No. 22-50145

In the United States Court of Appeals for the Fifth Circuit

RESTAURANT LAW CENTER AND TEXAS RESTAURANT ASSOCIATION

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; HONORABLE MARTIN J. WALSH, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR; AND 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, Austin Division

AMICUS BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, LOUISIANA, MISSISSIPPI, MONTANA, OKLAHOMA, SOUTH CAROLINA, AND UTAH

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General

ARI CUENIN
Deputy Solicitor General

CHRISTOPHER J.F. GALIARDO
Assistant Attorney General
Christopher.Galiardo@oag.texas.gov

Attorneys for Amici Curiae

Certificate of Interested Parties

Under the fourth sentence of Fifth Circuit Rule 28.2.1, Amici Curiae the States of Texas, Alabama, Arkansas, Louisiana, Mississippi, Montana, Oklahoma, South Carolina, and Utah, as governmental parties, need not furnish a certificate of interested persons.

/s/ Christopher J.F. Galiardo
CHRISTOPHER J.F. GALIARDO
Attorney of Record for Amici Curiae

Table of Contents

Table of Authorities

Page(s)

Cases:

Statutes and Rules:

Other Authorities:

Interests of Amici Curiae

Amici curiae are the States of Texas, Alabama, Arkansas, Louisiana, Mississippi, Montana, Oklahoma, South Carolina, and Utah. The Amici States have a significant interest in this case. The challenged Final Rule imposes administrative, compliance, and monitoring costs on restaurants in the States. Texas and the other Amici States have a quasi-sovereign interest in the economic wellbeing of their residents, which the Final Rule threatens to impair. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982); *Texas v. Biden*, 20 F.4th 928, 969 (5th Cir. 2021). States have a substantial *parens patriae* interest in assuring residents that it will act to protect their interests consistent with federal employment law. *Alfred L. Snapp & Son*, 458 U.S. at 609–10.

States have an interest in avoiding the pocketbook injuries the Final Rule threatens. Eight decades of empirical analyses demonstrate that reducing the tip credit causes increased termination of tipped employees and lower income for retained tipped employees. Those terminations and reductions are likely to impose additional unemployment and welfare costs, which constitute a positive pocketbook injury. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801–02 (2021).

Lastly, scholars have known for decades that reductions in the tip credit also increase restaurant failure rates, especially for new and small restaurants. Exacerbating restaurant failures induced by reducing the tip credit threatens to diminish public revenues, creating a negative pocketbook injury. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 982–83 (2017). The Amici States are thus uniquely interested in the proper interpretation of the Final Rule.

ARGUMENT

The district court should have granted a preliminary injunction of a new rule that threatens to upend nearly a century's worth of labor law for tipped employees.

The relevant background begins with *West Coast Hotel Co. v. Parrish*, where the Supreme Court declared that minimum wage laws are constitutional. 300 U.S. 379, 397–400 (1937). Then-Secretary of Labor Frances Perkins immediately began to draft a federal minimum wage bill. Frances Perkins, The Roosevelt I Knew 256–57 (1946). Her task was daunting. Business was hostile; labor divided; economists skeptical. *Id.* at 257–63. The States and the whole of Western Europe had failed to develop workable minimum wage laws for centuries. Price V. Fishback & Andrew J. Seltzer, *The Rise of American Minimum Wages, 1912-1968*, 35 J. of Econ. Perspectives 73, 75–79 (2021); Patricia Van den Eeckhout, *Waiters, Waitresses, and Their Tips in Western Europe Before World War I*, 60 Int'l Rev. of Social Hist. 349, 350–73 (2015).

Tip income proved to be among the most vexing issues. Social norms increasingly disfavored tipping and disputes between tipped and untipped workers in the same occupation sometimes turned violent. Kerry Segrave, Tipping: An American Social History of Gratuities 25–44, 67 (1998). Yet tens of millions of Americans relied on tips as a secondary income stream, and thousands of businesses had survived the Depression in part because third-party tips alleviated labor costs. *Id.* at 45–58.

