IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RESTAURANT LAW CENTER, a non-profit District of Columbia corporation; and TEXAS RESTAURANT ASSOCIATION, a non-profit Texas corporation, Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, Secretary of the United States Department of Labor, in his official capacity; and BRYAN JARRETT, Acting Administrator of the Department of Labor's Wage and Hour Division, in his official capacity, Defendants.	Civil Action No. 18cv567

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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PRELIMINARY STATEMENT

The United States Department of Labor (the "Department") has claimed for itself regulatory authority well beyond what Congress has conferred by statute. Through the device of an underground regulation, a provision slipped quietly into an internal agency handbook without notice to the public or an opportunity for comment, the Department has declared that if so-called tipped employees, such as waiters and bartenders, spend less than 80% of their working time on tip-generating tasks, the employer forfeits the statutory right to pay those employees a tipped wage. Worse still, the Department has attempted to elevate this subregulatory pronouncement to the force of law through repeated *amicus curiae* briefs arguing that the courts should defer to its rule. The Department's action is *ultra vires*, contrary to the pertinent statute, and illegal.

Under the Fair Labor Standards Act (the "FLSA"), employers may pay a "tipped employee"—i.e., "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips"—a cash wage of $2.13 per hour (or more) so long as the employer satisfies certain statutory criteria, including that the employee's tips plus the cash wage equal the minimum wage. *See* 29 U.S.C. §§ 203(m), 203(t). Congress has noted occupations in which workers qualify for this so-called tip credit: "waiters, bellhops, waitresses, countermen, busboys, service bartenders, etc." S. Rep. No. 93-690, at 43 (Feb. 22, 1974).

Not so fast, according to the Department. Employers might have a worker perform two different jobs, one tipped and one not tipped. Congress addressed that concern as well, noting that "where the employee performs a variety of different jobs, the employee's status as one who 'customarily and regularly receives tips' will be determined on the basis of the employee's activities over the entire workweek." S. Rep. No. 93-690, at 43 (Feb. 22, 1974). According to Congress, therefore, the availability of the tip credit in situations where the employee has both a tipped job and an untipped job depends on which job was predominant in any given workweek.

Dissatisfied with Congress's approach, the Department went in a different direction, issuing a regulation, without proper notice and comment, purporting to limit the tip credit in this so-called "dual jobs" scenario to the hours specifically spent in the tipped occupation. *See* 29 C.F.R. § 531.56(e). Then, doubling down on this hour-by-hour, minute-by-minute approach to the tip credit, the Department added a provision to the Wage and Hour Division's Field Operations Handbook applying this dual jobs construct to employees within a ***single*** occupation:

> (2) 29 CFR 531.56(e) permits the employer to take a tip credit for time spent in duties related to the tipped occupation of an employee, even though such duties are not by themselves directed toward producing tips, provided such related duties are incidental to the regular duties of the tipped employees and are generally assigned to the tipped employee. For example, duties related to the tipped occupation may include a server who does preparatory of closing activities, rolls silverware and fills salt and pepper shakers while the restaurant is open, cleans and sets tables, makes coffee, and occasionally washes dishes or glasses.
>
> (3) However, where the facts indicate that tipped employees spend a substantial amount of time (*i.e.*, in excess of 20 percent of the hours worked in the tipped occupation in the workweek) performing such related duties, no tip credit may be taken for the time spent in those duties. All related duties count toward the 20 percent tolerance.
>
> (4) Likewise, an employer may not take a tip credit for the time that a tipped employee spends on work that is not related to the tipped occupation. For example, maintenance work (*e.g.*, cleaning bathrooms and washing windows) are not related to the tipped occupation of a server; such jobs are non-tipped occupations. In this case, the employee is effectively employed in dual jobs.

U.S. Department of Labor, Wage and Hour Division, FIELD OPERATIONS HANDBOOK ("FOH") § 30d00(f)(2)-(4) (citations omitted), *see* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf at 29.

Tasks such as getting the restaurant ready for customers, restocking various items during meal service, cleaning, and closing down the restaurant at the end of the day—known in the industry as "side work"—have long been an integral part of the tipped occupations commonly found in restaurants. The Department acknowledges that these activities are a normal part of

these jobs. Yet the Department has inexplicably proclaimed that a server, bartender, busser, or any other tipped employee ***ceases*** to be a server, bartender, etc. if he or she spends more than 20% of his or her working time in a week on these particular duties.

