

No. 22-3561

United States Court Of Appeals
FOR THE SIXTH CIRCUIT

**MICHAEL BRADFORD, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY
SITUATED**

Plaintiff-Appellant,

v.

TEAM PIZZA, INC., AND CHRIS SHORT

Defendants-Appellees.

**On Appeal from the United States District Court
for the Southern District of Ohio**

No. 1:20-cv-00060 (The Hon. Michael R. Barrett)

**BRIEF OF RESTAURANT LAW CENTER AS AMICUS CURIAE IN
SUPPORT OF DEFENDANT-APPELLEES**

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF INTEREST	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT.....	4
I. The Reasonable Approximation Standard Is A More Accurate And Superior Method of Reimbursing Delivery Drivers for Vehicle-Related Expenses.....	4
A. The IRS Rate Is Imprecise.	5
1. <u>State Government Employees Within The Sixth Circuit Are Not Reimbursed for Vehicle- Related Costs Using The IRS Rate.</u>	10
2. <u>Federal Agency Employees and Contractors Are Reimbursed For Travel-Related Expenses Based on Geographical Variations.</u>	11
B. Technology Allows Employers to Reimburse Delivery Drivers At A More Precise Rate.	12
II. Adopting Appellant’s Interpretation of the FLSA Regulations Would Negatively Impact Small Restaurants.....	14
CONCLUSION	16
CERTIFICATE OF COMPLIANCE	17
CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Kennedy v. Mountainside Pizza, Inc.</i> No. 19-cv-01199-CMA-STV, 2020 U.S. Dist. LEXIS 154792 (D. Colo. Aug. 26, 2020)	5, 9
<i>Sullivan v. PJ United, Inc.</i> 362 F. Supp. 3d 1139 (N.D. Ala. 2018)	5
<i>Wass v. NPC Int'l, Inc.</i> 688 F. Supp. 2d 1282 (D. Kan. 2010)	10
<u>Statutes</u>	
Fair Labor Standards Act (“FLSA”)	1, 3, 4, 14
<u>Other Authorities</u>	
2021 Annual Report, DOMINOS, available at https://tinyurl.com/mrxeaxnh	15
Vehicle Reimbursement for Delivery Drivers, MOTUS, available at https://in.motus.com/2020-vehicle-reimbursement-for-delivery- drivers (last visited Feb. 19, 2023).....	13
FY 23 Per Diem Rates, U.S. GENERAL SERVICES ADMIN., available at https://www.gsa.gov/travel/plan-book/per-diem-rates/per- diem-files	12
FY 2023 Per Diem Highlights, U.S. GENERAL SERVICES ADMIN., https://tinyurl.com/5yhsh3wk	12
Gasoline and Diesel Fuel Update, U.S. ENERGY INFORMATION ADMIN., https://tinyurl.com/3mjzbswt	7

	Page(s)
<u>Other Authorities</u>	
<i>Gasoline and Diesel Fuel Update</i> , U.S. ENERGY INFORMATION ADMIN., https://www.eia.gov/petroleum/gasdiesel/	8
<i>Illinois Average Gas Prices</i> , AAA, https://gasprices.aaa.com/?state=IL	8
<i>IRS issues standard mileage rates for 2023; business use increases 3 cents per mile</i> , IRS, https://tinyurl.com/2vd325yh	10
Letter from Kimberly Murnieks, Dir. of Ohio Office of Budget and Mgmt. (Dec. 29, 2022), available at https://tinyurl.com/ycknuke5 ; <i>Schedule</i>	11
Nat'l Ass'n of Insurance Commissioners, <i>2019/2020 Auto Insurance Database Report (2023)</i> , available at https://content.naic.org/sites/default/files/publication-aut-pb-auto-insurance-database.pdf	8
<i>National Statistics</i> , NATIONAL RESTAURANT ASSOC., https://restaurant.org/research-and-media/research/industry-statistics/national-statistics/	14
<i>Ohio Average Gas Prices</i> , AAA, https://gasprices.aaa.com/?state=OH	7
<i>Papa Johns Announces Third Quarter 2022 Financial Results</i> , available at https://tinyurl.com/5n6e9ews	15
<i>Restaurant Units Activity Summary</i> , YUM! BRANDS, available at https://tinyurl.com/3awph66r	15

Page(s)

