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

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Appellants have demonstrated that they are likely to prevail on their claims, that they will suffer imminent and irreparable harm, and that the balance of interests favors an injunction. The Department's response confirms that it improperly assumed legislative authority in promulgating the Final Rule, which inserts a brand new test for the tip credit into the plain text of the FLSA. As shown below, the district court erred in denying Appellants' motion for preliminary injunction.

1. The Department's own evidence demonstrates clear irreparable harm warranting an injunction.

The record evidence is clear that the Associations' members will suffer continued irreparable harm every day that the Final Rule remains in effect because of the significant and ongoing familiarization, adjustment, management, and recordkeeping costs that are necessary to comply with the Final Rule. *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. To be clear, this is not a case where the Department denies that the Associations' members will suffer harm. The dispute here is the amount of the harm. But even the Department's ***own data*** are more than sufficient evidence of irreparable harm because the Final Rule acknowledges that businesses will spend $224,882,399 in familiarization costs, adjustment costs, and management costs during the first year alone. *See* Final Rule, 86 Fed. Reg. at 60143.

Thereafter, the Final Rule further acknowledges that for the following years, businesses will incur 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*. Yet, despite its own data analysis, the Department inexplicably argues that there is no ongoing irreparable harm to prevent because employers should have already incurred the upfront management and familiarization costs necessary to comply with the Final Rule. But the Department's own data refutes this argument because the Final Rule acknowledges that businesses will continue to expend monies ***for at least the next decade*** to comply. In light of these cold, hard numbers, the Department can no longer perpetuate this myth that compliance costs somehow abruptly ended the day that the Final Rule became effective. To the contrary, the record is undisputed that businesses will expend a decade's worth of resources to comply with the Final Rule—an indication of just how sweeping and disruptive the Final Rule is to the Associations' members.

The Department makes a second untenable argument that businesses will not suffer irreparable harm in the form of recordkeeping costs because "monitoring of employees will generally not be required" and "the rule expressly states that it has 'no recordkeeping requirement.'" (Dept. Br. at 30-31.)[1] In a litigation-free world, this argument might pass the litmus test. But that is not the case here.

Employers may not have *explicit* tip credit recordkeeping obligations under the Final Rule, but they certainly have explicit legal liability for misapplying the tip credit. And where legal penalties exist, the practical reality is that accurate record-keeping and employee monitoring are critical for employers to demonstrate compliance with the Final Rule and to avoid collective actions and potentially severe monetary liability. The Department's argument that recordkeeping and employee monitoring is unnecessary also ignores Supreme Court precedent creating a lenient standard for FLSA plaintiffs to prove damages where the employer has failed to keep records.

In *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 687 (1946), the Supreme Court discussed the relative FLSA recordkeeping obligations as between an employer and employee and found that:

> **[I]t is the employer** who has the duty under s 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to **produce the most probative facts concerning the nature and amount of work performed**. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy.

[1] All page references for filed documents are to the ECF-generated pagination rather than to the internal document pagination.

Id. (emphasis added). This Court has further advised that "[u]nder *Mt. Clemens*, if 'the employer's records are inaccurate or inadequate,' a plaintiff need only show by 'just and reasonable inference' that she was an employee, worked the hours, and wasn't paid.'" *United States Dep't of Lab. v. Five Star Automatic Fire Prot., L.L.C.*, 987 F.3d 436, 439–40 (5th Cir.), *reh'g denied*, 997 F.3d 1258 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1667 (2022). In other words, if an employer has no accurate records, courts accord an employee's testimony about hours worked an inference of correctness.