The Department's made-up 80% standard leads to absurd results, including:

- A waiter who works 26 hours in a week and performs five hours of side work (i.e., 19.2% of the working time) may receive the tipped wage for his entire week; but a different waiter with the same schedule who performs the same side work but has a personal emergency on the last day of the week and has to leave two hours early, resulting in 24 hours of work, is, according to the Department, engaged in two different occupations and must receive full minimum wage for the five hours of side work (i.e., 20.8%).
- Bussers and service bartenders perform jobs that, by their nature, involve little to no activity that directly generates tips. Their roles consist entirely, or almost entirely, of side work. With no explanation, the Department treats those roles as not subject to the 80% standard, such that all of their working time may be at a tipped wage. But if a server spends 75% of her time taking customer orders and bringing them their food and drinks, and 25% bussing tables, then, according to the Department, 25% of her time is a separate non-tipped occupation for which she must receive full minimum wage.

Predictably, the Department's 80% standard, as well as its "zero tolerance" policy for cleaning bathrooms or washing windows, has spawned a nationwide wave of collective and class actions against the restaurant industry. The dual jobs provisions in the Department's FOH are arbitrary, capricious, contrary to the FLSA, promulgated in violation of the Administrative Procedure Act (the "APA"), and a violation of separation of powers. They should be set aside and enjoined under the APA.

THE PARTIES

1. Plaintiff Restaurant Law Center ("Law Center") is a public policy organization, headquartered at 2055 L Street, N.W., Suite 700, Washington, D.C. 20036, and affiliated with the National Restaurant Association ("National Association"), the largest trade association representing the restaurant and foodservice industry (the "Industry") in the world. The National Association was founded in 1919 and launched the Law Center, its affiliate, in 2015. The Industry is comprised of over one million restaurants and other foodservice outlets employing almost 14.7 million people—approximately 10 percent of the U.S. workforce. National Association members have locations that operate within the Western District of Texas, including corporate-owned food service establishments, franchisees, and independent operators. The Law Center routinely advocates on matters of labor relations policy and represents the interests of the National Association members in labor and workforce matters before the courts. Many National Association members, including members doing business in Texas, including within this District, employ tipped employees who perform varying amounts of side work, thereby subjecting them to claims under the Department's 80% standard as well as its disallowance of a tip credit for any time spent on cleaning bathrooms or washing windows.

2. Plaintiff Texas Restaurant Association ("TRA") is a non-profit organization, headquartered at 3300 N. IH-35, Suite 610, Austin, Texas 78705, with thousands of members statewide. The TRA regularly counsels and advises member restaurants about legal issues, legislation, labor and employment law, and other issues relating to the regulation of the restaurant industry. The TRA is the leading business association for Texas' $52.4 billion restaurant and foodservice industry, which spans over 43,000 locations throughout the state, employing a workforce of 1.2 million—12% of the state's employment. The TRA works to improve the business climate for its members. Its diverse network of members ranges from

restaurant owners, operators, staff and suppliers, to educators and students. They include seasoned veterans and industry leaders, as well as those just entering the workforce for the first time. Many TRA members, including members doing business within this District, employ tipped employees who perform varying amounts of side work, thereby subjecting them to claims under the Department's 80% standard as well as its disallowance of a tip credit for any time spent on cleaning bathrooms or washing windows.

3. Defendant United States Department of Labor is the federal department charged with administering and enforcing the FLSA. *See* 29 U.S.C. § 204.

4. Defendant R. Alexander Acosta (the "Secretary") is the Secretary of Labor, the cabinet-level officer who leads the Department. Congress has granted the Secretary the power to administer and to enforce the FLSA. The Office of the Secretary of Labor is located in the Department of Labor in Washington, D.C. Plaintiffs sue the Secretary in his official capacity.

5. Defendant Bryan Jarrett (the "Acting Administrator") is the Acting Administrator of the Department's Wage and Hour Division. The FLSA authorizes the creation within the Department of a Wage and Hour Division under the direction of an Administrator. *See* 29 U.S.C. § 204. The Acting Administrator leads the Wage and Hour Division, the agency that promulgated the subregulatory guidance at issue in this case, in an acting capacity while the President's nominee for Administrator awaits Senate confirmation. Plaintiffs sue the Acting Administrator in his official capacity.

JURISDICTION AND VENUE

6. Plaintiffs bring this action under the APA, 5 U.S.C. §§ 500-706, and under Article I, section 1 of the United States Constitution.

7. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702.

8. Venue is proper under 28 U.S.C. § 1391(e) in that (a) the Defendants include an agency of the United States and employees of that agency acting in their official capacity; (b) Plaintiff TRA resides in this judicial district; and (c) no real property is involved in this action.

9. This Court can grant declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. 2201 (declaratory judgment) and 28 U.S.C. § 2202 (injunctive relief), as well as 5 U.S.C. §§ 701, et seq., for violations of, *inter alia*, the APA, 5 U.S.C. § 706.

10. This Court is authorized to grant Plaintiffs' prayer for relief and to award costs, including a reasonable attorney's fee, under 28 U.S.C. § 2412 and 5 U.S.C. § 504.

STANDING

11. The Law Center and the TRA have standing to bring this litigation.

12. The Law Center's affiliate's members and the TRA's members have restaurants subject to the FLSA. Many of these members employ tipped employees who perform varying amounts of side work in the course of their job duties. As a result, these practices render these members subject to an investigation or a public or private lawsuit premised on the Department's 80% standard regarding the amount of time tipped employees must spend on tip-producing tasks in order for their employer to be able to pay them at a tipped rate for all of their working time. These members are also subject to an investigation or a public or private lawsuit premised on the Department's zero tolerance policy regarding tipped employees cleaning bathrooms or washing windows at a tipped wage.

13. Accordingly, many of the Law Center's affiliate's members and many of the TRA's members have standing to bring this suit in their own right. Therefore, the Law Center and the TRA may bring this action on behalf of those members.

14. None of the claims asserted through this lawsuit, or the relief requested, requires direct participation of the members of the Law Center's affiliate or the TRA.

THE STATUTORY FRAMEWORK

15. Section 6(a) of the FLSA requires employers to pay their covered employees a minimum wage of at least $7.25 per hour. 29 U.S.C. § 206(a).

16. Section 3(m) of the FLSA, which defines the term "[w]age" under the statute, allows an employer to satisfy its minimum wage obligation to a "tipped employee" in part by taking a "credit" toward the minimum wage based on tips an employee receives. *Id.* § 203(m).

17. Section 3(t) of the FLSA defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." *Id.* § 203(t).

18. Section 3(m) requires an employer who elects to take the tip credit to pay the employee a cash wage of at least $2.13 per hour, and then the law defines the employee's tips as constituting a "wage" that counts toward the minimum wage, up to the point where the cash wage plus the employee's tips equal the minimum wage. *Id.* § 203(m).

19. If the employee does not earn sufficient tips to bring his or her earnings up to the full minimum wage, then the employer must pay additional wages to make up the difference. *Id.*

20. Before 1966, the FLSA generally did not apply to employees in restaurants and hotels.

21. In 1966, as part of the legislative compromise struck in extending the coverage of the FLSA to these industries, Congress enacted the tip credit provision, modifying section 3(m) and adding section 3(t) to allow the tips received by employees to satisfy a portion of the minimum wage obligation.

22. This change accommodated, in part, the long-standing practice in these industries whereby workers received most or even all of their income from customer tips.

THE DEPARTMENT'S TIP CREDIT REGULATIONS

23. After the enactment of the statutory tip credit, the Department issued regulations addressing tipped employment, codified at 29 C.F.R. §§ 531.50-.60. Those regulations, consistent with the statute, provide that the tip credit applies based on the "occupation" of the employee.

24. Like the text of the FLSA itself, the regulations do not contain any distinction between duties that are "directed toward producing tips" and duties that are "not by themselves directed toward producing tips."

25. Nor do the regulations impose any specific limitation, 20% or otherwise, on the amount of time an employee may spend on certain tasks within his or her occupation before the employer loses the statutory right to take a tip credit for all of the employee's working time.

26. The regulations explain, consistent with the text of the FLSA, that if certain positions, such as a waiter, always receive at least $30 a month in tips, they will qualify for the tip credit. *See* 29 C.F.R. § 531.57.

27. The regulations contrast that circumstance with an employee who only occasionally receives tips, such as an employee who receives tips only at Christmas or New Year's, "when customers may be more generous than usual." *Id.*

28. The regulations also address employees who may be employed in two different occupations. *See* 29 C.F.R. § 531.56(e).

29. Under this regulation, known as the "dual jobs" regulation, when an employee works in two separate occupations for the same employer, one tipped and one not tipped, the employer may take a tip credit only for the tipped occupation.

