IN THE SUPREME COURT OF MARYLAND

Misc. No. 0017, September Term 2024
SCM-MISC-017-2024

ESTEFANY MARTINEZ,

Appellant,

v.

AMAZON.COM SERVICES, LLC,

Appellee.

Certified Question of Law from the
United States District Court for the District of Maryland
Civil Action No. 22-00502-BAH
(The Honorable Hurson, J., Presiding)

BRIEF OF *AMICI CURIAE* METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANTS

Suzanna Bobadilla (CPF No. 2311281039)
Bethel Habte (*Pro Hac Vice* pending)
Jessica Westerman (*Pro Hac Vice* pending)
Carolyn L. Wheeler (*Pro Hac Vice* pending)
Katz Banks Kumin LLP
11 Dupont Circle NW, Suite 600
Washington, DC 20036
(202) 299-1140

Counsel for Amici Curiae

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STATEMENT OF INTEREST

The Metropolitan Washington Employment Lawyers Association (MWELA) is a local affiliate of the National Employment Lawyers Association, a national organization of attorneys, primarily employees' counsel, who specialize in employment law. MWELA has over 300 members who represent and protect the interests of employees under state and federal law. The purpose of MWELA is to bring into close association employee advocates and attorneys to promote the efficiency of the legal system and fair and equal treatment under the law. MWELA has frequently participated as *amicus curiae* in cases of interest to its members, including the following cases involving Maryland wage and hour issues: *Peters v. Early Healthcare Giver, Inc.*, 439 Md. 646 (2014); *Marshall v. Safeway, Inc.*, 437 Md. 542 (2014); *Ocean City, Maryland, Chamber of Commerce v. Barufaldi*, 434 Md. 381 (2013); and *Mario Ernest Amaya, et al., v. DGS Construction, LLC*, 479 Md. 515 (2022). MWELA has an interest in ensuring that Maryland's wage laws are interpreted consistently with the General Assembly's remedial purpose.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country focused on empowering workers' rights plaintiffs' attorneys. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment, wage and hour, labor, and civil rights disputes. NELA members routinely litigate wage and hour cases in Maryland and have an interest in ensuring that Maryland's wage laws are interpreted in a manner which protects the original intent of

the General Assembly, namely, protecting workers from wage theft and other workplace abuses.

Amici file this brief with the consent of the parties. Rule 8-511(a)(1).

INTRODUCTION

Modern employers, including Appellee, increasingly use digital tools to monitor their workers. Employers have implemented extensive, sometimes invasive, digital surveillance tools to track not only workers' arrival and departure times, but also their body movements and location on a warehouse floor. U.S. GOV'T ACCOUNTABILITY OFFICE, DIGITAL SURVEILLANCE OF WORKERS: TOOLS, USES, AND STAKEHOLDER PERSPECTIVES 2 (2024), https://perma.cc/7MU3-L8QF. Appellee famously monitored the productivity of its warehouse workers so closely that some opted to urinate into bottles rather than use the nearest toilet for fear of being disciplined over "idle time." Shona Ghosh, *Undercover Author Finds Amazon Warehouse Workers in UK 'Peed in Bottles' Over Fears of Being Punished for Taking a Break*, BUSINESS INSIDER (Apr. 16, 2018), https://perma.cc/AG4B-XLZ6.

This level of surveillance was unimaginable when the U.S. Supreme Court first applied the doctrine of *de minimis non curat lex* to the Fair Labor Standards Act (FLSA) in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In the time of *Anderson*, practical challenges to employee timekeeping made it impossible to track start and end times with modern precision. Employees used manual punch clocks and the only way for employers to monitor their productivity was to observe them firsthand. These, and other

limitations, hindered employer efforts to accurately capture, and therefore compensate employees for, smaller units of working time.

This is not the world we live in today. The notion that any modern employer with access to an internet-connected device cannot accurately track their employees' time is absurd. Applying the FLSA *de minimis* rule to the Maryland Wage and Hour Law (MWHL) and Maryland Wage Payment and Collection Law (MWPCL) would return Maryland workers to the 1940s while enabling their employers to exploit the benefits of the digital age. Employers, including Appellee, cannot have it both ways.

This Court should answer the certified question in the negative and find that the FLSA *de minimis* rule does not apply to claims under the MWHL and MWPCL.

ARGUMENT

I. The "realities of the industrial world" that necessitated a *de minimis* rule in 1946 do not exist today.

The U.S. Supreme Court's 1946 decision to apply a *de minimis* rule under the FLSA was rooted in the practical challenges of the post-World War II workplace. Not only are the practical considerations underlying that decision no longer relevant, but in light of the technological advancements since *Anderson*, applying the FLSA *de minimis* rule to the MWHL and MWPCL would place an unreasonable burden on employees vis-à-vis their employers.

a. Technological advances have eliminated the obstacles to employee timekeeping underpinning the *Anderson* decision.