The compromise Perkins proposed, and that Congress eventually adopted three decades later in its 1966 amendments to the Fair Labor Standards Act (FLSA), was a tip credit system that lets employers offset part of their tipped employees' tips against the federal minimum wage. 29 U.S.C. § 203(m); *see also* 29 C.F.R. § 531.50–

.60. That compromise produced immediate economic benefits for workers, businesses, and customers alike. Walter John Wessels, *Minimum Wages and Tipped Servers*, 35 Econ. Inquiry 334, 334–49 (1997). And because those benefits have perdured for more than half a century, *e.g.*, Ofer H. Azar, *The Economics of Tipping*, 34 J. of Econ. Perspectives 215, 220–26 (2020), Congress has declined to revisit that compromise even as it has reworked the FLSA more than a dozen times.

Secretary Perkins's prescient solution enjoyed the unvarying support of the U.S. Department of Labor from 1967 until the promulgation of the Final Rule that Plaintiffs-Appellants challenge here. Tip Regulations Under the Fair Labor Standards Act (FLSA), 85 Fed. Reg. 86,756 (2020). That Final Rule dispenses with the decades-old provision that an employer can offset part of an employee's wages if she customarily receives tips in the course of employment, even during the parts of the workday when she is engaged in side work. In its place, the Department invented a new system for calculating tip credits that is untethered to the statutory text, arbitrary, unworkable, and invasive.

Plaintiffs-Appellants moved for a preliminary injunction in the district court to protect their association member restaurants from the irreparable harm the Final Rule would cause them while litigation is pending. Because they demonstrated all four traditional factors for a preliminary injunction, the court abused its discretion when it denied the motion. Texas urges this Court to correct that error to minimize the ongoing and irreparable harms the Final Rule is causing tipped workers, restaurants, and the state public fisc.

I. The Plaintiffs-Appellants Are Likely to Succeed on the Merits.

Plaintiffs-Appellants complained to the district court that the Final Rule is contrary to the FLSA. Appellants' Br. 12. It is. For more than eight decades, the FLSA has neatly divided Americans workers into two main categories for minimum wage purposes: untipped employees and tipped employees. Employers generally must pay those who fall into the first category the prevailing minimum wage. 29 U.S.C. § 206(a). But they may credit part of the tip income those in the second category earn against that minimum wage. *Id.* § 203(m).

When Secretary Perkins first introduced the FLSA to Congress, she recognized her Department someday might attempt to exceed its delegated authority by increasing the number of these categories. *See* Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R 7200 Before the S. Comm. on Educ. & Labor and the H. Comm. on Labor, Part 1, 75th Cong. 178–79 (1937) (statement of Frances Perkins, Secretary of Labor). The Final Rule reifies her fear by creating a novel third category of American worker that can be found nowhere in the statutory text: the hybrid category of an employee in a "tipped occupation." 85 Fed. Reg. at 86,757. The Department struggles to define the category with anything other than a tautology—a "tipped occupation" is "when the employee performs work that is part of the tipped occupation." 29 C.F.R. § 531.56(f). This undefinable category is as ambiguously defined as it is unsupported by the FLSA text. *Id.* § 531.56(f)(3).

This Court should reject any notion that the Department may base this novel FLSA taxonomy on the thin read of agency deference. It does not follow that, because Congress never defined the word "occupation" in the FLSA, Congress must

have delegated to the Department the authority to decide what it means to be an employee who is engaged in an occupation that customarily and regularly receives tips. That is not the approach Congress takes to address such major questions. *See, e.g.*, *Nat'l Fed. of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam). But in any event, that explanation would not follow principles of agency deference under *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

A. *Chevron* step zero

Before an administrative agency can argue that its interpretation of a statute deserves deference, it must show both that Congress delegated authority to it to promulgate the rule in question and that the agency in fact promulgated the rule as an exercise of that authority. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). The court may not proceed to *Chevron* step 1 without first having undertaken this analysis. *Residents of Gordon Plaza, Inc. v. Cantrell*, 25 F.4th 288, 297 (5th Cir. 2022).