30. The Department uses examples in the regulation to illustrate that there is a difference between an employee in two distinct, non-overlapping jobs and an employee who works in a single tipped job but whose duties may also include both activities that directly generate tips and activities that do not:

> In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least $30 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. ***Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his or her own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.***

29 C.F.R. § 531.56(e) (emphasis added).

31. When the Department promulgated this "dual jobs" regulation, it did so without a proper opportunity for notice and comment. The Department's Notice of Proposed Rulemaking made no mention at all of this type of dual jobs provision. *See* 32 Fed. Reg. 222 (Jan. 10, 1967).

32. When the Department issued its Final Rule, it provided no commentary concerning this dual jobs provision, other than noting that "a new § 531.56(e) is added" to the regulation. *See* 32 Fed. Reg. 13,575 (Sept. 28, 2967).

33. The dual jobs regulation is not a logical outgrowth of the original Notice of Proposed Rulemaking, and thus the Department failed to provide the public with the required notice and opportunity to comment on the regulation.

THE DEPARTMENT'S SUBREGULATORY "DUAL JOBS" GUIDANCE

34. Apart from the dual jobs regulation, the first discussion by the Department of tipped employees engaging in supposedly non-tipped work appears to be in a 1979 opinion letter addressing waitresses who "report to work two hours before the doors are opened to the public to prepare the vegetables for the salad bar." U.S. Department of Labor, Wage and Hour Division, Opinion Letter FLSA-895 (Aug. 8, 1975). With little analysis, the Department concluded that "since it is our opinion that salad preparation activities are essentially the activities performed by chefs, no tip credit may be taken for the time spent in preparing vegetables for the salad bar." *Id.* at 1.

35. In 1980, the Department was asked to opine whether the tip credit applies to a server in a restaurant who, as part of her closing duties, cleaned the salad bar, placed condiment crocks in the cooler, cleaned and stocked the waitress station, cleaned and reset the tables (including filling cheese, salt and pepper shakers), and vacuumed the dining room carpet. *See* U.S. Department of Labor, Wage and Hour Division, Opinion Letter (Mar. 28, 1980), 1980 DOLWH LEXIS 1. The Department stated that the employee would be considered a tipped employee for this period and the tip credit would apply because the employee was not engaged in a dual occupation. The Department noted that there was no "clear dividing line" between the work of the server and the work of another occupation. The letter makes no mention of any percentage limitation on tipped versus non-tipped duties or that the appropriate analysis would involve such a limitation.

36. In 1985, the Department issued an opinion letter addressing whether a server who, during a five-hour shift, performed 1.5 to 2 hours of preparatory work prior to the restaurant opening could be paid the tip credit rate for the time spent performing preparatory activities, which amounted to "30%-40%" of the employee's workday. The Department concluded that

because only one employee was assigned to the opening duties, the employee was responsible for preparing the entire restaurant, not just her area, and because the amount of time was 30% to 40% of the entire shift, the tip credit could not be applied. *See* U.S. Department of Labor, Wage and Hour Division, Opinion Letter (Dec. 20, 1985), 1985 DOLWH LEXIS 9.

37. None of those opinion letters articulated a temporal limit on performing tasks that do not directly generate tips in order for an employer to retain the right to take a tip credit for all time a tipped employee works.

38. In 1988, the Department issued a section in its Field Operations Handbook that stated as follows:

> Reg. 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (*i.e.*, maintenance and preparatory or closing activities). For example, a waiter/waitress, who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. ***However, where the facts indicate*** that specific employees are routinely assigned to maintenance, or ***that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.***

FOH § 30d00(e) (Dec. 9, 1988) (emphases added).

39. On January 15, 2009, the then-Acting Administrator of the Wage and Hour Division issued an opinion letter concluding that a "barback"—another name for a service bartender, who is responsible for "restocking the bar and ensuring that the bar area remains clean and organized" and "clean[ing] empty glasses sitting on the bar, tak[ing] out the trash from behind the bar and clean[ing] the floor of the bar area" was a "tipped employee" eligible for the tip credit. The letter made no mention of the Department's 80% standard, although the

description of the job duties makes it plain that the barbacks spend far less than 80% of their working time on activities that directly generate tips. *See* U.S. Department of Labor, Wage and Hour Division, Opinion Letter FLSA2009-12 (Jan. 15, 2009).