In *Anderson v. Mt. Clemens Pottery Co.*, employees of a pottery company shared a single time clock with approximately 200 other employees, so that it took employees a minimum of 8 minutes to clock in during the 14 minutes they were permitted to prepare for work before the start of their shifts. *Anderson*, 328 U.S. at 683. The company used a steam whistle to indicate the starting time for productive work and calculated working time "from the succeeding even quarter hour after employees punch in to the quarter hour immediately preceding the time when they punch out." *Id.* In concluding the uncompensated time employees spent walking from time clock to work bench might be subject to a *de minimis* rule, the *Anderson* Court instructed that employee time "be computed in light of the realities of the industrial world." *Id.* at 692.

The "realities of the industrial world" in 1946 are a world apart from the realities of the modern workplace. The year after the *Anderson* decision,[1] the manufacturing industry was the largest overall contributor to the national gross domestic product (GDP) and agriculture industry output constituted approximately 7% of GDP. BUREAU OF ECONOMIC ANALYSIS, GDP BY INDUSTRY, GROSS OUTPUT BY INDUSTRY 1947-1997, https://perma.cc/VC5D-QW3A (last visited Jan. 14, 2025) (follow directions to "Download historical GDP by Industry ZIP file" by selecting "Annual Tables"). The U.S. was still emerging from World War II and the first personal computer was decades away.

[1] Statistics were not readily available for 1946.

As of 2023,[2] the largest contributor to the national GDP is the financial industry. Manufacturing industry output has decreased to less than 15% of GDP and agriculture industry output constitutes approximately 1% of GDP. BUREAU OF ECONOMIC ANALYSIS, GDP BY INDUSTRY, GROSS OUTPUT BY INDUSTRY 1997-2023, https://perma.cc/3RVQ-FX7Q (last visited Jan. 14, 2025) (select "All GDP-by-industry" to download ZIP file). More than 90% of Americans own internet-connected smartphones and retailers have introduced technology that "uses a combination of computer vision algorithms and sensor fusion to identify items put in [a] cart." *Mobile Fact Sheet*, PEW RESEARCH CENTER (Nov. 13, 2024), https://perma.cc/9CAR-X2GD; *Amazon Fresh Stores*, AMAZON, https://perma.cc/KVZ8-LXTG (last visited Jan. 14, 2025). In short, the modern industrial landscape would have been unrecognizable to the *Anderson* Court.

Consistent with these developments, the practical challenges to employee timekeeping that employers faced in 1946 simply are not present in the modern workplace. For example, many timekeeping companies sell products to enable employees to clock in remotely using a mobile app on their personal smartphones. *See, e.g.*, *Employee Time Clocks*, ADP, https://perma.cc/3LXH-N9TL (advertising ADP Time Kiosk App that "[t]urns a shared tablet into a timekeeping device" and ADP Mobile Solutions that include "[o]n-the-go clocking actions") (last visited Jan. 5, 2025). Rideshare companies (and other employers) use geolocation software to track drivers' locations. *See, e.g.*, *Safety*, LYFT, https://perma.cc/E2V6-P7TZ (advertising that Lyft

[2] This is the most recent year for which statistics are available.

"monitor[s] rides for unusual activity, like long stops or route deviations") (last visited Jan. 5, 2025). As noted above, Appellee monitors the whereabouts and productivity of its employees with extreme precision. Ghosh, *supra*, at 2.

Moreover, the federal regulation adopting the *de minimis* rule, which was promulgated in 1961, expressly limits its application to periods of time that are not only "insubstantial or insignificant," but also "cannot as a practical administrative matter be precisely recorded for payroll purposes . . . due to considerations justified by industrial realities." 29 C.F.R. § 785.47. That is, employers are entitled to disregard employee time under the FLSA *de minimis* rule only if it is *both* "insubstantial or insignificant" *and* impracticable to record with precision.

Even assuming the modern workday can be divided into discrete periods of time that could be considered "insubstantial or insignificant," *but see Glenn L. Martin Neb. Co. v. Culkin*, 197 F.2d 981, 987 (8th Cir. 1952) (recognizing that work time corresponding to a dollar a week is "not a trivial matter to a working man"), the plethora of digital tools available to modern employers undermines any justification for disregarding that time based on the "industrial realities" of the modern workplace. The suggestion that a twenty-first century employer cannot accurately record employee working time—if only by locating a time clock on the correct side of a security checkpoint—is ridiculous, and should not be used to justify applying the FLSA *de minimis* rule to Maryland wage and hour law.

b. In the modern era, the FLSA *de minimis* rule forces employees to bear an unreasonable burden vis-à-vis their employers.

