No. 23-50562

In the United States Court of Appeals for the Fifth Circuit

RESTAURANT LAW CENTER; TEXAS RESTAURANT ASSOCIATION,

Plaintiffs-Appellants,

v.

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
Case No. 1:21-cv-1106

BRIEF OF *AMICI CURIAE* RESTAURANT OPPORTUNITIES CENTER UNITED, NATIONAL WOMEN'S LAW CENTER, AND ECONOMIC POLICY INSTITUTE IN SUPPORT OF AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to the interested persons identified in the Brief of the Appellants and in the briefs of *amici curiae* supporting the Appellants, the following listed persons are entities as described in the fourth sentence of Rule 28.2.1 as having an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amici curiae
Restaurant Opportunities Center United
National Women's Law Center
Economic Policy Institute

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SO CERTIFIED this Third day of January 2024.

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STATEMENT OF PARTIES' CONSENT

Amici hereby state that counsel for the Appellants-Plaintiffs and counsel for the Appellees-Defendants both have consented to the filing of this brief. Therefore, pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, Amici submit this brief without a motion for leave.

STATEMENT CONCERNING MONETARY CONTRIBUTIONS

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Amici state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than Amici and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF INTEREST

Amicus Restaurant Opportunities Center United ("ROC") advocates for broader workplace protections for all Americans, including minimum-wage restaurant workers who benefit from the Department of Labor's Final Rule. ROC is America's oldest and largest restaurant worker-led organization. ROC strives to improve restaurant employees' lives, including through advocacy for safety and job protections and better working conditions. Among other things, ROC's advocacy has included commenting in support of the rule challenged in this case. There are more than 11 million restaurant workers in the United States, and these workers are more than twice as likely to live in poverty as the general workforce. Ensuring restaurant workers receive full wages for full work and curbing abuse of the tip credit are critical to ROC's mission. ROC thus has an interest in seeing this rule upheld.

The National Women's Law Center ("NWLC") fights for gender justice – in the courts, in public policy, and in our society – working across the issues that are central to the lives of women and girls. NWLC uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us – especially women of color, LGBTQ people, and low-income women and families. Since its founding in 1972, NWLC has worked to advance workplace justice, income security, educational opportunities, and health and reproductive rights for women and girls and has participated as counsel or amicus

curiae in a range of cases.

Women – disproportionately women of color – represent more than two-thirds of tipped workers nationwide and are even more likely to experience poverty than their male counterparts. Even before the COVID-19 pandemic and its impacts on the leisure and hospitality industries, the nationwide poverty rate for women tipped workers was nearly 2.5 times the rate for workers overall. In states that follow the federal standard allowing employers to pay just $2.13 per hour to tipped employees and take a "tip credit" toward the remainder of their minimum wage obligation, women face particularly wide gender wage gaps, and women tipped workers are even more likely to live in poverty. NWLC thus has a strong interest in upholding the longstanding "80/20 rule" as promulgated by the Department of Labor, which is a critical tool to prevent abuse of the Fair Labor Standards Act's tip credit provision and ensure that tipped workers are paid all the wages they are due.

The Economic Policy Institute ("EPI") is a non-profit organization with more than 35 years of experience analyzing the effects of economic policy on the lives of working people in the United States. EPI has studied and produced extensive research examining how the minimum wage affects workers and the economy. EPI has participated as amicus curiae in numerous cases impacting workers' rights under federal wage and hour laws. EPI strives to protect and improve the economic

conditions of working people. EPI works to ensure all working people in the United States have good jobs with fair pay.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fair Labor Standards Act ("FLSA") permits employers to offset an employee's minimum wage to as little as $2.13 per hour, but only if the worker is "engaged in an occupation in which he customarily and regularly receives more than" a minimum amount of tips.[1] Dating back to the Reagan administration, the Department of Labor ("Department") has maintained nearly uninterrupted guidance establishing an "80/20 rule." Under this guidance, a minimum-wage "tip credit" has been available to employers for non-tipped work only when that non-tipped work directly supports tipped work and does not exceed 20 percent of a worker's time; when such non-tipped work exceeds that threshold, the worker is no longer engaged in a tipped occupation and the employer must pay them the full minimum wage for the time spent on non-tipped work.