40. On January 16, 2009, the then-Acting Administrator of the Wage and Hour Division issued an opinion letter acknowledging that the 80% standard was unworkable and confusing, and expressly rescinded that standard. The Department stated that "no limitation shall be placed on the amount of these [related] duties that may be performed, whether or not they involve direct customer service, as long as they are performed contemporaneously with the duties involving direct service to customers or for a reasonable time immediately before or after performing such direct-service duties." The Department explained that, consistent with the text of the FLSA and its regulations, so long as the duties performed by the employees are part of their tipped occupation, those employees are not engaged in "dual jobs." *See* U.S. Department of Labor, Wage and Hour Division, Opinion Letter FLSA 2009-23 (Jan. 16, 2009).

41. Approximately six weeks later, following a change in the administration, the Department withdrew the January 16, 2009 opinion letter. *See* 2009 DOLWH LEXIS 27. The Department did not, however, withdraw the January 15, 2009 letter regarding barbacks.

42. In or around June 2012, the Department substantially revised this portion of the FOH, replacing the former section 30d00(e) with a new provision, now located at section 30d00(f):

> (1) When an individual is employed in a tipped occupation and a non-tipped occupation, for example, as a server and janitor (dual jobs), the tip credit is available only for the hours spent in the tipped occupation, provided such employee customarily and regularly receives more than $30 a month in tips. *See* 29 CFR 531.56(e).
>
> (2) 29 CFR 531.56(e) permits the employer to take a tip credit for time spent in duties related to the tipped occupation of an employee, even though such duties are not by themselves directed toward producing

> tips, provided such related duties are incidental to the regular duties of the tipped employees and are generally assigned to the tipped employee. For example, duties related to the tipped occupation may include a server who does preparatory or closing activities, rolls silverware and fills salt and pepper shakers while the restaurant is open, cleans and sets tables, makes coffee, and occasionally washed dishes or glasses.
>
> (3) However, where the facts indicate that tipped employees spend a substantial amount of time (*i.e.*, in excess of 20 percent of the hours worked in the tipped occupation in the workweek) performing such related duties, no tip credit may be taken for the time spent in those duties. All related duties count toward the 20 percent tolerance.
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> (4) ***Likewise, an employer may not take a tip credit for the time that a tipped employee spends on work that is not related to the tipped occupation. For example, maintenance work (e.g., cleaning bathrooms and washing windows) are not related to the tipped occupation of a server; such jobs are non-tipped occupations. In this case, the employee is effectively employed in dual jobs.***

FOH § 30d00(f) (Dec. 12, 2016) (emphasis added), *see* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf at 29 (last visited July 6, 2018).

43. Although the Department revised this portion of the FOH in 2012, it did not disclose this change publicly until July of 2016, when the Department mentioned this change in a footnote to an amicus curiae brief. *See* Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants, at 12-13 n.4, *Marsh v. J. Alexander's LLC*, Nos. 15-15791 et al. (9th Cir. Jul. 13, 2016), ECF No. 49-1.

44. The most fundamental substantive difference between the 1988 version and the 2012 version is that the 1988 version allowed tipped employees to spend up to 20% of their working time engaged in maintenance activity without loss of the tip credit.

45. The 2012 version, by contrast, expressly declares that maintenance work does not count toward the 20% threshold, and instead is per se a separate occupation regardless of the time spent, and that such time is always subject to the full minimum wage.

46. In April 2017, three days before a three-judge panel of the U.S. Court of Appeals was scheduled to hear oral argument in a case addressing the validity (or not) of the 80% standard, the Department submitted a letter to the Ninth Circuit stating, inter alia, that "[t]he Department wishes to clarify that there is no categorical rule that all cleaning duties are unrelated to the job of a server. Rather, . . . the inquiry into whether a particular task is related to the job of server is often fact-specific." Letter at 1 (citations omitted), *Marsh v. J. Alexander's LLC*, Nos. 16-15003 et al. (9th Cir. Apr. 17, 2017), ECF No. 75.

SIDE WORK IN THE RESTAURANT INDUSTRY

47. The Wage and Hour Division has never conducted a study to identify the types of job duties that are commonly associated with various tipped occupations.

48. Another agency at the Department, the Employment and Training Administration, sponsors a database that specifically collects exactly that type of information. According to that agency, "[t]he O*NET system is maintained by a regularly updated database of occupational characteristics and worker requirements across the U.S. economy. It describes occupations in terms of the knowledge, skills, and abilities required as well as how the work is performed in terms of tasks, work activities, and other descriptors." *See* www.doleta.gov/programs/onet (last visited July 6, 2018).

