No. 22-50145

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; HONORABLE MARTIN J. WALSH, Secretary of the U.S. Department of Labor; JESSICA LOOMAN, Acting Administrator of the Department of Labor's Wage and Hour Division, in her official capacity,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas
No. 1:21-cv-1106

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

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The undersigned counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Plaintiffs-Appellants:

Restaurant Law Center. The Restaurant Law Center is an independent 501(c)(3) corporation affiliated with the National Restaurant Association. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Texas Restaurant Association. The Texas Restaurant Association is a nonprofit organization under the laws of Texas. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellants respectfully request oral argument. This appeal raises a question of exceptional importance concerning the exercise of legislative power by an executive agency and the standard for irreparable harm when members of the public challenge an unlawful agency regulation. The issues involved will benefit from full discussion with the Court at oral argument, during which counsel can address any questions the Court might have. Because the decisional process will be significantly aided by oral argument, it is appropriate here under Fed. R. App. P. 34(a)(2).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1) because it is an appeal of an order that denied the motion by Plaintiffs-Appellants the Restaurant Law Center (the "RLC") and the Texas Restaurant Association (the "TRA"; together, the "Associations") for a preliminary injunction. The district court properly exercised jurisdiction under 28 U.S.C. § 1331. The Associations timely appealed by filing a notice of appeal on March 1, 2022, within 60 days of the district court's February 22, 2022 order denying the Associations' motion. ROA.640–42.

STATEMENT OF ISSUE PRESENTED

Section 3(m) of the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. § 203(m), allows employers to treat the tips of "tipped employees" as satisfying a portion of the employers' obligation to pay those employees minimum wage under the FLSA. 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). In late October of 2021, the U.S. Department of Labor (the "Department") issued a Final Rule[1] purporting to deny employers the right to take the tip credit any time an employee either (1) spends less than 80% of his or her working time actively pursuing tips or (2) spends 30 or more continuous

[1] Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60,114 (Oct. 29, 2021) (the "Final Rule").

minutes not actively pursuing tips. This regulation is patently unlawful under the Administrative Procedure Act (the "APA"), as it imposes significant substantive limitations on the use of the tip credit untethered to, and in conflict with, both the text and the legislative history of the FLSA. The Associations filed this suit to have the regulation declared invalid and moved for a preliminary injunction, which the district court denied. That court assumed for purposes of the motion that the Associations are likely to prevail on the merits, but the district court denied the injunction based on the conclusion that the Associations failed to establish irreparable harm.

The question presented in this appeal is whether the district court abused its discretion or committed legal error in denying the preliminary injunction on the basis of absence of irreparable harm, notwithstanding (1) that court's stated assumption that the challenged regulation is invalid and (2) the unrebutted evidence that compliance with the unlawful Final Rule results in ongoing, substantial compliance costs and regulatory monitoring expense that cannot be recovered from the Department.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

The FLSA generally requires payment of a minimum wage, currently $7.25 per hour. 29 U.S.C. § 206(a)(1)(c). In 1966, Congress amended the FLSA's coverage of employees in the hotel and restaurant industries by creating what is "commonly referred to as a 'tip credit.'" *Montano v. Montrose Rest. Assocs., Inc.*, 800

F.3d 186, 188 (5th Cir. 2015). Congress designed the tip credit "to permit the continuance of existing practices with respect to tips." *See* S. Rep. No. 89-1487, at 12 (Aug. 23, 1966), *as reprinted in* 1966 U.S.C.C.A.N. 3002, 3014. The "tip credit" is "an exception that permits employers to pay less than the general minimum wage—$2.13 per hour—to a 'tipped employee' as long as the employee's tips make up the difference between the $2.13 minimum wage and the general minimum wage." *Id.* (citing 29 U.S.C. § 203(m)). The tip credit thus does not operate to reduce an employee's pay below minimum wage, but instead recognizes as "wages" certain tips that employees earn for their work and credits those tips toward the minimum wage those employees must receive.

The statutory concept is simple. Under section 3(m) of the FLSA an employer may take a tip credit with respect to a "tipped employee." 29 U.S.C. § 203(m)(2)(A). Congress defined "tipped employee" in section 3(t) to mean "any employee **engaged in an occupation** in which he **customarily and regularly receives more than $30 a month in tips**." *Id.* § 203(t) (emphasis added). Thus, so long as the employee is engaged in an occupation from which he or she customarily and regularly receives tips in excess of $30 a month, the tip credit is available.

The terms "engaged" and "occupation" are unambiguous. Contemporaneous dictionary definitions define "engaged" as "occupied; employed" and "occupation" as "the principal business of one's life: a craft, trade, profession or other means of

earning a living[.]"[2] *See* ROA.155–57. Reading the ordinary meanings together with the statute, it is clear Congress intended the phrase "engaged in an occupation" to mean participating in the field of work and job as a whole, not the mix of specific tasks within a job, and did not intend to authorize the Department to eliminate the tip credit based on the time spent on different tasks.[3] Accordingly, so long as the employee is engaged in an occupation in which he or she customarily and regularly receives tips in excess of $30 a month, the employee is a "tipped employee," and the employer may take the tip credit under the plain text and ordinary meaning of the terms in the statute.

II. THE DEPARTMENT'S 1967 "DUAL JOBS" REGULATION

In 1967, the Department issued regulations addressing tipped employment, codified at 29 C.F.R. § 531.50-60 (1967). Those regulations, consistent with the statute, provide that the tip credit applies based on the "occupation" of the employee. For example, one portion of the 1967 regulation—29 C.F.R.§ 531.56(e)—known as

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[2] The Department certainly understands the plain meaning of the term "occupation," because it sponsors the "O*NET Program, which is "the nation's primary source of *occupational* information." ROA.135 n.2. "Every *occupation*," the Department explains, requires a different mix of knowledge, skills and abilities, and *is performed using a variety of activities and tasks*." ROA.135 n.3.

[3] Congress itself recognized that entire occupations can be listed by occupational title and recognized as occupations that "customarily and regularly receive tips—*e.g.*, waiters, bellhops, waitresses, countermen, busboys, service bartenders, etc."—without regard to the amount of time spent on duties that directly and immediately produce tips. S. Rep. No. 93-690, at 43 (Feb. 22, 1974) (legislative history to the 1974 amendments to the FLSA's tip credit, quoted in the Final Rule, 86 Fed. Reg. at 60,116).

the "dual jobs" regulation, and the precursor to the Final Rule currently at issue, is consistent with the statutory text. *See* 29 C.F.R. § 531.56(e) (1967). This original version of the dual jobs regulation addresses situations in which an employee works in two separate occupations for the same employer, one that results in tips one that does not, and specifies that the employer may take the tip credit for only the occupation in which the employee customarily and regularly receives tips. *Id*. The dual jobs regulation used an example of an employee working in two separate and distinct occupations: "maintenance man" and "waiter":

> 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) (1967) (emphasis added).

The emphasized sentences make clear that the Department knew and understood that side work—*i.e.*, duties that do not directly and immediately produce tips—was part and parcel of "engaging" in an "occupation" that "customarily and regularly

receives more than $30 a month in tips," as Congress defined "tipped employee" in 29 U.S.C. § 203(t). This is so because "cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses" is side work performed by a waitress, and "prepar[ing] his or her own short order" is side work for a counterman. Both Congress and the Department have long recognized employees working as a "waitress" and as a "counterman" to be "tipped employees" because they are "engaged in an occupation" that "customarily and regularly" receives the requisite amount of tips. *See* S. Rep. No. 93-690, at 43 (Feb. 22, 1974) (legislative history to the 1974 amendments to the FLSA's tip credit). Indeed, the original dual jobs regulation makes explicit the Department's recognition and understanding that performing side work duties is an integral part of being a "tipped employee" under the FLSA—*i.e.*, "engaging in an occupation" that "customarily and regularly receives" the requisite amount of tips. This is so because the final sentence of § 531.56(e) specifies that "such related duties"—*i.e.*, side work—"**need not by themselves be directed toward producing tips**" in order for the tip credit to apply. 29 C.F.R. § 531.56(e) (1967) (emphasis added).