Under the Final Rule, this means that the question of whether an employer violated the Final Rule will rise and fall on oral testimony from individual tipped employees about the specific tasks that they performed, when they performed such tasks, and for how long they performed each task. With this employee-friendly *Mt. Clemens* framework in mind, the Department cannot reasonably expect that employers will take the gamble of using the tip credit without adequate supporting records. The penalties and liability here for non-compliance with the Final Rule and the risk of collective actions are simply too high for employers to place their entire compliance defense on human memory and oral testimony alone. Rather, to adequately defend against any future litigation involving compliance with the Final Rule, employers need several layers of recordkeeping to show not only that an employee's main duties were tip-producing, but also that the employee (1) did not perform any tip-supporting duties for more than 20% of the time, (2) did not perform any tip-supporting duties for more than 30 consecutive minutes, and (3) did not perform any work that is not part of the "tipped occupation." Recordkeeping of this nature is not an easy administrative feat because employees in the service industry continually pivot between guest service and directly supporting tasks depending on customer volume and flow, which makes tracking, classifying, and recording this work immensely difficult.

Therefore, although the Final Rule does not impose a *formal* recordkeeping obligation on employers, it does impose a *de facto* recordkeeping requirement because employers will need sufficiently detailed documentary evidence on the daily activities of tipped employees to defend against future investigations by the Department and future individual and collective actions. Thus, the Associations' members continue to spend significant monies every day to develop these records and monitor their employees to prove compliance with the Final Rule. ROA.713:5-714:17; ROA.333, 335, 337 ¶¶ 10(d) & (f), 15; ROA.382, 386 ¶¶ 17, 19(f). Critically, the cost of these recordkeeping and monitoring activities is ***in addition to*** the $183.6 million that the Department estimates that the business community will bear annually over the next decade to comply with the Final Rule. Stated simply, the Department's $183.6 million annual cost estimate is the floor, not the ceiling, of the financial burden that the Associations' members will continue to suffer for the next ten years to comply with the Final Rule. By any measure, these numbers represent substantial ongoing irreparable harm.

Businesses are also not incurring these nine-figure expenditures in a vacuum. There is no dispute here that employers in the service-oriented industry were especially devastated by the effects of the COVID-19 pandemic which left them with depleted financial reserves. *See* ROA.340-43; ROA.387-88 ¶¶ 20-21; ROA.336 ¶¶ 11-12; ROA.397-98 ¶¶ 8-10. And yet, these businesses must now collectively spend hundreds of millions of dollars to comply with a potentially invalid regulation. Worse still, if that occurs, the Associations' members will never be able to recover these substantial nine-figure expenditures because of the Department's sovereign immunity shield against monetary damages. The Department simply buries its head in the proverbial sand and ignores the case law from this Court holding 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) (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). *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).

In sum, a trifecta of irreparable harm exists here because the facts are undisputed that: (1) following the financial devastation of a global pandemic, businesses must spend more than $2,000,000,000 over the next ten years to (2) comply with a regulation that is likely invalid, and (3) have no recourse to recover such expenditures if that is the case. Without question, this constitutes irreparable injury and the district court erred in holding otherwise. A preliminary injunction enjoining the Department from enforcing the Final Rule nationwide is therefore warranted.

2. The Department's sub-regulatory 80/20 guidance does not provide authority for the Final Rule.

The Department argues that it has authority to issue the Final Rule because the Final Rule simply codifies 40 years of alleged unbroken acquiescence by Congress, the courts, and employers of the informal 80/20 guidance that, according to the Department, has always applied to tipped employees: "the rule largely codifies the Department's longstanding 80/20 guidance by providing that an employer cannot take the tip credit for directly supporting work that 'exceeds 20 percent of the hours worked during the employee's work week.'" (Dept. Br. at 22.) This argument is based entirely upon a self-serving revisionist history of the FLSA's 1966 tip credit provision, the 1967 "dual jobs" regulation, and the genesis of the 80/20 guidance. A quick historical primer on the tip credit legal framework shows that there has never been a widely-accepted limitation, even by the Department itself, on how much time a tipped employee can spend on non-tip producing tasks as part of a single occupation.

The first tip credit regulations appeared in 1967, codified at 29 C.F.R. § 531.50-60 and implemented without comment. 29 C.F.R. § 531.56(e)—known as the "dual jobs" regulation—regulated whether the tip credit applied based upon the distinct *occupations* that the employee performed for an employer. That is, where an employee held two entirely separate and distinct occupations for the same employer, the 1967 regulation evaluated if, and when, the employer could take the tip credit for each of these dual occupations. *Id.* The regulation did not review the mix of tasks within each of those individual occupations and parse out which tasks were tip-producing, directly-supporting, or non-tip-producing.

