No. 23-50562

IN THE

United States Court of Appeals for the Fifth Circuit

RESTAURANT LAW CENTER; TEXAS RESTAURANT ASSOCIATION,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; JULIE A. SU, Acting Secretary, U.S. Department of Labor; JESSICA LOOMAN, Acting Administrator of the Department of 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

REPLY BRIEF OF APPELLANTS

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ARGUMENT IN REPLY

The Associations demonstrated in their principal brief that the Final Rule is invalid and unlawful under both the *Chevron* framework and the Administrative Procedure Act. In response, the Department's main arguments are that (1) the Final Rule is basically the same as the 80/20 subregulatory guidance that preceded it, which courts generally upheld; and (2) the Final Rule is necessary to prevent grave abuse of tipped employees. For the reasons that follow, the Department's contentions are insufficient to save the Final Rule.

1. The Final Rule represents a drastic, arbitrary, and unlawful solution in search of a non-existent problem.

The FLSA uses the readily understood, plain-language phrase "engaged in an occupation" as part of the definition of "tipped employee." *See* 29 U.S.C. § 203(t). For the past several decades, the Department has been unwilling or unable to accept the simple reality that this statutory text means what it says, and instead has found itself utterly befuddled by the deep metaphysical mystery of when is a bartender not a bartender. The origins of the Department's existential conundrum are understandable enough. The 1967 dual jobs regulation posited, correctly, that an employee may have two different jobs for the same employer, one of which results in tips and the other of which does not.

That principle works just fine when the two jobs involve non-overlapping sets of duties, such that it is readily apparent when the employee is engaging in one job

versus the other. But starting in the late 1970s, the Department moved incrementally toward applying that dual jobs framework to workers previously understood to be working in a single job. By 1988, the Department had convinced itself that it was a good idea to set relatively low limits on the amount of time an employee can spend on tasks that do not immediately and directly generate tips, at which point the employer loses the ability to take the tip credit.

Why did the Department do this, and why does the Department continue down that road today with the Final Rule? In a word, toilets. The Department warns in its brief not just once or twice, but four separate times, that without the Final Rule's requirement that employees spend at least 80% of their working time pursuing tips, unscrupulous restaurant employers will require servers and bartenders to "spend most of their shift . . . cleaning toilets." (Appellees' Br. 2-3; *see also id.* at 17-18 ("even if that employee spends most of her shift cleaning toilets"), 27 ("it would defy reason to say that an employee hired as a server that spent more than half her workday cleaning toilets was 'engaged in' her occupation as a server during that time"), 31 ("cleaning toilets for nearly an entire shift").)[1]

[1] To be fair, in one instance the Department changes things up and uses a different example—"even if that server spent nearly her entire shift performing non-tipped work—such as washing dishes" (Appellees' Br. 31)—but the rest of the brief underscores the Department's odd bathroom fetish.

In this same vein, the Department repeatedly mischaracterizes the Associations' arguments, suggesting incorrectly that the Associations contend that merely giving an employee a title of "server" means that the employee is automatically a tipped employee for all purposes regardless of what actual duties the employee performs. (Appellees' Br. 17, 28, 36.) Of course, the Associations have not argued anything even remotely close to that absurd proposition.

The Associations readily acknowledge that the possibility of dual jobs is real and that the Department has authority to attempt to solve for that issue, so long as it does so in a manner consistent with the FLSA. The Department had a number of legitimate options available to it. For example, the Department could have defined "occupation" in terms of the tasks normally associated with a particular job. And it could have defined "engaged in" by reference to some sort of familiar standard such as "primary duty"[2] or perhaps how the employee spends the majority of his or her working time. Even the Department lets its guard down briefly and admits that "[s]ervers are historically recognized as tipped occupations because *they primarily perform work that produces tips*: serving customers."[3] (Appellees' Br. 27 (emphasis added).)

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[2] *See, e.g.*, 29 C.F.R. §§ 541.100(a)(2), -.200(a)(2)-(3), -.300(a)(2) (defining the FLSA's executive, administrative, and professional exemptions, respectively, in part by reference to an employee's "primary duty").

[3] "Servers" are not, of course, "occupations"; they are tipped employees engaged in an occupation, but the Department's admission is telling nonetheless.