III. THE DEPARTMENT'S 2021 FINAL RULE

The Department issued the Final Rule after a notice and comment period.[4] The Final Rule changes the Department's prior regulations, creates a new term by which to consider application of the tip credit—"tipped occupation"—that does not appear in, and finds no support in, the statute, and imposes a regulatory regime in conflict with the plain language of the statute.

A. The Final Rule replaces the 1967 dual jobs regulation, which focused on two distinct and non-overlapping jobs, with a new standard focused solely on whether each task within a *single* job directly and immediately generates tips.

The Final Rule adds new subsection (f) to 29 C.F.R. § 531.56, creating a multi-layered definition of a term found nowhere in the statute: "tipped occupation." The Final Rule defines "tipped occupation" in an entirely circular manner: "An employee is engaged in a tipped occupation when the employee performs work that is part of the tipped occupation."[5] That linguistic legerdemain allows the Department

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[4] On several occasions between 1975 and 2018 the Department issued informal subregulatory guidance in the form of opinion letters and amendments to its Field Operations Handbook with regard to the dual jobs regulation. The Department's various different subregulatory pronouncements have been the subject of numerous court challenges throughout the years. *See, e.g.*, *Rafferty v. Denny's, Inc.*, 13 F.4th 1166 (11th Cir. 2021); *Marsh v. J. Alexander's LLC*, 905 F.3d 610 (9th Cir. 2018) (en banc); and *Fast v. Applebee's Int'l, Inc.*, 636 F.3d 872 (8th Cir. 2011). The legal questions presented in those cases focused on whether the courts should defer to the Department's interpretation of its own regulations and, if so, the appropriate level of deference. None of those decisions addressed in a meaningful way the question presented in this case: whether the Department's regulation conflicts with the FLSA. And none of those decisions addressed the Final Rule. Accordingly, those decisions have little or no bearing on the issue presented here.

[5] All references to § 531.56(f) refer to the version that took effect on December 28, 2021.

to create a brand new standard for what it views as "performing work that is part of the tipped occupation," and to decree that "[a]n employer may only take a tip credit for work performed by a tipped employee that is part of the employee's tipped occupation." 29 C.F.R. § 531.56(f). The Department then proceeds to devise three different categories of "work" that it deems to fall within or outside of the non-statutory term "tipped occupation."

First, the Final Rule refers to "tip-producing work." 29 C.F.R. § 531.56(f)(2). According to the Final Rule, this is work that actually "produces tips," and "includes all aspects of the service to customers for which the tipped employee receives tips," such as a server "providing table service" and a bartender "making and serving drinks." *Id.* § 531.56(f)(1)(i), (f)(2)(i)-(ii). The Final Rule limits the tip credit to time spent in "tip-producing work." *Id.* § 531.56(f).

Second, the Final Rule refers to "directly supporting work." 29 C.F.R. § 531.56(f)(3). According to the Final Rule, this is work "performed by a tipped employee in preparation of or to otherwise assist tip-producing customer service work," such as a server "refilling salt and pepper shakers and ketchup bottles, rolling silverware, folding napkins, sweeping or vacuuming under tables in the dining area, and setting and bussing tables." *Id.* § 531.56(f)(3)(i), (ii). The Final Rule also creates a new multi-part "substantial amount of time" limitation for "directly supporting work":

> An employer can take a tip credit for the time a tipped employee spends performing work that is not tip-producing, but directly supports tip-producing work, provided that the employee does not perform that work for a substantial amount of time. For the purposes of this section, an employee has performed work for a substantial amount of time if:
>
> (i) The directly supporting work exceeds a 20 percent workweek tolerance, which is calculated by determining 20 percent of the hours in the workweek for which the employer has taken a tip credit. The employer cannot take a tip credit for any time spent on directly supporting work that exceeds the 20 percent tolerance. Time for which an employer does not take a tip credit is excluded in calculating the 20 percent tolerance; or
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> (ii) For any continuous period of time, the directly supporting work exceeds 30 minutes. If a tipped employee performs directly supporting work for a continuous period of time that exceeds 30 minutes, the employer cannot take a tip credit for any time that exceeds 30 minutes. Time in excess of the 30 minutes, for which an employer may not take a tip credit, is excluded in calculating the 20 percent tolerance in paragraph (f)(4)(i) of this section.

29 C.F.R. § 531.56(f)(4).

Third, the Final Rule refers to work "that is not part of the tipped occupation." According to the Final Rule, this is work that the Department has deemed "does not provide service to customers for which tipped employees receive tips, and does not directly support tip-producing work." 29 C.F.R. § 531.56(f)(5)(i). The Department deems "[p]reparing food, including salads," to be "not part of the tipped occupation" of a server, and "[c]leaning the dining room" to be "not part of the tipped occupation" of a bartender. *Id.* § 531.56(f)(5)(ii). The Final Rule provides zero tolerance for "not part of the tipped occupation" work: "If a tipped employee is required to

perform work that is not part of the employee's tipped occupation, the employer may not take a tip credit for that time." *Id.* § 531.56(f)(5)(i). The Final Rule carves all work the Department deems "not part of the tipped occupation" from the tip credit even though there is no dispute that employees falling within the statute's definition of "tipped employee"—*i.e.*, "engaged in an occupation that customarily and regularly" receives the requisite amount in tips—indisputably perform such duties and activities. Indeed, the Department's own O*NET program, touted as "the nation's primary source of occupational information," expressly recognizes these tasks as part of these occupations. *See* ROA.144; *see also* ROA.347.

The Final Rule's brand new, and completely different, regulatory regime is untethered to Congress's definition of "tipped employee." Nothing in the statute purports to limit the availability of the tip credit to whether or not an employee performs specific job duties or tasks that directly and immediately produce tips; if the employee regularly receives at least $30 a month in tips from his or her job, regardless of how or why the employee gets those tips, the employee is a "tipped employee," and the employer may take the tip credit under the plain text and ordinary meaning of the terms in the statute. That is the law Congress wrote, and it precludes the Department's new standard for the tip credit in the Final Rule.

B. The Final Rule fails to consider relevant data for cost estimates and its decision points.

The Department failed to consider accurate costs or studies for its decision points in the Final Rule. First, the Department fails to accurately measure the costs to small businesses. *See* ROA.367. A separate federal agency, the SBA Office of Advocacy, submitted comments to the proposed version of the Final Rule expressing the "concern[] that the DOL's certification that the rule will not have significant economic impact on a substantial number of small entities **lacks an adequate factual basis[6].**" *Id.* Second, the Department acknowledged that labor markets and economic circumstances materially changed due to the COVID-19 pandemic, but then acknowledged the Final Rule's cost estimates were based on pre-COVID-19 pandemic data. *See* Final Rule, 86 Fed. Reg. at 60,150. Therefore, the Department's cost estimates for the Final Rule—by the Department's own acknowledgement and admission—have no relation to the current labor market or economic situation of tipped employees. *Id.* Finally, the Department failed to conduct any studies of any type to determine how affected occupations operate in the real world. *See Id.*, 86 Fed. Reg. at 60,123.

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[6] The SBA Office of Advocacy further observed that the "DOL improperly certified the proposed rule because it omitted some and underestimated other compliance costs of this rule for small employers." ROA.367–68. The SBA Office of Advocacy detailed its concerns, including assessing changes to wage costs, the costs of regulatory familiarization, adjustment costs, and management costs. *See* ROA.370–75.

C. The Final Rule acknowledges substantial ongoing compliance costs.

In the Final Rule, the Department admits that it will cost businesses $224,882,399 in familiarization costs, adjustment costs, and management costs during the first year alone. *See* Final Rule, 86 Fed. Reg. at 60,143. The Final Rule further acknowledges that for the following years, the Final Rule will impose management costs of $177,227,926. *Id*. And, over the next ten years, the Final Rule states that businesses will expend an additional $183.6 million in annual costs as a result of the Final Rule.

