No. 22-1862

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TORRI HOUSTON, INDIVIDUALLY, AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

ST. LUKE'S HEALTH SYSTEM, INC.;
ST. LUKE'S NORTHLAND HOSPITAL CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Missouri (Case No. 4:17-CV-00266-BCW)
The Honorable Brian C. Wimes

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INTRODUCTION

Saint Luke's response supplies all the reasons this Court needs to reverse the district court's judgment.

Saint Luke's studiously avoids mentioning the bulk of the facts. But those facts matter. They show that for more than six years Saint Luke's rounding practice shortchanged Appellant Torri Houston and two-thirds of her co-workers, leading Saint Luke's to receive more than 75,000 hours of unpaid work and retain more than $2 million in unpaid wages. Saint Luke's contests none of this.

Without an evidentiary leg to stand on, Saint Luke's asks this Court to ignore the plain terms of the FLSA and the DOL's rounding regulation. Casting aside traditional tools of judicial interpretation, Saint Luke's instead embraces an ill-defined policy-based approach that would make rounding's actual impact on employees almost irrelevant and insulate all but the most egregious rounding practices from review. But this Court is constrained to decide this case on the facts and the law—not vague assertions of administrative convenience and business judgment. And here the law and facts are clear. Rounding is permissible only if, over time, employees are fully compensated "for all the time they have actually worked." 29 C.F.R. § 785.48(b). That unequivocally did not happen here. For years Saint Luke's has undercompensated employees, both individually and as a group, through rounding.

Saint Luke's defense against Houston's state-law claims for unjust enrichment fares no better. Shifting its position from what it argued below, Saint Luke's now contends that a common-law de-minimis rule bars these claims. But it supplies no reason to believe that a Missouri court would apply any such rule to an unjust-enrichment claim, much less to this case, where Saint Luke's received tens of thousands of hours and millions of dollars' worth of free labor at the expense of its employees.

Saint Luke's arguments on Houston's individual breach-of-contract claim fail as well. Just as it does for Houston's other claims, Saint Luke's offers policy considerations rather than evidence. But the law and the evidence both support Houston's claim that Saint Luke's breached its contract.

At day's end this is an easy case. The FLSA and the rounding regulation require employees to be fully paid over time. Saint Luke's didn't do that. Missouri law prohibits employers from being unjustly enriched by retaining the benefits of employees' labor without compensation. Saint Luke's didn't follow that law either. And Houston's contract required Saint Luke's to pay her for all the hours that she worked. Saint Luke's failed to do that, too.

The district court's judgment should be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE FLSA AND MISSOURI MINIMUM WAGE LAW CLAIMS.

It is undisputed that for more than six years Saint Luke's underpaid a significant majority of employees because of rounding. Because the FLSA and its rounding regulation require each individual employee to be paid for all overtime worked, the employees who were underpaid must be fully compensated. That does not change even if Saint Luke's is permitted to aggregate rounding's effects across employees. Saint Luke's underpaid employees in the aggregate—week after week, month after month, year after year. Saint Luke's does not meaningfully contend with these points, producing only weak policy arguments that have nothing to do with this case and no support in the law.

A. The Text of the FLSA and the Rounding Regulation Require Each Employee To Be Paid for All Hours Worked.

The central issue in this appeal is the proper interpretation of the rounding regulation. It is not a difficult interpretive question: to comply with the FLSA, employers that use rounding must ensure that, over time, each employee is fully compensated.

The regulation permits rounding "provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." 29 C.F.R. § 785.48(b).

There is no dispute that the regulation incorporates a temporal-aggregation principle: employers using rounding may underpay an employee in some weeks as long as they overpay the same employee in equal measure in other weeks, so that, over time, the employee is fully compensated. But some courts interpreting the regulation have impermissibly read a second aggregation rule into it, one that permits employers to aggregate rounding's effects *across employees*. *E.g.*, *Levanoff v. Dragas*, 280 Cal. Rptr. 3d 610, 627 (Cal. Ct. App. 2021); *Utne v. Home Depot U.S.A., Inc.*, 2017 WL 5991863 (N.D. Cal. Dec. 4, 2017). On this analysis, what matters is rounding's impact on employees in the aggregate, or on the average employee, not its effect on individual employees.

This aggregation-across-employees interpretation directly conflicts with the text of the FLSA, the rounding regulation itself, and administrative guidance from the DOL.

Start with the FLSA. The FLSA requires employers to fully compensate *each* employee: "no employer shall employ any of his employees…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." 29 U.S.C. § 207(a)(1). The FLSA's regulations bolster this conclusion. They provide that "[u]nder the Act an employee must be compensated for all hours worked." 29 C.F.R.

