Nos. 25-1862 & 25-1865

IN THE
United States Court of Appeals for the Third Circuit

JULI WINTJEN, *ET AL.*,

Plaintiffs-Appellees / Cross-Appellants,

v.

DENNY'S, INC.,

Defendant-Appellant / Cross-Appellee.

On Appeal from the United States District Court
for the Western District of Pennsylvania

BRIEF OF *AMICUS CURIAE* RESTAURANT LAW CENTER IN SUPPORT OF APPELLANT/CROSS-APPELLEE AND REVERSAL

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DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a) of the Federal Rules of Appellate Procedure and Third Circuit Local Appellate Rule 26.1.1, *amicus curiae* Restaurant Law Center certifies that it is not a publicly held company, that it has no parent corporation, and that it is not aware of any publicly held corporation not a party to these proceedings with a financial interest of the outcome.

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STATEMENT REGARDING CONSENT TO FILE

All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel authored any part of this brief, nor did any party or party's counsel contribute any money used or intended to fund the preparation or submission of this brief. No person other than *amicus curiae* and its counsel contributed any money that was used or intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Restaurant Law Center is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other food-service outlets employing about 16 million people—approximately 10 percent of the U.S. workforce. Restaurants and other food-service providers are the second largest private sector employers in the United States. In addition, the Law Center represents the interests of its state restaurant association affiliates, many of which have both food service establishments and hotels as members as well as other hospitality interests. Through amicus participation and first party litigation, the Law Center serves as the industry's voice in the judicial system.

Through its initiatives, the Restaurant Law Center works to protect and advance the restaurant industry and promote pro-business laws and regulations that allow restaurants to continue to grow, create jobs and contribute to a robust American economy. The Law Center offers courts and regulatory agencies with the industry's perspective on significant

legal and regulatory issues to ensure that the views of America's restaurants are taken into consideration.

The Restaurant Law Center has substantial experience with the tip credit provisions of the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. §§ 201-19, and their implementing regulations, codified at 29 C.F.R. §§ 531.50-.60. For example, in *Restaurant Law Center v. United States Department of Labor*, 120 F.4th 163 (5th Cir. 2024), the Law Center persuaded the Fifth Circuit to vacate the Department of Labor's 2021 regulation that purported to limit an employer's ability to take the tip credit based on time workers spend on certain tasks. The court concluded that the regulation violates the FLSA and is also arbitrary and capricious. *See id.* at 171-77.

The Restaurant Law Center respectfully submits that its perspective on the FLSA's tip credit notice requirement may benefit the Court in its consideration of these appeals.

ARGUMENT

Congress approached applying the Fair Labor Standards Act to restaurants and hotels very cautiously and thoughtfully. From 1938 to 1961, FLSA coverage was very limited, applying primarily to individuals who specifically engaged in interstate commerce. From 1961 to 1974, Congress phased in, in stages, the application of the FLSA to a much broader range of industries, with the minimum wage first applying to restaurants and hotels in 1966, subject to the tip credit, and finally the overtime requirement applying in 1974. Given that history, as well as the importance of the tip credit to businesses and workers alike, Congress surely did not intend for employers to forfeit their statutory right to access the tip credit due to trivial or insubstantial considerations, such as failing to tell people who received notice of the tip credit what would have happened in an alternate reality in which they had not received notice of the tip credit, and who received all the substantive information they needed to protect their minimum wage rights.

I. THE TIP CREDIT IS AN INTEGRAL PART OF THE LEGISLATIVE BARGAIN CONGRESS STRUCK IN DECIDING TO APPLY THE FLSA TO WORKERS IN RESTAURANTS AND HOTELS.

A. The History Of The FLSA's Application To Restaurants And Hotels Demonstrates The Importance Of The Tip Credit To The Overall Statutory Scheme.