Moreover, nothing in the 1967 regulation restricted tip-supporting work within a single occupation to 20% of an employee's total work or 30 continuous minutes. Indeed, the regulation contained no language whatsoever that articulates limitations of this nature. *Id.* And at that time, neither Congress, the courts, nor the regulated business community knew or could have foreseen that the Department would attempt to take the regulation in that direction 40 years later. Put differently, in 1967, there was zero indication that the Department would attempt to stretch the dual-occupation concept of reviewing *two separate occupations* for tip credit entitlement to reviewing *the mix of tasks* within *a single occupation* for tip credit entitlement and placing temporal limitations on certain tasks.

Starting in 1979, the Department began taking the 1967 dual jobs regulation down this unauthorized path in informal opinion letters in which it advised the recipients of the letters that the tip credit was available only if tipped employees performed a certain amount of certain tip-producing work. *See* ROA.550-54. These opinion letters failed to gain the attention of employers nationwide because opinion letters do exactly as their name instructs: provide *opinions*, not *law*. The Department sent these opinion letters to specific recipients, and nothing in the FLSA anticipates that employers will unearth and review *ad hoc* agency letters.

On December 9, 1988, under the guise of clarifying the scope of § 531.56(e) of the 1967 dual jobs regulation, the Department officially adopted the concept that tipped employees had to perform tip-producing work for at least 80% of their work hours and could not spend more than 20% of work hours on tip-supporting side work (the "80/20 Guidance") in a non-public internal Field Operations Handbook. *See* ROA.555 §30d00(e)(1988). In the Handbook, the Department advised its field investigators that "where the facts indicate that . . . a tipped employee spends a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties." *Id.* The Department did not provide employers with the opportunity to provide input or comments on the proposed 80/20 Guidance, nor did the Department disseminate the Field Operations Handbook so that it was accessible to the regulated community. For this reason, employers were not aware or officially provided notice of the Department's adoption of the new 80/20 Guidance. Therefore, for over 20 years, the 80/20 Guidance lay in obscurity in Department opinion letters and internal agency documents (none of which went through the notice and comment process) and never reached the radars of employers (including the restaurant and service industry), legal practitioners, or the courts.

It was not until *Fast v. Applebee's International, Inc.*, 502 F. Supp. 2d 996 (W.D. Mo. 2007), in 2007, that the wider legal and business community received notice for the first time that the Department was attempting to create a new tip credit regime and applying the dual occupation tip credit concept to tasks within a single occupation. Since *Fast*, employers, business associations, and industry groups have aggressively litigated, opposed, and contested the 80/20 Guidance in courts throughout the country.

Indeed, the 80/20 Guidance proved so confusing and unworkable that the Department itself has changed its position on the Guidance several times in recent history. In January, 2009, the Department issued Opinion Letter FLSA2009-23 rescinding the 80/20 Guidance. ROA.556. Six weeks later, on March 2, 2009, the Department withdrew the letter. *Id.* Following the 2017 administration change, the Department then issued Opinion Letter FLSA2018-27 in 2018 which revived its 2009 guidance and stated that the Department did "not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties." ROA.556-59. The Department moved to codify the rescission of the 80/20 Guidance in a 2020 proposed regulation which never took effect due to another change in administration. *See* Tip Regulations Under the Fair Labor Standards Act (FLSA), 85 Fed. Reg. 86, 756 (Dec. 30, 2020).

History does not provide the authority that the Department needs for the Final Rule and does not support the notion that Congress, courts, and the business community tacitly complied with and agreed to the Department's expansion of the tip credit regulations in the 80/20 Guidance. From the moment that the 80/20 Guidance appeared on employer's radar in 2007, it has been controversial and aggressively litigated. No consensus has ever existed between the Department and employers on whether the "dual occupation" concept codified in the 1967 regulation can be shoehorned into a single occupation. Indeed, even the Department cannot make up its mind on this question. Moreover, history says nothing about the 30-minute limitation on tip-supporting work because this is a brand-new creature borne out of the Final Rule.

