NO. 23-50562

In the United States Court of Appeals for the Fifth Circuit

RESTAURANT LAW CENTER; TEXAS RESTAURANT ASSOCIATION,
Plaintiffs-Appellants,
v.
UNITED STATES DEPARTMENT OF LABOR; JULIE A. SU, ACTING SECRETARY 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, Austin Division, The Honorable Robert Pittman, District Court Judge
Civil Action No. 1:21-cv-1106-RP

UNOPPOSED MOTION OF HOSPITALITY ORGANIZATIONS FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS RESTAURANT LAW CENTER AND TEXAS RESTAURANT ASSOCIATION

TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Pursuant to Rule 29(a)(3) of the Federal Rules of Appellate Procedure, the National Retail Federation, National Federation of Independent Business, American Hotel and Lodging Association, and the American Gaming Association (collectively, the "Hospitality Organizations") file this Motion for Leave to File

Brief of Amici Curiae in Support of Plaintiffs-Appellants Restaurant Law Center and Texas Restaurant Association ("Motion") and state as follows:

1. The National Retail Federation (NRF) is the world's largest retail trade association and the voice of retail worldwide. NRF's membership includes retailers and restaurants of all sizes, formats and channels of distribution. NRF has filed briefs in support of the retail and restaurant community on dozens of topics.

2. The National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the Nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, NFIB Legal Center frequently files amicus curiae briefs in cases that will impact small businesses.

3. The American Hotel and Lodging Association ("AHLA") represents more than 30,000 members across the country including the 10 largest hotel companies in the United States. This includes 80% of all franchise hotels and nearly 3,800,000 total rooms. The AHLA has represented the hotel and lodging industry

for more than 100 years and advocates for policies not only applicable to major global brands but also small inns and bed and breakfasts.

4. The American Gaming Association ("AGA") represents the gaming industry to promote and advocate for modern gaming operations. The AGA supports the policy priorities of its members on a number of federal, state, and tribal regulatory and legislative issues. The membership of the AGA includes commercial and tribal casino operators, domestic gaming suppliers and other stakeholders in the gaming industry.

5. The Hospitality Organizations' members utilize the tip credit in their daily operations and can provide this Court insight into the practical application of the 80/20 Rule that is the subject of this appeal. The Hospitality Organization members will face insurmountable burdens to comply with the 80/20 Rule in its current form, which does not provide their members critical clarity on how compliance could be achieved, if at all. The Hospitality Organizations seek to inform this Court of these compliance challenges and the negative impact these challenges will have on their members' businesses so that this Court can properly assess the negative impact of the 80/20 Rule.

6. On October 26, 2023, counsel for the Hospitality Organizations asked counsel for Defendants-Appellees whether they would oppose the Motion and/or consent to the filing of the amicus brief as provided under Rule 29(a)(2) of the

Federal Rules of Appellate Procedure. On October 26, 2023, counsel for Defendants-Appellees advised counsel for Hospitality Organizations that they would consent to the filing.

7. On October 26, 2023, counsel for the Hospitality Organizations asked counsel for Plaintiffs-Appellants whether they would oppose the Motion and/or consent to the filing of the amicus brief as provided under Rule 29(a)(2) of the Federal Rules of Appellate Procedure. On October 26, 2023, counsel for Plaintiffs-Appellants advised counsel for Hospitality Organizations that they would consent to the filing.

8. The Hospitality Organizations respectfully request that this Court grant this Unopposed Motion of Hospitality Organizations for Leave to File Brief of Amici Curiae in Support of Plaintiffs-Appellants Restaurant Law Center and Texas Restaurant Association and order the Clerk of Court to file the Brief of Amici Curiae Hospitality Organizations in Support of Plaintiffs-Appellants Restaurant Law Center and Texas Restaurant Association, attached as Exhibit A to this Motion.

Respectfully submitted,

/s/ David B. Jordan

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 32(a)(7) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), this document contains 658 words.

2. This document 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 document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-pt Times New Roman.

/s/ David B. Jordan
David Jordan

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit through the appellate CM/ECF system resulting in electronic service on the following attorneys of record:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities are described in the fourth sentence of 5th Cir. Rule 28.2.1 have an interest in the outcome of the case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants	**Counsel for Plaintiffs-Appellants**
Restaurant Law Center Texas Restaurant Association	Paul DeCamp Kathleen Barrett Angelo Amador
Defendants-Appellants	**Counsel for Defendants-Appellants**
United States Department of Labor Julie A. Su, Acting 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	Alisa Beth Klein Jennifer Utrecht Johnny Hillary Walker III
Amici Curiae in support of Plaintiffs-Appellants	**Counsel for Amici Curiae in support of Plaintiffs-Appellants**
National Retail Federation National Federation of Independent Business American Hotel and Lodging Association American Gaming Association	David B. Jordan Mark A. Flores Daniel B. Boatright, *of counsel* Paul J. Sopher, *of counsel*

The National Retail Federation, National Federation of Independent Business, American Hotel and Lodging Association, and American Gaming Association (collectively, the "Hospitality Organizations") have no parent corporations and no

publicly held corporation owns 10% or more of the stock of the above-identified Hospitality Organizations.