§ 778.223(a). This language conclusively demonstrates that in determining the right to overtime compensation, the "focus should be on individuals, not groups." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1740 (2020).

The text of the rounding regulation supports the same conclusion. The regulation provides that rounding is permissible only when employees are fully compensated "for all the time they have actually worked." 29 C.F.R. § 785.48(b). True, the regulation uses the plural term "employees," rather than the singular term "employee." *Id.* But that does not imply that only employees as a group—rather than individual employees—must be properly compensated. The rounding regulation's plural language is simply an example of the maxim that "words importing the plural include the singular" "unless context indicates otherwise." 1 U.S.C. § 1. And the context does not indicate otherwise here. The FLSA, again, requires employers to pay *each* employee for all the overtime she works. 29 U.S.C. § 207(a)(1); 29 C.F.R. § 778.223(a). No provision of the FLSA provides an exception to this rule by letting employers underpay some employees so long as employees as a group are fully compensated. And both the FLSA and its implementing regulations regularly use the plural term "employees" to include the singular term "employee." *See, e.g.*, 29 U.S.C. § 203(m)(2)(B); 29 C.F.R. §§ 531.59(b), 778.317. There is no reason to believe that the rounding regulation is different or that it

departs from standard principles of interpretation to provide an exception found nowhere else in the FLSA or its regulations.

The DOL's interpretive guidance about the rounding regulation confirms this analysis. Both a 1994 opinion letter and a fact sheet analyze rounding's legality by reference to its effects on individual employees, not employees as a group. Dep't of Labor, Nov. 7, 1994 Opinion Letter (FLSA-843), 1994 WL 1004879, at *1; Dep't of Labor, *Fact Sheet #53: The Health Care Industry and Hours Worked*, Revised July 2009, https://www.dol.gov/agencies/whd/fact-sheets/53-healthcare-hours-worked.

Adding this all up, rounding an employee's hours is permissible so long as, over time, *that* employee is "fully compensated" for all the time that she works. 29 C.F.R. § 785.48(b).

Saint Luke's does not meaningfully contend with this analysis. It insists instead that the district court did not err in aggregating rounding's effects across employees because out-of-circuit cases have done something similar. But this Court is not bound by these cases; it must follow the text of the FLSA and the rounding regulation, and those legal texts require that, over time, each employee must be fully paid when an employer uses rounding.

That did not happen for Houston and thousands of other Saint Luke's employees. The undisputed evidence shows that for years Saint Luke's failed to compensate *these* employees for all the overtime they

worked. That alone makes the district court's summary-judgment order incorrect.

B. Even When Saint Luke's Rounding Is Viewed in the Aggregate, Saint Luke's Failed To Comply with the Rounding Regulation.

Summary judgment was equally improper even when Saint Luke's rounding is aggregated across employees. Both parties' experts' analyses show that employees as a whole lost net time and compensation because of rounding.

Viewed in the aggregate, Saint Luke's rounding is far from neutral in application. *See Feltzs v. Cox Commc'ns Cal., LLC*, 2021 WL 5050259, at *4 (C.D. Cal. Oct. 27, 2021) (stating that rounding policies must be neutral both facially and as applied). Juries may consider several types of datapoints—including whether rounding increased or decreased the compensation of the class as a whole and what percentage of employees had a net increase or decrease in compensation—in deciding whether rounding is neutrally applied. *Id.* at *5. The weight to be given this evidence and whether it shows employees have been undercompensated are questions of fact. *See's Candy Shops, Inc. v. Superior Court*, 148 Cal. Rptr. 3d 690, 708 (Cal. Ct. App. 2012); *Bebber v. Dignity Health*, 2022 WL 4080956, at *7 (E.D. Cal. Sept. 6, 2022).

Each datapoint supports the employees here. The undisputed facts show that Saint Luke's rounding resulted in an aggregate underpayment

of overtime without fail for years on end. Both experts agreed on this point.