The tip credit is at the heart of the legislative bargain that led to the application of the Fair Labor Standards Act to workers in restaurants and hotels. At the time of the FLSA's enactment in 1938, and for roughly 28 years thereafter, the FLSA did not apply to employees of restaurants and hotels. *See* Fair Labor Standards Act of 1938, Pub. L. 75-718, ch. 676, 52 Stat. 1060 (June 25, 1938) (codified as amended at 29 U.S.C. §§ 201-19). Indeed, the FLSA originally applied only on the basis of an individual employee's specific nexus to interstate commerce. *See id.*

In 1961, Congress expanded the FLSA's reach by introducing the concept of enterprise coverage, meaning that all employees of a covered enterprise can fall within the FLSA's protections, while at the same time adding minimum wage and overtime exemptions for employees of, among other establishments, restaurants and hotels. *See* Fair Labor Standards Amendments of 1961, Pub. L. 87-30, §§ 2(c) (creating concepts of "enterprise" and enterprise coverage), 9 (broadening FLSA section 13(a)(2)

exemption from minimum wage and overtime to include employees of local hotels, motels, restaurants, and motion picture theaters, as well creating new FLSA section 13(a)(20) minimum wage and overtime exemption for "any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption"), 75 Stat. 65, 71, 73 (May 5, 1961).

In 1966, Congress for the first time extended the protections of the FLSA's minimum wage provision, though not the overtime provision, to employees of, *inter alia*, restaurants and hotels. *See* Fair Labor Standards Amendments of 1966, Pub. L. 89-601, §§ 201(a) (narrowing FLSA § 13(a)(2) exemption), 210 (repealing FLSA § 13(a)(20) exemption and in its place creating new FLSA § 13(b)(18) overtime-only exemption for "any employee of a retail or service establishment who is employed primarily in connection with the preparation of offering of food or beverages for human consumption"), 80 Stat. 830, 833, 837 (Sept. 23, 1966). Recognizing that tipping is common in these industries and that many employees had previously worked for tips alone, without additional cash wages, Congress created the tip credit in order to avoid major disruption in applying the minimum wage requirement to these businesses where it had not

previously applied. *See* Fair Labor Standards Amendments of 1966, Pub. L. 89-601, § 101 (amending FLSA § 3(m) to allow for tips to satisfy up to 50% of the minimum wage requirement), 80 Stat. 830 (Sept. 23, 1966). Congress gave careful thought and attention to the interplay between cash wages, tips, and the minimum wage, observing that in the 1966 amendments "[s]pecial provisions are made for employees who receive tips." S. Rep. No. 89-1487, at 12 (Aug. 23, 1966), *as reprinted in* 1966 U.S.C.C.A.N. 3002, 3014.

Congress specifically designed the tip credit "to permit the continuance of existing practices with respect to tips" and to "provide enough flexibility to account for a practice as inconsistent as tipping." S. Rep. No. 89-1487, at 12 (Aug. 23, 1966), *as reprinted in* 1966 U.S.C.C.A.N. 3002, 3014. The legislative history provided an illustrative example of how to apply the tip credit given a certain minimum wage and amount of tips. *See id.* at 13, 1966 U.S.C.C.A.N. at 3014. The key Senate report makes clear that "[i]f the employee is receiving less than the amount credited, the employer is required to pay the balance so that the employee receives at least the minimum wage with the defined combination of wages and tips." *Id.* at 13, 1966 U.S.C.C.A.N. at 3015.

Thus, there would be no application of the FLSA's minimum wage provision to employees of restaurants or hotels without the tip credit.* With respect to businesses that employ tipped workers as well as the workers themselves, the availability of the tip credit is just as central to the statutory scheme as the overtime and minimum wage provisions. Therefore, the courts must take special care to give the statutory provisions relating to the tip credit, including its notice requirement, a "fair (rather than a 'narrow') interpretation." *See Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 88 (2018) (rejecting longstanding principle of construing FLSA exemptions narrowly in order to favor the statute's overtime provisions rather than fairly according to their plain language).

In the context of the tip credit, fair interpretation under *Encino Motorcars* means construing the notice provision in a way that gives full force and effect to, and does not undermine, the tip credit. As discussed below, the Department of Labor's "notice of notice" requirement creates an obstacle designed to defeat the tip credit for reasons unrelated to

* Congress extended the FLSA's overtime requirement to employees of these types of establishments in 1974. *See* Fair Labor Standards Amendments of 1974, Pub. L. 93-259, § 15 (sunsetting FLSA section 13(b)(18) overtime exemption), 88 Stat. 55, 65 (Apr. 8, 1974).

whether workers receive proper pay. That unduly broad interpretation of the statutory notice obligation results in an improperly narrow construction of, and bias against, the tip credit in favor of the minimum wage requirement. Because the tip credit provisions "are as much a part of the FLSA's purpose as" the minimum wage requirement, the courts "have no license to give" the tip credit verbiage in the statute "anything but a fair reading", *i.e.*, one that properly gives effect to the statutory language and congressional purpose. *See id.*

B. The Statutory Purpose For The Tip Credit Notice Requirement Is To Ensure That Workers Have Sufficient Information To Determine Whether Their Pay Satisfies The FLSA's Minimum Wage Standard.