49. According to the agency, "[t]he O*NET database is collected and updated through ongoing surveys of workers in each occupation supplemented in some cases by occupation experts. These data are incorporated into new versions of the database on an annual schedule to provide up-to-date information on occupations." *Id.*

50. O*NET provides a great deal of detailed information about a number of occupations within the "accommodation and food services" industry, specifically "waiters and waitresses" as well as "bartenders." The report for waiters and waitresses lists 24 separate tasks

that the occupation comprises, expressly including "preparing salads[,]" "[p]erform cleaning duties[,]" and "sweeping and mopping floors[.]" *See* www.onetonline.org/link/summary/35-3031.00 (last visited July 6, 2018).

51. The same report also lists 19 detailed work activities for these roles, including "[c]ook foods" and "[p]repare foods for cooking or serving[.]" *Id.*

52. The O*NET report for bartenders likewise lists 20 tasks and 18 detailed work activities, including "[c]ook foods" and "[p]repare foods for cooking or serving[.]" *See* www.onetonline.org/summary/35-3011.00 (last visited July 6, 2018).

53. Neither the Wage and Hour Division nor the Employment and Training Administration has undertaken a study regarding how much time tipped employees generally spend on specific tasks within their occupations, including the proportion of time spent on tasks that generate tips versus tasks that do not directly generate tips.

54. Side work is a normal and customary part of the tipped occupations found in restaurants, and it has been so since before the FLSA applied to restaurant employees.

55. There is no accepted standard within the restaurant industry regarding how much time a tipped employee should spend on side work versus other tasks.

56. It is common in restaurants for certain tasks, such as cleaning, preparing various work areas, bringing dirty dishes from the dining area to the kitchen, loading dirty dishes into a dishwasher, preparing salads, putting the final touches such as garnishes on a plate before delivering it to customers, or rolling silverware into napkins to be performed by more than one category of employee. There are overlapping tasks sets in restaurants that cut across job titles, with the emphasis being on teamwork and using the slower times to prepare the restaurant for the busier times.

57. Because restaurant employees often move rapidly from one task to another throughout a shift, there is no practical way for an employer to keep an accurate record of how much time an employee spends on tip-producing versus non-tip-producing tasks throughout a workweek.

THE DEPARTMENT'S DUAL JOBS FOH GUIDANCE IS ARBITRARY, CAPRICIOUS, AND AN ABUSE OF DISCRETION

58. The text of the FLSA allows employers to take a tip credit based on an employee's status as a tipped employee, which in turn hinges on the employee's occupation.

59. In short, if an employee has a job—the common meaning of the otherwise undefined statutory term "occupation"—that customarily and regularly produces at least $30 a month in tips, he or she is a tipped employee.

60. If an employee has two or more different jobs for an employer, one or more of which is tipped and one or more of which is not tipped, the FLSA's legislative history shows that for any given workweek, the employer either is or is not a tipped employee, depending on the overall mix of job responsibilities over the entire workweek.

61. The FLSA does not confer upon the Department the authority to subdivide a single workweek into hours or minutes subject to the tip credit and hours or minutes not subject to the tip credit.

62. The FLSA does not confer upon the Department the authority to subdivide a tipped occupation into tasks that generate tips and tasks that do not, and to limit the availability of the tip credit based on the relative proportions of those two groups of activities.

63. The FLSA does not confer upon the Department the authority to categorically deny an employer the right to take a tip credit for time an employee in a tipped occupation spends on maintenance activities such as cleaning a bathroom or washing windows.

64. The FLSA does not confer upon the Department the authority to dictate the appropriate mix of tasks within a tipped occupation. So long as an employer assigns a tipped employee to perform the core functions of an occupation during a shift (e.g., assigning a server to wait tables, or a bartender to prepare drinks for customers), that employee does not cease to be engaged in the tipped occupation by virtue of performing side work during a shift along with the core functions of the occupation. Nor does a tipped employee cease to be engaged in the tipped occupation merely because the employer assigns side work during times when the restaurant is slow.

65. The public policy underlying the FLSA's tip credit provision is to protect employees' minimum wage rights while at the same time accommodating the extensive history of tipping in the restaurant industry, among other industries.

66. It is not the purpose of the FLSA's tip credit provision to give tipped employees a windfall or to put tipped employees in a better position than other employees in the economy who are not subject to the tip credit.