The FLSA *de minimis* rule reflects nothing more than the *Anderson* Court's judgment that, in 1946, requiring employers to track regularly occurring yet variable employee time was too heavy a burden for them to bear. Technological advances of the last 70 years have significantly decreased that burden. *See supra* Section I(a). And yet, under the FLSA *de minimis* rule, employees continue to "bear the entire burden of any difficulty in recording regularly occurring worktime." *Troester v. Starbucks Corp.*, 421 P.3d 1114, 1125 (Ca. 2018). Applying the FLSA *de minimis* rule under the Maryland wage laws would ossify that imbalance of burdens between employer and employee in the modern workplace.

Moreover, Appellee has used the timekeeping technology at its disposal to penalize employees for "time off task," that is, any minute they stray from their work assignments. *The Amazon That Customers Don't See*, THE NEW YORK TIMES (June 15, 2021), https://perma.cc/8J63-SVVC. Not only is precise timekeeping possible, but employers readily use it to bolster their bottom lines. Employers like Appellee should not be able to use timekeeping technology that tracks employee time to the minute when it inures to their benefit, then disclaim it as impractical or burdensome when it inures to the benefit of their employees.

II. A growing number of courts are re-examining the FLSA *de minimis* rule and rejecting its application to state wage laws.

Over the last two decades, multiple state and federal courts have declined to apply the FLSA *de minimis* rule to state wage laws enacted subsequent to the FLSA. This Court should join that growing number of courts acknowledging the diminishing relevance of the FLSA *de minimis* rule in the modern workplace and reject its application to the MWHL and MWPCL. *See generally* Abigail Britton, *It's About Time: Rejection of the De Minimis Doctrine in State Wage and Hour Laws*, 127 DICK. L. REV. 603 (2022).

a. The highest courts of two states have questioned the continuing viability of the FLSA *de minimis* rule, altogether.

The highest courts of two states have rejected application of the FLSA *de minimis* rule to their states' wage laws and, in so doing, cast doubt on the continuing viability of a *de minimis* rule in the modern workplace.

i. Pennsylvania

In *In re Amazon.com, Inc.*, 255 A.3d 191 (Pa. 2021), another case against Appellee for uncompensated time related to mandatory security screenings, the Pennsylvania Supreme Court analyzed statutory and regulatory language and legislative purpose similar to that of the MWHL and MWPCL, as well as the U.S. Supreme Court's most recent articulation of the FLSA *de minimis* rule, and refused to apply it to the state's wage law.

The Pennsylvania Minimum Wage Act (PMWA) requires employers to pay employees for "all hours worked." 43 Pa. Stat. § 333.104. Its implementing regulations

define "hours worked" to include "time during which an employee is required by the employer to be on the premises of the employer, to be on duty or to be at the prescribed work place . . . " 34 Pa. Code § 231.1(b). In light of the PMWA's legislative purpose to "maintain the economic well-being of our Commonwealth's workforce by ensuring that each and every Pennsylvania worker is paid for all time he or she is required to expend by an employer for its own purposes," the *In re Amazon* court concluded the PMWA's requirement that employees be paid for "all hours worked" precluded application of the FLSA *de minimis rule*. *In re Amazon.com, Inc.*, 255 A.3d at 208-09.

The language of Maryland's wage laws and their implementing regulations parallels that of the PMWA and its implementing regulations. Both the MWHL and the MWPCL require employers to pay employees "all compensation that is due to an employee for employment." Md. Code, Lab. & Empl. ("LE") §§ 3-401(d) (MWHL); 3-501(c). Code of Maryland Regulations ("COMAR") 09.12.41.10 defines "hours of work" as "the time during a workweek that an individual employed by an employer is required by the employer to be on the employer's premises, on duty, or at a prescribed workplace." The legislative and regulatory purpose of the PMWA—maintaining the economic well-being of the workforce and ensuring workers are paid for all time worked—likewise aligns with the legislative purpose of the MWHL and MWPCL: promoting economic stability and increasing employee purchasing power while decreasing employees' need for financial assistance, as well as creating certainty around employee wages. 1965 Md. Laws 966 (MWHL); 1966 Md. Laws 1213 (MWPCL).