But the Department did not do any of those things. Instead, the Department articulated a standard that, in substance, makes pursuing tips the only core duty of any tipped employee's occupation, with all other duties being either ancillary (and grudgingly tolerated in small doses) or outright excluded from the occupation and not subject to the tip credit at all.

What exactly is wrong with looking at the actual duties that employees in these occupations normally and historically perform? To figure out whether a person is engaged in the occupation of server, bartender, host, table games attendant, bell-man, counterman, chauffeur, valet, or, indeed, bathroom attendant (which certainly can be a tipped occupation, notwithstanding the Department's squeamishness), might it be helpful to consider what duties are normal and customary for those roles? Absolutely not, according to the Department. We must not ask that question, because to do so is to create the possibility of a "fox-guarding-the-henhouse situation," or so the Department says, over and over again. (Appellees' Br. 15, 18, 28, 37.) The Department has an almost comical, were it not so sad, cartoon villain view of the American employer, positing that if the actual duties of an occupation were to factor into the analysis of whether an employee is engaging in that occupation, then employers might seize on that opportunity to change the nature of that occupation by piling on more and more non-tip-generating tasks. (*Id.*)

Of course, the Department cites no evidence that any employer anywhere has ever required a tipped employee to spend most of his or her working time engaging in cleaning bathrooms or washing dishes. And as a matter of common sense, if a restaurant is busy enough that the bathrooms require cleaning, the tipped employees will be busy with customers. Conversely, if the restaurant is not busy, the bathrooms are bound to require little or no cleaning. So too with other industries that have tipped employees; if there are no customers for the employees to serve, the employers are likely to send them home, not have them perform other jobs.

To review, according to the Department, the Final Rule is necessary to prevent employers from forcing tipped employees to spend most, or nearly all, of their working time engaged in non-tip-generating activity. Of course, the standard that the Department articulated does not in any sense solve for that problem. Rather than regulating to address *that* concern, the Department requires that nearly all of an employee's working time—at least 80%—must involve active pursuit of tips, and the employee must not have any continuous stretch of 30 minutes or more in which he or she does not pursue tips. Instead of using conventional notions of "occupation" and "engaged in," the Department has opted to deconstruct completely every job held by every employee who receives tips into its component tasks, categorizing all work as either "tipped occupation" or not by reference to whether the employee is, at any given time, actively pursuing tips. The Associations have found, aside from

the Final Rule, no recorded use of the word "occupation" anywhere in the history of the English language that bears any similarity to the manner in which the Department has chosen to use the word.

Indeed, the disconnect between the Department's rationale for regulating and the Final Rule becomes especially clear in light of the Department's treatment of "idle time" as counting against the tip credit. In the preamble to the Final Rule, the Department freely admits that it intends to treat time a tipped employee spends *not* on other tasks such as cleaning bathrooms or washing dishes but rather simply waiting for customers to walk in the door as "directly supporting" work that counts against the 20% limit on non-tip-producing activity. (Appellants' Br. 12-13.) Thus, a restaurant server who is sitting in a booth while the restaurant is open and waiting for customers to arrive, or a casino table games dealer who is standing at a blackjack table waiting for customers to sit down for a game, is, according to the Department, engaging in activity that can render the tip credit unavailable if that activity (alone or in conjunction with other activity) exceeds 20% of the employee's working time or occurs in a continuous block of more than 30 minutes. That position has *nothing* to do with rascally employers abusing the tip credit, and everything to do with gross administrative overreach by the Department.

Another aspect of the Department's arbitrary and irrational Final Rule that the Associations called out in their opining brief is the disparate treatment of bussers

and service bartenders—whose work consists mostly or entirely of non-tip-producing activity under the Department's framework—as compared to servers, bartenders, and other tipped employees. (Appellants' Br. 50-51.) In response, the Department insists that this distinction is rational, but offers virtually no reasoning as to *why* it is rational. (Appellees' Br. 39-40.)