Houston's expert found that nearly two-thirds of employees—64.4%—lost net time and pay because of rounding over a six-year period. App. 154; R. Doc. 146-2, at 17. Saint Luke's rounded away net time in 55.9% of all workweeks and in 60.8% of workweeks in which employees worked overtime. App. 153-54; R. Doc. 146-2, at 16-17. Employees lost net time due to rounding in 50.3% of shifts in weeks in which they worked overtime, and in 48.5% of shifts overall. App. 152-53; R. Doc. 146-2, at 15-16. Even after offsetting time and pay employees gained against time and pay they lost because of rounding, Saint Luke's failed to pay employees for 74,282.37 hours worked, totaling $2,212,425.59 in unpaid wages. App. 155; R. Doc. 146-2, at 18. As for Houston, Saint Luke's removed net time from 45.13% of her shifts and 71% of her workweeks, adding up to 7.63 hours of unpaid work and $205.13 in unpaid wages. App. 101, 185; R. Doc. 146, at 20 & R. Doc. 146-2, at 48.

Saint Luke's expert confirmed these findings. No matter the period or set of employees she looked at, rounding's impact was remarkably stable: rounding shortchanged employees almost identically across all metrics in all three limitations periods and across each set of employees that she examined. Nearly two-thirds of each group of employees lost net time and pay because of rounding in each period. App. 95-97; R. Doc. 146, at 14-16. Even after accounting for time and pay added to all employees

because of rounding, the *average* employee in each period still lost several hours of pay. *Id.* Rounding similarly caused the *average* employee to lose approximately 40 seconds per shift in each timeframe. App. 94-95; R. Doc. 146, at 13-14. The reason for all this is simple: employees lost time *more often* than they gained it, *and* they also lost *more time* when it was rounded away than when it was added. *Id.*

On every measure and in every period, then, both the average employee and employees as a whole lost time and compensation because of rounding. Saint Luke's rounding does not average out over time for employees. It unequivocally fails "to compensate the employees for all the time they have actually worked." 29 C.F.R. § 785.48(b).

That conclusion follows not only from the text of the FLSA and the rounding regulation. It is also buttressed by the most factually analogous precedent. Consider *Feltzs* first. After carefully comparing the evidence there to what was presented in other rounding cases, the district court denied summary judgment to the employer. 2021 WL 5050259, at *6-8. The data showed that rounding removed time from 58% of shifts, added time to 32.5% of shifts, and had no effect on 9.5% of shifts. *Id.* at *6. Employees as a whole had a net loss of about 9,500 hours and an average loss of 1.6 minutes per shift because of rounding over a five-year period. *Id.* Roughly 80% of class members had a net loss of time. *Id.*

Turn now to *Bebber*. Like *Feltzs*, *Bebber* thoroughly analyzed the evidence and compared it with that produced in other rounding cases in

which courts had determined whether summary judgment was warranted. 2022 WL 4080956 at *6-7. And like *Feltzs*, the court denied summary judgment because a jury could have concluded that rounding was not neutrally applied. *Id.* The evidence showed that the class as a whole lost time over an eight-year period, and that roughly 77% of employees lost net time. *Id.* at *6. Even when accounting for time that employees gained because of rounding, employees lost an average of 1.4 minutes per shift, adding up to several thousand hours of lost time. *Id.* at *2.

Now look at *Shiferaw v. Sunrise Senior Living Management*, 2016 WL 6571270 (C.D. Cal. Mar. 21, 2016). There, too, the court denied summary judgment because employees as a whole lost time and a greater percentage of employees were undercompensated rather than overcompensated because of rounding. *Id.* at *29-30.

This case is like *Feltzs*, *Bebber*, and *Shiferaw*. Here, like in those cases, "the class as a whole lost time" and compensation "over a [multi-] year period." *Feltzs*, 2021 WL 5050259, at *7. Indeed, as in *Feltzs*, "viewing the class of [employees] as a whole, the employees in this case were undercompensated for the period in question, as well as for each year within that period." *Id.* The similarities don't end there. Here, like in all three cases, more than half of employees had net time and pay rounded away. And here, like in *Feltzs* and *Bebber*, rounding caused a net loss of time on a per-shift basis when "averaged across all shifts for all

employees, regardless of whether an employee personally experienced a net reduction or increase in hours from rounding." *Feltzs*, 2021 WL 5050259, at *7. As in *Feltzs*, *Bebber*, and *Shiferaw*, a jury could find that Saint Luke's rounding was far from neutral in application.

C. Saint Luke's Arguments Are Unpersuasive Policy-Based Pleas Without Textual or Factual Support.

Saint Luke's arguments in support of affirmance are unavailing. Saint Luke's first briefly and unpersuasively argues that its rounding is neutral as applied. It studiously avoids mentioning the great swath of damaging facts, cherry picking only a handful that it believes support its case. Saint Luke's Br. at 16, 26. But like other employers in rounding cases in which courts have denied summary judgment, Saint Luke's "selectively draws on isolated statistics while ignoring the larger context." *Feltzs*, 2021 WL 5050259, at *7; *Bebber*, 2022 WL 4080956, at *6. When all the facts are considered, this case is easily distinguishable from those in which courts have granted employers summary judgment.