The Department's own explanation for the Final Rule shows that it fails to meet even this minimal threshold. In the Department's view, the Final Rule "amends § 531.36 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." Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60,114, 60,115 (2021). But section 3(t) of the FLSA does not even contain any of the key words the Final Rule purports to define.

B. *Chevron* step one.

The Department would fare no better even if it could reach *Chevron* step one. At bottom, step one requires that a statute be ambiguous before a court will defer to

an agency's interpretation of it. *Jaco v. Garland*, 24 F.4th 395, 405 (5th Cir. 2021). But a court must give effect to Congress's expressed intent if it has spoken directly to the issue at hand. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220 (2016). Here Congress did.

Start with the text. *Cochran v. U.S. S.E.C.*, 20 F.4th 194, 200 (5th Cir. 2021) (en banc). Section 3(t) of the FLSA defines "[t]ipped employee" as "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). Congress did not provide a technical definition for the key word "occupation," which means that the district court should have presumed that the FLSA adopts the ordinary meaning of that everyday word. *HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2176 (2021). And that ordinary meaning when section 203(t) was added to the Code was so intuitive to layman and lawyer alike as to be utterly unremarkable.

An occupation can be said to be "an activity that serves as one's regular source of livelihood." American Heritage Dictionary of the English Language 908 (1969). It can be said to be a "more or less continuous or habitual engagement in a certain line of employment or industrial or business activity." Ballentine's Third Dictionary 879 (1969). But it by no means can be said to be ambiguous. The definitions focus on the *field* of work in which one is employed and on the tasks of that job taken as a *whole*. No reader in 1966 would have understood the word "occupation" to refer to any combination of unbundled tasks across an employee's working day as the Final Rule does. *See Wooden v. United States*, 142 S. Ct. 1063, 1069 (2022).

Words must, of course, always be read in context rather than in isolation. *Territory of Guam v. United States*, 141 S. Ct. 1608, 1613 (2021); *Parker Drilling Management Services, Ltd. v. Newton*, 139 S. Ct. 1881, 1888 (2019). But such contextual reading only strengthens the argument that the FLSA definition of tipped employees excludes the novel construction the Department grafts onto it in the Final Rule.

For example, words are presumed to have a consistent meaning when Congress uses them in the same or a related statute. *United States v. Davis*, 139 S. Ct. 2319, 2331 (2019); *United States v. Bittner*, 19 F.4th 734, 741 (5th Cir. 2021). One need not look far afield of section 203(t) to find other uses of the word "occupation" in the FLSA. Subsection (j) clearly wields the term "occupation" in the sense of a field of work rather than a bundle of disaggregated tasks. 29 U.S.C. § 203(j). So does subsection *l*, which uses the term "occupation" in that same sense of a field of work six separate times. *Id.* § 203(*l*). That consistent usage continues in surrounding sections of the FLSA as well in reference to diverse topics from the minimum wage for home workers in Puerto Rico to the employment of children in dangerous agricultural jobs to students working on farms. *Id.* §§ 206(a)(2), 213(c)(2), 214(b)(2). In fact, the term "occupation" is nowhere used in any other sense in the entire FLSA.

As another example, courts normally presume Congress intended to give general terms such as "occupation" their full, general meaning. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 101 (2012). Authorizing an agency or a court to arbitrarily limit that scope would run counter to that understanding. Here, the Final Rule's definition of "occupation" is narrow by design and

contravenes the most natural reading of the general term "occupation" in section 203(t).