For these reasons, the 80/20 sub-regulatory guidance falls far short of providing the Department with the necessary authority to promulgate the Final Rule.

3. The Final Rule implicates the "major questions" doctrine and requires a clear statement of authorization from Congress.

The Associations' original complaint against the Department is grounded in the principle of separation of powers. ROA.8–44. The Associations contend that the Department has usurped its executive authority in promulgating the Final Rule and engaged in unauthorized legislative activity in violation of Article I, section I of the United States Constitution, which vests exclusive legislative authority in Congress. ROA.8–44 ¶¶ 4, 124-125. As a matter of statutory construction, this case tests the line between authorized agency rulemaking and unauthorized agency legislative activity.

On June 30, 2022, the Supreme Court decided *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022), which examines principles of administrative law and separation of powers that apply to the central issue in this case: is the Department authorized by Congress to promulgate the Final Rule?

In *West Virginia*, the Supreme Court, for the first time, comprehensively articulated the "major questions" principle, which limits administrative agencies from regulating on issues of "vast economic and political significance" absent a clear legislative statement from Congress authorizing such agency action. *Id*. at 2616. The Supreme Court recognized that there are certain "extraordinary cases" where a stricter approach to statutory construction is required:

> It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme . . . . Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be "shaped, at least in some measure, by the nature of the question presented"—whether Congress in fact meant to confer the power the agency has asserted . . . . In the ordinary case, that context has no great effect on the appropriate analysis. **Nonetheless, our precedent teaches that there are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a 'reason to hesitate before concluding that Congress meant to confer such authority.**

Id. at 2607-08 (cleaned up, emphasis added, citations omitted). Where an agency seeks to take action in an "extraordinary case," the agency must satisfy a higher level of scrutiny in proving congressional authorization:

> Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there . . . . To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "**clear congressional authorization**" for the power it claims.

Id. at 2609 (emphasis added, citations omitted).

Justice Gorsuch joined in the majority's opinion and also issued a concurring opinion that provided expanded guidance on the following two steps of the major questions analysis: (1) identifying "extraordinary cases" and (2) applying the stricter scrutiny of Congress's intent. *Id*. at 2620-24 (Gorsuch, J., concurring).

For step one, Justice Gorsuch mined Supreme Court precedent for examples of "extraordinary cases" and determined that the Court had previously applied the major questions doctrine in cases where (1) an agency claimed the power to resolve a matter of great political significance; (2) an agency sought to regulate a significant portion of the American economy, or require billions of dollar in spending by private persons or entities; or (3) an agency sought to intrude into an area that is the particular domain of state law. *Id*. at 2620–21.

For step two, Justice Gorsuch discussed four "clues" that courts may use to determine whether there is a clear congressional statement authorizing agency action. First, a court must review the legislative provisions on which the agency seeks to rely with a view to their place in the overall statutory scheme. Next, a court must review the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address. Third, courts examine the agency's past interpretation of the relevant statute. Finally, courts may express skepticism of congressional authorization where there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise. *Id*. at 2622–23. In this second step, if the agency cannot point to any clear statement supporting its authority, then the regulatory action is contrary to law and must instead be adopted through duly enacted legislation.

As discussed in depth below, the Department's attempt to regulate the FLSA tip credit in the manner contemplated by the Final Rule implicates a matter of great "economic significance." *Id*. at 2608. Congress has not clearly authorized this delegation of power, and therefore the Final Rule fails the major questions analysis.