IV. THE PRESENT LITIGATION

The Associations represent restaurant owners located across the United States who use the tip credit provided for by the FLSA and are expending monies to comply with the Final Rule's unlawful amendments to the statutory text, at great cost to the livelihood of their businesses. *See* ROA.327 ¶ 3; ROA.378 ¶ 3. Shortly after the Department published the Final Rule on October 29, 2021, the Associations filed a Complaint against the Department and associated officials on December 3, 2021 seeking to permanently enjoin and vacate the Final Rule. ROA.8–44. The Complaint asserted that the Final Rule is arbitrary, capricious, contrary to the FLSA, promulgated in violation of the APA, and a violation of separation of powers. ROA.11. On December 17, 2021, the Associations filed an emergency motion for nationwide preliminary injunction to prohibit the Department from enforcing the

unlawful provisions of the Final Rule and to protect their restaurant members from ongoing irreparable injury. ROA.276–322. On February 9, 2022, the district court held an evidentiary hearing. ROA.661–757.

In support of its motion and during the hearing, the Associations presented the unrebutted affidavits of Angelo Amador, Executive Director of the RLC, Dr. Emily Knight, President and CEO of the TRA, and Tracy Vaught, TRA restaurant member who operates five restaurants in Texas, explaining the ongoing harms facing the Associations and their members. *See* ROA.331-38 ¶¶ 10-12, 16; ROA.381, 383-88 ¶¶ 13, 19-22; ROA.396-97 ¶¶ 5-9. Mr. Amador also testified at the evidentiary hearing and further detailed the ongoing, substantial compliance costs and necessary recordkeeping costs due to the increased threat of litigation experienced by the Associations' members trying to comply with the Final Rule. *See* ROA.702:22-703:7, ROA.707:15-24, ROA.713:5-12.

Mr. Amador, Dr. Knight, and Ms. Vaught explained in their declarations that each day the Final Rule is in effect, restaurants are expending significant monies on increased wage costs, adjustment costs, staffing costs, management costs, compliance costs, and record keeping costs to comply with the Final Rule. *See* ROA.331-38 ¶¶ 10-12, 16; ROA.381, 383-88 ¶¶ 13, 19-22; ROA.396-97 ¶¶ 5-9. *see also* ROA.704:2-21, 707:15-24, 708:15-709:15, 709:22-710:8, 710:16-24, 711:9-16,

713:5-12, 713:23-714:17. Mr. Amador and Dr. Knight further explained that members are expending resources, time, and money to perform ongoing auditing and monitoring of employees' activity to ensure compliance with the Final Rule. *See* ROA.381, 383-88 ¶¶ 13, 19-22; ROA.331-36, 338 ¶¶ 10-12, 16; *see also* ROA.694:17-695:9.

Mr. Amador and Dr. Knight also explained that the Final Rule is forcing many members to reluctantly discontinue their use of the tip credit altogether, which increases labor costs and wipes out already-thin profit margins. *See* ROA.384-88 ¶¶ 19(c)-(g), 20-22; ROA.332-35 ¶¶ 10(c)-(g), 12, 16. For example, Mr. Amador testified that he was aware of restaurants "that are now paying their bussers . . . the full minimum wage, instead of the tip credit, for that work because they're afraid that they might not be in compliance and might not be able to track the work properly." *See* ROA.704:5-14. Ms. Vaught also explained that her restaurant group "will spend close to one million dollars extra per year on labor" to comply with the Final Rule and once her restaurant spends these monies, they "cannot get the million dollars back." *See* ROA.396 ¶ 5.

It is an impossible time to add these additional substantial costs and burdens to many of the Associations' members as their operations are just barely surviving from COVID-19 pandemic financial losses and have depleted reserves. *See* ROA.387-88 ¶¶ 20-21; ROA.336 ¶¶ 11-12; ROA.397-98 ¶¶ 8-10; *see also*

ROA.694:9-16. Mr. Amador and Dr. Knight explained that as these ongoing increases in labor, operational expenditures, and compliance costs necessitated by the Final Rule continue, many restaurant members will terminate employees or permanently close due to their financially fragile state. *See* ROA.331-36, ROA.338 ¶¶ 10-12, 16; ROA.383-88 ¶¶ 10-22. The Associations' members with pandemic-stricken financial constraints have relatively few options as they continue to try to comply with the Final Rule—all of which have a devastating unrecoverable financial effect on the restaurant and its ability to serve the public. *See id.*

On February 22, 2022, the district court issued its decision denying the motion for preliminary injunction. *See* ROA.630-39. In that order, the district court assumed that the Associations would succeed on the merits of their claims, but held that the Associations had not established irreparable injury. *See* ROA.633. This timely appeal followed.

SUMMARY OF ARGUMENT

The Associations have met all four requirements for issuance of a preliminary injunction. The Department concedes in the Final Rule that the Associations' members are suffering irreparable injuries in the form of ongoing, substantial nonrecoverable compliance costs. This Court has repeatedly held that "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *See Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016)

(quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring); *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). At each turn, the district court erred by concluding that the unrebutted substantial, ongoing compliance and regulatory monitoring injuries suffered by the Associations' members are not irreparable harms. The district court grounded its decision on incorrect legal principles and thus erred in holding that the Associations have not met their burden to show that they will be irreparably harmed in the absence of an injunction.

In addition, because the Associations are likely to succeed on the merits of their claims and the balance of harms, as well as the public interest, weigh in favor of granting a preliminary injunction, the Court should reverse the district court and remand with instructions that the district court enter a preliminary injunction enjoining the Department and its associated officials from enforcing the Final Rule. *See, e.g.*, *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 288 (5th Cir. 2012) (vacating the district court's order denying plaintiff's motion for preliminary injunction to enjoin enforcement of a zoning ordinance and remanding for further proceedings consistent with the court's opinion); *see also Speaks v. Kruse*, 445 F.3d 396 (5th Cir. 2006) (reversing and remanding with instructions to enter preliminary injunction).

ARGUMENT

I. STANDARD OF REVIEW

A plaintiff is not required to prove its case in full to merit a preliminary injunction. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Rather, a preliminary injunction is warranted when the plaintiff demonstrates (1) a substantial likelihood of success on the merits; (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury outweighs any damage that the injunction might cause defendants; and (4) that the injunction will not disserve the public interest. *Speaks*, 445 F.3d at 399–400; *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 329 (5th Cir. 2005).

On appeal, a district court's denial of a preliminary injunction is reviewed for an abuse of discretion. *Women's Med. Ctr. v. Bell*, 248 F.3d 411, 418-19 (5th Cir. 2001); *Robinson v. Hunt County*, 921 F.3d 440, 451 (5th Cir. 2019). Each of the four requirements for a preliminary injunction presents a mixed question of law and fact, and while this Court reviews the district court's factual findings only for clear error, any legal conclusions are subject to *de novo* review. *Women's Med. Ctr.*, 248 F.3d at 418-19. Importantly, "[a]though the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed *de novo*." *Id.*

Here, the district court had no basis to make factual findings adverse to the Associations. Instead, that court denied the preliminary injunction based on legal error. Specifically, the district court erroneously concluded that its evaluation of the Associations' members' required efforts to comply with the Final Rule could override (1) the established principle that complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs; and (2) the uncontested evidence in the record, including the Department's own concessions in the Final Rule, that showed that the Associations' members are incurring ongoing, substantial unrecoverable compliance costs necessitated by the Final Rule. That erroneous conclusion is subject to *de novo* review.

II. THE ASSOCIATIONS' MEMBERS ARE IRREPARABLY HARMED EVERY DAY THE FINAL RULE STAYS IN EFFECT.

The record demonstrates that the Associations' members will suffer irreparable harm in the form of substantial, ongoing compliance costs due to the Final Rule and that these costs are nonrecoverable. *See* ROA.331-38 ¶¶ 10-16, ROA.381, 383-88 ¶¶ 13, 19-22, ROA.396-98 ¶¶ 5-10; *see also* ROA.704:2-21, 707:15-24, 708:15-709:15, 709:22-710:8, 710:16-24, 711:9-16, 713:5-12, 713:23-714:17, 719:14-23. This Court has consistently held that "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *See EPA*, 829 F.3d at 433 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring); *BST Holdings*, 17 F.4th at 618 (5th Cir.