/s/ David B. Jordan
David B. Jordan

Attorney of Record for the Hospitality Organizations

4887-9975-4378.1 / 122302-1000

EXHIBIT A

NO. 23-50562

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BRIEF OF AMICI CURIAE HOSPITALITY ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLANTS RESTAURANT LAW CENTER AND TEXAS RESTAURANT ASSOCIATION

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Amici Curiae in support of Plaintiffs-Appellants	**Counsel for Amici Curiae in support of Plaintiffs-Appellants**
National Retail Federation National Federation of Independent Business Small Business Legal Center, Inc. American Hotel and Lodging Association American Gaming Association	David B. Jordan Mark A. Flores Daniel B. Boatright, *of counsel* Paul J. Sopher, *of counsel*

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no parent corporations and no publicly held corporation owns 10% or more of the stock of the above-identified Hospitality Organizations.

/s/ David B. Jordan
David B. Jordan

Attorney of Record for the Hospitality Organizations

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I.
STATEMENT OF THE INTEREST OF THE AMICI CURIAE

The National Retail Federation (NRF) is the world's largest retail trade association and the voice of retail worldwide. NRF's membership includes retailers and restaurants of all sizes, formats and channels of distribution. NRF has filed briefs in support of the retail and restaurant community on dozens of topics.

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Members of the above identified organizations ("Hospitality Organizations") have insurmountable burdens to comply with the 80/20 Rule in its current form, which does not provide their members critical clarity on how compliance could be achieved. The Hospitality Organizations seek to inform this Court of these compliance challenges and the negative impact these challenges have and will continue to have on their members' businesses.

II.
ARGUMENT

A. The FLSA ensures employees receive minimum wage, and industry data shows tipped employees receive tips that far exceed minimum wage.

Congress's sole charge under the FLSA is that tipped employees make sufficient tips from their work to ensure they receive at least the general minimum wage—$7.25 per hour. The Department of Labor's ("DOL") October 2021 Final Rule, however, seeks to usurp Congressional authority and relegate the tip credit to the margins of the hospitality industry under the guise of protecting tipped employees from "abuse" of the tip credit. Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal ("Final Rule" or "80/20 Rule"), 86 Fed. Reg. 60114, 60134 (providing limits on non-tipped supporting work "are important to protect both protect [sic] vulnerable tipped employees and well-meaning employers from unscrupulous employers that might abuse the tip credit"). The DOL's stand-in-the-shoes-of-Congress solution exceeds its rulemaking authority, creates a panoply of unintended consequences, and deprives the hospitality industry of decades of reliance upon a pay practice that makes tipped workers among the highest paid in the hospitality sector.

Tipped workers earn an average hourly wage ($14.32), which is nearly double the current federal minimum wage ($7.25). Employment Policies Institute, *The Case for the Tip Credit: From Workers, Employers, and Research*, 3 (February 2021),

available at https://epionline.org/studies/the-case-for-the-tip-credit/. Among hourly employees in restaurants, bars, hotels, and casinos, tipped employees typically enjoy the highest level of income. Recent wage data gathered from members of the Hospitality Organizations confirm their employees in states where the tip credit is permitted have average total earnings that far exceed their non-tipped coworkers. Servers and bartenders employed by restaurant members of the Hospitality Organizations make on average over $25 per hour compared to less than $15 per hour for non-tipped coworkers. For casino employees, the average total earnings for tipped employees is in excess of $25 per hour compared to an average of $15-$18 per hour for non-tipped employees. Thus, tipped employees receive pay exceeding that of their non-tipped coworkers and the minimum wage.[1]

With the misguided aim of protecting a population of employees from "abuse" of the tip credit, the DOL has imposed its own politicized view of what specific duties certain occupations should include and dictate how and when employees in those occupations may perform those duties. Indeed, the DOL's final rule is its best attempt to do what Congress has not been willing to do: eliminate the tip credit altogether. *See e.g.,* Raise the Wage Act of 2023, S. 2488, 118th Cong. § 3 (2023)

[1] This does not include tips unreported to employers by tipped employees, a decades-old common practice that has allowed tipped workers to underestimate earnings and maximize take-home pay despite employers' efforts to require tipped employees report all tips.