67. The public policy underlying the FLSA's minimum wage and tip credit provisions is fully satisfied and vindicated so long as in any given workweek a tipped employee receives sufficient tips, combined with the cash wage, to cover the minimum wage multiplied by the total number of hours worked.

68. The Department's 80% standard concerning tip-generating tasks, as well as its zero tolerance for taking a tip credit for time a tipped employee spends cleaning bathrooms or washing windows, derives from a misunderstanding and a lack of information regarding how employees actually perform their jobs in restaurants.

69. Congress never intended for the Department to micromanage restaurant employment at the task level, nor did it ever give the Department the authority to do so.

70. The Department's 80% standard and its prohibition on taking a tip credit for any time spent cleaning bathrooms or washing windows is contrary to the text of the FLSA, the statute's legislative history, and the public policy underlying the minimum wage and tip credit provisions.

71. The Department's 80% standard and its prohibition on taking a tip credit for any time spent cleaning bathrooms or washing windows is arbitrary, capricious, and irrational.

CLAIMS FOR RELIEF

COUNT I
Declaratory Judgment Under 28 U.S.C. §§ 2201-2201 and 5 U.S.C. §§ 706(2)(A) and 706(2)(C) that the Dual Jobs FOH Provisions Exceeded Statutory Authority

72. Plaintiffs restate and incorporate by reference the preceding paragraphs as if fully set forth herein.

73. Defendants' dual jobs FOH provisions, FOH § 30d00(f) (Dec. 12, 2016), are not authorized by the FLSA or any other law.

74. Defendants' dual jobs FOH provisions, FOH § 30d00(f) (Dec. 12, 2016), exceed Defendants' statutory jurisdiction and authority.

75. Accordingly, Defendants' dual jobs FOH provisions, FOH § 30d00(f) (Dec. 12, 2016), are in excess of Defendants' statutory authority, jurisdiction, and limitations, in violation of 5 U.S.C. § 706(2)(C), and are not in accordance with law, in violation of 5 U.S.C. § 706(2)(A).

76. Because of Defendants' actions, Plaintiffs and their members have suffered harm as set forth above, including exposure to legal claims for failure to comply with Defendants' guidance.

77. Plaintiffs have no other adequate remedy in court or administratively for Defendants' unlawful action as described herein, and such action has caused Plaintiffs to suffer undue and actual hardship and irreparable injury.

COUNT II
Declaratory Judgment Under 28 U.S.C. §§ 2201-2201 and 5 U.S.C. §706(2)(A) that the Dual Jobs FOH Provisions Are Arbitrary and Capricious, an Abuse of Discretion, and Not In Accordance with the Law

78. Plaintiffs restate and incorporate by reference the preceding paragraphs as if fully set forth herein.

79. Under the APA, a reviewing court must set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

80. Defendants issued the dual jobs FOH provisions, FOH § 30d00(f) (Dec. 12, 2016), in violation of the APA as it is an abuse of discretion and otherwise not in accordance with the law.

81. The pertinent text of the FLSA is unambiguous, and it precludes the Defendants' dual jobs interpretation in the FOH.

82. In addition, the legislative history of the FLSA demonstrates that Congress has spoken to this issue in a manner that is irreconcilable with the Defendants' approach.

83. Therefore, the Defendants' dual jobs FOH provisions are not entitled to deference, are arbitrary and capricious, are an abuse of discretion, and are contrary to the law.

84. Because of Defendants' actions, Plaintiffs and their members have suffered harm as set forth above, including exposure to legal claims for failure to comply with Defendants' guidance.

85. Plaintiffs have no other adequate remedy in court or administratively for Defendants' unlawful action as described herein, and such action has caused Plaintiffs to suffer undue and actual hardship and irreparable injury.

COUNT III
Declaratory Judgment Under 28 U.S.C. §§ 2201-2201 and 5 U.S.C. § 706(2)(D) that Defendants Issued the Dual Jobs FOH Provisions Without Observance of Procedure Required by Law

86. Plaintiffs restate and incorporate by reference the preceding paragraphs as if fully set forth herein.

87. Defendants issued the dual jobs FOH provisions, FOH § 30d00(f) (Dec. 12, 2016), in violation of the APA as by virtue of failing to issue the guidance as a regulation subject to full public notice and opportunity to comment.