In 2021, the Department took steps to codify this guidance. After giving notice and accepting comments, the Department adopted a rule that minimum-wage tip

[1] 29 U.S.C. § 203(t). As provided by 29 U.S.C. § 203(m), the FLSA only allows employers to take a tip credit for a "tipped employee" – defined at 29 U.S.C. § 203(t) as an "employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." This definition requires further explanation to ensure that employers understand when an individual employee is employed in both a tipped occupation (for which the employer may take the tip credit) and a non-tipped occupation (for which the employer must pay at least the full minimum wage). The "dual jobs" regulation at 29 C.F.R. § 531.56(e) thus distinguishes between an employee who holds both a non-tipped and a tipped occupation and a person in a tipped occupation who performs some related, non-tipped tasks.

credits are available to employers for non-tipped work only when non-tipped work directly supports tipped work and does not exceed "a substantial amount of time" – defined as 20 percent of an employee's workweek, or more than 30 consecutive minutes.[2]

Among the comments that the Department considered were stories from restaurant workers who earn the tipped minimum cash wage and depend on tips to make ends meet. These accounts underscore that the Department's decision was neither arbitrary nor capricious.[3]

ARGUMENT

I. Tipped Workers Often Live on the Margins of the U.S. Economy. The Department's Rule Is a Badly Needed Safety Net.

Since 1991, the federal minimum cash wage for workers in tipped occupations has been just $2.13 per hour. In an effort to reinforce decades-old guidance, the Department adopted a rule capping the amount of time for which tipped workers may receive the $2.13 minimum wage for non-tipped work. That step was well supported by the administrative record's evidence, including both hard data and tipped workers' individual stories of their struggles to make ends meet.

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[2] *See* Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60,114 (Oct. 29, 2021) (codified at 29 C.F.R. pts. 531.65(e) and (f)) (hereafter "Final Rule").

[3] *See, e.g.*, *Huntco Pawn Holdings, LLC v. U.S. Dep't of Defense*, 240 F. Supp. 3d 206, 226 (D.D.C. 2016) (rule not arbitrary and capricious where agency "relied on anecdotal evidence"); *Northport Health Servs. of Arkansas, LLC v. U.S. Dep't of Health & Hum. Servs.*, 438 F. Supp. 3d 956, 977 (W.D. Ark. 2020) (agency rule adopting change to previous position "is justified by anecdotal evidence . . . .") (internal quotations omitted).

People who rely on tips to make a minimum wage work throughout America's service economy: in restaurants, hotels, casinos, bars, and nail salons. But that dependence on tips makes tipped employees' earnings dangerously unstable. A tipped employee working 40 hours per week in a 52-week year at the $2.13 minimum wage is guaranteed less than $4,500 in take-home pay. And while the FLSA requires employers to ensure that their tipped employees receive at least the standard minimum wage by making up the difference when tips fall short, low base wages leave many tipped workers living near or below the poverty line.

Appellants claim that the rule was based on "no evidence,"[4] but this is simply incorrect. The evidence in the administrative record showed, for example, that "[p]overty rates for people who work for tips are more than twice as high as rates for working people overall – with female tipped workers, especially women of color, at a particular disadvantage."[5] Similarly, the record before the Department showed that eliminating the 80/20 rule would cost tipped workers more than $700 million per year.[6] The Department also heard from multiple commenters that the practice of

[4] Appellants' Br. at 45.
[5] The Leadership Conference on Civil and Human Rights, *Comment: Tip Regulations Under the Fair Labor Standards Act (FLSA)*, Regulations.gov, WHD-2019-0004, 2 (Aug. 23, 2021), available at https://www.regulations.gov/comment/WHD-2019-0004-2417 (citations omitted).
[6] Restaurant Opportunities Centers United Comments on Tip Regulations Under the Fair Labor Standards Act (FLSA), Regulations.gov, WHD-2019-0004, 6 (Apr. 14, 2021), available at https://www.regulations.gov/comment/WHD-2019-0004-0524.