2021); *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021). In the recent case of *BST Holdings*, this Court held that "compliance and monitoring costs associated with" the Occupational Safety and Health Administration's vaccine mandate constituted irreparable harm to the companies seeking stay of the mandate. 17 F.4th at 618. *See also ESI/Emp. Sols., L.P. v. City of Dallas*, 450 F. Supp. 3d 700, 736 (E.D. Tex. 2020) (finding plaintiffs will suffer irreparable harm resulting from compliance costs and increased regulatory burden, including hiring additional personnel to oversee compliance).

Although economic harm is not normally considered irreparable, the imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity ***does*** constitute irreparable injury. *See Wages & White Lion Invs.*, 16 F.4th at 1142; *Texas v. Becerra*, No. 5:21-CV-300-H, 2021 WL 6198109, at *20 (N.D. Tex. Dec. 31, 2021). Here, the Associations and their members will suffer irreparable harm in the form of substantial, ongoing compliance costs which would be unrecoverable given the Department's sovereign immunity to monetary damages.

The Department concedes in the Final Rule that businesses are incurring ongoing, substantial costs, to comply with the Final Rule. In particular, the Final Rule acknowledges that it will cost businesses $224,882,399 in familiarization costs, adjustment costs, and management costs during the first year alone. Final Rule, 86 Fed. Reg. at 60,143. The Final Rule further acknowledges for the following years,

the Final Rule will impose management costs of $177,227,926. *Id*. And, over the next ten years, the Final Rule states that businesses will expend an additional $183.6 million in annual costs. *Id*. It is well settled that the hundreds of millions of dollars of ongoing harm resulting from the costs imposed upon businesses (which, includes the Associations' members) to comply with the Final Rule cannot be recovered from the Department. *See Wages & White Lion Invs.*, 16 F.4th at 1142; *Becerra*, 2021 WL 6198109, at *20.

The district court, however, ignored the Department's concessions and instead erroneously concluded that the "[compliance] costs should have already been incurred." *See* ROA.634, 638. The district court's statement that compliance costs should have already been incurred is inconsistent with the court's statements during the evidentiary hearing, which acknowledged the substantial, ongoing compliance costs associated with the Final Rule. In response to a restaurant owner's concern that because of the Final Rule it will have to discontinue using the tip-credit, which will result in a loss of approximately a million dollars a year, the district court posited: "[C]ouldn't [the restaurant] hire five people to be present with a pad, keeping track of what people are doing all day, for a million dollars a year in five restaurants?" and "[the restaurant owner] can spend a million dollars over five restaurants complying with this regulation." ROA.719:14-23. The million dollars a year this restaurant will have to spend to comply with the Final Rule, and will not be able to

recover as damages, is in and of itself an irreparable harm. *See Wages & White Lion Invs.*, 16 F.4th at 1142; *Becerra*, 2021 WL 6198109, at *20. Accordingly, the district court's conclusion cannot be reconciled with its own findings, this Court's precedent, and the Department's own concessions that the compliance costs here are substantial and ongoing.

The district court's assumption that "[Appellants] are likely to succeed on the merits of their claim" further underscores the error of that court's approach. ROA.633. The district court's assumption in conjunction with its acknowledgment of the Final Rule's nonrecoverable ongoing compliance costs required the district court to find that the Associations and their members are likely to sustain irreparable harm. The logic here is simple: if "complying with a regulation later held invalid almost always produces the irreparable harm", *see EPA*, 829 F.3d at 433, and the district court assumes that the Associations are likely to succeed on the merits of their claims, then the only possible conclusion is that the Associations will be irreparably harmed absent an injunction. The district court, however, did not make such a finding. Instead, it disregarded the obvious effects of its own assumption and this Court's precedent to erroneously find that the Associations are not likely to suffer irreparable harm.

The Associations have also produced ample, uncontested evidence demonstrating additional specific irreparable harm they will continue to suffer if a preliminary injunction does not issue. It is uncontested that the Associations' members are continually "incurring costs right now to become familiar with the [Final] rule". ROA.702:22-703:2. To defend against litigation, the Associations' members continue to spend monies every day to develop records to prove compliance with the Final Rule. ROA.713:5-714:17. These members are also devoting substantial time and money to provide constant monitoring of their employees to comply with the Final Rule. ROA.333, 335, 337 ¶¶ 10(d) & (f), 15; ROA.382, 386 ¶¶ 17, 19(f). In addition, the Final Rule is forcing many members to reluctantly discontinue their use of the tip credit altogether, which increases labor costs and wipes out already-thin profit margins. *See* ROA.332-36, 338 ¶¶ 10(c)-(g), 12, 16; ROA.384-88 ¶¶ 19(c)-(g), 20-22; *see also* ROA.704:5-14.

In the face of all this uncontested evidence, and the Department's own concessions in the Final Rule, the district court held that the Associations' members will not suffer irreparable harm because the Associations' evidence was "speculative" and "conclusory". ROA.638-39. That conclusion, however, is irreconcilable with this Court's precedent that "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *See EPA*, 829 F.3d at 433. Furthermore, "[w]hen the threatened harm is more than de

minimis, it is not so much the magnitude but the irreparability that counts for purposes of a preliminary injunction." *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 756, 770–71 (10th Cir. 2010) (finding that trade associations' members were likely to suffer irreparable harm from compliance costs related to state law that might total more than $1,000 per business per year because such costs were unrecoverable due to sovereign immunity).

Here, not only is it uncontested that the Associations' members are spending substantial, unrecoverable monies to comply with the Final Rule, but the Department also admits in the Final Rule that the restaurant industry and other tipped industries will have to expend hundreds of millions of dollars a year to comply with the novel Final Rule. Final Rule, 86 Fed. Reg. at 60,143. Because the Associations will never be able to recover these substantial compliance costs, they have met their burden of showing a substantial threat of irreparable injury, and the district court erred in reaching a contrary conclusion. *Georgia v. Biden*, No. 1:21-CV-163, 2021 WL 5779939 (S.D. Ga. Dec. 7, 2021) at *4, *11 (citing overhead of collecting vaccination data from covered employees).

III. THE ASSOCIATIONS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCEEDING WITH THEIR CHALLENGES TO THE FINAL RULE.

The Associations have a strong likelihood of success in establishing that the Department acted arbitrarily, capriciously, and in excess of its statutory authority when it promulgated the Final Rule.

Congress specifically defined "tipped employee" in the FLSA to mean "any employee *engaged in an* ***occupation*** in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t) (emphasis added). The Final Rule observes that "Congress left 'occupation,' and what it means to be 'engaged in an occupation,' in section 3(t) undefined." Final Rule, 86 Fed. Reg. at 60,116. The Department therefore believes that "Congress delegated to the Department the authority to determine what it means to be 'engaged in an occupation' that customarily and regularly receives tips." *Id*. The Department is mistaken.

The Department incorrectly believes it is authorized to define terms in the statute simply because Congress did not specifically define those terms. In redefining the terms "occupation" and "engaged", the Department overlooks a fundamental question: whether the statutory terms it wants to [re-]define are clear and unambiguous. *See United States v. Castro-Gomez*, 365 F. Supp. 3d 801, 812 (W.D. Tex. 2019) (Pitman, J.) ("[a]s a general rule of statutory interpretation, a regulatory definition does not displace a statutory definition where the statute is clear and unambiguous"; ruling that unambiguous statutory definition controlled over conflicting

regulatory definition). Courts have consistently recognized that the "existence of ambiguity is not enough per se to warrant deference to the agency's interpretation . . . . The ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity." *Am. Bar Ass'n v. F.T.C.*, 430 F.3d 457, 469 (D.C. Cir. 2005); *Chamber of Commerce of U.S. v. N.L.R.B.*, 721 F.3d 152, 161 (4th Cir. 2013). For all the reasons that follow, the Final Rule is unlawful because it fails the "*Chevron* Two-Step." *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1023 (5th Cir. 2019) (vacating final administrative regulation promulgated after full notice and comment because it was unlawful under "the *Chevron* test for reviewing agency interpretations of statutes") (citation omitted); *see generally Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 468 U.S. 837 (1984).[7]

A. The *Chevron* Framework

1. *Chevron* Step One

> At step one, the court considers whether Congress has directly spoken to the precise question at issue. If Congress has directly spoken on an issue, that settles the matter: the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. Only if the statutory text is ambiguous can the court proceed to step two, asking whether the agency's construction of the statute is permissible.