Other Authorities

Schedule of Travel Rates for Classified and Unclassified Employees,
MICHIGAN DEP'T OF TECH., MGMT. & BUDGET (Jan 1, 2023), available
at <https://tinyurl.com/599e9bwm>11

State Employee Travel, KENTUCKY OFFICE OF STATEWIDE ACCOUNTING
SERVICES, <https://tinyurl.com/mwwzpb8x>11

Variations in Mileage Reimbursement Programs: What You Need to Know,
MOTUS, available at <https://tinyurl.com/mwvrx2yy>6

Wage & Hour Division, U.S. DEP'T OF LABOR, Opinion Letter,
FLSA2020-12 (Aug. 31, 2020), available at
<https://tinyurl.com/2tz7jrxz>6, 13

STATEMENT OF INTEREST

Restaurant Law Center ("RLC") respectfully submits this *Amicus Curiae* Brief in support of Appellees Team Pizza, Inc. and Chris Short ("Team Pizza"). RLC is a public policy organization affiliated with the largest trade association in the United States, the National Restaurant Association. RLC advocates on behalf of the restaurant and foodservice industry, a labor-intensive industry comprised of over one million restaurants and other foodservice outlets employing approximately 15.3 million people across the nation – approximately 10% of the U.S. workforce. Restaurants and other foodservice providers are the nation's second largest private-sector employers. The restaurant industry is also the most diverse industry in the nation, as approximately 47% of restaurants are minority-owned, compared to 30% across the rest of the private sector.

RLC submits this *amicus* brief because a ruling interpreting the FLSA Regulations in the manner urged by Appellant Michael Bradford ("Appellant") and his amici supporter would impose an enormous burden on every restaurant and foodservice business that employs delivery drivers, particularly small local businesses. RLC and its members, therefore, have a

keen interest in the outcome of this action.

No party's counsel authored this brief, in whole or in part. Nor did a party, party's counsel or person other than the *amicus curiae* contribute money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court properly resolved this case. Specifically, the district court correctly found that for an employer to reimburse sufficiently its delivery driver employees for vehicle-related costs under the FLSA, the employer may either reimburse the drivers' actual costs or reimburse drivers using a reasonable approximation of the actual vehicle costs associated with making deliveries.

Appellant and his amici supporter, Cleveland Jobs With Justice ("CJWJ"), argue that employers should be limited to using the actual costs or the IRS standard business mileage rate (the "IRS rate") when reimbursing a delivery driver for vehicle-related expenses. Appellant and CJWJ summarily conclude that allowing employers to reimburse delivery drivers for vehicle-related expenses using a reasonable approximation standard would have negative consequences for workers and the labor market and would ultimately result in delivery drivers being paid below the minimum wage. These arguments are demonstrably false.

First, as explained below, the reasonable approximation standard is not just the legally correct method of reimbursing delivery drivers for

vehicle-related expenses, but also results in a more precise reimbursement than the IRS rate. Second, Appellant's interpretation of the FLSA Regulations would have a detrimental impact on small restaurants and the workforce at large. Accordingly, this Court should affirm the district court's order.

ARGUMENT

I. The Reasonable Approximation Standard Is A More Accurate And Superior Method of Reimbursing Delivery Drivers for Vehicle-Related Expenses.

This Court should follow the district court's sound reasoning in holding that employers may reimburse their delivery driver employees for vehicle-related costs under the FLSA by reasonably approximating such expenses. Contrary to the positions advanced by Appellant, the reasonable approximation standard is an accurate and more precise method of reimbursement than the IRS rate in many instances, as it often results in fewer instances of over-reimbursement of delivery drivers in areas where vehicle-related costs fall below the national average.

A. The IRS Rate Is Imprecise.

Plaintiff's argument, that allowing employers to "approximate" the vehicle-related costs of delivery drivers will make it less likely that drivers are paid the minimum wage, ignores the obvious fact that the IRS rate itself is merely an approximation. *See Kennedy v. Mountainside Pizza, Inc.*, Civil Action No. 19-cv-01199-CMA-STV, 2020 U.S. Dist. LEXIS 154792, at *10 n.6 (D. Colo. Aug. 26, 2020) ("[T]he IRS standard mileage rate is a form of approximation by virtue of being a national average.") Indeed, the IRS rate is a national annualized weighted average that does not account for variances in geography or operating costs and is neither specific to individual drivers, nor individual locations. *See Kennedy*, 2020 U.S. Dist. LEXIS 154792, at *4 n.2 ("The IRS standard mileage rate is a national annualized weighted average... [and] does not account for geographic variances; 'as such, it is not specific to individual drivers or locations.'"); *see also Sullivan v. PJ United, Inc.*, 362 F. Supp. 3d 1139, 1154 (N.D. Ala. 2018) ("the IRS rate is per se unrepresentative of a local class's actual damages as '[t]he IRS figure is a national average of the cost of operating a motor vehicle.'").