This is not a case in which only a bare majority of employees lost net time and compensation; or in which only a subset of employees at one facility were underpaid; or in which the evidence is only about a single plaintiff or rounding's effects on shifts. *See Feltzs*, 2021 WL 5050259, at *7 (distinguishing cases with facts like these); *Bebber*, 2022 WL 4080956, at *6-7 (same).

This is a case in which two-thirds of employees lost net time and compensation in every pay period for more than six years. And even when net time added to all employees is accounted for, the average employee lost time on each shift that she worked and several hours of pay in each time period. Employees as a whole always came out behind, and their losses are significant, totaling more than 75,000 hours and $2 million in unpaid wages.

Truth be told, Saint Luke's spends little time trying to convince the Court that its rounding is neutral. Barely mentioning the text of the rounding regulation, Saint Luke's primary argument on appeal hinges on policy concerns that conflict with the plain terms of the regulation and have no bearing here.

Saint Luke's starts by mischaracterizing Houston's arguments. It suggests that Houston contends that each employee must break even or come out ahead in *each* pay period, but that is not what Houston has argued. Houston asserted only that rounding must average out so that, over time, each employee is fully paid for the work he performs. That is what the plain text of the regulation requires, 29 C.F.R. § 785.48(b), and that is all that Houston has asserted here.

Nor does Houston argue that an entire rounding policy becomes unlawful if it results in underpayment to a subset of employees. Although courts sometimes speak of rounding policies as lawful or unlawful, that is really neither here nor there. There is no cause of action under the

FLSA for an "unlawful" rounding policy. The question is always whether rounding results in overtime or minimum-wage violations. Even when an employer has a rounding policy that is not facially neutral, that gives rise to an FLSA claim only if, in the long run, it leads employees to lose overtime or not receive a minimum wage.

These basic points demonstrate the error in Saint Luke's hypothetical about a rounding policy supposedly flipping between being lawful and unlawful based on a single shift of a single employee. Saint Luke's Br. at 26-28. No policy does that. Rounding policies are not in and of themselves lawful or unlawful. And their impact on a single shift or even a single pay period is not material; what matters is their effect on compensation in the long term.

Saint Luke's complains that Houston fails to specify just how long this term must be to support a claim based on improper rounding. But this is not a defect in Houston's argument; it is a feature of the rounding regulation itself. Consistent with the regulation and case law, Houston explained that rounding must average out over time. 29 C.F.R. § 785.48(b); *Shiferaw*, 2016 WL 6571270, at *28. The regulation does not specify the "period of time" relevant to determining rounding's propriety. 29 C.F.R. § 785.48(b). Nor, for that matter, have many other authorities. *See McElmurry v. US Bank Nat'l Ass'n*, 2004 WL 1675925, at *15 (D. Or. 2004).

In the end, this is not a real issue for this case.[1] When, as here, an employer fails to pay employees the overtime they are due for years on end, it is plain that rounding has not averaged out over time. *Feltzs*, 2021 WL 5050259, at *7; *Bebber*, 2022 WL 4080956, at *6. That makes perfect sense. "In determining whether a rounding policy results in systematic under compensation, there is a correlation between the longer the period of time assessed and accuracy." *Shiferaw*, 2016 WL 6571270, at *28. Whatever length of time is required to assess rounding's effects, the employees have satisfied it here.

Houston asks this Court to do nothing more than apply the plain terms of the FLSA and the rounding regulation. Saint Luke's protests, claiming that doing so would undermine the purpose of rounding because it supposedly would require employers to audit their time records to ensure that employees broke even over time, making rounding less convenient. This complaint is little more than a policy argument masquerading as legal analysis.

To begin, Saint Luke's asks this Court to adopt a purpose-driven interpretation that runs headlong into the rounding regulation's text. The proper interpretation of the regulation cannot be one that ignores

[1] Nor is Saint Luke's concern about "strategic pleading." Saint Luke's Br. at 18. Although that may be an issue in some cases, it is not here because Houston and the class base their claims on the time records for all employees and for the entirety of the limitations periods at issue. They have not selectively edited out or cherry picked any time period or employees.

the clear terms of the regulation and the FLSA requiring that all employees be paid for all hours worked. Courts must "analyze the…text to derive its 'purposes.'" *Magdy v. I.C. Sys., Inc.*, 47 F.4th 884, 888 (8th Cir. 2022) (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012)).