[7] The Associations also challenge the Final Rule as arbitrary and capricious and unlawful abuse of discretion under the Administrative Procedures Act, 5 U.S.C. § 706(2)(A). "Because *Chevron* step two and the APA share the 'arbitrary and capricious standard, the APA reflects the principles of *Chevron*, and analysis under the two standards proceeds similarly." *Sw. Elec. Power*, 920 F.3d at 1028 (cleaned up, citation omitted).

Sw. Elec. Power, 920 F.3d at 1014 (cleaned up, citations omitted). More simply stated, "[t]he authority of administrative agencies is constrained by the language of the statute they administer," *Texas v. United States*, 497 F.3d 491, 500-01 (5th Cir. 2007) (citation omitted), so "[w]here Congress has established a clear line, the agency cannot go beyond it." *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 269 (5th Cir. 2015) (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013)). Courts answer the Step One question of "whether Congress has directly spoken to the precise question at issue" by relying on "the conventional standards of statutory construction—*i.e.*, text, structure, and the overall statutory scheme[.]" *Sw. Elec. Power*, 920 F.3d at 1023 (cleaned up, citations omitted). Courts "are not to focus myopically on a particular statutory provision in isolation because the meaning—or ambiguity—of certain words or phrases may only become evidence when placed in context." *Id.* (cleaned up, citations omitted).

"Canons of statutory interpretation further assist [courts] in assessing the meaning of a statute" at Step One. *Contender Farms*, 779 F.3d at 269. "Several basic considerations guide [the court's] inquiry under these canons: (1) we begin with the statute's language; (2) **we give undefined words their ordinary, contemporary, and common meaning**; (3) we read the statute's words in proper context and consider them based on the statute as whole, and (4) we consider a statute's terms in the light of the statute's purposes." *Contender Farms*, 779 F.3d at 269

(cleaned up, emphasis added, citations omitted). *Accord Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning"); *Nevada v. United States Dep't of Labor*, 218 F. Supp. 3d 520, 529 (E.D. Tex. 2016) ("The Court assumes Congress's intent from the plain meaning of a word when the statute does not define the term") (citation omitted); *Maralex Res., Inc. v. Barnhardt*, 913 F.3d 1189, n.4 (10th Cir. 2019) ("At the first step of the *Chevron* analysis, we must give all undefined terms their ordinary meaning") (cleaned up, citation omitted). And "[l]egislative history" is also a "traditional tool of statutory interpretation" to be utilized at Step One. *Contender Farms*, 779 F.3d at 269 (cleaned up, emphasis added, citations omitted).[8]

2. *Chevron* Step Two

Step Two also "compels a judicial evaluation of congressional intent." *Texas v. United States*, 497 F.3d at 506. The court asks whether the regulation "is based on a *permissible* construction of the statute." *Sw. Elec. Power*, 920 F.3d at 1028 (emphasis in original, citation omitted). "While this is a highly deferential standard,

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[8] *See also Texas v. Alabama-Coushatta Tribe of Texas*, 918 F.3d 440, 449 (5th Cir. 2019) ("*Chevron* step one . . . requires the reviewing court to apply 'the traditional tools of statutory interpretation"—like the canons and legislative history—to determine whether Congress has spoken to the precise issue") (quoting *Chevron*, 467 U.S. at 843); *Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 442 & n.51 (5th Cir. 2001) (finding a regulation's definition "to be facially invalid" because it was inconsistent with the Endangered Species Act, observing that "[t]he legislative history of the ESA affirms the inconsistency of [the regulation] with the statute," and noting that in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987), the Supreme Court affirmed "that legislative history may be consulted in determining the Congressional intent under the first step of *Chevron* analysis").

an agency interpretation can fail *Chevron* step two if it is contrary to clear congressional intent or frustrates the policy Congress sought to implement." *Sw. Elec. Power*, 920 F.3d at 1028 (cleaned up, citation omitted). For example:

> In the process of considering a regulation in relation to specific factual situations, a court may conclude the regulation is inconsistent with the statutory language or is an unreasonable implementation of it. In those instances, the regulation will not control.

Castro-Gomez, 365 F. Supp. 3d at 812-13 (quoting *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999)). "Agency action that is arbitrary, capricious, or manifestly contrary to the statute also fails step two." *Sw. Elec. Power*, 920 F.3d at 1028 (cleaned up, citation omitted).

B. The Final Rule fails at *Chevron* "Step Zero" because the Department did not promulgate the Final Rule within the exercise of the authority it claims Congress granted to it.

As an initial matter, the court must determine whether the FLSA even authorizes the Department to have promulgated the Final Rule at all, which is sometimes referred to as the "*Chevron* Step Zero" inquiry. *See Ali v. Barr*, 951 F.3d 275, 278-79 (5th Cir. 2020) ("*Chevron* Step Zero is the initial inquiry whether the *Chevron* framework applies at all") (cleaned up, citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001), other citation omitted). As relevant here, *Mead* imposes two requirements: (1) Congress must have delegated authority to promulgate the Final Rule, and (2) the Final Rule must have been "promulgated in the exercise of that

authority." *Mead*, 533 U.S. at 226-27; *see Pool Co. v. Cooper*, 274 F.3d 173, 177 n.3 (5th Cir. 2001) (noting that *Mead* imposes both requirements). The second requirement is applicable here, because it highlights that a regulation promulgated outside Congress's delegated authority is unlawful. *E.g.*, *Nevada*, 218 F. Supp. 3d at 530 ("With the Final Rule, the Department exceeds its delegated authority and ignores Congress's intent . . . . Consequently, the Final Rule . . . is unlawful.").[9]

As set forth above, the Final Rule contends that Congress, by leaving the terms "occupation" and "engaged in an occupation" undefined, "delegated the Department the authority to determine what it means to be 'engaged in an occupation' that customarily and regularly receives tips." Final Rule, 86 Fed. Reg. at 60,114. The Associations do not concede this claimed delegation, but need not debate it now, because the Final Rule does not in fact determine, or even purport to determine, what it means to be "engaged in an occupation that customarily and regularly receives tips." Rather, and to the contrary, the Final Rule explains that it defines a completely different term:

> The final rule amends § 531.56 to define when an employee is performing the work of a ***tipped occupation***, and is therefore ***engaged in a tipped occupation*** for purposes of section 3(t) of the FLSA.

[9] The Court made this statement in the context of analyzing *Chevron* Step One, but the point applies equally to the second *Mead* requirement where, as here, the agency promulgates a regulation entirely outside its delegated authority.

Final Rule, 86 Fed. Reg. at 60,115 (emphasis added). **But section 3(t) of the FLSA does not contain the terms "tipped occupation" or "engaged in a tipped occupation."** The Final Rule is thus a *non sequitur*, because the end result (defining the term "tipped occupation") does not logically follow its premise (Congress delegated the Department authority to define "engaged in an occupation"). *A fortiori*, the Final Rule is unlawful because the Department acted outside of its claimed delegated authority in promulgating it. *Mead*, 533 U.S. at 226-27; *Nevada*, 218 F. Supp. 3d at 530.

C. The Final Rule fails *Chevron* Step One.

Even if the Department had authority to promulgate the Final Rule, it founders at Step One because (1) the ordinary meaning of the statutory definition speaks directly to the issue at hand, and (2) the non-statutory definition the Final Rule creates—a multi-layered regime under which application of the tip credit depends upon whether specific job duties directly and immediately produce tips—conflicts with the ordinary meaning of the statutory definition.

