

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

RESTAURANT LAW CENTER, *et al.*,

Plaintiffs

v.

UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Defendants.

Civil Action No. 1:21-cv-01106-RP

**PLAINTIFFS' UNOPPOSED MOTION FOR LEAVE TO FILE A
NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Restaurant Law Center and Texas Restaurant Association (referred to collectively as "Plaintiffs") respectfully move the Court pursuant to Local Rule CV-7(B) and 7(E)(1) for entry of an Order permitting them to file a notice of supplemental authority in support of their motion for summary judgment and in opposition to Defendants' motion for summary judgment. Specifically, Plaintiffs seek leave to file a 350-word notice of supplemental authority informing the Court of a pertinent recent ruling by the Supreme court of the United States. In support of this motion, Plaintiffs state as follows:

1. Plaintiffs filed their motion for summary judgment on April 22, 2022. (D.E. 36.) Defendants filed their motion for summary judgment (D.E. 38) and combined memorandum in support thereof and opposition to Plaintiffs' motion on May 13, 2022. (D.E. 39.) Plaintiffs filed their combined reply and opposition memorandum (D.E. 41) on May 27, 2022. Defendants filed their reply memorandum (D.E. 42) on June 13, 2022.

2. On June 30, 2022, the Supreme Court issued its decision in *West Virginia v. EPA*, — U.S. —, 2022 WL 234728 (June 30, 2022). That decision articulated principles of

administrative law and separation of powers that, in Plaintiffs' view, bear on the pending cross-motions for summary judgment. Specifically, the new ruling supports the arguments Plaintiffs make at pages 16 through 36 (references are to ECF-assigned pagination) of their opening summary judgment memorandum (D.E. 36) and at pages 5 through 12 of their summary judgment reply and opposition memorandum (D.E. 41).

3. Plaintiffs' counsel has conferred with counsel for Defendants, who advises that Defendants take no position on this motion for leave so long as Plaintiffs limit the notice of supplemental authority to 350 words and state their consent in this motion—as Plaintiffs hereby do—to Defendants filing a response subject to the same length limitation.

WHEREFORE, Plaintiffs respectfully request that this Court grant leave to file the notice of supplemental authority attached hereto as Exhibit 1 in support of their motion for summary judgment and in opposition to Defendant's motion for summary judgment. A proposed order appears as Exhibit 2.

Respectfully submitted,

By: /s/ Paul DeCamp

Angelo I. Amador (*admitted pro hac vice*)
Restaurant Law Center
2100 L. Street, N.W., Suite 700
Washington, D.C. 20036
Tel: 202.331.5913
Fax: 202.973.3952
AAmador@restaurant.org

Paul DeCamp (*admitted pro hac vice*)
Epstein Becker & Green, P.C.
1227 25th Street, NW, Suite 700
Washington, D.C. 20037
Telephone: 202.861.1819
Facsimile: 202.861.3571
PDeCamp@ebglaw.com

Greta Ravitsky
Epstein Becker & Green, P.C.
700 Louisiana Street
Suite 3950
Houston, Texas 77002
Tel: 713.300.3215
Fax: 713.300.3235
GRavitsky@ebglaw.com

Kathleen Barrett (*admitted pro hac vice*)
Epstein Becker & Green, P.C.
227 West Monroe Street, Suite 3250
Chicago, Illinois 60606
Tel: 312.499.1400
Fax: 312.845.1998
KBarrett@ebglaw.com

Counsel for Plaintiffs

July 11, 2022

CERTIFICATE OF SERVICE

I, Paul DeCamp, an attorney, hereby certify that on July 11, 2022, I caused a copy of the foregoing **PLAINTIFFS' UNOPPOSED MOTION FOR LEAVE TO FILE A NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** to be filed with the clerk of the court, using the court's CM/ECF System. Notification of such filing will be sent to the following party:

Johnny H. Walker
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W., Room 12304
Washington, D.C. 205330
johnny.walker@usdoj.gov

/s/ Paul DeCamp _____

EXHIBIT 1

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

RESTAURANT LAW CENTER, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Defendants.

