No. 23-50562

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESTAURANT LAW CENTER; TEXAS RESTAURANT ASSOCIATION, Plaintiffs-Appellants, v. UNITED STATES DEPARTMENT OF LABOR; JULIE A. SU, ACTING SECRETARY, U.S. DEPARTMENT OF LABOR; JESSICA LOOMAN, ACTING ADMINISTRATOR OF THE DEPARTMENT OF LABORS WAGE AND HOUR DIVISION, IN HER OFFICIAL CAPACITY, Defendants-Appellees.	:	On Appeal from the United States District Court for the Western District of Texas District Court Case No. 1:21-CV-1106

BRIEF OF *AMICI CURIAE* OHIO, ARKANSAS, GEORGIA, INDIANA, IOWA, KANSAS, MISSISSIPPI, MONTANA, SOUTH CAROLINA, TEXAS, AND UTAH SUPPORTING APPELLANTS AND REVERSAL

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

Amici Curiae are governmental parties. Under Fifth Circuit Rule 28.2.1, a certificate of interested persons is not required.

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STATEMENT OF AMICI INTERESTS AND INTRODUCTION

The Department of Labor's 2021 Dual Jobs Rule restructures employment relationships in the restaurant, bar, hotel, nail salon, and other industries by requiring that employers pay tipped employees $7.25 per hour for time spent on tasks that do not generate tips. The Department promulgated the Rule to fill a perceived ambiguity in the Fair Labor Standards Act's definition of "tipped employee." The Act defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips," and exempts such employees from standard minimum wage. 29 U.S.C. §203(t). It allows employers to pay these employees less, but only when tips make up the difference. 29 U.S.C. §203(m)(2). The Department views this language as ambiguous because it does not specify whether a tipped employee performing a task that does not produce tips is "engaged in" the "occupation" that produces tips at that precise moment. The Department's Rule contravenes Congress' decision to allow employers to credit employees' tips against the employer-paid direct wage and infringes the States' power to regulate wages within the framework Congress designed.

The *Amici* States file this brief to vindicate their interests in preserving their constitutionally reserved power over employment relationships and to defend policies enacted under that power from the Rule's unauthorized intrusion. As States,

the amici "may file … without the consent of the parties or leave of court." Fed. R. App. P. 29(a)(2).

SUMMARY OF ARGUMENT

The Rule is invalid for two reasons besides those Appellants offer. First, statutory context confirms that Appellants' interpretation of "engaged in an occupation" is correct, making the statute unambiguous at *Chevron* Step One. Second, the Rule's effect of reducing State power in an area of traditional State policymaking indicates that the Rule must have a clear grounding in the Act. Therefore, this Court should reverse the district court.

ARGUMENT

This Court reviews the district court's rulings on the parties' summary judgment motions *de novo*. *GWTP Invs., L.P. v. SES Americom, Inc.*, 497 F.3d 478, 481 (5th Cir. 2007). That fresh start will show that Section 203(t) is unambiguous under the *Chevron* framework, meaning Congress never authorized the Rule.

I. Statutory context confirms that the Rule fails at *Chevron* Step One.

Context confirms what Appellants show from contemporaneous dictionary definitions, structure, and legislative history—that "Congress intended the phrase 'engaged in an occupation' to mean participating in the field of work and job as a whole." Apt. Br. at 4, 35–41. Because Congress unambiguously addressed the

question the Rule answers, the statute must be given effect, not the Rule. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843 n.9 (1984).

A. Courts must consider context when deciding if a statute is "ambiguous."

This Court applies the *Chevron* framework to statutory provisions "us[ing] traditional tools of construction, focusing on statutory text, context, structure, and history." *Texas v. United States Env't Prot. Agency*, 983 F.3d 826, 836 (5th Cir. 2020). Contextual canons are part of that analysis. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018). Here, two contextual canons confirm that employees are "engaged in an occupation" whenever working in a job in a field of work. 29 U.S.C. §203(t). That matters because, under *Chevron*, if "the statute is unambiguous, the inquiry ends" and the Department lacks authority to promulgate the Rule. *Texas*, 983 F.3d at 836.

Start with the whole-text canon. That canon requires courts "to construe one part of the statute by [reference to] another part of the same statute" when possible. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) (quotation omitted). The canon works alongside the presumption of consistent usage, which prescribes that "[a] word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning." *Id.* at 170. Together, these contextual canons require the Court to consider

"occupation" as it appears elsewhere in Section 203 and give it a consistent meaning throughout. *See, e.g.*, *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019); *Caldwell v. Dretke*, 429 F.3d 521, 527 (5th Cir. 2005).