Consider also the presumption of consistent usage when Congress uses the same word in different legislation but on the same topic and tackling the same ill. *Erlenbaugh v. United States*, 409 U.S. 239, 243–44 (1972); *see* Scalia & Garner, Reading Law at 200. Other landmark FLSA-era statutes reveal that Congress in 1966 clearly saw an "occupation" as the dictionaries of the time period did: a field of endeavor rather than an assortment of duties. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352 §704(b), 78 Stat. 241, 257–58. This definition persisted in the years after the FLSA was enacted, too, in an unbroken continuum of understanding from one bill to the next. *E.g.*, Rehabilitation Act of 1973, Pub. L. No. 93-112 § 7(4)(c), 302(b)(2), 87 Stat. 355.

Even if the statutory context did not provide such overwhelming evidence that had spoken directly to the issue of what an "occupation" is (which it does), statutory history would lead to the same conclusion. Courts construe legislation in the light of the law as it existed before and after each amendment to it. *United States v. Wong Kim Ark*, 169 U.S. 649, 653–54 (1898). A significant statutory amendment "presumptively connotes a change in meaning." *In re Crocker*, 941 F.3d 206, 213 (5th Cir. 2019) (citing Scalia & Garner, Reading Law at 256). Congress did not create new categories or definitions for an "occupation" in 1966 when it expanded the minimum wage statute to restaurants and tipped workers for the first time. Instead, it treated tipped employees—in restaurants as elsewhere—as neatly falling into the same paradigm that had served the FLSA well since 1938: tipped employees had a single,

holistic "occupation," not a mishmash of "occupations" depending on what they did at any given moment.

To the extent that legislative history might help as a "tool of statutory interpretation," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 269 (5th Cir. 2015), it favors Plaintiffs-Appellants as well. The Senate Committee Report notes that 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." 120 Cong. Rec. S2747, 2510 (daily ed. Feb. 28, 1974). It is impossible to reconcile that holistic view of an occupation with the unbundled theory of discrete tasks that the Department adopted in its Final Rule.

C. *Chevron* step two

In a counterfactual world in which the Department did not trip over both *Chevron* step zero and *Chevron* step one, the Final Rule would still of course also fail to offer a permissible construction of the key word "occupation" at *Chevron* step two. Distilled to its essence, this final step demands that agency must show that its construction of a statute is permissible. *Brackeen v. Haaland*, 994 F.3d 249, 425 (5th Cir. 2021) (per curiam). The Department cannot make that showing.

As this Court noted in *Texas v. United States*, regulations fail at step two if "it appears from the statute or legislative history" that the rule offers a construction that is "not one that Congress would have sanctioned." 497 F.3d 491, 506 (5th Cir. 2007) (quoting *Chevron*, 467 U.S. at 845). One such category of constructions that Congress would not sanction is an agency action that is arbitrary and capricious. *Sw. Elec.*

Power Co. v. EPA, 920 F.3d 999, 1028 (5th Cir. 2019). Another such category of constructions are ones that either are "contrary to clear congressional intent or frustrate[] the policy Congress sought to implement." *Id.* And here, the Final Rule's approach to the tip credit falls into not just one but both of these deference-defeating categories.

Plaintiffs-Appellants offer several reasons why the Final Rule is arbitrary and capricious. The Department remarkably conducted *no* fact finding before it issued the Final Rule. Appellants' Br. 40. It did not consult its own database of occupational information to review the breakdown of duties for the occupations that the Final Rule would cover. *Id.* at 41–42. It fed data it knew to be stale and nonrepresentative into its cost prediction models. *Id.* at 43. Another federal agency, the Small Business Administration, criticized the Final Rule during notice and comment as lacking "an adequate factual basis." *Id.* at 43–44. And the Final Rule is internally inconsistent. *Id.* at 45–47.