Against this backdrop, the Pennsylvania Supreme Court highlighted the U.S. Supreme Court's decision in *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220 (2014) and called into question the continuing viability of the FLSA *de minimis* rule in the modern era. In *Sandifer*, the U.S. Supreme Court declined to apply the *de minimis* rule to a provision of the FLSA that it described as being "all about trifles"—in that case, the "relatively insignificant periods of time in which employees wash up and put on various items of clothing needed for their jobs." 571 U.S. at 234. In analyzing whether employee time spent donning and doffing certain items was compensable, the Court found itself attempting to separate the minutes employees spent putting on glasses, earplugs, and respirators from the minutes they spent putting on an industrial snood. *Id.* Finding no principled reason to disregard one minutes-long "trifle" in favor of another, the *Sandifer* Court dispensed with the exercise, altogether, leaving the issue instead to the collective bargaining process. *Id.*

As the *In re Amazon* court observed:

> [T]he high Court [in *Sandifer*] signaled its possible discomfort with the continuing application of the *de minimis* exception . . . given the inherent tension between the objective of [the FLSA] to secure compensation for all hours an employee spends working for an employer, and the concept that any period of time which constitutes hours of work under the FLSA and its interpretive regulations can be disregarded as trifling.

In re Amazon.com, Inc., 255 A.3d at 207.

As employers monitor their employees with increasing precision, see *supra* Section I(a), they undoubtedly will be called to "select among trifles" with even more frequency. *Sandifer*, 571 U.S. at 234. Where the *de minimis* rule might once have been

necessary to fill in the gaps where employee time could not be quantified, as the *Sandifer* Court correctly acknowledged, its application to the small yet quantifiable periods of employee time in the modern workplace has become an exercise in absurdity. If an employer can capture an amount of time worked by an employee, no matter how small, there is no principled reason to disregard it.

ii. California

In *Troester v. Starbucks Corp.*, 421 P.3d 1114 (Cal. 2018), the California Supreme Court also analyzed statutory and regulatory language similar to that of the MWHL and MWPCL, as well as the continuing viability of the FLSA *de minimis* rule, and declined to apply it to the state's wage laws.

California Industrial Welfare Commission (IWC) Wage Order No. 5-2001, which applies to coffee shop employees like the plaintiff in *Troester*, defines "hours worked" as "the time during which an employee is subject to the control of an employer," including "all the time the employee is suffered or permitted to work, whether or not required to do so[.]" Wage Order No. 5-2001(2)(K).[3] It also specifies that employees be paid for "all hours worked." Wage Order No. 5-2001(4)(A), (3)(A). California Labor Code section 510(a) additionally provides that employees are entitled to overtime pay for "[a]ny work" outside the eight-hour workday or 40-hour workweek. Cal. Lab. Code § 510(a).

[3] California's IWC Wage Orders specify minimum requirements with respect to wages, hours, and working conditions by industry and are "accorded the same dignity as statutes." *Brinker Rest. Corp. v. Superior Ct.*, 273 P.3d 513, 527 (Ca. 2012).

The language of the Wage Order and Labor Code parallels that of the MWHL and MWPCL. Like California's requirements that employees be paid for "all hours worked" and "any work," the MWPCL and MWHL require that employees be paid "all compensation that is due to an employee for employment," without exception. LE §§ 3-401(d) (MWHL); 3-501(c) (MWPCL). The California Legislature's and IWC's shared purpose of protecting employees also is consistent with the legislative purpose of the MWHL and MWPCL of promoting economic stability and increasing employee purchasing power. *Troester*, 421 P.3d at 1119; 1965 Md. Laws 966 (MWHL); 1966 Md. Laws 1213 (MWPCL).

Like the Pennsylvania Supreme Court, the California Supreme Court also re-examined the wisdom of the FLSA *de minimis* rule and expressed doubt about its continuing viability in the modern workplace. First, the *Troester* court highlighted the modern class action mechanism as a tool for aggregating "small individual recoveries worthy of neither the plaintiff's nor the court's time . . . to vindicate an important public policy." *Troester*, 421 P.3d at 1123-24. Created by the 1966 amendments to Federal Rule of Civil Procedure 23—after passage of both the FLSA and 29 C.F.R. § 785.47—the modern class action's concern with amounts of money that otherwise might be considered *de minimis* substantially undermines the rationale behind applying a *de minimis* rule to class actions in the employment context. *Id.* at 1123.