This text-first approach shines a clear light here. Although convenience may be part of the rationale for the rounding regulation, the text shows it is not its only purpose. The regulation mandates that rounding must be "used in such a manner that it will not result, over a period of time, in failure to compensate the employees for all the time they have actually worked." 29 C.F.R. § 785.48(b). Nowhere does the regulation state or imply that the express requirement that employees be fully compensated takes a backseat to employers' convenience. No law "pursues its purpose at all costs," Scalia & Garner, Reading Law at 57, and legal texts often strike a balance between competing purposes. *Rapanos v. United States*, 547 U.S. 715, 752 (2006). Saint Luke's has failed to show that the plain text of the statute and regulation—and their express purpose of setting uniform wage-and-hour standards—must yield to employers' desire for maximum administrative efficiency.

Saint Luke's next perversely suggests that interpreting the regulation to mean what it says—that, over time, employees are fully compensated—"would effectively nullify the regulation altogether." Saint Luke's Br. at 21. But interpreting the regulation to mean what it says

would not, in fact, put rounding out to pasture. Employers could—and already do—use rounding in ways in which they can enjoy its convenience without shortchanging employees. One way is to combine rounding with a grace-period policy under which employees may clock in before or after the start or end of their shift without penalty, and a policy prohibiting employees from working outside of their scheduled hours. *See* 29 C.F.R. § 785.48(a). No employer using this approach would need to review employees' time records because all the pre- and post-shift time rounded away would be non-compensable.

But this is not what Saint Luke's has chosen to do. Saint Luke's has agreed that all the time employees spend on the clock—and thus all the time that Saint Luke's has rounded away—*is* compensable working time. App. 203; R. Doc. 149, at 8. And when, as here, employers routinely round off and fail to pay compensable overtime for years, they violate the FLSA. *See Aguilar v. Mgmt. & Training Corp.*, 948 F.3d 1270, 1288-89 (10th Cir. 2020).

In any event, Saint Luke's concern that auditing could make rounding less convenient is misplaced. It takes that idea from *Corbin*, which correctly explained that requiring employers to guarantee that employees gain or break even in every pay period did not square with the rounding regulation. *Corbin v. Time Warner Ent.-Advance/Newhouse P'ship*, 821 F.3d 1069, 1079 (9th Cir. 2016). But to repeat: Houston does not assert that employees must break even in every pay period.

Consistent with *Corbin*, she argues that rounding must "average out *in the long-term*," not in each pay period. *Id.* at 1077. Houston does not argue that employers must accomplish that by auditing their payroll.

But to the extent that ensuring employees are fully compensated in the long term does require employers using rounding to occasionally review their time records, that cannot be blamed on what Houston proposes. It is what the FLSA, the rounding regulation, and the case law interpreting it mandate, since they require employees to be fully compensated in the long term. If auditing is the only way some employers may satisfy that requirement, then that is what they must do if they want to use rounding.

Next, and perhaps most critically, Saint Luke's fails to recognize that its argument about auditing and convenience collapses under its own weight. Saint Luke's comes close to suggesting that when an employer uses a facially neutral rounding policy, courts should just conclusively presume, without further analysis, that rounding averages out over time for employees. The law emphatically does not support that view. Employers must show that the facts of the case warrant judgment in their favor. *See Feltzs*, 2021 WL 5050259, at *6.

Elsewhere in its submission Saint Luke's recognizes this. It acknowledges that in assessing whether rounding is neutral in practice, "courts may look to the employer's time records for clues as to the real-world impact of the policy." Saint Luke's Br. at 13-14. And it concedes

that "an audit of an employer's time records could reveal…that the policy is not neutral." *Id.* at 24. Even on Saint Luke's view, then, rounding's actual effects are what matter and the way courts and employers come to grips with that is by reviewing the time records. That is no different than what Houston argues and what courts have held for years.

Saint Luke's tries to escape this contradiction by conflating the question whether a rounding policy is facially neutral with whether it is neutral as applied. The DOL aptly notes that the district court made the same error. DOL Br. at 20. Saint Luke's repeats it on appeal, suggesting that for employees to prove that rounding is not neutral as applied, they must show that their employer had a "scheme to consistently round down or to systematically undercompensate employees." Saint Luke's Br. at 25. Not so. Employees need not show either why they were on the clock or why their employer rounded their time away. *See* DOL Br. at 20 n.4 ("[T]he reason why the policy generates certain results is ultimately irrelevant; the requirements of the FLSA apply regardless of the reason that an employee is working unpaid overtime."). They must prove only that, over time, their employer in fact failed to fully compensate them because of rounding. Houston has made that showing here in spades.