B. Context shows that "occupation" encompasses all tasks associated with a line of work.

Although Section 203 of the Act does not define "occupation," it does give examples of "occupation[s]" that support a whole-job definition of that term. The examples appear in the Act's definition of "Oppressive child labor." That definition creates a limited exception for "an occupation other than manufacturing or mining," meaning that "manufacturing" and "mining" are both occupations. 29 U.S.C. §203(l). And because both of those occupations are jobs comprising various tasks, "occupation" refers to a whole job, not just the tasks most essential to that job. Had Congress meant otherwise, it would have instead pointed to the relevant tasks as the "occupation." Perhaps something like "an occupation other than affixing parts to partially assembled products or separating ore from a rock formation." Reading the Act as a whole, and reading it consistently, shows that "occupation" refers to a whole job. That is, "occupation" has the same meaning in Section 203(l) as it has in Section 203(t).

Context also shows that Congress used a materially different term—"activities"—when it wanted to refer to individual job tasks instead of whole jobs.

"Activities" appears in Section 203(r)(2)'s demarcation of which "*activities* performed by any person or persons" "shall be deemed to be *activities* performed for a business purpose." 29 U.S.C. §203(r)(2) (emphasis added). These include activities "in connection with the operation of a hospital," nursing home, or school. 29 U.S.C. §203(r)(2). Similarly, Section 203(y) instructs how to recognize an "[e]mployee in fire protection *activities*." 29 U.S.C. §203(y). Contrast those provisions with Section 203(t), which does not define "tipped employee" as someone "engaged in an activity" for which tips are customary, but rather as "any employee engaged in" a customarily tipped "occupation." 29 U.S.C. §203(t). Only reading "occupation" to mean "job in a field of work" complies with the presumption of consistent usage by giving these different terms different meanings.

In these two ways, context demonstrates that Congress spoke directly to the issue of who is a "tipped employee" by giving that term an unambiguous definition. This plain meaning of occupation means that the Rule is invalid because Congress left no ambiguity for the Department to fill in. *Chevron,* 467 U.S. at 842–43 & n.9.

II. The Rule violates federalism principles.

The Department's Rule upsets the balance between State and federal governments by removing States' power to regulate in an area of traditional State concern. That dynamic is further reason why the Rule is invalid.

A. The federalism canon disfavors transfers of traditional State power to the federal government.

The federalism canon polices Congress's decision "to alter the usual constitutional balance between the States and the Federal Government" by "legislat[ing] in areas traditionally regulated by the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quotation omitted). Under the canon, Congress may alter that balance only if "its intention to do so [is] unmistakably clear in the language of the statute." *Id.* (quotation omitted). Congress' ability to alter the federalism balance is "an extraordinary power" because "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Id.* at 460, 457 (quoting *Tafflin v. Levitt,* 493 U.S. 455, 458 (1990)). "For this reason, it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" and "upset[s] the usual constitutional balance." *Id.* at 460 (quotation omitted). Courts discharge this duty by requiring that agencies establish clear statutory grounding for rules affecting federalism.

B. The Rule transfers traditional State power to the federal government without clear Congressional authorization.

The Rule violates the federalism canon because its minimum-wage requirements would override State policies and restructure employment relationships that States historically regulate. The question is not whether Congress could authorize the Department to enact the Rule, but whether Congress has authorized the Rule.

1. Minimum wage laws are an area of traditional State sovereign power.

Minimum wage laws began with the States and remain within States' police power. The Supreme Court reiterated last term that the "ability to protect the people, property, and economic activity within its borders" is "a fundamental aspect of a State's sovereign power." *New York v. New Jersey*, 598 U.S. 218, 225 (2023). Minimum wage laws are one way States have exercised their sovereign power. Massachusetts enacted the country's first minimum wage law in 1912, followed by California, Oregon, and Washington the next year. William P. Quigley, *"A Fair Day's Pay For A Fair Day's Work": Time to Raise and Index the Minimum Wage*, 27 St. Mary's L. J. 513, 516 (1996). By 1920, thirteen states, the District of Columbia, and Puerto Rico set minimum wages. *Id.* All this activity began decades before Congress set a federal wage floor in the Act.

After the Act passed, States built on its floor for tipped workers' wages. Thirty-four States provide additional protection for tipped workers by further restricting or eliminating employers' tip credit. Department of Labor, *Minimum Wages for Tipped Employees*, https://perma.cc/HE3E-HB9L. Even the Department seems to recognize that the Rule would have no application in the twelve of those thirty-four States whose existing protections for tipped workers exceed the Rule's. *Tip*

Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60114, 60141 (Oct. 29, 2021).