But even if the Final Rule were not arbitrary and capricious (it is), it still would frustrate the policy Congress sought to implement in at least two ways as explained in Part II, *infra*. First, the novel taxonomy of jobs and definition of "occupation" that the Final Rule engrafts onto the FLSA would *hurt* tipped workers that section 206 aims to protect. Second, the Final Rule would thwart the FLSA's overarching and express statutory purpose to eliminate abject living conditions "without substantially curtailing employment or earning power." 29 U.S.C. § 202(b). In short, Plaintiffs-Appellants are likely to succeed on the merits of their claim.

II. The Final Rule Is Causing Ongoing and Irreparable Harm.

Plaintiffs-Appellants have also shown that they are likely to suffer irreparable and ongoing injury from the challenged action in the absence of an injunction. *Ramirez v. Collier*, 142 S. Ct. 1264, 1275 (2022).The district court adjudged that any harm the Final Rule might cause Plaintiffs-Appellants already has been incurred and that there will be no ongoing or irreparable harms in the future. This is wrong, given both the operational requirements of the Final Rule and the structure and culture of work in a restaurant setting. The resulting injury is far more than a mere "possibility." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 17 (2008).

Plaintiffs-Appellants refer the Court (at 18–19) to the mountain of evidence of ongoing compliance costs that it shared with the district court. Amici will not rehash their able presentation of that evidence or their correct reading of this Court's caselaw that characterizes such nonrecoverable compliance costs as irreparable harm. Appellants' Br. at 18 (quoting *Texas v. EPA*, 829 F.3d 405, 433 (2016)).

Amici do wish, however, to emphasize why the harm cannot feasibly be remedied after the fact. Without an injunction, restaurants face a false choice between two harmful options: either they can abandon the tip credit altogether and thereby begin to shoulder extra labor costs that will prove unsupportable in the long run for many of them, or they can continue to use the tip credit after sinking substantial funds into new employee monitoring, surveillance, and management systems. Whichever option a restaurant chooses, it will bear costs to comply with the Final Rule. And because the United States has not expressly and unmistakably waived sovereign immunity to damages caused by FLSA rulemakings, those damages are irrecoverable.

Maine Cmty. Health Options v. United States, 140 S. Ct. 1308, 1327 (2020); *Ortega Garcia v. United States*, 986 F.3d 513, 522 (5th Cir. 2021). Those damages alone therefore constitute irreparable harm under this Court's jurisprudence. *E.g.*, *Texas v. EPA*, 829 F.3d at 433.

The Final Rule also is poised to hurt the very tipped workers it hopes to help. It is well established that increases in the effective minimum wage does little to nothing, by itself, to increase the take-home pay of minimum wage workers. *E.g.*, Jeffrey Clemens & Michael R. Strain, *How Important Are Minimum Wage Increases in Increasing the Wages of Minimum Wage Workers?* 19 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29824, 2022). The lack of a positive income effect is especially pronounced for tipped workers. Maggie R. Jones, Center for Admin. Records Research and Applications, U.S. Census Bureau, *Measuring the Effects of the Tipped Minimum Wage Using W-2 Data* 17–19 (Nat'l Bureau of Econ. Rsch., Working Paper 2016-03, 2016). In fact, the elimination or reduction in tip wage credits has regularly been found to *increase* the poverty rate among tipped employees. David Neumark & Maysen Yen, *The Employment and Redistributive Effects of Reducing or Eliminating Minimum Wage Tip Credits* 4–12, 23 (Nat'l Bureau of Econ. Rsch., Working Paper 29213, 2021). And combined with recent proposals in Congress to raise the federal minimum wage, elimination of the tip credit would be predicted to result in the loss of up to 3.7 million jobs. Congressional Budget Office, The Effects on Employment and Family Income of Increasing the Federal Minimum Wage 13 (2019).