Finally, a word on the FLSA's de-minimis regulation. That regulation permits employers to disregard recording employees' time under certain circumstances. 29 C.F.R. § 785.47. Although Saint Luke's argued below that the de-minimis doctrine warranted summary

judgment on the FLSA claims, the district court declined to reach that issue, applying the doctrine instead only to the state-law claim for unjust enrichment. App. 250 n.3; R. Doc. 159, at 16 n.3. On appeal, Houston and the DOL both showed that the de-minimis doctrine does not apply to this case, because, among other things, Saint Luke's precisely records the time at issue. Appellant Br. at 42-53; DOL Br. at 22-27. Apparently acquiescing in the correctness of that analysis, Saint Luke's now expressly disclaims any reliance on the de-minimis doctrine—or any more general de-minimis rule as applied to rounding policies—for affirming summary judgment on the FLSA and Missouri Minimum Wage Law ("MMWL") claims. Saint Luke's Br. at 30-31. Because Saint Luke's waives any argument about the application of the de-minimis regulation or any other de-minimis principles to these claims, Houston will not expand upon the arguments she made about these issues in her opening brief. Summary judgment on Houston's FLSA claims is not appropriate on this or any other ground.

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE UNJUST-ENRICHMENT CLAIMS.

Summary judgment is likewise inappropriate on the unjust-enrichment claims.

The undisputed evidence shows that Saint Luke's was unjustly enriched. Houston and other employees conferred a benefit on Saint Luke's by performing 75,000 net hours of unpaid labor, Saint Luke's

appreciated the benefit of that work, and Saint Luke's inequitably retained the value of that labor—worth more than $2 million in wages—without compensating employees for it. *See Jennings v. SSM Health Care St. Louis*, 355 S.W.3d 526, 536 (Mo. Ct. App. 2011).

Saint Luke's argued below that the FLSA's "*de minimis* doctrine is a complete defense to Plaintiff's unjust enrichment claim." App. 116; R. Doc. 146, at 35. The district court accepted that contention, applying the FLSA's de-minimis regulation to the unjust-enrichment claims and holding that these claims failed because they were de minimis under that rule. App. 250-53. Houston described the manifest errors of that conclusion in her opening brief, explaining that the *FLSA's* de-minimis rule did not apply to her *Missouri* unjust-enrichment claims. App. Br. at 53-56.

Although Saint Luke's defends the district court's decision, it does so on different grounds than it asserted below and than the district court relied on to grant summary judgment. Saint Luke's abandons the premise that the *FLSA's* de-minimis doctrine applies to the unjust-enrichment claims and instead contends that a *common-law* de-minimis rule requires summary judgment. Saint Luke's argument proceeds in three steps: (1) the district court correctly looked to the FLSA for guidance; (2) courts have applied a common-law de-minimis rule to unjust-enrichment claims; and (3) that rule applies here, warranting summary judgment. Saint Luke's argument fails at each step.

First, its assertion that the court correctly relied on the FLSA's de-minimis regulation is wrong. Saint Luke's draws support from inapposite and non-binding cases holding that when a federal law does not create a private right of action, it's permissible to use that law to fashion a standard for a state common-law claim. *See Iconco v. Jensen Constr. Co.*, 622 F.2d 1291, 1296 (8th Cir. 1980). Those cases are little help here because Saint Luke's must make two additional showings: that *Missouri* courts would embrace this general principle *and* that they would rely on the FLSA's de-minimis rule when deciding an unjust-enrichment claim. *See id.* at 1299. But Saint Luke's has shown nothing of the sort. It cites no authority even suggesting that a Missouri court would adopt this principle or use it to apply the FLSA's de-minimis rule to an unjust-enrichment claim.

Worse, Saint Luke's contention that the court properly relied on the FLSA's de-minimis regulation is a non sequitur. Saint Luke's makes no effort to defend the district court's faulty analysis of the FLSA's de-minimis doctrine or to independently argue that it applies here. That is sensible because Houston and the DOL both showed that the doctrine does not apply to this case. Appellant Br. at 42-53, 56 n.6; DOL Br. at 22-27. So, it does not matter whether the district court *could* have looked to the FLSA for guidance in deciding the unjust-enrichment claims, because Saint Luke's has waived any reliance on the FLSA for those claims.