Civil Action No. 1:21-cv-01106-RP

**NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

On June 30, 2022, the Supreme Court issued its decision in *West Virginia v. EPA*, — U.S. —, 2022 WL 234728 (June 30, 2022), for the first time expressly adopting the “major questions” doctrine. “[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there.” *Id.* at *13 (citation omitted). In such instances, involving “agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted,” “[t]he agency . . . must point to ‘clear congressional authorization’ for the power it claims.” *Id.* (citation omitted). Concurring, Justice Gorsuch identified several types of situations that may present such major questions, two of which apply here: “when [an agency] seeks to regulate ‘a significant portion of the American economy’ or require ‘billions of dollars in spending’ by private persons or entities” and “when an agency seeks to ‘intrud[e] into an area that is the particular domain of state law.” *Id.* at *22-23 (Gorsuch, J., concurring) (citations omitted).

Here, based solely on alleged ambiguity in the statutory phrase “engaged in an occupation” in a statute setting forth the federal minimum wage, Defendants have asserted the authority to regulate at a task level the work of all tipped employees in the United States earning cash wages of less than \$7.25 per hour. This includes setting strict temporal limits on different types of activities that these employees may engage in and requiring businesses to change how they pay employees whenever someone goes more than 30 minutes without helping a customer or patron. By Defendants’ own projections, this regulation affects close to 500,000 different workplaces across the country, *see* 86 Fed. Reg. 60,141, and imposes on businesses more than two billion dollars in familiarization and compliance costs. *See id.* at 60,143. There is no general federal law on the performance of restaurant dining room work or customer-facing work in other industries; that is a matter for state law.

This regulation involves a major question. It lacks clear congressional authorization. Thus, it is unlawful.

Respectfully submitted,

By: /s/ Paul DeCamp

Angelo I. Amador (*admitted pro hac vice*)
Restaurant Law Center
2100 L. Street, N.W., Suite 700
Washington, D.C. 20036
Tel: 202.331.5913
Fax: 202.973.3952
AAmador@restaurant.org

Paul DeCamp (*admitted pro hac vice*)
Epstein Becker & Green, P.C.
1227 25th Street, NW, Suite 700
Washington, D.C. 20037
Telephone: 202.861.1819
Facsimile: 202.861.3571
PDeCamp@ebglaw.com

Greta Ravitsky
Epstein Becker & Green, P.C.
700 Louisiana Street
Suite 3950
Houston, Texas 77002
Tel: 713.300.3215
Fax: 713.300.3235
GRavitsky@ebglaw.com

Kathleen Barrett (*admitted pro hac vice*)
Epstein Becker & Green, P.C.
227 West Monroe Street, Suite 3250
Chicago, Illinois 60606
Tel: 312.499.1400
Fax: 312.845.1998
KBarrett@ebglaw.com

Counsel for Plaintiffs

July 11, 2022

CERTIFICATE OF SERVICE

I, Paul DeCamp, an attorney, hereby certify that on July 11, 2022, I caused a copy of the foregoing **NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** to be filed with the clerk of the court, using the court's CM/ECF System. Notification of such filing will be sent to the following party:

Johnny H. Walker
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W., Room 12304
Washington, D.C. 205330
johnny.walker@usdoj.gov

/s/ Paul DeCamp _____

EXHIBIT 2

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

RESTAURANT LAW CENTER, *et al.*,

Plaintiffs

v.

UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Defendants.

Civil Action No. 1:21-cv-01106-RP

PROPOSED ORDER

Upon consideration of the Plaintiffs' unopposed motion for leave to file a notice of supplemental authority in support of their motion for summary judgment and in opposition to Defendants' motion for summary judgment, it is hereby ORDERED that the motion is GRANTED. Plaintiffs may file a notice of supplemental authority limited to 350 words, and Defendants may file a response limited to 350 words.

Dated: _____

ROBERT PITMAN
United States District Judge