In the end, the law does not require the Department to conduct formal fact-finding when issuing a rule. Nor must the Department treat as gospel the O*NET occupational database or any other particular source. But what the Department cannot do is what it did here: simultaneously turning a blind eye to any meaningful real-world evidence regarding the actual work that employees in tipped occupations perform *and* issuing a regulatory standard that bears no resemblance to, and finds no grounding in, the statutory text it purports to implement. The Final Rule does not even try to define any arguably ambiguous statutory terms, opting instead to create the new concept of a "tipped occupation" defined exclusively by reference to pursuing tips, rather than focusing on the actual terms Congress used in the statute, which make the "occupation" the operative concept.

It is time for this Court to put an end to the Department's ill-advised, illegal, and anti-statutory frolic and detour.

2. The cases on which the Department principally relies rest on an obvious misreading of the 1967 dual jobs regulation.

The Department contends that the Final Rule is reasonable because three circuits have upheld the predecessor 80% standard embodied in the 1988 guidance. Those decisions are not helpful to the Department for two reasons. First, those cases involve deference under *Auer v. Robbins*, 519 U.S. 452 (1997), not *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 468 U.S. 837 (1984), based on alleged ambiguity in the Department's 1967 dual jobs regulation. Second, and more importantly, each of those decisions clearly misreads that 1967 regulation, as pointed out with great clarity in two separate decisions critical of that interpretation.

In *Fast v. Applebee's International, Inc.*, 638 F.3d 872 (8th Cir. 2011)[4], and *Marsh v. J. Alexander's LLC*, 905 F.3d 610 (9th Cir. 2018) (en banc)[5], the main issue was whether the 80% standard in the 1988 guidance should receive *Auer* deference.[6] Both decisions employed the following interpretive approach: (1) the FLSA does

[4] Although the full Eighth Circuit denied review in *Fast*, four judges voted in favor of rehearing en banc. *See Fast*, 638 F.3d at 872 n.*.

[5] In *Marsh*, a divided three-judge panel had rejected the 80% standard. *See Marsh v. J. Alexander's LLC*, 869 F.3d 1108 (9th Cir. 2017), a decision later set aside by the en banc court.

[6] In *Fast*, the court noted that "[t]he parties do not dispute that § 531.56(e)"—referring to the 1967 dual jobs regulation—"is entitled to *Chevron* deference." 638 F.3d at 877. In *Marsh*, the court held, over a dissent, that the 1967 dual jobs regulation is entitled to *Chevron* deference because of circuit precedent limiting procedural challenges to regulations to the first six years following their promulgation. *See* 905 F.3d at 621.

not define "occupation" or "engaged in an occupation," thereby permitting the Department to do so; (2) the 1967 dual jobs regulation filled an unanticipated statutory gap to address potential situations where individuals have two or more different jobs; (3) that regulation allows for non-tipped activity subject to the ambiguous temporal limits "occasionally" and "part of [the] time"; and thus (4) the 80% standard is a reasonable and permissible attempt by the Department to clarify the temporal limits in the Department's own regulation, thereby triggering *Auer* deference. *See Fast*, 638 F.3d at 875-80; *Marsh*, 905 F.3d at 622-31.

In *Rafferty v. Denny's, Inc.*, 13 F.4th 1166 (11th Cir. 2021), the court considered the 80% standard in a more complicated context with respect to the Department's ever-changing interpretations. By the time the court heard the case, the Department had reissued an opinion letter rejecting the 80% standard and had withdrawn the Field Operations Handbook guidance that had served as the basis for the 80% standard. *See id.* at 1176-77. The Department had also issued the 2020 final rule that would have expressly rejected the 80% standard, the early 2021 rulemaking delaying the effective date of the 2020 rule, and a proposed rule that served as the basis for the Final Rule currently at issue. *See id.* at 1177. The question for the court was, in essence, which interpretation from the Department, if any, should apply to the case before it.

The court declined to give any deference at all to any of the Department's actions seeking to withdraw the 80% standard. *See Rafferty*, 13 F.4th at 1178-90. According to the court, "[t]he removal of any limit on the time a tipped employee may perform non-tipped duties flatly contradicts the dual-jobs regulation's ceiling on related duties at 'occasional[]'—or infrequent." *Id.* at 1185. Instead, the court adopted the 80% standard as its own independent reading of the 1967 dual jobs regulation. "We conclude that a twenty-percent limit on the hours in which a tipped employee may perform untipped related tasks best complies with the temporal limits the regulation places on such duties." *Id.* at 1189.[7]

It is these three decisions—*Fast*, *Marsh*, and *Rafferty*—that the Department now contends support the Final Rule. Yet all three cases proceed from the same flawed premise—i.e., that the 1967 dual jobs regulation places temporal limits on activity that does not directly generate tips.[8] The separate opinions by Judges Graber and Ikuta in *Marsh* make this point very clearly.