requiring workers to live off of tips has its roots in slavery;[7] as a result, Black people and other people of color are more likely to work for tips and live in poverty than their white counterparts.[8]

Against this backdrop, the Department heard, considered, and ultimately acted on the wealth of comments and studies showing what restaurant workers have known for decades: the costs that restaurants save through tip credits are borne by their workers. The administrative record affirms that it is a common practice for employers to abuse the tip credit by paying workers the tipped minimum cash wage even when they have no opportunity to earn tips – and are thus not "engaged" in a tipped occupation within the meaning of the FLSA. As the Department's brief explains, the rule was adopted to serve as "an essential backstop to prevent abuse of the tip credit."[9]

"I have worked ma[n]y a serving job . . . when management will send dishwashers home early to make servers finish up the dishes after closing to save money," wrote Amber Jenkins, "or send kitchen staff home and have the servers (myself included as a server) finish washing the floors [because] we, as servers, are

[7] *See, e.g.*, One Fair Wage, *Comment: Tip Regulations Under the Fair Labor Standards Act (FLSA)*, Regulations.gov, WHD-2019-0004, 7 (Aug. 23, 2021), available at https://www.regulations.gov/comment/WHD-2019-0004-2419 ("After the Emancipation, restaurant lobbyists sought to hire newly free slaves to work for tips only. Employers did not pay these workers a fair wage; they were forced to live entirely from tips. This practice diverts from the original concept of tips, which were meant to be a bonus only and not a wage replacement. By continuing this practice today, we allow service work to be structured by this racist history.").
[8] Leadership Conference on Civil and Human Rights, *supra* n. 5.
[9] Appellees' Br. at 24 (quoting 86 Fed. Reg. at 60,125).

making a fraction of what the kitchen [and] dishwashers get paid. And that's all on top of our own side work that can take anywhere from an hour or more."[10]

Another longtime restaurant worker, Katie Klein, told the Department that her employer commonly required her to perform hours of untipped "side work" but nevertheless paid her only the tipped minimum cash wage. "I have spent years in restaurants and bars where my 'side work' amounted to hours every shift of scheduled labor when the restaurant or bar was closed," Klein commented. "This means I might spend 3 hours of a 6 hour shift cutting fruit, juicing, setting up the bar, deep cleaning, sweeping, all while the bar is closed and doors are locked, meaning I have zero potential to make tips."[11]

Yet another restaurant worker reported similar experiences. "Currently at my job[,] me and my fellow servers are required to clean and break down the entire restaurant including the dining room and the kitchen," Larra Gobble commented. "This process can take hours even after the last c[u]stomer has left the building. It's quite clear that restaurants are abusing the ability to push extra labor on the ones that corporation only has to pay their pocket change on."[12]

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[10] Amber Jenkins, *Comment: Tip Regulations Under the Fair Labor Standards Act (FLSA)*, Regulations.gov, WHD-2019-0004 (Aug. 22, 2021), available at https://www.regulations.gov/comment/WHD-2019-0004-2309.

[11] Katie Klein, *Comment: Tip Regulations Under the Fair Labor Standards Act (FLSA)*, Regulations.gov, WHD-2019-0004 (Aug. 2, 2021), available at https://www.regulations.gov/comment/WHD-2019-0004-0582.

[12] Larra Gobble, *Comment: Tip Regulations Under the Fair Labor Standards Act (FLSA)*, Regulations.gov, WHD-2019-0004 (Aug. 23, 2021), available at https://www.regulations.gov/comment/WHD-2019-0004-1165.

These stories were echoed in additional comments from researchers and others with expertise in the challenges facing tipped workers.[13] To address these challenges and improve employer compliance with the FLSA's tip credit provision, the Department's rule erects bright-line requirements for when employers may pay workers the tipped minimum cash wage. The rule protects a worker's legal right to earn a real minimum wage, whether they are performing tipped work or not.

Either the studies on which the Department relied or the stories that it received would have been enough to support its adoption of the rule.[14] But its reliance on both leaves no doubt that its decision was neither arbitrary nor capricious. The Department acted fully within its legal authority when it gave weight to those stories.