And while the IRS rate fails to account for variances in vehicle-related costs, the costs of owning and operating a vehicle are localized and may vary by thousands of dollars per year based on geography alone, making the use of a weighted national average particularly flawed. *See Variations in Mileage Reimbursement Programs: What You Need to Know*, MOTUS, available at <https://tinyurl.com/mwvrx2yy> (last visited Feb. 19, 2023). The U.S. Department of Labor confirmed this very point in its August 31, 2020 Opinion Letter on this subject, which states that a national average of vehicle costs is of “little practical use” in determining the actual expenses incurred by employees to operate vehicles because vehicle costs vary significantly by region. *See Wage & Hour Division, U.S. Dep’t of Labor, Opinion Letter, FLSA2020-12 (Aug. 31, 2020)*, available at <https://tinyurl.com/2tz7jrxz>.

The most obvious example of this geographic variation in vehicle-related costs is the price of gasoline. For example, as of February 21, 2023, the average price of regular grade gasoline in the Midwest¹ was \$3.24 per

¹ As used by the U.S. Energy Information Administration (“EIA”), the term “Midwest” refers to the following states: Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, and Wisconsin.

gallon. See *Gasoline and Diesel Fuel Update*, U.S. ENERGY INFORMATION ADMIN., <https://tinyurl.com/3mjzbswt> (last updated Feb. 19, 2023). Yet the average price across most of the country was much higher – \$4.11 on the West Coast², \$3.77 in the Rocky Mountains³, and \$3.48 per gallon in the Central Atlantic⁴. *Id.* This would mean, by way of example, that a delivery driver who uses their vehicle for 12,000 miles in one year at a rate of 30 miles per gallon would spend \$1,296 on fuel at \$3.24 per gallon, but at \$4.11 per gallon would spend \$1,644 – a difference of \$348.

Further, even within a specific geographic region, the cost of gasoline can vary greatly and is often highly volatile. For example, as of February 19, 2023, the average price of regular grade gasoline in Akron, Ohio was \$3.25, while the average price in Chicago, Illinois was \$4.00. See *Ohio Average Gas Prices*, AAA, <https://gasprices.aaa.com/?state=OH> (last visited Feb. 19,

² As used by the EIA, the term “West Coast” includes the following states: Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington.

³ As used by the EIA, the term “Rocky Mountains” includes the following states: Colorado, Idaho, Montana, Utah, and Wyoming.

⁴ As used by the EIA, the term “Central Atlantic” includes the following states: Delaware, Maryland, New Jersey, New York, and Pennsylvania.

2023); *Illinois Average Gas Prices*, AAA, <https://gasprices.aaa.com/?state=IL> (last visited Feb. 19, 2023). Additionally, in the past three months, Ohio has seen a 48 cent fluctuation in the average price of a gallon of regular grade gasoline and since January 30, 2023 alone, the price has fluctuated 29 cents. See *Gasoline and Diesel Fuel Update*, U.S. ENERGY INFORMATION ADMIN., <https://www.eia.gov/petroleum/gasdiesel/> (last updated Feb. 21, 2023).

In addition to the cost of gasoline, the cost of auto insurance also varies greatly based on geography. For example, in 2020, drivers in Ohio spent, on average, approximately \$781 on auto insurance, while in Louisiana and New York, this cost was nearly double, as drivers spent on average \$1495 and \$1436, respectively. See Nat'l Ass'n of Insurance Commissioners, *2019/2020 Auto Insurance Database Report* (2023), available at <https://content.naic.org/sites/default/files/publication-aut-pb-auto-insurance-database.pdf>. Even within this Circuit, the cost of auto insurance significantly differs, as the average cost of auto insurance in 2020 was approximately \$781 in Ohio, \$854 in Tennessee, \$909 in Kentucky, and \$1,419 in Michigan. See *id.*

While the reasonable approximation standard allows employers to consider these wide variations in fuel and vehicle-related costs based on geography, the IRS rate fails to account for such differences. Accordingly, by using the IRS rate, employers in states with lower vehicle-related costs – such as Ohio, Kentucky, Tennessee, and Michigan – are typically over-reimbursing their employees for the costs associated with the use of their personal vehicles for business purposes.