Second, the *Troester* court observed that the obstacles to recording employee worktime discussed in *Anderson* "may be cured or ameliorated by technological advances that enable employees to track and register their worktime via smartphones, tablets, or

other devices." *Troester*, 421 P.3d at 1124. As discussed above, timekeeping companies sell products that allow employees to clock in remotely and employers routinely use geolocation software to track their employees' whereabouts. *See supra* Section I(a). The *Troester* court accordingly expressed its reluctance to adopt a rule "purportedly grounded in 'the realities of the industrial world' when those realities have been materially altered in subsequent decades." *Troester*, 421 P.3d at 1124 (citation omitted).

Indeed, ignoring the massive technological advancements since *Anderson* would work a hardship on Maryland employees to the unwarranted benefit of their employers.

b. Several other courts have assumed the FLSA *de minimis* rule does not apply to state wage laws analogous to the MWHL and MWPCL.

Other courts have declined to incorporate the FLSA *de minimis* rule under state wage laws absent express incorporation by the state legislature or regulatory body and in light of those laws' remedial purpose. *See, e.g., Vaccaro v. Amazon.com.dedc, LLC*, No. CV 18-11852 (GC) (TJB), 2024 WL 4615762, at *18–20 (D.N.J. Oct. 30, 2024) (rejecting FLSA *de minimis* rule under New Jersey wage law where remedial purpose of law is safeguarding the "health, efficiency, and general well-being" of workers); *Strohl v. Brite Adventure Ctr., Inc.*, No. 08 CV 259 RML, 2010 WL 3236778, at *7 (E.D.N.Y. Aug. 13, 2010) (declining to apply *de minimis* rule to New York wage law where court was "unaware of any *de minimis* exception under state law"); *Robertson v. Valley Commc'ns Ctr.*, 490 P.3d 230, 237 (Wa. 2021) (declining to apply *de minimis* rule to Washington wage law where "no substantive state authority" had adopted it and it would not advance legislature's intent to protect employee wages and assure payment); *Parow v. Howard*,

No. 021403A, 2003 WL 23163114, at *3 (Mass. Super. Nov. 12, 2003) (rejecting employer's *de minimis* argument under Massachusetts wage law where "the statute does not provide such a defense" and "mandates prompt payment of wages in the time permitted, regardless of the amount").

This Court likewise should interpret the MWPCL and MWHL consistently with the statutes' remedial purpose, not break new ground where the General Assembly and Maryland Department of Labor have declined to do so, and reject application of the FLSA *de minimis* rule under the MWPCL and MWHL. *See, e.g.*, *Peters v. Early Healthcare Giver, Inc.*, 439 Md. 646, 663 (Md. 2014) (encouraging trial courts to "consider the remedial purpose of the [M]WPCL when deciding whether to award enhanced damages to employees"); *Stevenson v. Branch Banking and Tr. Corp.*, 159 Md. App. 620, 644 (Md. App. Ct. 2004) (interpreting MWPCL to cover deferred compensation in light of "the broad language of the statute and its remedial purpose").

CONCLUSION

For the above reasons, *Amici* request that this Court answer the certified question in the negative.

Date: January 15, 2025

Respectfully submitted,

/s/ Suzanna Bobadilla
Suzanna Bobadilla (CPF No. 2311281039)
Email: bobadilla@katzbanks.com
Bethel Habte (*Pro Hac Vice* pending)
Email: habte@katzbanks.com
Jessica Westerman (*Pro Hac Vice* pending)
Email: westerman@katzbanks.com
Carolyn L. Wheeler (*Pro Hac Vice* pending)
Email: wheeler@katzbanks.com
Katz Banks Kumin LLP
11 Dupont Circle NW, Suite 600
Washington, DC 20036
(202) 299-1140

Counsel for Amici Curiae

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 3486 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the requirements stated in Rule 8-112.

/s/ Suzanna Bobadilla
Suzanna Bobadilla

CERTIFICATE OF SERVICE

I certify that on this 15th day of January, 2025, a copy of the foregoing was served on all counsel of record via the Court's MDEC system and by first-class mail, postage prepaid, to the following:

Joshua Boyd Waxman
Littler Mendelson P.C.
815 Connecticut Avenue, NW, Suite 400
Washington, DC 20006
jwaxman@littler.com

Kaiser Husain Chowdhry
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
kaiser.chowdhry@morganlewis.com

Brian Markovitz
Michal Shinnar
Joseph Greenwald Laake
6404 Ivy Lane, Suite 400
Greenbelt, MD 20770
bmarkovitz@jgllaw.com
mshinnar@jgllaw.com

Peter Winebrake
Andrew Santillo
Winebrake & Santillo
715 Twining Road, Suite 211
Dresher, PA 19025
pwinebrake@winebrakelaw.com
asantillo@winebrakelaw.com

/s/ Suzanna Bobadilla
Suzanna Bobadilla

Counsel for Amici Curiae