"I have never minded pitching in if we are short staffed," Jenkins concluded, "but to be repeatedly made to do others['] work [because] we are in essence – basically

[13] *See, e.g.*, Fish Potter Bolaños P.C., *Comment: Tip Regulations Under the Fair Labor Standards Act (FLSA)*, Regulations.gov, WHD-2019-0004, 2 (Aug. 23, 2021), available at https://www.regulations.gov/comment/WHD-2019-0004-2413 ("In our experience, wage and hour violations and discrimination are commonplace in industries which employ tipped workers, in part due to the nature of tip-based compensation agreements."); National Women's Law Center, *Comment: Tip Regulations Under the Fair Labor Standards Act (FLSA)*, Regulations.gov, WHD-2019-0004, 3 (Aug. 23, 2021), available at https://www.regulations.gov/comment/WHD-2019-0004-2415 (observing that the rise in take-out restaurant service spurred by the pandemic "could encourage employers to pay just $2.13/hour for greater amounts of non-tipped work, unless appropriate restrictions are in place to prevent this practice").

[14] *See, e.g.*, *Huntco Pawn Holdings, LLC*, 240 F. Supp. 3d at 226 (agency "relied on anecdotal evidence"); *Northport Health Servs. of Arkansas, LLC*, 438 F. Supp. 3d at 977 (agency rule adopting change to previous position "is justified by anecdotal evidence . . . ." (internal quotations omitted)).

free labor or close to it. I have always been a team player but feel like servers are being taken advantage of and have been for a long time."[15]

Jenkins is right. Since its inception, the very structure of the tip credit system has enabled restaurants and other employers of tipped workers to pay extraordinarily little to the people who serve their customers. And while the Department does not have the authority under the FLSA to bar employers from using the tip credit, the Department very clearly has the authority to bar employers from *abusing* the tip credit – which is what the Department did in its rulemaking. The rule's adoption returned the Department to a longstanding practice that helps to narrow the power gap between employers and tipped employees and ensure that tipped workers receive all the wages they are due under the FLSA.

To be sure, industry-side commenters saw things differently. Through largely duplicative comments, restaurant owners claimed that the Department's rule will require increased monitoring that will prove difficult.[16] But the Department considered and responded to those comments. Ultimately, it decided that the human interests of tipped workers outweigh industry's administrative headaches.[17] Courts

[15] Jenkins, *supra* n. 10.
[16] *See, e.g.*, Jessica Narain, *Comment: Tip Regulations Under the Fair Labor Standards Act (FLSA)*, Regulations.gov, WHD-2019-0004 (Aug. 6, 2021), available at https://www.regulations.gov/comment/WHD-2019-0004-1517.
[17] Final Rule at 60,139 ("As noted above, the Department has taken into account the practical concerns of employers by making several adjustments to its proposal, which will provide greater clarity and predictability to employers. The Department acknowledges that this final rule will lead to some costs to employers, as discussed in greater detail in the economic analysis below; however, the

have agreed. As one district court put it: "[S]ince employers, in order to manage employees, must assign them duties and assess completion of those duties, it is not a real burden on an employer to require that they be aware of how employees are spending their time before reducing their wages by 71%."[18] The Department weighed competing interests and decided between them. That does not render its decision arbitrary and capricious. It simply makes the decision one that industry-side commenters did not support.[19]

II. Tipped Workers Are Relying Every Day on the Rule's Critical Protections. Because of That Reliance, the Court Should Not Vacate the Rule. If the Department Improperly Adopted the Rule, Then the Court Should Remand Instead.

Even if this Court concludes that the Department misstepped in adopting this rule, it still should not vacate the rule. "Courts have explained that remand is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so, and when vacating would be disruptive."[20] Specifically, courts have found that vacatur would be disruptive where

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Department predicts that such costs will be a minimal share of total revenues for businesses of all sizes, and we believe that the protections afforded to workers outweigh these costs.").

[18] *Irvine v. Destination Wild Dunes Mgmt., Inc.*, 106 F. Supp. 3d 729, 734 (D.S.C. 2015).