III. A Preliminary Injunction Would Not Cause Any Harm.

In addition to Plaintiffs-Appellants' ongoing and irreparable injury, the district court failed to recognize that a preliminary injunction was appropriate because it would not cause any harm. This analysis requires a balancing of harms that a preliminary injunction would *cause* against those that it would *prevent*. *Winter*, 555 U.S. at 17; *see Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021). Plaintiffs-Appellants satisfied that standard.

On one side of the balance sit all the nonrecoverable compliance costs Plaintiffs-Appellants will suffer if the preliminary injunction is not granted. On the other side of the balance sits *nothing*. The Department never alleged that it, the general public, or anyone else will suffer *any* injury if the preliminary injunction were granted. Nor can it reasonably do so. The current tip credit regulations have been in place for more than a decade, and under them restaurants' tipped employees already have received the full protection of the federal minimum wage. If any tipped employee's tips drop off during any pay period such that they fail to yield a total cash wage that meets the federal minimum wage, employers already must pay that employee additional wages to make up the difference. 29 U.S.C. § 203(m)(2); 29 C.F.R. § 531.39. Indeed, the Department's own conduct implicitly concedes the lack of harm that would weigh against a preliminary injunction of the final rule: it voluntarily delayed the proposed Final Rule for *over a year* to study it. *See* 86 Fed. Reg. at 60,119.

IV. Public Interest Supports Granting the Preliminary Injunction.

Given the equitable origins and nature of a preliminary injunction, a court also must consider whether to grant it with an eye toward the public interest. *Trump v.*

Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (per curiam). The district court should have found that considerations of the public policy concerns at stake in this case likewise weigh in favor of granting Plaintiffs-Appellants a preliminary injunction.

In addition to the discussion of this factor by Plaintiffs-Appellants (at 48), the Amici States wish to highlight several additional public-interest concerns. In Texas, as in other States, restaurants represent an important economic driver. Fed. Reserve Bank of Dallas, Southwest Economy: Second Quarter 2021, at 8–9 (2021). The Final Rule would compound a number of problems that restaurants currently face by raising compliance and administrative costs, wage expenditures, and managerial overhead at the very time that many restaurants are facing financial headwinds.

Restaurants in Texas, as elsewhere, suffered significant economic disruption during the COVID-19 pandemic. *See* Alexander W. Bartik et al., *Measuring the Labor Market at the Onset of the COVID-19 Crisis* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27613, 2020). Sales and revenue at restaurants plummeted to a degree seen in few industries, and many of the restaurants still have not fully recovered their financial footing. *See* Raj Chetty et. al, *How Did COVID-19 and Stabilization Policies Affect Spending and Employment?* 20–21, 27 (Nat'l Bureau of Econ. Rsch., Working Paper 27431, 2020). Just as the pandemic was beginning to ebb, restaurants were hit by an unprecedently tight labor market that rapidly inflated their labor costs. Alex Domansh & Lawrence H. Summers, *How Tight Are U.S. Labor Markets?* 13–21 & fig.4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29739, 2022). Commodity input prices for foodstuffs are soaring. *E.g.*, U.S. Dept. of Agric., Wheat Outlook:

April 2022, at 8 (Apr. 12, 2022); U.S. Dept. of Agric., Coffee: World Markets and Trade 1–4 (Dec. 2021). Unsurprisingly, more than nine in ten restaurants in Texas report that they are paying more for food than they did a year ago, and more than eight in ten are paying more for labor. Texas Restaurant Association, *New Data Confirms that Texas Restaurants Are Still in a Precarious Position, with Recovery Reversing for Many* (Sept. 30, 2021).