In *Kennedy*, the U.S. District Court for the District of Colorado acknowledged this very point, stating that “a bright line rule that reimbursement of delivery drivers at the IRS standard mileage rate is *per se* reasonable would result in under-reimbursement of employees who work in regions of the nation with above average vehicle related costs.” 2020 U.S. Dist. LEXIS 154792, at *13-14. Similarly, a such bright-line rule will also result in the excess reimbursement of employees who work in regions of the nation with below average vehicle-related costs, such as the Midwest, and would disadvantage small businesses who employ delivery drivers in less expensive regions of the country.

In short, while the IRS rate may be a “predictable” rule as Appellant

and CJWJ argue, it is certainly not the most accurate or precise approach to reimbursing delivery drivers. *See Wass v. NPC Int'l, Inc.*, 688 F. Supp. 2d 1282, 1287 n.2 (D. Kan. 2010) (“[G]iven the practical difficulties inherent in reimbursing an employee for his actual vehicle expenses incurred that relate only to his driving that vehicle for his employment... the regulations permitting a reasonable approximation by the employer make sense.”).

1. State Government Employees Within The Sixth Circuit Are Not Reimbursed for Vehicle-Related Costs Using The IRS Rate.

The imprecise nature of the IRS rate for reimbursement of vehicle-related expenses within the Sixth Circuit, where vehicle-related costs are often less than the national average, is further underscored by the fact that most state governments within this Circuit reimburse their employees for use of their personal vehicles at a rate that is lower than the IRS rate. Specifically, while the IRS rate is currently 65.5 cents per mile, Ohio state employees are reimbursed at a rate of 58 cents per mile, and Kentucky and Michigan state employees at a rate of 44 cents per mile. *See IRS issues standard mileage rates for 2023; business use increases 3 cents per mile*, IRS, <https://tinyurl.com/2vd325yh> (last visited Feb. 19, 2023); *State Employee*

Travel, KENTUCKY OFFICE OF STATEWIDE ACCOUNTING SERVICES, <https://tinyurl.com/mwwzpb8x> (last visited Feb. 19, 2023); Letter from Kimberly Murnieks, Dir. of Ohio Office of Budget and Mgmt. (Dec. 29, 2022), available at <https://tinyurl.com/ycknuke5>; *Schedule of Travel Rates for Classified and Unclassified Employees*, MICHIGAN DEP'T OF TECH., MGMT. & BUDGET (Jan 1. 2023), available at <https://tinyurl.com/599e9bwm>.

Just like state governments, pizza companies within the Sixth Circuit should be allowed to consider local and regional cost differences when reimbursing their employees for vehicle expenses.

2. Federal Agency Employees and Contractors Are Reimbursed For Travel-Related Expenses Based on Geographical Variations.

The federal government also recognizes that a national average, which fails to consider geographical variations in cost, is not the most reasonable approach to reimbursing employees and contractors for travel-related expenses. Indeed, while the U.S. General Services Administration sets a standard per diem rate to reimburse employees of federal agencies and federal contractors for expenses incurred while on official travel, there are currently 316 non-standard areas that have higher per diem rates than the

standard rate. *See FY 2023 Per Diem Highlights*, U.S. GENERAL SERVICES ADMIN., <https://tinyurl.com/5yhsh3wk> (last visited Feb. 19, 2023). For example, the standard per diem rate for the continental United States is \$157 (\$98 for lodging and \$59 for meals and incidentals). However, the per diem rates for Los Angeles (\$242-\$256, depending on the time of year) and New York City (\$238-\$365, depending on the time of year) are much higher than the standard rate. *See FY 23 Per Diem Rates*, U.S. GENERAL SERVICES ADMIN., *available at* <https://www.gsa.gov/travel/plan-book/per-diem-rates/per-diem-files> (last visited Feb. 19, 2023).