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[7] Judge Luck, concurring in the result, would have rejected all of the Department's guidance beyond the 1967 dual jobs regulation itself, concluding that the regulation was not ambiguous and thus that there was no need to refer to the Department's opinion letters or any other subregulatory guidance. *See Rafferty*, 13 F.4th at 1195 (Luck, J., concurring).

[8] For reference, the 1967 dual jobs regulation states in full:

> 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

Judge Graber's partial dissent in *Marsh*

Judge Graber began by noting that "[t]he 'dual jobs' regulation is no model of clarity. But it plainly forecloses the DOL's interpretation that an employee spending a certain amount of time doing related, but non-tipped, work qualifies as working a dual job." *Marsh*, 905 F.3d at 635 (Graber, J., concurring in part and dissenting in part). She observed that "[t]he regulation's first example—on which the remainder of the regulation is premised—makes the focus clear. It describes a situation in which an employee performs two different functions: that of a 'maintenance man' and that of 'waiter.'" *Id.* That "example says nothing about the amount of time that the employee spends doing each kind of work. That is, the given employee would qualify as having 'dual jobs' (only one of which is a tipped occupation) no matter how he split his time between the two jobs." *Id.* The employee "qualifies as having 'dual jobs' not because he spends a certain amount of time as a waiter, but because he performs tasks that are unrelated to one another." *Id.*

> 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).

By contrast, "[t]he other two examples—the 'counterman' and the 'waitress' examples—confirm the regulation's focus on that distinction. Importantly, the regulation presents those two examples as foils for the first example. That is, they are not separate examples of instances in which a person works 'dual jobs.'" *Marsh*, 905 F.3d at 635 (Graber, J., concurring in part and dissenting in part) (citation omitted). Those "examples, instead, merely illuminate when employees have 'dual jobs' by describing instances in which an employee is *not* engaged in 'dual jobs.'" *Id.*

Thus, "[r]ead in context, the waitress example does not permit the conclusion that a waitress might work 'dual jobs' because she spends a certain amount of time doing non-tipped tasks related to her work as a waitress." *Marsh*, 905 F.3d at 635-36 (Graber, J., concurring in part and dissenting in part). Instead, "it stands for the notion that she is *not performing two jobs*, because her non-tipped work—unlike the waiter's work as a maintenance man—*relates* to her tipped occupation. So, too, with the counterman example." *Id.* at 636. Thus, "the majority opinion errs in arguing that the 'temporal' words *found exclusively in those counterexamples* muddle the regulation's focus on unrelated work." *Id.* at 636.

Turning to the final sentence of the regulation, which "puts to rest any ambiguity," Judge Graber concluded that the "final reference to 'related duties' makes clear that the three examples exist to demonstrate the distinction between an employee who is engaged in duties *related* to an occupation that produces tips and an

employee who is engaged in a job that is *unrelated* to a tipped occupation." *Marsh*, 905 F.3d at 636 (Graber, J., concurring in part and dissenting in part). That "final sentence thus confirms that one cannot reasonably read the waitress and counterman examples as standing for the notion that a certain amount of related, non-tipped work constitutes a separate job." *Id.*[9]

Judge Ikuta's dissent in *Marsh*

Writing separately, Judge Ikuta pulled no punches: "In the guise of interpreting a regulation (that itself is far afield from the statute at issue) the Department of Labor (DOL) created detailed and specific legislation that effectively eliminated an employer's statutory right to take a tip credit." *Marsh*, 905 F.3d at 637 (Ikuta, J., dissenting). In her view, "the DOL's purported interpretation is no interpretation at all, and the majority's holding to the contrary raises the worst dangers of improper *Seminole Rock* and *Auer* deference[.]" *Id.* at 638 (citing *Bowles v. Seminole Rock*, 310 U.S. 410 (1945)).