A. This is an extraordinary case with vast economic significance.

The Final Rule has vast economic significance because it regulates a "significant portion" of the American economy and imposes a financial burden amounting to billions of dollars on private persons or entities over the next decade. *Id*. at 2621. The Final Rule is a sweeping regulation that covers almost every business in the restaurant and foodservice industry, which is a major segment of the U.S. economy employing 14.7 million people (10% of the U.S. workforce). ROA.378 ¶ 3. The Texas Restaurant Association alone represents members who operate in Texas' **$70 billion** restaurant and food service industry and employ 1.3 million people (12% of the state's employment). ROA.327-28 ¶ 3.

No one, including the Department, disputes that private businesses will bear an enormous cost ($186 million per year at a minimum) to comply with this new regulation. Indeed, the requirements of the Final Rule are so onerous that many employers have reluctantly abandoned using the tip credit altogether, which has increased their labor costs and wiped out already-thin profit margins. *See* ROA.384-88 ¶¶ 19(c)-(g), 20-22; ROA.332-35 ¶¶ 10(c)-(g), 12, 16.

The record here is incontrovertible that the Final Rule has "vast economic significance" and that the Department is attempting to regulate a "significant portion of the American economy." The next question is: does the Department have clear congressional authorization to do so? Per the analysis below, the answer is no.

B. Congress did not issue a clear statement authorizing the Department to promulgate the Final Rule.

Applying each of the Supreme Court's four "clues" of congressional authorization definitively shows that Congress never provided a clear statement authorizing the Department to promulgate the Final Rule.

i. Review of the phrase "engaged in an occupation" against the rest of the FLSA's tip credit scheme shows no ambiguity that needs agency action.

To determine whether Congress authorized the challenged agency action, courts must review the legislative provisions on which the agency seeks to rely with a view to their place in the overall statutory scheme. *West Virginia*, 142 S. Ct. at 2622. Here, the Department's entire justification for the Final Rule is to argue that the tip credit application must be ambiguous because the phrase "engaged in an occupation" is undefined. The Department therefore relies on a miscellaneous "gap filler" provision in the FLSA that generally authorizes the Department "to promulgate necessary rules, regulations or orders" with regard to the 1966 FLSA amendments that created the tip credit. ROA.520-22. According to the Department, this provision supplies it with unlimited authority and discretion "to work out the details" of what the words "engaged in an occupation" mean in the definition of "tipped employee." ROA.522.

But contrary to the Department's contention, the FLSA is not, in fact, ambiguous with regard to the issue of the tip credit application. *See Nevada v. Dep't of Labor*, 218 F. Supp. 3d 520, 528 (E.D. Tex. 2016) ("A statute is ambiguous if it is susceptible to more than one reasonable interpretation or more than one accepted meaning."). When Congress first extended the FLSA to apply to restaurants in 1966, it 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). The tip credit concept was 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). Congress then specifically defined "tipped employee" in section 3(t) as meaning "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).

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. 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[.]" *See* ROA.305-307, 399-415. After reading these ordinary meanings together with the statute, it is clear that Congress intended the term "engaged in an occupation" to mean the field of work and job as a whole, not the mix of specific tasks within a job. There is no ambiguity here to fix.

The Supreme Court has cautioned that agencies cannot hide "elephants in mouseholes." *West Virginia*, 142 S. Ct. at 2622. The Department has tried to do exactly that by using a non-existent ambiguity to create a completely new test for when an employer can exercise its statutory right to take a tip credit that conflicts with the plain text of the FLSA. Congress never authorized the Department to take such action. If Congress wanted the Department to "work out the details" of the definition of "engaged in an occupation," it would have issued a clear statement delegating this authority to the Department in sections 3(m) and 3(t) of the FLSA. As the Supreme Court recently instructed: "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].' . . . [n]or does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme." *West Virginia*, 142 S. Ct. at 2609 (cleaned up, citations omitted). In sum, no clear statement of congressional authorization is ascertainable from the FLSA's statutory text to support the Final Rule.

ii. The age and focus of the FLSA shows there is no problem with the tip credit that needs to be addressed through the Final Rule.

Reviewing the age and focus of the FLSA against the problem that the Department seeks to address through the Final Rule further shows that no clear congressional authorization. In applying this factor, the Supreme Court warned that "an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority." *West Virginia*, 142 S. Ct. at 2623. The Final Rule certainly triggers these alarm bells.