(attempting to phase out separate minimum wage for tipped employees under FLSA); Raise the Wage Act of 2021, S. 53, 117th Cong. § 3 (2021) (same); Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act, H.R. 5994, S. 3219, 117th Cong. § 121 (2021) (same); America Rescue Plan Act of 2021, H.R. 1319, 117th Cong. §2101 (2021) (same); Raise the Wage Act of 2023, H.R. 4889, 118th Cong. § 3 (2023) (same); *see also* Tipped Worker Protection Act, H.R. 5369, 118th Cong. § 2 (2023), H.R. 8427, 117th Cong. § 2 (2022) (attempting to repeal separate minimum wage for tipped employee). And hospitality-related labor unions have made no secret about their efforts to eliminate the tip credit. *See* P. Romeo, Union group mounts $25M campaign against the tip credit, RESTAURANT BUSINESS (Feb. 14, 2022), available at https://www.restaurantbusinessonline.com/workforce/union-group-mounts-25m-campaign-against-tip-credit (explaining how labor group conducted a $25 million campaign to end the separate minimum wage for tipped employees). Given this backdrop, the DOL exceeds its rulemaking authority while advancing an onerous, if not impossible, regulatory regime.

B. <u>Compliance with the Final Rule is practically impossible.</u>

The Final Rule mandating that businesses comply with a set of regulatory requirements is painfully ill-suited to the realities of the industries. The DOL's "regulatory squeeze" will cause significant litigation and compliance costs, as the

Final Rule is vague and ambiguous, making compliance practically impossible. To approach compliance, businesses will have to adopt (or invent) impractical and burdensome employee-monitoring systems causing enormous costs to both employers and employees. Moreover, the Final Rule treats employee "idle time" in a manner completely inconsistent with that of other FLSA provisions.

1. The 80/20 Rule provides insufficient and conflicting guidance on treatment of tasks tipped employees perform.

The Final Rule requires employers to sort tipped employees' duties into 1 of 3 bureaucrat-created categories: (1) tip-producing work, (2) work that directly supports tip-producing work, and (3) unrelated work (i.e., work that is neither tip-producing nor directly supportive of tip-producing work). 29 C.F.R. § 531.56(f). To determine what time an employee must be paid at tip-credit rate versus the general minimum wage, an employer must divine regulatory intent (from an officious rubric drawn by administrative staffers) to determine which tasks fall into which bucket. The DOL attempts to answer this question by creating its own "job descriptions" for 3-4 roles in hospitality, but without any regard to the remarkable variety and individual characteristics of the millions of hospitality providers across the country today.[2] Moreover, the Final Rule provides employers conflicting

[2] The DOL has made much mention that the Field Operations Handbook ("FOH"), an investigator-facing manual for DOL staff, has long discussed the 80/20 rule, and claims the hospitality industry should not be surprised by its existence (despite the FOH not even being available to the public, beyond a FOIA request, well into the

guidance on how to categorize the myriad of tasks tipped employees perform.

If the hospitality industry could even distill the thousands of varieties of tasks performed in the millions of hospitality organizations across the country into the DOL's 3-4 roles, the Final Rule inconsistently provides that some tasks are tip-producing for some employees but directly supporting for others. If a busser clears a table and replaces table linens, that is considered tip-producing work. 29 C.F.R. § 531.56(f)(2)(ii). But if a server clears a table to prepare for the next guest, that is directly supporting work. *Id.* § 531.56(f)(3)(ii). This begs the question: in which category do these tasks fall if performed by a food runner? What if the employer utilizes no bussers, and servers clear the tables? Likewise, if a housekeeper cleans a hotel room, it is tip-producing work. *Id.* § 531.56(f)(2)(ii).[3] But if a server checks a restroom to ensure it is tidy, it is unrelated work. *Id.* § 531.56(f)(5)(ii).

The regulations also characterize nearly identical duties as either tip-producing or directly supporting depending on whether they are performed for customers generally or in response to a specific customer request. For example, the

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mid- to late-2000's). But curiously, the DOL is silent about its removal in the last few years of another longstanding key provision in its FOH at § 30d4(i), which directed investigators to look to local custom and practice and the type of establishment to resolve key tip-related issues, including whether an employee is deemed a "tipped employee" under the FLSA. By dropping these "local custom" directions, the DOL seeks to reclaim the ability to decide for itself what is, and what is not, tipped work and thereby who counts as a "tipped employee."

[3] If a housekeeper cleans or sets up a hotel meeting room for guest use, it is unrelated work. 29 C.F.R. § 531.56(f)(5)(ii).

DOL posits "a bartender who retrieves a particular beer from the storeroom at the request of a customer sitting at the bar, is performing tip-producing work," but "a bartender who retrieves a case of beer from the storeroom to stock the bar in preparation for serving customers, would be performing directly supporting work." Final Rule, 86 Fed. Reg. at 60128. In the abstract, one could perhaps draw a conceptual distinction between these tasks; however, the distinction collapses when considering the realities of the service environment. In response to a customer request for a particular beer that is not in stock at the bar, it is unlikely a bartender would ever go to the storeroom to retrieve only one bottle of beer. Rather, the bartender would go to the storeroom, retrieve a case of that type of beer, then restock the bar with more of that beer.[4] Has the bartender performed tip-producing work or directly supporting work in that instance?