"In a nutshell," Judge Ikuta reasoned, "rather than interpreting the dual jobs regulation," the Department "effectively replaces the concept of a tipped employee with a new regulatory framework" that "requires the employer to count the number

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[9] Judge Graber dissented from the majority's holding with respect to giving *Auer* deference to the 80% standard. She concurred with the majority's decision with respect to allowing a minimum wage claim to proceed regarding time employees spend on tasks having nothing to do with the occupation from which they receive tips. *See Marsh*, 905 F.3d at 636-37 (Graber, J., concurring in part and dissenting in part).

of minutes the employee spends on: (1) serving customers; (2) performing duties related to serving customers; and (3) performing duties not directly related to serving customers." *Marsh*, 905 F.3d at 641 (Ikuta, J., dissenting). That "guidance does not constitute an interpretation of the dual jobs regulation; it is a completely different approach to the tip credit." *Id.*

Judge Ikuta pointed out that "the underlying dual jobs regulation merely requires employers to discern whether an employee is working in two distinct jobs, based on a common-sense understanding of what it means to have two jobs." *Marsh*, 905 F.3d at 644 (Ikuta, J., dissenting). That "regulation gives one example of a person in a dual job: a maintenance man in a hotel who also serves as a waiter. This first example involves jobs that are ordinarily understood to involve different types of duties." *Id.* Whereas "a maintenance man has a range of duties associated with keeping buildings or equipment in good repair, a waiter has a range of duties associated with serving customers at their tables in a restaurant. In common usage, these constitute distinct jobs." *Id.*

Turning to the other examples in the regulation, "[t]he waitress and counterman examples are consistent with the everyday understanding that a job is comprised of a cluster of tasks typically associated with that job." *Marsh*, 905 F.3d at 644 (Ikuta, J., dissenting). Thus, "[a] waitress is engaged in a single job so long as the range of duties she performs in typical for a waitress job (e.g., some cleaning, some

food preparation),” while “a counterman is engaged in a single job so long as his range of duties is typical for that job (e.g., cooking some of his own orders, or taking a turn as a chef) and his fellow countermen share in those duties.” *Id.* Therefore, “if the employer has hired a person for one job (such as 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” if he or she regularly receives sufficient tips to satisfy the FLSA’s definition of “tipped employee.” *Id.* at 645.

Based on this analysis, “[t]here is no reasonable view” of the 80% standard “that permits the conclusion that it is an interpretation of the dual jobs regulation.” *Marsh*, 905 F.3d at 645 (Ikuta, J., dissenting). This is because the 80% standard “does not attempt to explain or derive a general principle from the regulation’s example of what constitutes two distinct jobs. . . . Instead, the [guidance] effectively disregards this example and takes a different approach . . . .” *Id.* As Judge Ikuta observed, “[t]here is no job that can be described as more-than-20-percent-of-time-spent-on-untipped-related tasks, nor is there a job that can be described as the five or ten minutes spent here and there on unrelated tasks.” *Id.*

Indeed, the 80% standard “effectively disregards the regulation’s examples of when an employee is engaged in a single job, despite being involved in a multitude of tasks.” *Marsh*, 905 F.3d at 645 (Ikuta, J., dissenting). In accordance with the

regulation, "a waitress doing typical waitress duties remains a waitress, even if (in five-minute increments throughout her workweek) she spends 60 percent of her time waiting tables, 10 percent cleaning tables, 10 percent toasting bread, 10 percent making coffee, and 10 percent washing dishes." *Id.* That "regulation—and common sense—tells us that the waitress is 100 percent engaged in the single tipped occupation of waitressing—she is not 60 percent a waitress, 10 percent a janitor, 10 percent a barrista, and 10 percent a dishwasher." *Id.* Yet, according to the Department, "because such a waitress spends more than 20 percent of her time in tasks that are not themselves tipped, she is both engaged in the tipped occupation of waitress and engaged in the untipped occupation of . . . something else?" *Id.*