The Final Rule, devised ***55 years*** after the FLSA's tip credit enactment, goes far beyond the policy aims of the statute and seeks to fix a problem that just does not exist. The policy of the FLSA is to ensure that workers receive at least the minimum wage of $7.25. Employers may take the tip credit only for employees who engage in an occupation in which they customarily and regularly receive more than $30 a month in tips. Nothing in any of the tip credit legislative history suggests a congressional intent to limit 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.

The Final Rule, which is not based on the text, history, or purpose of the FLSA, is the Department's attempt to address its own dissatisfaction with Congress allowing employers to pay tipped employees a reduced cash wage of $2.13 to satisfy a portion of their minimum wage obligations. The Department's policy aim is to ensure "that tipped employees do not have the value of their tips diluted by being paid a reduced direct wage while performing substantial work that does not produce tips." ROA.527. But this is not the purpose of the tip credit or the FLSA; this is the Department's own policy preference separate and apart from the statute.

As long as tipped workers are no worse off than non-tipped workers and earn a minimum wage of $7.25/hour, then the requirements and policy aims of the FLSA are satisfied. Moreover, the FLSA already has built-in protections of allowing the tip credit for only those employees who customarily and regularly receive more than $30 a month in tips. The Department's additional concerns about side work and non-tip producing work (which have taken half a century for the Department to formulate) are outside of the FLSA's minimum wage directive and untethered from the statute.

For 55 years, the FLSA tip credit has operated to effectuate the statute's purpose of ensuring that tipped workers and non-tipped workers alike receive the federal minimum wage. The Final Rule, which seeks to create a system of task-based equity between workers, is beyond the FLSA's clear policy goals and not sanctioned by Congress in a clear statement.

iii. The Department's past interpretation of the FLSA's tip credit provision shows no clear statement from Congress authorizing the Final Rule.

In his concurring opinion, Justice Gorsuch points out that "a 'contemporaneous' and long-held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute's original charge to the agency." *West Virginia*, 142 S. Ct. at 2623. As shown above, history is not on the Department's side because the Final Rule does not codify a long-held interpretation by the Department of the FLSA tip credit provision. Over the past several decades, the Department has been unable to make up its mind about whether limitations apply to tipped employees performing side work.

In 1988, the Department updated its Field Handbook instructing its field investigators that tipped employees could not spend more than 20% of their time on non-tipped side work, a position that remained essentially hidden from the public until *Fast v. Applebee's* in 2007. ROA.555. Then, in 2009, the Department reversed course and rescinded this instruction. ROA.556. Shortly thereafter, the Department changed course again and rescinded its 2009 rescission of the 80/20 Guidance. *Id*. But then in 2018, the Department had *another* change of heart and realized that its 2009 rescission of the 80/20 Guidance was in fact correct and took steps to formally memorialize the rescission of the 80/20 Guidance in a regulation. ROA.556-59; *see also* Tip Regulations Under the Fair Labor Standards Act (FLSA), 85 Fed. Reg. 86756 (Dec. 30, 2020). That is until 2021, when the Department took *yet another* 180-degree turn and created the Final Rule which limits the tip credit entitlement, not just under an 80/20 framework, but on a task-by-task basis. Indeed, the historical record shows the Department's incongruent and conflicting interpretations of the tip credit provision. *Compare* "where . . . a tipped employee spends a substantial amount of time (in excess of 20 percent) performing preparation work or maintenance, no tip credit may be taken" *with* "[the Department did] not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed." ROA.555-59.

History is clear that over the past 40 years, the Department has failed to pick a side in regulating the FLSA tip credit provision. If Congress had issued a clear statement authorizing the Department to limit the tip credit at the granular task level, this regulatory and sub-regulatory flip-flopping would not have occurred.

iv. A mismatch exists between the Final Rule and the Department's congressionally assigned mission and expertise.