The Preamble notes "[t]he determination [of whether work is tip-producing or directly supporting] is [based on] whether the tipped employee can receive tips because they are performing that task for a customer." *Id.* That explanation is unhelpful, as tasks service employees perform throughout their shifts are often simultaneously aimed at meeting the specific needs of customers they are serving and the ***anticipated*** needs of other customers whom they may be serving in the

[4] The bartender may also, for efficiency's sake, retrieve on that same trip cherries for cocktail garnishes, bar napkins, etc.

future. Thus, categorizing work as either tip-producing or directly supporting predicated on whether the work is performed ***in reaction*** to a specific customer request is conceptually impossible.

Other examples of ambiguity abound. For instance, a server who cuts a lemon wedge on the fly to respond to a customer's request is engaged in tip-producing work. Final Rule, 86 Fed. Reg. at 60128. But what if the server takes a bit of additional time to slice an entire lemon for later use, anticipating other tables in her section will order tea? What about a bartender who prepares a batch of margarita mix when a group, whom he knows from experience are margarita drinkers, come to the bar, but the group ends up ordering beer instead, and the margarita mix is used to make drinks for other customers that night? In which category does the margarita mix-making fall? Does the same work warrant different categorization simply because of the immediacy of the need?

The DOL's position on food preparation by tipped employees likewise leaves employers guessing how to categorize commonly performed tasks. The Preamble and Final Rule state a tipped employee cannot perform ***any*** food preparation, including making salads. *See* 29 C.F.R. § 531.56(f)(5)(ii) ("Preparing food, including salads, . . . is not part of the tipped occupation of a server."); 86 Fed. Reg. 60128 ("The Department's longstanding position . . . continues to be that general food preparation, including salad assembly, is not part of the tipped occupation of a

server.") (citation omitted). However, the DOL continues that "a server's tip-producing table service may include some work performed in the kitchen," and goes on to list the following food-related activities as tip-producing (and not merely "directly supporting"): adding dressing to pre-made salad; adding a garnish to the plate; toasting bread to accompany prepared eggs; ladling pre-made soup; scooping ice cream onto pre-made dessert; assembling bread and chip baskets; and placing coffee in a pot for brewing. *Id.*

If a server in a diner toasts bread not to accompany eggs, but to fulfill an order for just toast, is he engaged in tip-producing work? What if the server adds ice cream, chocolate sauce, whipped cream, and sprinkles to a pre-made brownie? Minute and seemingly immaterial variations on the DOL's examples demonstrate the impossibility of principled categorization of the tasks tipped employees perform.

Salad preparation is particularly illustrative. What if, in addition to salad dressing, a server adds croutons and a hard-boiled egg to a pre-made salad? What if he then adds precooked chicken? At what point does the addition of an ingredient cross the line into "food preparation" such that the task must be paid at a different rate? These and other questions about minutiae of duties tipped employees perform that the Final Rule raises but fails to answer will be the subject of costly litigation.

Proper categorization of countless other tasks performed by restaurant workers are ambiguous under the Final Rule, including common ones such as:

- Helping deliver food/drink or otherwise attending to customer needs, such as a spill, at a table in a coworker's section;
- Singing "Happy Birthday" to customers seated in a coworker's section;
- Resolving customer complaints;
- Restocking condiments or rolling silverware while keeping a watchful eye on customers.

Employers in other industries with tipped employees also customarily carry out a variety of tasks that do not neatly fit into one of the three categories, such as:

- A delivery driver sorting and loading delivery items in the vehicle;
- Time lost by a delivery driver while in route to a delivery due to vehicle breakdown or heavy traffic;
- A delivery driver waiting for a customer to answer a door;
- Refueling a delivery vehicle enroute to a delivery;
- Checking with the home office for delivery instructions;
- Scheduling spa customer appointments;
- Processing spa treatment and billing transaction records;
- Restocking towels and supplies in a spa room;
- A parking valet touching up the interior or exterior of a vehicle and inspecting for damage, or patrolling a parking area to prevent theft;
- A housekeeper tidying the hallway outside a guest room he is cleaning;
- A hotel bell captain arranging for shipment of forgotten items.

The Final Rule forces hospitality employers to dissect and itemize tipped employees' duties, predict the classification of each, and quantify how much each employee devoted to each classification across every shift. The Rule thus not only demonstrates a misconception of how work is performed in a service environment, but it also fundamentally betrays the definition of "tipped employee" under the

statute. That definition – "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)) – is in concert with the reality in hospitality that tipped employees perform a broad range of duties in furtherance of providing a positive service experience for guests. *Cf.* O*NET, www.onetonline.org (listing upwards of 61 work activities and tasks regularly performed by the job category "Waiters and Waitresses"). Those duties are unique to the business and service environments in which they are performed. Rather than allowing employees the latitude to perform the panoply of duties needed to enhance guests' overall service experience, the Final Rule demands imposition of artificial, bureaucrat-created classifications on those duties, and mandates employers come up with ways to track time spent within those classifications. The end result is significant cost to the employer in the form of litigation and imperfect compliance measures.