B. Technology Allows Employers to Reimburse Delivery Drivers At A More Precise Rate.

As an alternative to using the IRS rate, technology allows employers to reimburse employees for vehicle-related expenses at a more precise and targeted rate. There are a number of companies that are regularly engaged in the business of calculating vehicle expense reimbursement rates and are able to consider a variety of factors, including vehicle classes and geographic location, when determining such rates.⁵ For example, one such company,

⁵ The Wage and Hour Division of the U.S. Department of Labor has stated that employers may use “vehicle expense reimbursement rates

Motus, considers the following highly location-specific factors when calculating vehicle expense reimbursement rates: (1) annual cost of insurance premiums for a specific vehicle type in a particular location; (2) the appropriate government authority's taxes and fees; (3) depreciation; (4) maintenance and repair costs; (5) state monthly average fuel costs; (6) fuel consumption rate; and (7) vehicle types. *See Vehicle Reimbursement for Delivery Drivers, MOTUS, available at <https://in.motus.com/2020-vehicle-reimbursement-for-delivery-drivers> (last visited Feb. 19, 2023).* Further, unlike the IRS rate, which is generally updated only once or twice per year, Motus' vehicle reimbursement rates are updated on a monthly basis to timely account for variations in cost. *Id.*

Because technology exists to reimburse delivery drivers at a more precise monthly rate— using a methodology that accounts for variations in vehicle-related costs based on geography and other factors— there is no need

calculated by companies regularly engaged in the business of calculating such rates, such as Motus," so long as such rates "reasonably approximate actual business expenses incurred by employees..." Wage & Hour Division, U.S. DEP'T OF LABOR, Opinion Letter, FLSA2020-12 (Aug. 31, 2020), *available at* <https://tinyurl.com/2tz7jrxz>.

to require employers to use the national weighted average (*i.e.*, the IRS rate) to approximate vehicle-related expenses.

II. Adopting Appellant's Interpretation of the FLSA Regulations Would Negatively Impact Small Restaurants.

Additionally, because the reasonable approximation standard allows employers to more precisely calculate reimbursement for vehicle-related costs, as explained above, employers are able to avoid over-reimbursing delivery driver employees for such costs. This is of particular importance in the restaurant industry, where 7 out of 10 restaurants are small single-unit operations, often referred to as “mom and pop” restaurants, which do not have the high profit margins of large national franchisors. *See National Statistics*, NATIONAL RESTAURANT ASSOC., <https://restaurant.org/research-and-media/research/industry-statistics/national-statistics/> (last visited Feb. 19, 2023).

For example, many pizza restaurants that employ delivery drivers, including those affiliated with corporate chains, are small businesses. Over 94% (6,185) of Domino's U.S. stores are franchisee stores which are owned and operated by 735 independent U.S. franchisees and substantially all of these independent franchisee owners started their careers with Domino's as

delivery drivers or in other in-store positions. *See 2021 Annual Report, DOMINOS, available at <https://tinyurl.com/mrxeaxnh>* (last visited Feb. 19, 2023). More importantly, of these 735 franchisees, 216 operate only one Domino's store. *Id.* Similarly, over 84% of Papa Johns' U.S. stores and over 99% of Pizza Hut's U.S. stores are franchisee owned and operated. *See Papa Johns Announces Third Quarter 2022 Financial Results, available at <https://tinyurl.com/5n6e9ews>* (last visited Feb. 19, 2023); *Restaurant Units Activity Summary, YUM! BRANDS, available at <https://tinyurl.com/3awph66r>* (last visited Feb. 19, 2023).

If "mom and pop" restaurants in geographic areas with lower vehicle costs are required to use the IRS rate, and are thus required to pay excessive reimbursements for vehicle-related costs to their delivery drivers, those overpayments would carry significant consequences for small operations that survive on the margins. By contrast, allowing restaurants, particularly restaurants in geographic areas with lower vehicle costs, to reimburse delivery drivers at a more accurate rate that accounts for cost variations, ensures the survival of small restaurants that currently comprise approximately 70% of the industry and account for millions of jobs. And for

reasons explained above, doing so fairly reimburses drivers because a rate that is more frequently updated and sensitive to geographic differences in costs is necessarily more accurate than the IRS rate.

CONCLUSION

For the foregoing reasons, RLC respectfully requests that the Court affirm the district court's order.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 3,013 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally space typeface using Microsoft 365 in 14-point Book Antiqua font.

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CERTIFICATE OF SERVICE

I certify that on February 21, 2023, the foregoing was electronically filed with the Clerk of the Court via the Court's CM/ECF system, which provides electronic notice to all parties.

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