Second, Saint Luke's suggestion that common-law de-minimis principles apply to the unjust-enrichment claims also misfires. Saint Luke's cites a handful of non-Missouri authorities for support. But Saint Luke's provides no reason to conclude that *Missouri* courts would apply a de-minimis rule here. Saint Luke's fails to cite a single Missouri state case adopting a common-law de-minimis rule, much less applying any such rule to a claim for unjust enrichment.

And the cases Saint Luke's cites could not be more different from this one, where employees suffered more than $2 million in net lost wages. *See* Saint Luke's Br. at 34 (citing*, e.g.*, *Von Nessi v. XM Satellite Radio Holdings, Inc.*, 2008 WL 4447115 (D. N.J. Sept. 26, 2008) (plaintiffs suffered less than a $1 worth of damages and defendant offered a credit exceeding the damages)). Nor does *McClean v. Health Systems, Inc.*, support Saint Luke's position. 2015 WL 12426091 (W.D. Mo. June 1, 2015). There, the district court discussed in dicta the potential application of the FLSA's de-minimis rule to the class's MMWL claims. 2015 WL 12426091, at *4. There is no dispute that the FLSA's de-minimis regulation may apply to such claims. Mo. Rev. Stat. § 290.505.4. The court did not discuss the de-minimis rule's application to the class's unjust-enrichment claims.

Third, Saint Luke's argument that summary judgment is warranted because the unjust-enrichment claims are de minimis fails. At day's end, Saint Luke's entire argument on these claims boils down to

this: Saint Luke's was not unjustly enriched because the time and compensation employees lost to rounding was de minimis in some common-law sense. Saint Luke's supports this argument with a single fact: that class members lost 38 seconds per shift on average because of rounding. That solitary fact cannot bear the tremendous weight Saint Luke's puts on it.

Whether a defendant has been unjustly enriched is a question of fact, *Chouteau Dev. Co., LLC v. Sinclair Mktg., Inc.*, 200 S.W.3d 68, 71 (Mo. Ct. App. 2006), and a jury could easily find in employees' favor on the facts here. Employees who lost net time because of rounding during the class period—and thus, those employees who can recover on an unjust-enrichment claim—lost nearly 4 minutes per shift, not 38 seconds. App. 97; R. Doc. 146, at 16. Even when time lost *and* time gained are added together, the *average* employee was not paid for 5.65 hours of work during the class period, totaling more than $2 million in unpaid wages. App. 97, 100; R. Doc. 146, at 16, 19. Summing up those hours for the 13,683 employees in the class means that Saint Luke's got **77,308.95** hours of work for free. App. 100; R. Doc. 146, at 19. That's the equivalent of more than 37 employees working a standard 40-hour shift for an entire year—all without pay. No jury would be required to find this to be de minimis or equitable.

Such a conclusion is fully in line with cases in which courts in Missouri and across the country have held that employers were or may

have been unjustly enriched by short-changing employees. *See, e.g.*, *Hornady v. Outokumpu Stainless USA*, 2022 WL 495186, at *12-14 (S.D. Ala. Feb. 17, 2022); *Boswell v. Panera Bread Co.*, 2016 WL 1161573, at *17 (W.D. Mo. Mar. 24, 2016), *aff'd*, 879 F.3d 296 (8th Cir. 2018); *Jennings*, 355 S.W.3d at 536; *Encinas v. J.J. Drywall Corp.*, 840 F. Supp. 2d 6, 9-11 (D.D.C. 2012); *Singleton v. Adick*, 2011 WL 1103001, at *7 (D. Ariz. Mar. 25, 2011). Nor can it be argued, as Saint Luke's suggests, that Saint Luke's was a passive beneficiary of its employees' uncompensated labor. Saint Luke's created, implemented, and maintained the policies and timekeeping systems responsible for the gross underpayments. There is nothing just or equitable about this, making summary judgment on the unjust-enrichment claims inappropriate.

III. SUMMARY JUDGMENT WAS INAPPROPRIATE ON THE BREACH-OF-CONTRACT CLAIM.

The district court also erred in granting summary judgment on Houston's individual breach-of-contract claim.

Houston's contract theory is very simple. She had a contract with Saint Luke's requiring Saint Luke's to pay her for every hour she worked. App. 34-35, 90-91, 254; R. Doc. 43, at 18-19, R. Doc. 146, at 9-10, R. Doc. 159, at 20. Saint Luke's breached by failing to pay Houston for 7.63 hours of work, causing her $205.13 in damages. App. 100-01; R. Doc. 146, at 19-20. The contract, in other words, does not include the rounding policy or

the FLSA's rounding regulation, so Saint Luke's can be liable for a breach even if it complied with that regulation.