1. Congress directly spoke to the issue of tip credit application by defining "tipped employee" using the unambiguous term "engaged in an occupation."

a. Ordinary meaning

The ordinary meaning of the term "engaged in an occupation" is clear and unambiguous. The Supreme Court refers to dictionaries in use around the time Congress enacted the statute at issue to determine the ordinary meaning of undefined

terms. *Taniguchi*, 566 U.S. at 566-69 (engaging in a "survey of the relevant dictionaries" to determine "ordinary or common meaning" of an undefined statutory term). Dictionaries contemporaneous with the tip credit's 1966 statutory enactment are consistent in defining "engaged" and "occupation":

- "Engaged" means "occupied; employed";[10] "busy or occupied; involved";[11] and "to employ or involve one's self."[12]
- "Occupation" means "the principal business of one's life: a craft, trade, profession, or other means of earning a living: employment; vocation <his occupation is farming> . . .";[13] "one's usual or principal work or business, esp. as a means of earning a living: *his occupation was dentistry*";[14] and "Vocation. That which principally takes up one's time, thought, and energies, especially, one's regular business or employment;

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[10] 2 WEBSTER'S THIRD NEW INT'L DICTIONARY 751 (1961 ed.) ("WEBSTER'S"). ROA.402

[11] THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 473 (1967 ed.) ("RANDOM HOUSE"). ROA.409

[12] BLACK'S LAW DICTIONARY 622 (4th ed. 1957) ("BLACK'S"). ROA.414

[13] ROA.405; *accord* "Occupation," Oxford English Dictionary Online, Oxford University Press, December 2021, Web. ("A particular action or course of action in which a person is engaged, esp. habitually; a particular job or profession; a particular pursuit or activity").

[14] RANDOM HOUSE, ROA.410

> also, whatever one follows as the means of making a livelihood."[15]

Occupied. Employed. Principal business. Principal work. Profession. Whatever one follows as the means of making a livelihood. All exemplified by: "Her occupation is [fill in the blank]—Waiter . . . Waitress . . . Server . . . Counterman . . . Busboy . . . Bartender . . . ." The plain and ordinary meaning of "engaged in an occupation" focuses on the field of work and the job as a whole. Nothing about the plain and ordinary meaning of "engaged in an occupation" suggests or indicates a focus on the relative mix of specific tasks within a job, much less elimination of the tip credit based on side work long recognized as part of the same occupation.[16]

b. The statutory definitions and the overall statutory scheme

The Final Rule myopically—and, thus, improperly—focuses on "engaged in an occupation" without considering the whole of the statutory definition of "tipped employee": "any employee engaged in an occupation *in which he customarily and*

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[15] BLACK'S, ROA.415.

[16] Putting an even finer point on the point, "principal" means "main, prominent" or "leading." *Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010) (quoting 12 Oxford English Dictionary 495 (2d ed. 1989)). By choosing the word "occupation," Congress intended for the tip credit to apply when the employee's main, prominent, or leading work customarily and regularly resulted in the requisite amount of monthly tip income. *See* S. Rep. No. 93-690 at 43 ("In establishments 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"). The Final Rule turns Congressional intent on its head by *eliminating* the tip credit based on duties the Department characterizes as *not* directly and immediately producing tips—*i.e.*, *not* the employee's principal, main, prominent, or leading duties.

regularly receives more than $30 a month in tips." *See* 29 U.S.C. § 3(t) (emphasis added). The Final Rule's erroneous focus on whether specific job duties directly and immediately produce tips or not effectively writes the rest of the text out of the statutory definition. This is illustrated by applying the statutory definition to the question it is designed to answer—whether the tip credit applies to a particular employee: Does Employee X engage in an occupation—*e.g.*, waiter or waitress or server or counterman or busboy or bartender—in which he or she customarily and regularly receives the requisite amount of tips per month? The answer is binary: it's either "Yes" or "No." The statute does not call for, permit, or in any way support the answer the Final Rule demands, which amounts to the following:

> Yes, but only if the employee's duties produce tips, and even then only if the employee does not perform duties more than 20% of the time that merely support the duties that directly produce tips, and not for any time over 30 minutes if the employee performs those supporting duties for 30 consecutive minutes at any time during the week, and absolutely not for any time spend on duties the Department has decreed are not worthy of the tip credit.

c. The FLSA's legislative history

The legislative history supports the foregoing ordinary meaning analysis in multiple ways.

First, as the Department itself recognizes, the legislative history identifies occupations in which employees customarily and regularly receive the requisite amount of tips just like the dictionary definitions do: in their ordinary, colloquial

sense. *Compare* "his occupation is farming", ROA.405, *with* "employees who customarily and regularly receive tips—*e.g*, waiters, bellhops, waitresses, countermen, busboys, service bartenders, etc." S. Rep. No. 93-690 at 43 (quoted in Final Rule, 86 Fed. Reg. at 60,116).

Second, the legislative history explains that the tip credit provisions were intended to be "sufficiently flexible to ***permit the continuance of existing practices*** with respect to tips," and "provide enough flexibility to account for ***a practice as inconsistent as tipping***." S. Rep. No. 89-1487 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3014, 3015 (emphasis added). This supports an understanding that the tip credit would apply to tipped employees based on their existing duties within their jobs, which has always included side work. Nothing in any of the tip credit legislative history suggests a congressional intent to allow the tip credit for only certain duties, disallow the tip credit for certain side work duties if performed more than 20% of the workweek or for 30 continuous minutes, and disallow the tip credit for yet other side work duties.

Third, the legislative history specifically refers to the definition of "tipped employee," and analogizes it to the reporting requirements for tipped employees under the Social Security Act of 1965:

> A "tipped" employee is defined in the bill as any employee engaged an occupation in which he customarily and regularly receives more than $20 a month in tips. *This is analogous to the*

> *reporting requirements for a tipped employee under the provision of the Social Security Act of 1965*.

S. Rep. No. 89-1487 at 1966 U.S.C.C.A.N. 3014 (emphasis added). Those Social Security Act reporting requirements require every employee who receive tips in a calendar month to report them:

> Reports by Employees. Every employee who, in the course of his employment by an employer, receives in any calendar month tips which are wages (as defined in section 3121(a) or section 3401(a)) shall report all such tips in one or more written statements furnished to his employer on or before the 10th day following such month. Such statements shall be furnished by the employee under such regulations, at such other times before such 10th day, in such form and manner, as may be prescribed by the Secretary or his delegate.

Pub. L. No. 89-97, 79 Stat. 384-85, codified at 26 U.S.C. § 6053(a). Again, the inquiry is binary: the employee either received tips in a calendar month, and thus has to report them, or the employee did not. The reporting requirements do not permit, much less require, consideration of how much time the employee spent on job duties that produced tips, or supported the production of tips, or did not produce tips. By specifically analogizing the "tipped employee" definition to this reporting requirement, the legislative history demonstrates congressional intent for the "tipped employee" definition to be interpreted in the same way.

Fourth, as noted above, the legislative history cited in the Final Rule demonstrates, consistent with the meaning of "occupation," an intent for the tip credit analysis to focus on the principal duties performed "over the entire workweek." S. Rep.

No. 93-690 at 43 ("In establishments 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"). Thus, when someone employed in an occupation the Department acknowledges qualifies for the tip credit—waiter, counterman, service bartender—principally performs the duties of a waiter, counterman, or service bartender over the entire workweek, that person is a "tipped employee" to which the tip credit applies. The Final Rule creates a conflicting and directly opposing analysis eliminating the tip credit based on side work duties.[17]

2. The Final Rule impermissibly supplants the statutory definition of "tipped employee" with a different approach based solely on whether specific job duties directly and immediately produce tips.

For all the reasons explained above, the Final Rule's approach to the tip credit—limiting the tip credit based on whether duties directly and immediately produce tips—directly conflicts with the approach required by the ordinary meaning of the statutory definition of "tipped employee." It should not be surprising that the Final Rule imposes a completely different and conflicting regulatory regime, given

[17] The Final Rule expresses concern for alleged situations in which an employer nominally titles an employee a "server" but forces that employee to clean floors, windows, and bathrooms all day. No one would dispute that an employee assigned to clean floors, windows and bathrooms all day is not tipped employee. The 1967 dual jobs regulation is sufficient to address this situation, and litigation discovery would expose the server title as a pretext. The Final Rule is not necessary to solve that alleged problem.

that the Final Rule is based its definitions of a term ("tipped occupation") that does not appear in the statute. But conflict it plainly does, so the Final Rule fails *Chevron* Step One and is unlawful. *E.g.*, *Sw. Elec. Power*, 920 F.3d at 1025-28 (regulation failed Step One because it "contravenes the plain text and structure of the [statute]"); *Chamber of Commerce v. United States*, 885 F.3d 360, 379 (5th Cir. 2018) (Department regulation failed Step One because it "conflicts with the plain text" and "is inconsistent with the entirety of ERISA's [statutory] definition"); *Nevada,* 218 F. Supp. at 530-31 & n.5 (noting that the "Fifth Circuit and the Supreme Court routinely strike down agency interpretations that clearly exceed a permissible interpretation based on the plain language of the statute," and ruling that a Department FLSA regulation "does not meet *Chevron* Step One and is unlawful" because it was "[d]irectly in conflict with Congress's intent"); *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 325–26 (2014) ("[an] agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms"); *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2073 (2018) (the Department cannot rewrite a statute "under the banner of speculation about Congress might have intended").

