been included in Ms. Balbed's wages because the room was furnished in violation of federal and local law.

Our opening brief (at 27-29) showed that the FLSA prohibited including the purported value of the cellar room in Ms. Balbed's wages because the room was provided in violation of local law. *See* 29 C.F.R. § 531.31. None of defendants' responses has merit.

Defendants' principal argument reprises its overall position that section 785.23 overrides all other FLSA regulations. Def. Br. 35-36. Defendants repeat their semantic assertion that they are "not seeking to include the 'cost' of board/lodging within the definition of 'wages'" or "claiming any relief" under 29 U.S.C. § 203(m). Def. Br. 36. But that is exactly what defendants are doing. Indeed, as noted (*supra* at 4), defendants need section 203(m) because, as they acknowledge, without counting in-kind items, they have not paid Ms. Balbed the minimum wage.

Defendants cite four cases for the proposition that local law may be ignored because an employer operating under section 785.23 need only provide "adequate sleeping facilities." Def. Br. 36-37. Those cases support Ms. Balbed. Each concerned

only whether "sleep time" should be included in a worker's *hours* under 29 C.F.R. § 785.22, thus underscoring that part 785 concerns how to count *hours* (and nothing else). In none of the cases was the employer even attempting to pay the plaintiffs in-kind, and in none did the plaintiffs argue that the hourly *wage* was unlawfully low.[3] In sum, these decisions have nothing to do with 29 C.F.R. § 531.31, which expressly bars an employer from including in an employee's "wage" lodging provided in violation of local law.

Defendants argue briefly that Ms. Balbed cannot take advantage of section 531.31 because she did not prove that the room violated local law. Def. Br. 38. At the threshold, defendants have forfeited this argument. In the district court, Ms. Balbed expressly argued that 29 U.S.C. § 531.31 prohibited inclusion of lodging in her wages, ECF 27-1, 12-13, and, as noted in our opening brief (at 15, 28-29), defendants did not respond at all, *see generally* ECF 29 & 33. If "a party wishes to preserve an argument for appeal, the party must press … the argument during the proceedings before the district court." *In re Under Seal*, 749 F.3d 276, 287 (4th Cir. 2014) (quotation marks omitted). This principle applies to all issues raised for the first time on appeal, including, for instance, a response to a party's defense to liability. *See, e.g.*, *Jones v.*

[3] *See Hendricks v. Okla. Prod. Ctr. Group Homes, Inc.*, 159 Fed. Appx. 875, 877 (10th Cir. 2005); *Bouchard v. Reg'l Governing Bd.*, 939 F.2d 1323, 1328-30 (8th Cir. 1991); *Trocheck v. Pellin Emergency Med. Serv.*, 61 F. Supp. 2d 685, 689 n.5 (N.D. Ohio 1999); *Beaston v. Scotland Sch. For Veterans' Children*, 693 F. Supp. 234, 235-36 & n.2 (M.D. Pa. 1988).

C.I.R., 642 F.3d 459, 466 (4th Cir. 2011) (tolling response to statute of limitations defense forfeited because not raised below).

Beyond their forfeiture, defendants' arguments are meritless. We rely on the arguments in our opening brief (at 27-29), and note only that, at summary judgment, Ms. Balbed easily created a dispute on the section 531.31 issue, given that the burden was on defendants "to segregate permissible [in-kind] credits from impermissible ones," *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 476 (11th Cir. 1982). This is especially true given defendants' concession below that they obtained County permits for the upstairs guest rooms but not for the cellar room. JA 235, 430-31.

C. Room and board should not have been included in Ms. Balbed's wages because their purported values were unlawfully calculated and unsubstantiated.

Our opening brief (at 29-34) shows that the district court erred by allowing defendants to count as wages unlawfully calculated and unsubstantiated values for room and board, and that Ms. Balbed's motion for partial summary judgment should have been granted on that basis alone. Defendants' principal response is the same as with almost everything else: that they properly ignored the law regarding calculation and substantiation of in-kind wages because it flows from section 3(m) of the Act, which, they say, has no bearing on agreements under "the *sui generis* regulation found at §785.23." Def. Br. 39. This is wrong for the reasons already given, and we simply remind the Court that section 3(m) is essential to *defendants'* position because, without

it, an employee's "wage" cannot include room and board at all. *See* 29 U.S.C. § 203(m).

Defendants go on to extol the supposedly "undisputed evidence" of the value of the in-kind items. Def. Br. 40. We could address this argument on its own terms – for instance, defendants provided *no* evidence of the value of utilities, *see* Balbed Br. 33-34 – but that would ignore the fundamental problem: Defendants seek credits for the purported market value of in-kind items (including profit), but, as our opening brief shows (at 29-31), applicable regulations and all relevant case law demand that in-kind items be substantiated and valued at the actual cost to the employer (without profit).[4] And on that score, defendants did not (and cannot) prove any cost to them for use of an unpermitted cellar room that was never rented out, and they presented no evidence whatsoever to substantiate the costs of allowing Ms. Balbed to eat the breakfast foods that she prepared and for the tiny marginal costs that may have been associated with her use of lights and water. *See* Balbed Br. 30-34.