2. The 80/20 Rule imposes untenable recordkeeping obligations and compliance costs.

Even if employers could discern which tasks fall into which classification, tracking the time employees spend on the tasks performed over the course of a shift is impractical, if not impossible. It would require perpetual monitoring and tracking of work by the employer and perpetual self-reporting of work by the employee—presumably through implementation of specialized timekeeping and tracking systems.

The DOL's own examples illustrate this. To adequately ensure 20% per workweek compliance, employers would need to monitor and document and/or employees would need to report, to the second, the following tasks:

- Each visit a bartender makes to the storeroom to denote whether the visit was to retrieve an item for a particular customer in response to that customer's request (tip producing) or whether the visit was to retrieve items with which to stock the bar generally (directly supporting). *See* 86 Fed. Reg. at 60128; 29 C.F.R. § 531.56(f)(2)(ii); *id.* § 531.56(f)(3)(ii).
- Each car a valet moves around a parking lot to determine whether that car was moved to retrieve a particular customer's car (tip producing) or facilitate parking customers' cars generally (directly supporting). *See* 86 Fed. Reg. at 60128; 29 C.F.R. § 531.56(f)(2)(ii); *id.* § 531.56(f)(3)(ii).
- Each salad dressed and dessert finished by a server to account for whether the quantum and quality of the task performed crossed the line from tip-producing work into unrelated "food preparation." *See* 86 Fed. Reg. at 60128; 29 C.F.R. § 531.56(f)(2)(ii); *id.* § 531.56(f)(5)(ii).
- Each moment spent by housekeepers restocking their carts with a cleaning product (directly supporting) before, after, or in between cleaning rooms (tip producing). *See* 29 C.F.R. § 531.56(f)(3)(ii); *id.* § 531.56(f)(2)(ii).
- Each moment bellhops spend rearranging luggage in the luggage-storage area (directly supporting) as they assist guests with their luggage (tip producing). *See* 29 C.F.R. § 531.56(f)(3)(ii); *id.* § 531.56(f)(2)(ii).

The Final Rule also provides that a server clearing dishes or wiping up a spill while guests are seated is performing tip-producing work, but it ceases to be so if guests have departed. 86 Fed. Reg. at 60128. What is an employer to make of the situation where table-wiping or dish-clearing begins while guests are seated and

continues after they leave? At what point in the guest departure continuum must the employer "flip the switch"?

The DOL "believes" employers can avoid the need to track tipped employees' time minute-to-minute by "assigning" directly supporting work "in scheduled blocks of time." 86 Fed. Reg. at 60133. As the above examples illustrate, that is simply impossible within the realities of the service environment.

The DOL's belief reflects a naïve view of the litigation threat employers face if they do not track, to the second, time spent on directly supporting work. Presumably, the DOL (and employee-side attorneys) know the absence of records showing allocation of time employees spend on different tasks in a shift can be held as an adverse inference against the employer in litigation, just as the absence of records demonstrating employees' work start- and stop-times is held against the employer in off-the-clock FLSA litigation. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946) (holding if an employer does not keep accurate time records, an employee's testimony about hours worked provides an inference of correctness as to those hours). As one court astutely opined,

> Permitting Plaintiffs to scrutinize every day minute by minute, attempt to differentiate what qualifies as tipped activity and what does not, and adjust their wage accordingly would create an exception that would threaten to swallow every rule governing (and allowing) for tip credit for employers. First of all, ruling in that manner would present a discovery nightmare. Of greater concern is the fact that under the reasoning proffered by Plaintiffs, nearly every person employed in a tipped occupation could claim a cause of action against his employer if

> the employer did not keep the employee under perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts.

Pellon v. Bus. Representation Int'l, Inc., 528 F. Supp. 2d 1306, 1314 (S.D. Fla. 2007).

The reality is no practical means exists to track and record time tipped employees spend on each task during a shift to ensure full compliance with the Final Rule. The inherent nature of service work, during which employees perpetually pivot between guest service and directly supporting tasks depending on customer volume and flow (and other erratic factors), makes tracking and classifying all such work nearly impossible. Thus, even large businesses with ample resources cannot hope to practically comply with the regulations. To the extent practical methods for compliance could be developed (perhaps in the form of advanced timekeeping and/or non-existent work-monitoring technologies), such tools will undoubtedly be too costly for small restaurant and hospitality businesses to adopt.