D. The Final Rule fails *Chevron* Step Two.

"The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Texas v. United States*, 497 F.3d at 506 (quoting *Chevron*, 467 U.S. at 843

n.9). Regulations thus fail at Step Two if "it appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned." *Id*. at 506 (quoting *Chevron*, 467 U.S. at 845). Even if the phrase "engaged in an occupation" were ambiguous, the Final Rule's approach to the tip credit is not a permissible interpretation of the FLSA because it is contrary to clear congressional intent.

1. Limiting the tip credit based on whether duties directly and immediately produce tips is not a permissible construction of the FLSA.

Nevada v. United States is instructive. The Department's final rule there raised the minimum salary threshold for the FLSA's executive, administrative, and professional exemptions to such a degree that it effectively supplanted the duties test Congress provided in the statute. *Nevada*, 218 F. Supp. 3d at 531 ("this significant increase to the salary level creates essentially a de facto salary-only test"). But "Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption." *Id*. Consequently, the final rule failed *Chevron* Step Two because it was "contrary to the statutory text and Congress's intent." *Id*.

Just so here. As explained above, the statutory term "'occupation' does not mean how often a person performs a task.'" *Marsh*, 905 F.3d at 645 (Ikuta, J., dissenting) (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1560 (3d ed. 2002)). Accordingly, under the statutory definition of "tipped employee":

> [I]f the employer has hired a person for one job (such as a waitress or counterman), but that job includes a range of tasks not necessarily directed towards producing tips, the person is still considered a tipped employee engaged in a single job so long as the person 'customarily and regularly receives at least $30 a month in tips.

Marsh, 905 F.3d at 645 (Ikuta, J., dissenting). The Final Rule, in contrast, bases the tip credit analysis *entirely* on whether tasks and duties directly and immediately produce tips. That is "a completely different approach to the tip credit." *Id*. at 641 (Ikuta, J., dissenting). Agencies are not authorized to take approaches completely different from what Congress chose—particularly where, as here, Congress specifically expressed its choice in a statutory definition. *Castro-Gomez*, 365 F. Supp. 3d at 812 ("a regulatory definition does not displace a statutory definition when the statute is clear and ambiguous"). "[B]ecause it is contrary to the statutory text and Congress's intent," *Nevada*, 218 F. Supp. 3d at 531, the Final Rule's tip credit approach is "not one that Congress would have sanctioned," and consequently fails *Chevron* Step Two. *Texas v. United States*, 497 F.3d at 506 (quoting *Chevron*, 467 U.S. at 845).

2. The Final Rule is arbitrary and capricious because it is cut from whole cloth.

As noted above in footnote 7, arbitrary and capricious agency action in violation of the APA necessary fails at *Chevron* Step Two. Numerous different types of failings render agency action arbitrary and capricious: "if the agency has relied on

factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *EPA*, 829 F.3d at 425 (citations omitted). The following factors render the Final Rule arbitrary and capricious under this standard.

a. The Department conducted no fact finding.

First, the Department conducted no fact-finding whatsoever to either determine the scope of the supposed problem, or to determine the real-world duties of the occupations Congress and the Department have historically recognized as qualifying for the tip credit. The Final Rule demonstrates that the Department accepted at face value the stories told by employee and employee-side commenters, and discounted and/or ignored employer-side commenters, without any fact finding to determine how these occupations actually operate in the real world. The Department therefore entirely failed to consider an important aspect of the problem, namely, (a) whether the supposed problem actually exists, and (b) the factual basis of and background for the supposed problem. Consequently, the Department's answer to the unknown purported problem is necessarily just baseless *ipse dixit*.

b. The Department deliberately ignored "the nation's primary source of occupational information"—its own.

The Department's failure to engage in any fact-finding is particularly inexcusable here, because the pertinent wheel has already been invented. The Department itself sponsors and maintains "the nation's primary source of occupational information": its O*NET Program.[18] The Department acknowledges, as it must, that the O*NET provides for each occupation a "fixed list of duties that tipped employees are required by their employers to perform as part of their work." Final Rule, 86 Fed. Reg. at 60,127. There is no dispute that the list of duties for Waiter and Waitress and Bartender contain numerous side work duties that do not directly and immediately produce tips. ROA.346-64; ROA.20-26 ¶¶ 41-57. Consequently, there is no dispute that these side work duties are part and parcel of those occupations. The Department just seems to dislike the fact that employees qualifying for the tip credit under the statutory definition of "tipped employee" engage in side work. The Department thus candidly acknowledges that the Final Rule's "tipped occupation" definition and its tip-producing-or-not test is specifically designed to carve side work out of the tip credit. *See* Final Rule, 86 Fed. Reg. at 60,127 ("Rather, the final rule creates a functional test to measure whether a tipped employee is engaged in their

[18] *See* ROA.313 n. 25; *see also* ROA.346-64; ROA.20-26 ¶¶ 41-57.

tipped occupation . . . ."). But as explained above, carving side work out of application of the tip credit is contrary to the statutory definition of "tipped employee" and congressional intent.

Further, and tellingly, the Department acknowledges that it developed its new "tipped occupation" definition tip-producing-or-not test and guidelines to specifically assign FLSA liability based on an employee's specific job duties throughout a day. Final Rule, 86 Fed. Reg. at 60,127 (observing that "O*NET was not created to identify an employer's legal obligations under the FLSA"—the natural corollary of which is that the Final Rule *is* created to do so). "Congress, however, did not delegate authority to the [Department] to develop new guidelines or to assign liability in a manner inconsistent with the statute." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 562 (2002). The Department's deliberate decisions (1) to ignore its own real-world data showing that "tipped employees" as the FLSA defines them engage in side work and (2) to carve those side work duties out in order to impose FLSA liability render the Final Rule arbitrary and capricious.[19]

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[19] The Final Rule refers to criticism of the O*NET data based on the potential for manipulation. Specifically, the Department appears to accept as plausible speculating that reliance on O*NET data might result in employers coordinating among themselves to assign tipped employees duties like washing windows to such an extent that nation-wide O*NET data would one day reflect that the principal duty of a server is washing windows. This is absurd. *First*, there is no suggestion by anyone that employers have successfully manipulated the O*NET data to this point, so there is no reason to believe the O*NET data the Department refused to consider is anything but the "valid data" the Department represents it to be. *See* https://www.onetcenter.org/overview.html (emphasis added, last visited May 8, 2022). *Second*, the suggestion that employers across industries could somehow act in concert to the degree that would be required to artificially manipulate the O*NET

c. The Department relied on labor market and employee economic circumstances data it acknowledged was outdated.

The Final Rule acknowledges that the Department is required to evaluate the costs of the Final Rule on those affected, by analyzing the relevant labor market and economic situation for tipped employees. And the Department did analyze the Final Rule's potential effects with regard to the relevant labor market and economic situation for tipped employees. But the Final Rule relied on pre-COVID-19 pandemic data from 2018 and 2019. Final Rule, 86 Fed. Reg. at 60,150 ("The Department notes that this [cost] analysis relies on data from 2018 and 2019, which is prior to the COVID-19 pandemic"). And the Department further acknowledged the patently obvious: the COVID-19 pandemic dramatically changed the labor market and economic situation for tipped employees. *Id.* *A fortiori*, the Department's reliance on out-of-date data for its cost estimates represents reliance "on factors which Congress has not intended it to consider." *EPA*, 829 F.3d at 425.