Like Judge Graber, Judge Ikuta pointed out that while the 1967 dual jobs regulation "establishes that an employee is not engaged in dual jobs merely because the employee has multiple duties[,]" the 80% standard "flips this determination, holding that an employee *is* engaged in dual jobs when the employee has multiple duties and spends more than 20 percent of the time on related but untipped duties." *Marsh*, 905 F.3d at 647 (Ikuta, J., dissenting). Such a "reversal of the regulation's example finds no support in the language of the regulation." *Id.* Similarly, the regulation's counterman example, which "establishes that an employee is *not* engaged in dual jobs merely because the employee takes a turn as a short order cook[,]" conflicts with the Department's 80% standard, which "flips this determination, so that a counterman

who engages in work as a short order cook *is* engaged in dual jobs if the counterman's work as a short order cook is unrelated to tips (or takes more than 20 percent of his time)." *Id.* But "this reversal of the regulation's examples contradicts the regulation because, under the regulation, working as a 'short order cook for the group' is part of the single, tipped occupation of a counterman." *Id.*

* * *

As the well-reasoned opinions by Judges Graber and Ikuta demonstrate, the 80% standard derived from a clear misreading of the 1967 dual jobs regulation. In short, that regulation simply did not purport to place a limit on the time an employee may spend on non-tipped tasks while receiving a tipped wage, so long as the employee is performing job duties consistent with his or her occupation. The Department's interpretive error, echoed by the majorities in *Fast*, *Marsh*, and *Rafferty*, was to assume that the waitress and counterman examples in the regulation somehow constitute the outermost permissible bound for individuals to have a single job, and that anything that went an iota beyond those examples necessarily involved dual jobs. But the regulation says no such thing.[10] Thus, those three circuit rulings are, at best, deeply flawed *Auer* decisions. They offer virtually no support for the Final Rule under the different, and demanding, *Chevron* standard.

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[10] The Department continues to cling to this misreading, declaring—incorrectly—in its brief that the 1967 dual jobs regulation "allowed the tip credit to be taken only if the nontipped work was performed 'occasionally'[.]" (Appellees' Br. 25.)

3. The Final Rule falls within the major questions doctrine.

The Department makes two main arguments regarding why the Final Rule supposedly does not invoke the major questions doctrine. First, the Department repeatedly asserts, some version of the requirement of spending at least 80% of one's working time pursuing tips has been in force for "decades." (Appellees' Br. 19, 33, 35, 41.) Although it may be true that the Department initially placed the original 80% standard in an internal Department handbook in 1988, the Department does not dispute the point made in the Associations' opening brief that the 1988 guidance was not initially made available to the public and did not achieve wide public attention until a court addressed it in 2007. (Appellants' Br. 9.) *See, e.g.*, *Marsh*, 905 F.3d at 640 (Ikuta, J., dissenting) ("This 20-percent cap was not made public until decades later, when the DOL included it in an amicus brief filed in the Eighth Circuit in 2010."); *id.* at 652 ("[T]he DOL has never initiated enforcement litigation based on the 20-percent rule, even though it initially circulated the FOH to investigators in 1988."). And since that 80% standard became widely known, it has been the subject of nearly constant litigation challenge, along with multiple policy reversals. (Appellants' Br. 9-10.)

It is thus much more accurate to say that the 80% standard that preceded the Final Rule was essentially secret and not known to the regulated community until roughly 2007, or more than 40 years after Congress created the tip credit. With each

of the past four administrations reversing the policy of its predecessor on this point, the 80% standard has been anything but a settled, noncontroversial exercise of clear agency authority as the Department would like the Court to believe. Moreover, at no time before the Final Rule had any earlier regulatory or subregulatory guidance from the Department hinted at a 30-minute cap on consecutive non-tip-producing activity; that portion of the Final Rule is entirely new and unprecedented.

Second, the Department contends that the economic impact of the Final Rule is significantly less than the "trillion"-dollar impact on gross domestic product anticipated over a 32-year period in *West Virginia v. EPA*, 142 S. Ct. 2587, 2604 (2022). (Appellees' Br. 33-34.) Tellingly, unlike the other cases the Department discusses, where the Department lists out the entire anticipated impact over the life of the regulation, when it comes to the Final Rule the Department switches stance and refers only to the *annual* impact, which when looked at as a single-year event significantly—and misleadingly—understates the full impact. (*Id.* at 34.) The Department fails to mention that in 2023 dollars the Department's own estimate of costs exceeds $2.2 billion over the first ten years. (Appellants' Br. 23.) Nor does a case need to involve trillions of dollars for the major questions doctrine to apply; billions will do. *See EPA*, 142 S. Ct. at 2620-21 (Gorsuch, J., concurring).