The Final Rule and its inherent recordkeeping obligations are so burdensome they render the tip credit unworkable, contravening Congress's intent when it made the tip credit available in the FLSA. Employers seeking continued use of the tip credit must transform occupations traditionally deemed tipped ones into new positions devoted to "directly supporting" work, an impossibility for some like full-service diners, at a time when many employers are struggling to find workers to staff

their businesses under traditional models. Moreover, the Final Rule disproportionately affects small employers that cannot afford to hire dedicated employees to perform "directly supporting" work. This will have devastating consequences for a critical segment of the U.S. economy and our communities.[5]

3. The DOL erroneously takes the position idle time is "directly supporting" work.

One of the most incomprehensible aspects of the Final Rule is its treatment of idle or "down time." Faced with commentators asking for clarity regarding employees who have down time before and between direct customer interactions, the Preamble states:

> ["Down time"] cannot be categorized as tip-producing work under the revised definition. Because the tipped employee is available to immediately provide customer service when the customer arrives, however, the time is being spent in preparation of the customer service, and is therefore properly categorized as directly supporting work.

Final Rule, 86 Fed. Reg. at 60130. This approach fundamentally ignores the reality of the service environment and conflicts with established legal principles that conceive such time as inseparably integral to the duties an occupation comprises.

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[5] According to U.S. Small Business Administration, small businesses accounted for 64% of overall employment in the food and services industry pre-pandemic, and 42% of employment in the accommodation industry. *See Small Business Facts, Restaurants and Bars Staggered by Pandemic*, U.S. Small Business Administration, Office of Advocacy, available at: https://advocacy.sba.gov/wp-content/uploads/2020/06/Small-Business-Facts-Restaurants-And-Bars-Staggered-By-Pandemic.pdf.

In the service environment, "down time" is interwoven within duties tipped employees perform. Casino dealers man their unpopulated tables waiting for the next tour bus to arrive; servers stand at the kitchen window waiting for their table's entrees to be completed; bussers wait while guests finish their coffee before clearing and resetting the table; servers stand by with watchful eye on guests before closing out a check. No principled explanation exists for why these intervals of time in the course of service should be viewed as conceptually distinct from "tip-producing" duties these employees perform. And such intervals could never be practicably tracked and quantified over the course of a shift.

By classifying idle time as "directly supporting" work and not truly part of a tipped employee's occupation, the DOL puts hospitality employers between a rock and a hard place: if business is slow, an employer cannot ask employees to spend too much time preparing for the next rush of business; but employees cannot spend too much time waiting during lulls in direct service.[6] The Final Rule provides no flexibility for those in the hospitality industry who cannot predict with certainty customer traffic patterns over which employers have no control (e.g., higher-than-

[6] The problem for hospitality employers is further compounded in jurisdictions with predictive scheduling laws, which restrict employers' ability to adjust employee schedules as a result of lulls or increases in business. *See, e.g.*, Phila. Code § 9-4601, *et seq*. (Philadelphia Fair Week Work Ordinance).

average crowds following late-scheduled playoff games, lower-than-average crowds due to severe weather, etc.).

Consideration of table game dealers in a casino illustrates the point. Dealers typically stand at an assigned table for about an hour at a time between rest breaks. During their active time, dealers engage with customers, but must also concentrate and perform repeated mathematical computations, all while standing on their feet. David Shelton, *Being a Casino Dealer: Dream Job or Nightmare*, Feb. 17, 2014, CASINO.ORG, Feb. 17, 2014), https://www.casino.org/blog/being-a-casino-dealer-dream-job-or-nightmare/. The active work period is typically followed by a 20-minute rest break, during which the dealer remains "on-the-clock." *Id.* This schedule of 60 minutes on and 20 minutes off means a dealer has approximately 25% idle time built into each shift from the outset. That 25% idle grows even more for dealers operating during non-peak times or at high roller tables, where dealers often stand by for longer periods awaiting gamblers to populate the table.[7] Dealers almost universally pool tips whereby each dealer receives a pro rata portion of the shift's collected tips based on the number of tip-producing hours each dealer worked on the

[7] Of course, all direct customer interaction during these "down" times does not necessarily come to a screeching halt – customers may approach "idle" dealers to inquire about the casino's amenities or chitchat. However, it is nearly impossible to for a casino to predict on any given shift whether a dealer will remain idle at a table for a few minutes at a time or more than 30 minutes at a time, making compliance all the more impractical. *Cf.* 29 C.F.R. § 531.56(f)(4)(ii) (providing down time in excess of 30 continuous minutes must be paid at full minimum wage).

shift. *See* FOH § 30d08I (limiting participation in tip pool to only employees meeting 80/20 rule).

DOL's classification of dealers' "down time" as directly supporting thus engenders consequences benefitting no one: it requires casinos to either force dealers to take fewer breaks or segregate and pay the "down time" at full minimum wage, thereby reducing the pro rata share of pooled tips a dealer will receive. Neither option makes sense nor is supported by the statute, and both result in less lucrative and desirable dealer jobs. *Cf.* Staff Writer, *Being a Casino Dealer: Dream Job or Nightmare*, Feb. 17, 2014, CASINO.ORG, https://www.casino.org/blog/being-a-casino-dealer-dream-job-or-nightmare/ (noting tips could range from $30,000 to $40,000 a year).