In response, Saint Luke's argues that (1) it did not breach, (2) it substantially complied with the contract, and (3) accepting Houston's breach-of-contract claim would nullify the FLSA's rounding regulation. These arguments are meritless.

Saint Luke's contention that it did not breach turns on the premises that the rounding policy and the rounding regulation are part of Houston's contract, and that Saint Luke's paid Houston in accordance with the policy. But the sole piece of evidence Saint Luke's cites to support these premises is the existence of the rounding policy itself. Saint Luke's Br. at 40-43 (citing App. 91-92; R. Doc. 146, at 5-6). It produces no evidence so much as suggesting that Houston—or any other employee—agreed to be paid according to this policy. Nor does it provide any evidence that the contract incorporates the rounding policy or any provision of the FLSA. And just because an employer has a policy does not mean that the policy is part of its employment agreements. *See Jennings*, 355 S.W.3d at 532-34. The simple fact is that Saint Luke's has not produced evidence showing that the contract includes the rounding policy or the FLSA's rounding regulation.[2]

[2] Of course, if the Court agrees with Saint Luke's that the contract provides for rounding consistent with the FLSA's rounding regulation, then Saint Luke's has still breached because it did not comply with the FLSA.

Saint Luke's substantial-compliance argument provides no refuge. This argument reduces to a single claim: "Saint Luke's compliance with the law dictates a finding that it (at least) substantially complied with the purported employment agreement." Saint Luke's Br. at 45. This argument stumbles right out of the gate: the FLSA expressly provides that state law may supply greater protection to employees than the FLSA, 29 U.S.C. § 218(a), so an employer like Saint Luke's may be liable for breach of contract even if it complies with the FLSA.

Matters only get worse from there. Whether Saint Luke's substantially complied is simply irrelevant to this case. The substantial-compliance doctrine applies in two situations in Missouri: (1) it bars *the plaintiff* from recovering when *she* does not substantially comply, *Weitz Co. v. MH Washington*, 631 F.3d 510, 524 (8th Cir. 2011); and (2) it permits one party to cancel the contract when the other does not substantially comply, *Fire Sprinklers, Inc. v. Icon Contracting, Inc.*, 279 S.W.3d 230, 233-34 (Mo. Ct. App. 2009). Neither situation is present here.

Finally, Saint Luke's again returns to policy: permitting Houston's contract claim to go forward supposedly would "nullify [the FLSA's] rounding regulation" because accepting it may mean that employees could maintain a claim for breach of contract if they were underpaid even if the underpayment were due to rounding. Saint Luke's Br. at 39-40. This argument misunderstands basic principles of contracts and the FLSA. It repeats the errors present in Saint Luke's other arguments by

incorrectly assuming that compliance with the FLSA insulates an employer from liability for breach of contract. But again: state law may supply greater protection to employees than the FLSA. 29 U.S.C. § 218(a). That basic principle is reflected in decisions from courts in Missouri and across the country recognizing that employees can prevail on a contract theory even when cognate FLSA claims fail. *See, e.g.*, *Hootselle v. Mo. Dep't of Corr.*, 624 S.W.3d 123, 131-33 (Mo. 2021); *Avery v. City of Talladega*, 24 F.3d 1337, 1348 (11th Cir. 1994). Far from "nullifying" the FLSA, permitting employees to maintain contract claims when FLSA claims fail gives full effect to the clear terms of the FLSA. And to the extent that employers like Saint Luke's that use rounding fear that this means that they may be liable for breach of contract, they have an easy fix. They can simply write their employment contracts to include clauses providing that employees will be paid according to a rounding policy and the FLSA's rounding regulation. But there is no evidence that Saint Luke's did that here, making summary judgment inappropriate.

CONCLUSION

The district court's judgment should be reversed.

Dated: January 20, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, TYPE STYLE REQUIREMENTS, AND VIRUS-SCANNING REQUIREMENTS

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because the brief contains 6,497 words, as determined by the word-count function of Microsoft Word for Office 365, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: January 20, 2023

s/ Colin Reeves
Colin Reeves

CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of January, 2023, I caused the foregoing brief to be filed electronically with the Court, where it is available for viewing and downloading from the Court's CM/ECF system, and that such electronic filing automatically generates a Notice of Docket Activity constituting service. I certify that all participants in the case are registered CM/ECF filing users and that service will be accomplished by the CM/ECF system.

I further certify that I will submit ten paper copies of the foregoing brief to the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit and one paper copy to counsel of record for Appellees, and that the paper copies of the brief will be identical to the version submitted electronically to this Court.

Dated: January 20, 2023

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