The Department makes no effort to counter the remaining arguments the Associations make regarding major questions, including the political significance of

the Final Rule, the absence of a clear statement of congressional authority to regulate on this topic, and the mismatch between the Final Rule and the Department's mission and expertise. (Appellants' Br. 20-32.) The Final Rule involves a major question.

4. The 2018 amendment to the FLSA has nothing to do with this case.

The Department claims to find support for the Final Rule in a 2018 amendment to the FLSA. (Appellees' Br. 18-19, 29-31.) That amendment, however, has no bearing whatsoever on this case and certainly does not support either the Department's 80% threshold for tipped activity or its 30-continuous-minute limit on non-tip-generating activity. This is because the 2018 legislation affects *only* employees who have a cash wage at or above full minimum wage; the new statutory provision does not affect the rights of employees who receive a tipped wage and for whom the employer takes a tip credit.

A review of the history of that 2018 amendment is necessary in order to demonstrate why that law has no relevance here. Before 2018, section 3(m) of the FLSA stated, as a condition to an employer taking the tip credit, that "all tips received by" a tipped "employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips." 29 U.S.C. § 203(m) (2017). Shortly after that language became part of the FLSA, a concern arose that employers might require employees not subject to a tip credit to turn some or all of their tips over to

the employer. In the early 1970s, the Department issued subregulatory guidance purporting to bar employers from requiring tipped employees to share tips with non-tipped employees, regardless of whether an employee was subject to the tip credit. In 2010, the Ninth Circuit rejected that guidance as inconsistent with the FLSA. The court held that the statute did not preclude an employer that took no tip credit and paid all of its employees at least full minimum wage from implementing a mandatory tip pool that combined dining room staff (e.g., servers) and traditionally non-tipped employees such as kitchen staff (e.g., cooks). *See Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010).

Dissatisfied with that plainly correct statutory interpretation, the Department in 2011 issued a final rule purporting to prohibit such combined tip pools even where all employees have a cash wage at or above the federal minimum wage. Various trade associations challenged that rule. A sharply divided panel of the Ninth Circuit held that, notwithstanding *Cumbie*, the Department's 2011 rule was permissible under the FLSA. *See Or. Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080 (9th Cir. 2016). The Ninth Circuit denied rehearing en banc, with Judge O'Scannlain issuing a blistering dissent joined by nine other judges. *See Or. Rest. & Lodging Ass'n v. Perez*, 843 F.3d 355, 356 (9th Cir. 2016) (en banc) (O'Scannlain, J., dissenting).

While two petitions for a writ of certiorari were pending arising from that Ninth Circuit ruling, *see Nat'l Rest. Ass'n v. Dep't of Labor*, *petition for cert. filed*

(U.S. Jan. 19, 2017) (No. 16-920); *Wynn Las Vegas, LLC v. Cesarz*, *petition for cert. filed* (U.S. Aug. 1, 2016) (No. 16-163), a change of administration occurred. The Department, under new leadership, proposed a new regulation that would rescind the portions of the 2011 rule at issue in the litigation and clarify that the restrictions on who can participate in a tip pool apply only when an employer takes a tip credit and pays a cash wage below minimum wage. *See* Tip Regulations Under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57,395 (Dec. 5, 2017). That proposal, however, resulted in criticism by workers' advocates that the Department was attempting to allow employers to confiscate the tips of employees. *See, e.g.*, Ben Penn, *Labor Dept. Ditches Data on Worker Tips Retained by Businesses*, DAILY LABOR REPORT, Feb. 1, 2018.