A separate federal agency, the SBA Office of Advocacy, emphasized the impact of the Department's failing in this regard. *See* ROA.367 (SBA's comment to the proposed Final Rule, expressing the "concern[] that the DOL's certification that the rule will not have a significant economic impact on a substantial number of small

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data for specific individual occupations is, in the absence of any factual evidence suggesting that were possible, a paradigm example of something "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *EPA*, 829 F.3d at 425.

entities **lacks an adequate factual basis**." (emphasis added)). The SBA Office of Advocacy observed that, "DOL improperly certified this proposed rule because it **omitted some and underestimated other compliance costs of this rule** for small employers." *Id*. at 367-68 (emphasis added). Specifically, the SBA Office of Advocacy detailed its concerns, focusing on several areas, including assessing changes to wage costs, the costs of regulatory familiarization, adjustment costs, and management costs. *Id*. at 370-75. The SBA Office of Advocacy therefore "believes that DOL's certification is flawed because it **fails to estimate small business compliance for increased wages under this regulation**." *Id*. at 371 (emphasis added). And the SBA Office of Advocacy comments also relay the comments of small businesses with regard to the financial impact the Final Rule would have on small businesses with tipped employees from nail salons to hotels and, of course, restaurants, particularly given the continuation of the COVID-19 pandemic:

> Small businesses have commented that these new restrictions for the use of the tip credit are complex and unworkable for small operations, who are already facing staff shortages and are just recovering from pandemic losses.
>
> ***
>
> Small businesses also commented that this was a difficult time to add these additional costs and burdens, as their operations were just surviving from pandemic financial losses.

Id. at 368, 374. The Final Rule ignored these concerns, apparently in favor of the outdated pre-pandemic data Congress would never have intended for the Department to consider. *EPA*, 829 F.3d at 425.

d. The Final Rule is internally inconsistent.

Given that the Final Rule ignores real-world realities and costs, it should not be surprising that it is so internally inconsistent as to render its artificial distinctions so unworkable as to be implausible. Two examples illustrate the point.

First, the Department recognizes that "busboy," also referred to as busser, and "service bartender" are occupations that "have long been considered to be occupations that customarily and regularly receive tips" and therefore have long fallen under the statutory definition of "tipped employee" and qualified for the tip credit. *See* Final Rule, 86 Fed. Reg. at 60,129 n.30. Bussers and service bartenders, however, do not engage in any of the direct customer servicing work the Final Rule's test would consider to directly and immediately produce tips. After all, bussers and service bartenders generally do not interact with customers at all. *See* Final Rule, 86 Fed. Reg. at 60,128. This puts the Department in a quandary: how to fit occupations that "have long been considered" as qualifying for the tip credit within the Final Rule's new test that now categorically excludes them. The Department's only solution is to fall back on the *ipse dixit* favored by parents of small children: "Because I said so":

> To the extent that this is true under the revised test, this categorization of tasks merely reflects the unique nature of some tipped employees' tip-producing work, such as bussers and service bartenders, who receive tips from other tipped employees such as servers because they are supporting their customer, service, tip producing work.

Final Rule, 86 Fed. Reg. at 60,128 n.28. In other words, the Department is going to allow bussers and service bartenders to remain tipped employees, even though their duties fail the Final Rule's "tipped occupation" definition, because they have always been considered "tipped employees" under the statutory definition. Yet the very same principle holds just as true for servers, bartenders, and the rest of the tipped employee population across the country. A regulation that creates a test and then applies that test differently to those affected is the very definition of arbitrary and capricious.

Second, under the Final Rule's test the very same duties might automatically qualify for the tip credit, or might not, depending on context. The Final Rule explains that a bartender who retrieves "a particular beer from the storeroom at the request of a customer sitting at the bar, is performing tip-producing work," but a "bartender who retrieves a case of beer" from the same storeroom is only performing "directly supporting work," the minutes of which must be tracked to comply with the 20% limitation for such work. *See* Final Rule, 86 Fed. Reg. at 60,128. But the bartender in both examples is indisputably performing the duties of the bartender occupation. The Final Rule also suggests that a server wiping down a table to clean

a customer's spill would be "tip-producing work," but wiping down that same table in between customers would not. *Id.* Again, the same duty, and again, that duty is indisputably the duty of a server. Further, in an apparent attempt to remain consistent with the 1967 dual jobs regulation example, the Final Rule categorizes "toasting bread" as ***not*** "food preparation" for purposes of the Final Rule. *See* Final Rule, 86 Fed. Reg. at 60,131. This is just more semantic gymnastics so the Department can arbitrarily categorize certain duties as "tip-producing," rather than "directly supporting" based on nothing more than the Department's whim.

In sum, the Final Rule is not the product of reasoned decision-making. The Final Rule is the product of agency legislating that is in conflict with the plain language of the statute and congressional intent. The Final Rule fails *Chevron* Step Two because it is not a permissible interpretation of the statutory definition of "tipped employee."

IV. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST WEIGH IN FAVOR OF GRANTING A PRELIMINARY INJUNCTION.

The Associations also established that the "threatened injury to [Plaintiffs-Appellants] . . . outweighs the potential harm the injunction causes the [Defendants-Appellees]." *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 332 (5th Cir. 1981). On one side of the equation is the certainty that the Associations' members are spending ongoing substantial sums of unrecoverable funds to comply with the Final Rule, together with interference with the financial viability of many of

those members causing employee terminations and disrupting their ability to keep their doors open to the public. *See* ROA.331-38 ¶¶10-16; ROA.382-88 ¶¶ 17-22; ROA.396-98 ¶¶ 5-10; *see also* ROA.719:14-23. On the other side, the Department cannot point to any injury remotely approaching the enormous harm to the Associations' members and the public. With or without the Final Rule, tipped employees *already* receive the full protection of the federal minimum wage. If the employee's tips are insufficient, when added to the required cash wage, to satisfy the minimum wage, then the FLSA already requires employers to pay additional wages to make up the difference. *See* 29 U.S.C. § 203(m)(2); 29 C.F.R. § 531.59. Furthermore, because the Department has improperly assumed legislative authority that Congress never delegated to it and acted outside of any legitimate authority in promulgating the Final Rule, the Department itself suffers no injury if the Final Rule is enjoined. And, "there is generally no public interest in the perpetuation of unlawful agency action." *See Wages & White Lion Invs., L.L.C.*, 16 F.4th at 1143 (quoting *Texas v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021)).

Thus, the Department and the public will not suffer any harm from maintaining its status quo level while the serious legal issues raised in this litigation are addressed. *See Texas v. U.S.*, 809 F.3d 134, 186 (5th Cir. 2015). ("The [plaintiff] states have shown 'that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted.' . . . The harms the United States

has identified are less substantial[,] . . . vague, and the principles the government cites are more likely to be affected by the resolution of the case on the merits than by the injunction.").

V. THE IRREPARABLE HARM SUFFERED IS SUFFICIENT FOR A NATIONWIDE PRELIMINARY INJUNCTION.

"[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographic extent of the plaintiff class." *Califano v. Yamaski*, 442 U.S. 682, 702 (1979). A federal rule, like the one challenged in this suit, is usually meant to establish a national policy and therefore has a nationwide impact. Here, the RLC is a national business association representing more than 500,000 restaurant members across the United States, while the TRA is a business association representing 50,000 restaurants in Texas. *See* ROA.327-28 ¶ 3; ROA.378 ¶ 4. Because the Department's Final Rule is a federal rule meant to apply to all restaurants utilizing the tip credit nationwide, the Associations' restaurant members who rely on the tip credit are similarly situated and equally stand to face continuous, irreparable harm from the Final Rule. *Id*. Accordingly, a nationwide injunction is proper and warranted.

CONCLUSION

For the reasons stated above, the Court should reverse the district court. Because the propriety of injunctive relief can be decided more efficiently by this Court in the first instance than by awaiting further proceedings in the district court, the

Associations respectfully request that the Court remand with instructions that the district court enter a preliminary injunction enjoining the Department and its pertinent officials from enforcing the Final Rule pending final judgment in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in Times New Roman, 14-point, except for footnotes, which are in 12-point type. The brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,407 words, excluding the items set forth in Fed. R. App. P. 32(f).

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