The Final Rule's resulting costs will likely hit tipped employees themselves because minimum wage laws cause job losses and reduce total take-home pay for low-wage and unskilled workers. Milton Friedman, Capitalism and Freedom 216 (2020); David Neumark & William Wascher, *Minimum Wages and Employment: A Review of Evidence from the New Minimum Wage Research* 6-72 (Nat'l Bureau of Econ. Rsch., Working Paper 12663, 2006) (meta-study of all recent research). This effect has been known since the 1940s. George J. Stigler, *The Economics of Minimum Wage Legislation*, 36 Am. Econ. Rev. 358, 361–62 (1946). The Department's own data surveys have shown these effects since at least the 1950s. John M. Peterson, *Employment Effects of Minimum Wages, 1938-1950*, 65 J. of Political Econ. 412, 430 (1957). And the effects have been repeatedly confirmed to be the same for tipped employees in the restaurant industry. *E.g.*, W.J. Wessels, *The Minimum Wage and Tipped Employees*, 14 J. of Labor Rsch. 213, 218–21 (1993).

Analysis in States over the past two decades confirms that the reduction or elimination of the tip credit in a State strongly correlates with reduced employment and reduced hours among tipped employees. Ofer H. Azar, *The Effect of the Minimum Wage for Tipped Workers on Firm Strategy, Employees, and Social Welfare*, 19 Labour

Econ. 748, 749–54 (2012). Because the FLSA does not *require* that all States allow restaurants to apply the entire tip credit amount against the federal minimum wage, State practice has varied considerably. Neumark & Yen, *supra* 7–10, 28 fig.3. Some States allow restaurant owners to deduct the maximum amount of the tip credit, others disallow any tip credit, and yet others have policies that fall onto the sliding scale in between those two extremes. Ofer H. Azar, *Effect* at 748. But reductions in and eliminations of the tip credit also have pushed restaurant owners to ban tipping at their restaurants in favor of service charges they either retain for themselves or redistribute across tipped and untipped staff. *See* Jones, *supra* 16, 18–19. Either way, tipped workers lose even more than minimum wage workers in other industries.

Those same empirical studies show that when the effective minimum wage is increased, as it is when the tip credit is reduced, job losses, reduced working hours, and lower effective hourly wage impose increased strain on the public fisc through higher welfare and unemployment expenditures. *E.g.*, David W. Berger et al., *Minimum Wages, Efficiency and Welfare* 17–21, 23–24, 47–48 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29662, 2022) (finding negative social welfare effect); Arindrajit Dube & Attila S. Lindner, *City Limits: What Do Local-Area Minimum Wages Do?* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27928, 2020). The Final Rule also may raise restaurant failure rates, especially for mom-and-pop restaurants and restaurants in low-income neighborhoods where franchising opportunities have been one of the most reliable ladders out of poverty and into the middle class. Dara Lee Luca & Michael Luca, *Survival of the Fittest: The Impact of the Minimum Wage on Firm Exit* 18–21 (Nat'l Bureau of Econ. Rsch., Working Paper 25806,

2019); *see generally* Marcia Chatelain, Franchise: The Golden Arches in Black America 223–58 (2020).

States also suffer direct financial loss when restaurants close. Texas, for instance, requires that most restaurants annually pay for licenses and permits to help protect public health and safety: a certified food manager's permit, a sales tax permit, a food establishment permit, and a facilities permit. Tex. Health & Safety Code § 437.0076; 25 Tex. Admin. Code § 229.372. Any restaurant that serves alcohol must acquire additional permits to do so. Tex. Alco. Bev. Code § 25.13 (wine and malt beverages); *id.* § 28.18 (mixed beverages). An increase in restaurant failures raises the threat of a decrease in revenue that helps fund public health and safety.

CONCLUSION

The Court should reverse the district court and remand with instructions to enter a preliminary injunction.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General

ARI CUENIN
Deputy Solicitor General
ari.cuenin@oag.texas.gov

/s/ Christopher J.F. Galiardo
CHRISTOPHER J.F. GALIARDO
Assistant Attorney General
christopher.galiardo@oag.texas.gov

Attorneys for amici curiae

Certificate of Service

On May 16, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Christopher J.F. Galiardo
Christopher J.F. Galiardo

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,739 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Christopher J.F. Galiardo
Christopher J.F. Galiardo