The FLSA first required employers to provide notice of the tip credit as a result of the 1974 amendments, which replaced the final sentence of FLSA section 3(m) with the following language:

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. *The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection*, and

> (2) all tips received by such 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.

Fair Labor Standards Amendments of 1974, Pub. L. 93-259, § 13(e), 88 Stat. 55, 64-65 (Apr. 8, 1974) (emphasis added).

In the 51 years since the 1974 amendments, the method of calculating the maximum tip credit has changed, but otherwise the notice requirement has remained constant. The current pertinent statutory text, set forth in FLSA section 3(m)(2)(A), is as follows:

> In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to—
>
> (i) the cash wage paid such employee which for purposes of such determination shall not be less than the cash wage required to be paid such an employee on August 20, 1996; and
>
> (ii) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in clause (i) and the wage in effect under section 206(a)(1) of this title.
>
> The additional amount on account of tips may not exceed the value of the tips actually received by an employee. *The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection*, and all tips received by such 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)(2)(A) (emphasis added).

The purpose of the notice requirement regarding the tip credit is obvious from the statutory text. Nevertheless, to remove any doubt, Congress explained this provision in the legislative history to the 1974 FLSA amendments: "The tip credit provision of S. 2747 is designed *to insure employer responsibility for proper computation of the tip allowance and to make clear that the employer is responsible for informing the tipped employee of how such employee's wage is calculated*." S. Rep. No. 93-690 at 42-43 (1974) (emphasis added). This dual purpose is eminently sensible: (1) facilitating proper computation of wages and (2) making sure that workers understand the calculation of their wages, both of which help to ensure that workers receive wages sufficient to satisfy the FLSA's minimum wage requirement. Those considerations are entirely consistent with the statutory text and purpose.

What is not consistent with the statutory text or purpose is what the district court has done here: determining that employers forfeit the statutory right to take the tip credit unless, in addition to disclosing the

various substantive aspects of the FLSA's tip credit provision, they also inform workers "that the tip credit shall not apply to any employee who has not been informed of these requirements[.]" 29 C.F.R. § 531.59(b).

Nothing in the text of FLSA section 3(m) purports to obligate an employer to inform a worker who has received all the information necessary to understand the calculation of his or her wages of what the consequences would have been had the employer *not* provided that information. The Seventh Circuit eviscerated the "notice of notice" requirement in *Schaefer v. Walker Brothers Enterprises, Inc.*, 829 F.3d 551 (7th Cir. 2016): "If the employer *does* tell the worker the first four things, then it can take the tip credit; the fifth does not add anything to the worker's fund of knowledge (unless the worker is studying to be a lawyer and planning to represent tipped employees at other establishments)." *Id.* at 556. *See also Crowell v. M Street Entm't, LLC*, 670 F. Supp. 3d 563, 589 (M.D. Tenn. 2023) ("The statute itself, although it also requires notice, does not unambiguously require notice that notice is required.").

II. THE TIP CREDIT CONTINUES TO SERVE AN IMPORTANT ROLE IN HELPING WORKERS.

By any measure, the availability of the tip credit makes workers better off than they would be without the tip credit.

First, tipped workers have total earnings—i.e., including tips—that average $15.51 per hour, more than twice the current federal minimum wage. *See* Rebekah Paxton, *The Case for the Tip Credit: From Workers, Employers, and Research*, at 3 (Employment Policies Institute June 2023).

Second, as tipped minimum wages increase, customer tipping decreases. States with lower tipped minimum wages see higher average tip percentages than states with higher tipped minimum wages. *See id.* at 8.

Third, when faced with the alternatives of tipped employment subject to the tip credit or all-in menu pricing with no tipping, 97 percent of tipped employees prefer the tipping option. *See id.* at 3.

Fourth, numerous restaurants that have shifted to a no-tip approach have found themselves forced to return to a tipping model due to high numbers of employees leaving to pursue other employment opportunities that allow for tips. *See id.* at 14-16 (discussing experiences at nine different restaurant concepts that tried a no-tipping approach).