Finally, it is clear that Congress never authorized the Final Rule because there is a complete mismatch between the Final Rule and the mission and expertise that Congress's assigned to the Department with respect to implementing the FLSA's tip credit provision. The Department contends that Congress' assigned mission to the

Department was "to determine what it means to be 'engaged in an occupation' that customarily and regularly receives tips." Final Rule, 86 Fed. Reg. at 60114. The Associations do not concede that this is correct, but even if it were, the Department failed in this purported mission because the Final Rule does not even attempt to define, or to provide greater clarity on, what it means to be "engaged in an occupation that customarily and regularly receives tips."

Rather, in a completely different self-authorized mission, the Department took it upon itself to create and define the completely new term of "tipped occupation." Section 3(t) of the FLSA does not contain the terms "tipped occupation" or "engaged in a tipped occupation." To make matters worse, the definition that the Department created for "tipped occupation" defines the term 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." 29 C.F.R. § 531.56(f). Instead of creating greater clarity to an existing unambiguous statutory term, the Department has now created more confusion about a new tautological term that appears nowhere in the FLSA's statutory text.

The Final Rule is an unauthorized detour off the regulatory path that Congress set for the Department, and under *West Virginia v. EPA*, Congress never issued a clear statement authorizing the Department to create the tip credit regime articulated in the Final Rule.[2]

4. The Associations have demonstrated a likelihood of success on the merits, warranting a ruling in the Associations' favor on this injunction requirement.

Time is of the essence in determining whether Congress clearly authorized the Department to implement the Final Rule. The irreparable harm for employers in the service industry compounds on a daily basis, and the stakes for businesses are high because every dollar spent on Final Rule compliance is an unrecoverable dollar. The district court has already signaled a leaning towards upholding the Final Rule, and businesses cannot afford to wait for years of protracted trial court proceedings and appellate litigation for an answer to the purely legal question of whether the Final Rule is valid or invalid. Under the Supreme Court's major questions framework, this question begins and ends with the FLSA's statutory text. Thus, this Court has all the information needed to make this determination. This Court is well-situated

[2] The Department relies heavily on the majority decisions in *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 625 (9th Cir. 2018) (en banc); *Fast v. Applebee's Int'l, Inc*., 638 F.3d 872, 879-81 (8th Cir. 2011); and *Rafferty v. Denny's, Inc*., 13 F.4th 1166, 1179 (11th Cir. 2021), to support the tip credit limitations devised in the Final Rule and the predecessor 80/20 Guidance. (Dept. Br. at 41.) These cases are not dispositive because, other than the dissent in *Marsh*, none of these courts grappled with the question of whether Congress authorized the tip credit limitations set forth in the 80/20 Guidance. But that is the central question before this Court. In addition, the Eighth, Ninth, and Eleventh Circuits did not have the benefit of the Supreme Court's analytical framework established in *West Virginia v. EPA* for reviewing the propriety of agency actions—like the 80/20 Guidance and the Final Rule— in major questions cases. Thus, the majority opinions in *Marsh*, *Fast*, and *Rafferty* have limited import and precedential value post-*West Virginia v. EPA*.

to perform the major questions analysis now, and the district court ruling does not limit this Court to considering only the irreparable harm element of the preliminary injunction analysis. *See Weaver v Univ. of Cincinnati*, 942 F.2d 1039, 1045-47 (6th Cir. 1991) (analyzing all four preliminary injunction factors even where district court denied injunction based on no irreparable injury, and reversing and remanding with instructions to the district court to award injunctive relief). All the named and unnamed parties of this litigation affected by the Final Rule—including, the Associations' members, the Department, and the wider regulated business community—stand to benefit from a clear and timely pronouncement from this Court on whether the Final Rule is a valid regulation under the FLSA.

CONCLUSION

For the reasons stated above, the Court should reverse the district court and 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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July 29, 2022

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on July 29, 2022, 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.

/s/ *Paul DeCamp*
Paul DeCamp

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 6,040 words, excluding the items set forth in Fed. R. App. P. 32(f).

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