D. The employment agreement was not a "reasonable agreement" under 29 C.F.R. § 785.23, and therefore Ms. Balbed was entitled to minimum wages and overtime pay, if any, for all hours worked.

Independent of the arguments that room and board should not have counted toward Ms. Balbed's minimum wage – which, as already explained, entitled Ms.

[4] *See, e.g.*, 29 C.F.R. § 531.3(a)-(b); Field Assistance Bulletin, JA 852; *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1514 (11th Cir. 1993); *New Floridian Hotel, Inc.*, 676 F.2d at 474 n.12 (11th Cir. 1982); *Estanislau v. Manchester Developers, LLC*, 316 F. Supp. 2d 104, 109 (D. Conn. 2004).

Balbed to partial summary judgment even on *defendants'* understanding of the employment agreement – the employment agreement was not "reasonable" as required by section 785.23. Therefore, Ms. Balbed is entitled to a remand for a determination by the trier of fact of the amounts due her under the FLSA for all hours worked. *See* Balbed Br. 34-42.

Ms. Balbed's opening brief (at 24-25, 35-36) pointed out, for starters, that the agreement cannot be reasonable because a reasonable agreement's most basic element is a statement of the presumptive number of hours for which the employee will be paid. *See Leever v. Carson City*, 360 F.3d 1014, 1021 (9th Cir. 2004); *see also id.* at 1018 (noting that employer has burden to prove the terms of the agreement "plainly and unmistakably"). And though defendants insist that the contract lists only twenty-nine hours, it actually lists seventy-one. Defendants claim that this "distort[s] the terms of the Agreement," Def. Br. 29, but we are not making this up: the agreement lists weekly hours in two columns, totaling seventy-one. JA 611.

Defendants next argue that Ms. Balbed waived any argument about what the agreement actually says because she conceded that the agreement required twenty-nine work hours and no more. Def. Br. 30. Even if true, this would be irrelevant because *defendants* bore the burden of proving at summary judgment the reasonableness of the agreement, *Garofolo v. Donald B. Helsep Ass'n*, 405 F.3d 194, 199-200 (4th Cir. 2005), and that burden cannot be met on a presumed number of work hours flatly (and significantly) at odds with the agreement itself. *Leever*, 360 F.3d at

1021. (Put another way, Ms. Balbed is not trying to prove that the contract entitles her to pay for seventy-one hours per week, but only that the agreement is unreasonable as a matter of law as interpreted and applied by defendants. Her position is that the FLSA entitled her to the correct pay for all hours worked.)

Defendants' waiver claim is also factually incorrect. Ms. Balbed never conceded the agreement provided for twenty-nine hours and no more. She moved for *partial* summary judgment on the theory that even if she were entitled to be paid for only the "absolute minimum" of twenty-nine hours, "*excluding* any time she was *required* [by the contract] to be available for check-in times and closing," she still had not been paid the minimum wage. ECF 27-1, at 18 (second emphasis added). She then went on to note that, based on the evidence, including "Defendants' own records and testimony," she was entitled to be paid for "all hours worked." *Id.* There is no waiver.[5]

[5] Defendants' distortion of the statements of Ms. Balbed's trial counsel is particularly disturbing. Defendants assert that counsel "confirm[ed] that the Agreement provides for '29 hours.'" Def. Br. 27. What counsel actually said is that twenty-nine hours was an "absolute minimum" and that to the "right of the column [of the agreement] with the guest room and common area cleaning, there is additional time that would be *required* for check-in and closing. And based on the duties and the job responsibilities listed in this contract, they are sort of an ambiguous number of hours that might be required especially for that sixth point [in the agreement,] which is to ensure complete guest satisfaction." JA 878 (emphasis added); *see also* JA 879. This statement is fully consistent with the agreement, which sets out the two columns noted by counsel, JA 611, and with Ms. Balbed's position that, even at defendants' "absolute minimum," she was entitled to partial summary judgment and compensation for all hours actually worked. We reiterate that if the agreement is ambiguous, under basic contract law, it cannot be upheld as "reasonable" under section 785.23. *See* Balbed Br. 35-36.

Beyond disputing the terms of the agreement, defendants say little about its reasonableness other than that "*Ms. Mukendi* [was] aware that the main tasks of cooking and cleaning took less than 29 hours per week," Def. Br. 42 (emphasis added), and that, according to defendants, Ms. Balbed "engaged in her personal pet projects," *id.* at 43. To be sure, that is defendants' view of things.