The Final Rule's classification of idle time as directly supporting is also at odds with well-settled legal principles recognizing such time as part and parcel of the range of activities an employee performs in furtherance of the primary duties of the employee's occupation. *See, e.g.*, *Townsend v. Mercy Hosp. of Pittsburgh*, 862 F.2d 1009, 1012 (3d Cir. 1988) (recognizing "idle time . . . is inherent in any job"). It Is fundamental that periods of time in which an employee is "engaged to wait" is treated as compensable work under the FLSA. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944); *Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1411 (5th Cir. 1990); 29 C.F.R. § 785.14. The "engaged to wait" doctrine is premised on the notion that

various periods of down time within an employee's workday are dictated by forces outside the employee's and employer's control. Thus, for time-tracking and compensation purposes, down time is on par with the employee's primary productive duties, which altogether constitute the "work" of the employee's occupation for which she is paid. *See, e.g.*, *Mireles*, 899 F.2d at 1412 (holding sporadic periods of idle time when assembly line temporarily not running is compensable work); *Brock v. DeWitt*, 633 F. Supp. 892, 895 (W.D. Mo. 1986) (holding time spent by restaurant employees waiting during business lulls compensable work); *Sedano v. Mercado*, No. 92-0052, 1992 WL 454007, at *3 (D.N.M. Oct. 8, 1992) ("Time spent by agricultural workers waiting in the fields for the fields to dry in the morning . . . must be included as compensable time."); *Smith v. Superior Casing Crews*, 299 F. Supp. 725, 730 (E.D. La. 1969) (holding oil well workers entitled to compensation for time spent waiting for wells to reach specific depth); *cf.* 29 C.F.R. § 778.223(b) ("[W]orking time is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness.").

Further illustrating this point is the seaman exemption found in 29 U.S.C. § 213(b)(6), which provides an overtime exemption for "any employee employed as a seaman." By regulation, the DOL has explained "an employee will ordinarily be regarded as 'employed as a seaman' if he performs . . . service . . . primarily as an

aid in the operation of [a] vessel as a means of transportation, ***provided he performs no substantial work of a different character***." 29 C.F.R. § 783.31 (emphasis added). The DOL has explained "differing work is 'substantial' if it occupies more than 20 percent of the time worked by the employee during the workweek." 29 C.F.R. § 783.37.[8]

In *McLaughlin v. Harbor Cruises LLC*, 880 F. Supp. 2d 179 (D. Mass. 2012), a group of deckhands challenged the employer's reliance on the seaman exemption, arguing idle time in which they engaged on the employer's ship should fall into the 20% side of the equation. The court rejected the argument that only active work should "count" as part of the seaman occupation (the 80% side of the equation):

> The plaintiffs' argument is wrong. They have a bit of math on their side, but that is all. It is true, of course, that if an employee's work must be characterized as either seaman's or nonseaman's work, and if the non-seaman's work must comprise 20% or less of the time worked for the exemption still to apply, then in such a case as a mathematical matter seaman's work will obviously comprise 80% or more. What the plaintiffs have made up, however, contrary to settled law, is the idea that only active performance of tasks can count in assessing whether the employee is doing seaman's work 80% of the time.

Id. at 189 (citing *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944)). As *McLaughlin* and numerous other courts interpreting the FLSA have recognized, "idle time" spent carrying out the myriad duties constituting an occupation is part of

[8] Notably, the 20% limitation in the seaman exemption provides a tolerance of up to 20% of working time devoted to an entirely different occupation, as opposed to some artificially drawn distinctions between duties within an occupation.

the occupation itself, not an activity separable from it.

C. Consideration of a 15-minute portion of a shift further highlights the significant compliance issues raised by the 80/20 Rule.

A brief illustration of routine work of a restaurant server shows the impracticality associated with not only classifying time spent on a shift but the impossibility associated with tracking such time to comply with the Final Rule:

Time	Activity
4:00:00 PM	Server rolls silverware in anticipation of the dinner rush. There is a single table in the server's section with a party of two with a father and a twelve-year-old son celebrating his birthday finishing up their meal.
4:00:30 PM	Server approaches party of two and offers dessert. The party orders an ice cream sundae with sprinkles and chocolate syrup.
4:01:00 PM	A family of four who attended a high school baseball playoff game two blocks away comes into the restaurant. Management was unaware of the playoff game and begins to call in other staff to assist.
4:01:30 PM	Server approaches the family of four to take drink orders.
4:02:30 PM	Server places drink order in the point of sale (POS) system and begins filling drinks as the restaurant nears capacity and a wait list is prepared by the host.
4:02:45 PM	Server delivers drinks to family of four.
4:03:15 PM	Server approaches a party of eight to welcome to the restaurant and take drink orders.
4:03:30 PM	Kitchen serves up ice cream next to sundae bar in serving area with already prepared fixings standing by for the server to assemble. Kitchen makes server aware of ice cream.