[19] *See Associated Builders & Contractors of Texas, Inc. v. Nat'l Lab. Rels. Bd.*, 826 F.3d 215, 224-25 (5th Cir. 2016) ("But on review of agency decisions under the arbitrary and capricious standard, we cannot substitute our judgment or preferences for that of the agency. To affirm an agency's action, we need only find a rational explanation for how the Board reached its decision.") (emphasis in original) (citation omitted).

[20] *Central & South West Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (quoting *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999)) (cleaned up).

the "reliance interests" of an agency decision's beneficiaries are "persuasive."[21]

Clearly, vacatur would cause massive disruption for the tipped workers whose minimum-wage rights the rule clarifies. The Department's rule is in effect and already protecting tipped employees. They depend on that rule to ensure that they earn a true minimum wage. Workers for whom the rule served as a ladder out of poverty will be thrust back into poverty, potentially causing serious, and often irrevocable, harm – particularly for those who made housing, insurance, schooling, or other commitments in reliance on increased wages that the rule has secured. In turn, many tipped workers could be forced to work additional hours at other jobs,[22] which itself is often harmful to workers' health and wellbeing.[23]

Tipped workers see these risks more clearly than anyone. While preparing this brief, *amicus* Restaurant Opportunities Center United surveyed tipped workers among its membership concerning the effect of the Department's rule in their everyday lives. Many confirmed that the lasting effects of COVID-19 continue to limit their tips.

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[21] *Ackerman Bros. Farms, LLC v. USDA*, No. 1:17-cv-11779, 2021 WL 6133910, *7 (E.D. Mich. Dec. 29, 2021).

[22] Ray A. Smith, More Workers Get Side Hustles to Keep Up with Rising Costs, Wall Street Journal (Nov. 7, 2022), https://www.wsj.com/articles/more-professionals-need-to-get-second-jobs-because-of-inflation-11667774723 (reporting that approximately 75% of workers need additional work to earn adequate income).

[23] *See, e.g.*, Courtney Jenkins Sievers, Multiple Job Holders: The Impact of Employment Structure on Health, Access to Care, and the Effect of Policy Intervention, Univ. of Memphis Digital Commons, 28-30 (2020), https://digitalcommons.memphis.edu/etd/2780 (finding that multiple job holders are more likely to suffer negative health consequences than single job holders); Angela Bruns & Natasha Pilkauskas, Multiple Job Holding and Mental Health Among Low-income Mothers, 29(3) Women's Health Issues, 205-12 (May 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7141154 (same for mental health).

"Many chain restaurants do Uber, Doordash and Grubhub. We don't make any money off of those but are required to take time from our tables to do them," one tipped employee said. "Not to mention many people order to go online with no tip." Even now, though, the rule's protections are helping preserve what little recovery tipped employees have enjoyed. "There were many times, especially at the tail end of Covid that I made no tips[,] was paid no wage for minimum, and had twice the side work and cleanups to do with nobody paying me anything," another said.[24]

Yet another tipped employee confirmed that this modest improvement has come without the logistical headaches that the Appellants predicted. "We currently clock in at regular minimum wage in order to do opening side work," one tipped employee reported. "When we open at 11 AM, we clock out and then clock back in under tipped minimum wage[.] [A]fter we close out all tables and do our final paperwork, we clocked [*sic*] out and back in[ ] at the regular minimum wage if we have closing side work to do."[25]

Appellants ignore the real and substantial threats that their case portends for the lives and livelihoods of these tipped workers. But this Court should not. For that reason, even if the Department erred in its adoption of the rule, this Court should remand this matter to the agency rather than vacating the rule, so long as there is any serious possibility that any flaws could be remedied.

[24] Statements provided by Restaurant Opportunities Center United on Dec. 12, 2023.
[25] *Id.*

CONCLUSION

The Department's Final Rule is more than adequately supported by the administrative record, including the record's evidence of tipped workers' experiences under the rule. The district court's grant of summary judgment to the Department should be affirmed.

RESPECTFULLY SUBMITTED this Third day of January 2024.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This document complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) and Rule 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 3,438 words.

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/s/ *Will Bardwell*
Will Bardwell