To defuse that controversy, then-Secretary of Labor Alexander Acosta reached a deal with Senator Patty Murray that resulted in the 2018 creation of new FLSA section 3(m)(2)(B), 29 U.S.C. § 203(m)(2)(B), which prohibits employers from taking employee tips regardless of whether the employer takes a tip credit, while at the same time denying the 2011 regulations any further force or effect. *See* Pamela Wolf, *Top Story—Deal Reached on FY2018 Appropriations; It Would Also Resolve Proposed Tip Rule Controversy*, 2018 WL 1417466, EMPLOYMENT LAW DAILY, Mar. 22, 2018. Respondents in both then-pending Supreme Court cases briefed the effect of the 2018 amendments—with the Department arguing for a grant

of certiorari, and the private plaintiffs in the *Wynn* litigation arguing mootness—and the Supreme Court denied both petitions on June 25, 2018.

In short, employees who receive a cash wage less than minimum wage have the same rights today that they had before the 2018 amendment: they have a right to retain their tips, subject to a tip pooling arrangement among other tipped employees, whereas non-tipped employees such as kitchen staff, supervisors, and managers must not be part of such a tip pool. The Department is well aware of all of this history, as it was an active participant in both the regulatory and the legislative events culminating in the 2018 FLSA amendment. The Department fully understands that FLSA section 3(m)(2)(B) did not originate out of any concern regarding workers subject to the tip credit, and it therefore cannot lend support to either the 80% threshold or the 30-minute limit set forth in the Final Rule, which apply only with respect to employees paid a tipped wage and subject to the tip credit.

5. The Department has waived any defense of the 30-minute standard, as well as any argument under *Chevron*.

The Department asserts, without citing any authority, that the Associations "have forfeited any challenge specific to the 30 consecutive minutes limitation," and for that reason alone it has "not addressed that limitation separately in this brief." (Appellees' Br. 46.) The Department's statement simply ignores the multiple times the Associations called out that specific portion of the Final Rule in their principal

brief. For example, the Associations discussed the 30-minute provision in the statement of issue presented (Appellants' Br. 2), provided the complete pertinent regulatory text (*id.* at 12), and discussed it in the argument portion of the brief with respect to various steps in the *Chevron* analysis (*id.* at 27 (regarding Step Zero), 38-39 (regarding Step One)). The Department's waiver argument fails as a factual matter.

Beyond this unfounded assertion of waiver, the Department offers no substantive argument regarding why the 30-minute standard is a permissible reading of the FLSA under either *Chevron* or the Administrative Procedure Act. As a result, it is the Department that has waived its defense of that portion of the Final Rule. *See, e.g.*, *Bradley v. Village of University Park*, 59 F.4th 887, 897 (7th Cir. 2023) ("An appellee may also waive arguments . . . by failing to respond to an appellant's arguments . . . ."). Nor is the Department's failure to offer any type of defense of the 30-minute standard surprising, as that portion of the Final Rule patently finds no basis in the text of the FLSA. Had the Department been able to come up with anything substantive to say as to why the 30-minute rule is lawful and reasonable under the statute, surely it would have made the argument, given that the Department had plenty of space available in its brief. The Department's silence in that regard speaks volumes, as this portion of the rule is utterly indefensible.

Indeed, the Department has waived the argument that the Final Rule, or any portion thereof, is valid under *Chevron*. In their principal brief, the Associations

framed their entire argument in terms of the Final Rule failing *Chevron* Steps Zero, One, and Two, citing or referring to that landmark decision approximately three dozen times (Appellants' Br. 16-52), while also noting the similar analysis under the Administrative Procedure Act (*id.* at 18-19 n.8). In response, the Department's brief does not mention *Chevron* even once. Nowhere does the Department expressly contend that the Final Rule satisfies any of the specific steps of the *Chevron* analysis, much less all of them, as the Final Rule must in order to be valid. As discussed above, the decisions the Department relies on as having previously upheld a version of the 80% standard—minus the 30-minute provision—were not *Chevron* cases, but instead involved the validity of subregulatory guidance under *Auer v. Robbins*, 519 U.S. 452 (1997). Having failed to brief the issue under the correct legal standard, the Department cannot now contend that the Final Rule satisfies *Chevron*. *See Bradley*, 59 F.4th at 897.

CONCLUSION

For these reasons, the Court should reverse the judgment of the district court and provide the additional relief requested in the Associations' principal brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure 25(d) and Fifth Circuit Rule 25.2.5, I hereby certify that on this date, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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January 17, 2024

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 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 Rule 32(a)(7)(B) because it contains 6,433 words, excluding the items set forth in Rule 32(f).

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