88. The dual jobs FOH provisions, FOH § 30d00(f) (Dec. 12, 2016), are not simply a restatement of agency opinion letters or other previous guidance, or mere clarification of preexisting regulations. Instead, the FOH's 80% standard and per se exclusion of certain maintenance activities from tip credit eligibility are entirely new requirements, applicable to restaurants and other employers throughout the country, and thus a substantive rule under 5 U.S.C. § 551(4). By submitting amicus curiae briefs to various federal courts in support of private lawsuits alleging claims premised on the dual jobs FOH provisions, Defendants have demonstrated a clear intention that these provisions be treated as giving rise to judicially enforceable rights.

89. Because the dual jobs FOH provisions, FOH § 30d00(f) (Dec. 12, 2016), are in reality a rule, Defendants were required to follow the notice-and-comment rulemaking procedures set forth in 5 U.S.C. § 553.

90. Defendants' failure to follow the required procedure in issuing the dual jobs FOH provisions violates the APA, 5 U.S.C. § 706(2)(D), rendering the dual jobs FOH provisions null and void and entitled to no deference.

91. Because of Defendants' actions, Plaintiffs and their members have suffered harm as set forth above, including exposure to legal claims for failure to comply with Defendants' guidance.

92. Plaintiffs have no other adequate remedy in court or administratively for Defendants' unlawful action as described herein, and such action has caused Plaintiffs to suffer undue and actual hardship and irreparable injury.

COUNT IV
Declaratory Judgment Under 28 U.S.C. §§ 2201-2201, 5 U.S.C. § 706(2)(B), and Article I, Section I of the United States Constitution that the Dual Jobs FOH Provisions Are Contrary to Constitutional Right

93. Plaintiffs restate and incorporate by reference the preceding paragraphs as if fully set forth herein.

94. Article I, section I of the United States Constitution vests exclusive legislative authority in the Congress.

95. In issuing the dual jobs FOH provisions, FOH § 30d00(f) (Dec. 12, 2016), Defendants, who are members of the Executive Branch, engaged in prohibited legislative activity. Defendants did not merely interpret or administer the statute that Congress enacted. Instead, they created substantive requirements wholly untethered to the statutory text. They accomplished this through the two-step ruse of issuing an arguably ambiguous dual jobs regulation, 29 C.F.R. § 531.56(e), which itself was the product of an invalid process due to the absence of an opportunity for notice and comment, followed by promulgating what purported to be an interpretation of the regulation. The end product, however—the dual jobs FOH

provisions—bears no resemblance or relationship to the FLSA or even to the dual jobs regulation.

96. By engaging in legislative activity from the Executive Branch, Defendants violated Article I, section I and the separation of powers required therein.

97. In violating constitutional separation of powers, Defendants also violated the APA, 5 U.S.C. § 706(2)(B).

98. Because of Defendants' actions, Plaintiffs and their members have suffered harm as set forth above, including exposure to legal claims for failure to comply with Defendants' guidance.

99. Plaintiffs have no other adequate remedy in court or administratively for Defendants' unlawful action as described herein, and such action has caused Plaintiffs to suffer undue and actual hardship and irreparable injury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court issue the following relief:

1. A declaratory judgment that the dual jobs FOH provisions, FOH § 30d00(f) (Dec. 12, 2016), are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" under the APA;

2. A declaratory judgment that the dual jobs FOH provisions, FOH § 30d00(f) (Dec. 12, 2016), are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the APA;

3. A declaratory judgment that Defendants issued the dual jobs FOH provisions, FOH § 30d00(f) (Dec. 12, 2016), "without observance of procedure required by law" under the APA;

4. A declaratory judgment that the dual jobs FOH provisions, FOH § 30d00(f) (Dec. 12, 2016), are "contrary to constitutional right, power, privilege, or immunity" under the APA;

5. A declaratory judgment that the dual jobs FOH provisions, FOH § 30d00(f) (Dec. 12, 2016), are unlawful under the Constitution's separation of powers;

6. A permanent injunction barring Defendants from enforcing, publicizing, or otherwise encouraging any person or court to follow or to defer to the dual jobs FOH provisions, FOH § 30d00(f) (Dec. 12, 2016);

7. A permanent injunction ordering Defendants to rescind the dual jobs FOH provisions, FOH § 30d00(f) (Dec. 12, 2016), forthwith; and

8. All other relief to which the Plaintiffs may show themselves to be entitled, including attorneys' fees and costs of suit.

Respectfully submitted,

By: /s/ Greta Ravitsky

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