Fifth, tipped workers are approximately 40% less likely than other nominally minimum wage workers to fall below the poverty line. *See*

David Neumark & Maysen Yen, *Tipped Workers, Minimum Wage Workers, and Poverty: Analyzing the Redistributive Impact of Eliminating Tip Credits*, at 1, 9-11 (Employment Policies Institute Feb. 2021).

Sixth, there is a broad consensus among American labor economists, with approximately three out of four agreeing that reducing the tip credit, and thereby increasing the cash wage tipped workers must receive, reduces employment. *See* Paxton, *supra*, at 6.

The tip credit helps workers. When given the choice, tipped employees prefer tipped employment to non-tipped employment. The tip credit provisions of the FLSA ensure that tipped employees are no worse off than other minimum wage workers, and the reality of tipping practices leads to tipped employees receiving total earnings nearly double those of the typical minimum wage worker. No worker who wants an hourly wage at or above minimum wage needs to choose a tipped position. Indeed, workers seek out tipped jobs precisely because these positions offer the opportunity to achieve significant total earnings.

III. NO WORKER WHO HAS RECEIVED THE FIRST FOUR ITEMS OF NOTICE SET FORTH IN THE DEPARTMENT OF LABOR'S REGULATION CAN CONCEIVABLY SUFFER HARM FROM NOT RECEIVING THE FIFTH ITEM.

The Department's regulation purports to require employers to inform workers of five pieces of information in order to avail themselves of the tip credit authorized by Congress in the FLSA. As discussed below, there is no scenario in which an employee who receives the first four items, but not the fifth, can thereby suffer any harm. The pertinent regulatory language is as follows:

> Pursuant to section 3(m), an employer is not eligible to take the tip credit unless it has informed its tipped employees in advance of the employer's use of the tip credit of the provisions of section 3(m) of the Act, *i.e.*: [1] The amount of the cash wage that is to be paid to the tipped employee by the employer; [2] the additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, [3] which amount may not exceed the value of the tips actually received by the employee; [4] that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and [5] and that the tip credit shall not apply to any employee who has not been informed of these requirements in this section.

29 C.F.R. § 531.59(b) (bracketed numbers added).

The fifth provision on its face does not apply to any employee who has received those first four items of information. In what possible way does it help a worker who has the first four pieces of information to learn that had the employer *not* provided that information then the tip credit would be unavailable? While that information may be relevant to a worker who did not receive the first four items, which plainly go to substantively understanding the tip credit and the wage calculation, that fifth piece of information is of no use or benefit to a worker who has received the first four. Indeed, the employer in that instance would be describing for the worker the availability of the tip credit not as to that worker, but perhaps as to other individuals in different circumstances who received less notice than the worker at issue received.

Stated differently, that fifth item of notice that the Department's regulation would require in no way assists a worker in understanding whether his or her wages comply with the FLSA's minimum wage requirement, which as discussed above is the purpose of the statute's notice requirement. *See* S. Rep. No. 93-690 at 42-43. For this reason, it is not at all surprising that the Department did not find this fifth item to be required by the FLSA until 2011, nearly four decades after Congress first

added the notice requirement to FLSA section 3(m). Courts are rightly skeptical when agencies purport to discover new and novel interpretations of their statutes long after the enactment of the pertinent statutory text. *See West Virginia v. EPA*, 597 U.S. 697, 725 (2022). The clear and simple truth is that a requirement to provide notice of the notice requirement was never part of the FLSA in the first place—not in 1974, nor in 2011 when the Department promulgated the regulation, nor today.

CONCLUSION

For these reasons, this Court should reverse the summary judgment ruling and direct that the district court enter summary judgment in favor of Denny's, Inc.

Respectfully submitted,

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September 17, 2025

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rules 28.3(d) and 46.1(e), I hereby certify that I am a member of the Bar of this Court.

/s/ Paul DeCamp
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because it contains 3,227 words, excluding the exempted portions under Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font. This brief complies with the electronic filing requirements of Third Circuit Local Appellate Rule 31.1(c) because the text of the electronic brief is identical to the text in the paper copies, and a virus detection program has been run on this file and no virus was detected. The virus detection program used was SentinelOne.

/s/ Paul DeCamp
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CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing document was electronically filed in this matter with the Clerk of Court, using the CM/ECF system, which sent notification of such filing to all counsel of record.

Pursuant to this Court's August 1, 2025, Order, I certify that I will cause seven copies of this brief to be transmitted to the Court via overnight delivery, delivery charge prepaid, within five days of the filing date.

/s/ Paul DeCamp
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September 17, 2025