But defendants do not deny that the agreement itself lists many tasks required of Ms. Balbed beyond the cooking and cleaning that the agreement presumes will take twenty-nine hours, JA 611; they do not deny that Ms. Balbed performed those additional tasks, Balbed Br. 7-9; they do not deny that among Ms. Balbed's many tasks were yard work and on-going, time-consuming efforts to improve the Inn's social-media presence, both of which earned the Mukendis' lavish praise, *id.* at 8, 9; and they do not deny that they expected Ms. Balbed to "be there 24 hours a day or as much as possible," JA 398, and not "leave the Eden Park Guest House premises unless it was her 'day off'," JA 835. And even though defendants would prefer to pay Ms. Balbed for just twenty-nine breakfast and cleaning hours, they do not deny that the contract also required Ms. Balbed to be at Eden Park from 4 p.m. to 9:30 p.m. each night for check-in and at 10 p.m. for closing, JA 611. (During these times, she was not only available to guests, but performing her required social-media work, checking-in new guests, answering the phone, and completing other tasks. *See* Balbed Br. 38-39 & n.10.)

Two of these points are particularly salient. First, recall that in deciding whether an agreement is reasonable, a court must look to "all of the pertinent facts," including the extent to which the employee has "periods of complete freedom from all duties when he may leave the premises for purposes of his own." 29 C.F.R. § 785.23. This is an important factor, *see, e.g.*, *Garofolo*, 405 F.3d at 196-97; *De Guzman v. Parc Temple LLC*, 537 F. Supp. 2d 1087, 1092 (C.D. Cal. 2008), and defendants do not deny that the restrictions on Ms. Balbed's "complete freedom" were very significant. (The long hours listed in the agreement, JA 611, and that Ms. Balbed was not to leave Eden Park unless it was her day off, JA 835, make that clear.)

Second, although the parties differ on just how many hours Ms. Balbed worked beyond daily cooking and cleaning, defendants do not dispute that she was required to be present to serve customers seven nights a week (totaling forty-two hours) or that she did social media work, yard labor, and many other tasks. There is therefore little doubt that, whatever her exact hours, they regularly went beyond the twenty-nine listed for cooking and cleaning. Because section 785.23 "simply offers a methodology for calculating how many hours the employees *actually worked* within the meaning of the FLSA," *Garofolo*, 405 F.3d at 199 n.6 (emphasis added), an agreement that paid Ms. Balbed only for the cooking and cleaning hours cannot be viewed as reasonable. *See Leever*, 360 F.3d at 1014 (to be reasonable under section 785.23, an "agreement must take into account some approximation of the number of hours actually

worked."). For all these reasons, the district court should have held the agreement *unreasonable* as a matter of law.

On review of a grant of summary judgment, this Court is "required to view the facts and all justifiable inferences arising therefrom in the light most favorable to the nonmoving party," *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 312 (4th Cir. 2013), and reverse if, when viewed in this light, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Under these standards, even if the terms of the agreement, the severe restrictions on Ms. Balbed's freedom, and the evidence of Ms. Balbed's workload and hours do not demand, as we urge, a finding of unreasonableness, at the very least reasonableness was a question that should not have been resolved for defendants on summary judgment.

A final word. Defendants' brief is suffused with the assertion that they must be allowed to enforce the agreement, on defendants' antitextual terms no less, because it would have been "impossible" for them "to track and confirm every minute/hour of the day that Balbed was performing actual work for Eden Park." Def. Br. 20; *see also id.* at 8, 11, 32, 34, 48. To be sure, section 785.23 seeks to account for situations where it would be "difficult to determine the exact hours worked" (though only when the parties clearly agree on a presumptive number of work hours and where the agreement is otherwise "reasonable").

But many unmonitored workers paid on an hourly basis work without agreements, like the clerk paid to sit until dawn at the lobby desk at the Holiday Inn, or the car mechanic, accountant, or lawyer, all of whom are expected to honestly report how long they have worked and be paid accordingly. Though section 785.23 authorizes a different approach under certain circumstances, we mention these common practices as a reminder that if an agreement fails to survive under section 785.23 because it does not fairly and accurately memorialize the presumptive number of work hours or is otherwise unreasonable – as we ask the Court to hold here – the sky will not fall. Rather, the parties' employment relationship here will then mimic many other employment relationships, and, if the parties are unable to settle their dispute, the trier of fact will determine the hours that Ms. Balbed actually worked.

II. Ms. Balbed's state-law claims are not preempted.

If this Court reverses on Ms. Balbed's FLSA claims, it need not reach the preemption question. If it affirms on these claims, however, it should hold that Ms. Balbed's state-law claims are not preempted. *See* Balbed Br. 43-48.[6]

Defendants begin with a lengthy discourse maintaining that the FLSA and Maryland law often are substantively identical. Def. Br. 45-48. True, but irrelevant. State and federal wage-and-hour law frequently do mirror each other.