The variety of the state regulations reflects the variety of political and economic considerations that States must balance in setting policy in this area. And the variety of regulations gives reason to doubt that Congress authorized the Department to squeeze out much of the States' experimentation.

2. The Rule crowds out States' sovereign power to regulate tipped employees' wages.

The Rule would reduce States' power in this area by preempting State policies that conflict with it. *See, e.g.*, *AT&T Corp. v. Pub. Util. Comm'n of Texas*, 373 F.3d 641, 645 (5th Cir. 2004). It would restrict States' options for regulating tipped employment, including some options that many States have chosen. The Rule would, for example, preempt fourteen States' choices to stick with the Act's floor for tipped workers' wages. *See* Department of Labor, *Minimum Wages for Tipped Employees*, https://perma.cc/HE3E-HB9L. The Rule would also preempt four other States' choice to leave most of the Act's defaults in place and limit the tip credit only by setting a higher monthly tip threshold for it. *See id.* The Department may sweep away these States' laws only if Congress unambiguously authorized the Rule. *Gregory*, 501 U.S. at 460.

Overriding those States' policy choices not only unbalances concurrent sovereignty in this area, but also destroys the "numerous advantages" that the unaltered "federalist structure" offers "to the people." *Gregory*, 501 U.S. at 458. First, the existing local variation assures "decentralized" policymaking that is "more sensitive to the diverse needs of a heterogenous society." *See id.* at 458; *see also* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491–1511 (1987). The existing State laws reflect each State's judgment about what best suits their citizens' unique mix of political and economic concerns, while the uniform Rule lacks such tailoring.

Relatedly, State-led policy "increases opportunity for citizen involvement in democratic processes" and "makes government more responsive," *Gregory*, 501 U.S. at 458, because citizens have greater access to State legislators and hold them accountable at regular elections, whereas citizens have no opportunity to influence or replace Department personnel. Finally, State-led policy "allows for more innovation and experimentation in government," *id.*, because the costs of experimentation and failure in a single State are much lower than nationwide, and State case studies provide valuable data to policymakers at every level of government. The Rule threatens all these advantages of federalism.

3. The Rule lacks clear Congressional authorization.

The Department identifies no solid statutory grounding for the Rule's transfer of traditional State power to the federal executive branch. The Department claims that Congress impliedly delegated authority over the tip credit through ambiguity in Section 203(t) of the Act, but that text is unambiguous. *See* Apt. Br. at 35–41; *above* at 2–5. It includes all necessary details of a system that balances the competing interests of tipped workers in receiving a minimum wage and of employers in allowing tips to cover part of that wage when possible.

The Act's system is straightforward. It ensures that every employee receives no less than $7.25 per hour worked. 29 U.S.C. §206(a)(1)(C). But it also allows employers to pay a direct hourly wage less than $7.25 when tips make up the difference. 29 U.S.C. §203(m)(2). The Act fills in the remaining details too. It sets the direct wage employers must pay tipped employees, *id.*, and a metric for determining which employees the tip credit can apply to—those who customarily and regularly receive $30 in tips per month, 29 U.S.C. §203(t). That specificity leaves no gaps for the Department to fill. It also explains why the Department failed to recognize the supposed statutory "ambiguity" for twenty-two years after enactment. *See* Apt. Br. at 2.

All that suggests the Department's aim is not to finish setting up a system Congress only outlined, but to replace Congress' complete system with one of the Department's own design. Congress' system allows employers to assign employees some tasks that will produce no tips, yet still pay them a reduced direct wage so long as other tasks generate enough tips to make up the difference. The Department apparently views this as a problem because the Rule seeks to solve it by restricting "tipped employees" to spending no more than twenty percent of their time and thirty minutes at a time on non-tipped tasks. Agencies cannot replace Congress' expressed intent with their own preferred policy by claiming newfound ambiguity in a statute that has been functioning for decades. Instead, it takes a clear statement from Congress to authorize federal law that would redraw lines of State and federal sovereignty. *Gregory*, 501 U.S. at 460. This Court should set aside the Rule because the Department has not identified express or implied Congressional authorization for the Rule's restructuring of traditionally State-regulated employment relationships.

CONCLUSION

For these reasons, this Court should reverse the district court.

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2023, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this brief complies with the type-volume requirements and contains 2,394 words. *See* Fed. R. App. P. 29(a)(5), 32(a)(7).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

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