[6] In that circumstance, the Court could instead remand to the district court for a determination whether to retain supplemental jurisdiction under 28 U.S.C. § 1367(c)(3). *See* Balbed Br. 43.

But defendants do not contest – nor could they – that on the preemption question here, state and federal law do *not* mirror each other. Federal law contains section 785.23, and state law does not have a similar provision, but instead demands that each hour worked be compensated at the minimum wage (and, where applicable, at the overtime rate). The preemption problem here is thus identical in principle to the preemption problem posed when federal law excludes coverage for an entire category of workers, but state law is silent on the issue, thus covering those workers under its general wage-and-hour provisions. *See, e.g.*, *Overnite Transportation Co. v. Tianti*, 926 F.2d 220, 221-22 (2d Cir. 1991) (per curiam); *Baxter v. M.J.B. Inv'rs*, 876 P.2d 331, 336 (Or. Ct. App. 1994).

Defendants assert that, in responding to their obstacle-preemption argument, we have erred "by focusing on the general purpose of the FLSA" rather than on the purpose of section 785.23. Def. Br. 52. That assertion is doubly wrong.

First, it is no error to focus on the fundamental purpose of the FLSA – "to guarantee either regular or overtime compensation for all actual work or employment," *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) – and then ask whether application of state law would undermine that purpose. Courts resolving preemption questions do that all the time. *See, e.g.*, *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1780 (2013); *Wyeth v. Levine*, 555 U.S. 555, 574 (2009); *English v. Gen. Elec. Co.*, 496 U.S. 72, 81-82 (1990). And that focus is particularly salient here, where the federal law's "central aim" is to achieve only

"certain *minimum* labor standards," *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (emphasis added). When federal law sets a floor, not a ceiling, state prerogatives are at their apex and preemption generally takes a back seat. *See, e.g.*, *Wyeth*, 555 U.S at 573-75; *Atherton v. F.D.I.C.*, 519 U.S. 213, 227-28 (1997); *Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (1987); *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 863 (4th Cir. 2001).

Second, we *did* explain in some detail why Maryland law does not threaten the purpose of section 785.23. *See* Balbed Br. 47-48. That section does not *require* employers and employees to enter an agreement whenever the employee lives on the employer's premises; and when they do come to a reasonable agreement, section 785.23 "simply offers a methodology for calculating how many hours the employees actually worked," *Garofolo*, 405 F.3d at 194. This is precisely what Maryland law seeks as well (though through a different methodology). *See id.*

Which brings us to the case law. Defendants cite no cases holding that a state law that uses an hour-calculation methodology different from section 785.23 is preempted by the FLSA. And they struggle to respond to the unbroken line of decisions holding that state wage-and-hour laws that cover categories of workers when the FLSA expressly excludes them are not preempted by the FLSA. *See* Balbed

Br. 45-46 & n.11 (discussing case law). Defendants only describe these cases' holdings, rather than confront their implications. *See* Def. Br. 52-53. [7]

Yet these applications of state law – which require employers to pay employees minimum wage and/or overtime when federal law expressly frees employers from those obligations – are far more powerful and anti-preemptive than what Maryland law does here: calculate actual work hours using a means different from the means chosen in section 785.23. To say, as defendants do, that federal law would be "eviscerated" by application of Maryland law here, *see* Def. Br. 54, is to say that all these precedents are wrong. More importantly, it is to misunderstand the FLSA's purpose in establishing minimum economic protections that the states may safeguard and enhance as they see fit.

CONCLUSION

This Court should reverse the district court's grant of summary judgment to defendants and its holding that the agreement here was reasonable under 29 C.F.R. § 785.23. It should direct the district court to grant Ms. Balbed's motion for partial summary judgment because defendants failed to pay the wages due her under the FLSA, leaving questions of the precise amounts due and undecided issues of individual liability for resolution on remand. If the Court affirms on the FLSA issues,

[7] Defendants do the same thing with circuit-court decisions holding that state-law opt-out class actions are not preempted even though FLSA plaintiffs are prohibited from pursuing opt-out class actions. Def. Br. 53 n.14; *see* Balbed Br. 46-47 (describing that line of authority).

it should either remand the Maryland state and local claims to the district court in the first instance for a decision on whether to retain supplemental jurisdiction, or hold that those claims are not preempted by the FLSA and remand for further proceedings on their merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,761 words, as calculated by Word 2013, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I certify that on July 10, 2017, I electronically filed this Reply Brief of Appellant Maryam Balbed using the CM/ECF System, which will send notice of the filing to the following registered CM/ECF user: appellees Eden Park Guest House, LLC, et al.'s attorney of record, Brian M. Maul (Brian@bmaullaw.com).

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