Time	**Activity**
4:04:15 PM	Server returns to family of four and takes food order.
4:05:00 PM	Server places drink and food orders in POS and begins preparation of drinks.
4:05:30 PM	Server remembers the ice cream and puts on chocolate syrup and sprinkles. Server delivers the ice cream with two spoons before approaching the next table, a party of five. Server takes the drink order and heads back to the POS.
4:06:30 PM	On the way to the POS, a manager informs the server that one of the guests who attended the high school baseball game became dehydrated and vomited in the restroom. The manager asks the server to go to the restroom to assess.
4:06:45 PM	Server heads to the restroom. On her way, she asks the host to serve the drinks prepared by the host to the table of eight and let them know the server is coming back.
4:07:00 PM	Server assesses the situation in the restroom and realizes the reported vomit does not exist. Server notices, however, paper towels strewn on the floor. Server picks up the paper towels and places them in waste receptacle.
4:07:30 PM	Server notices ketchup bottles are running low and retrieves a dozen bottles from the storeroom. Server delivers one bottle to a table with guests seated, and one to an empty table.
4:09:00 PM	Server notices that silverware is running low and prepares several more silverware rolls.
4:11:00 PM	Server heads to drink stand to prepare drinks for party of five. At drink stand, the server notices a spill and wipes it up with a towel.
4:11:45 PM	Server serves drinks to party of five before heading to table of eight to take their food order.
4:12:30 PM	Server heads to party of five to take their food order.

Time	**Activity**
4:13:00 PM	On the way to the POS, party of two informs server they have completed the ice cream. The father asks the server if she can arrange for the staff to sing Happy Birthday to his son.
4:13:20 PM	Server notices a napkin on the floor next to the party of five and picks it up enroute to the POS.
4:13:35 PM	Server heads to the host stand to ask the host to assemble the staff for the birthday song and pick up the requisite hat they will put on the birthday celebrant while the staff sings the song. While at the host stand, server assists in organizing menus as the line continues to get longer.
4:14:00 PM	Server inputs the food order for the party of five and the party of eight.
4:14:45 PM	The host informs the server the staff is ready to sing the birthday song and hands the server the birthday hat.
4:15:00 PM	The server leads the staff to the table with the party of two, puts the birthday hat on the twelve-year-old boy and leads the staff in the birthday song.

In a span of 15 minutes, the server performed no fewer than 25 distinct functions. This 15 minutes of "chaos" repeats for several hours over the course of the shift (and every day the restaurant operates), resulting in numerous tasks requiring meticulous timekeeping and tracking to comply with the Final Rule.

Although a large chain restaurant would surely struggle trying to comply with the 80/20 Rule, a small business would find compliance nearly insurmountable. Of the small businesses polled by National Federation of Independent Business, 51% stated they do payroll in-house and do not utilize a third-party tracking service or

accountant to do this task. NFIB, *411 Small Business Facts*, *available at* http://www.411sbfacts.com/pollresults_g.php? QID=00000002696&KT_back=1. Only about 12% of small businesses have a human resources professional or any dedicated employee to handle personnel matters like this. *See* NFIB, *NFIB Small Poll Business Structure (2004)*, *available at* http://www.411sbfacts.com/pollresults_g.php?QID=00000000661&KT_back=1. In short, the Final Rule imposes insurmountable compliance challenges.

D. The Final Rule fails to provide guidance for the ever-evolving nature of the hospitality industry in a post-pandemic world.

The evolving nature of tips, as well as customers' treatment of tips in a post-pandemic world and the explosion of tipping on orders made online requires significantly more flexibility than the rigidity imposed by the Final Rule. The proportion of online orders for food that had tips added to the charge rose to more than 75% during the first two months of the pandemic. Saahil Desai, *The Pandemic Really Did Change How We Tip*, THE ATLANTIC, June 28, 2021, https://www.theatlantic.com/health/archive/2021/06/tipping-restaurants-pandemic-waiters/619314/. By May 2021, the number of online transactions that included a tip rose to 84%. *Id.*; *see also* Mary Meisenzahl, *Restaurants created a monster by emphasizing to-go and online orders during the pandemic, and now they can't control it*, BUSINESS INSIDER, Dec. 4, 2021, https://www.businessinsider.com/restaurants-cant-handle-the-demands-of-to-go-

orders-2021-12. As a result, hospitality employers have had to adjust their staffing and job roles to accommodate this expansion of the delivery and to-go market.

Particularly in the curbside to-go space, the restaurant industry has adjusted to accommodate this onslaught of demand for which tips have now become customary. For instance, restaurants now have dedicated employees to assemble curbside to-go orders, interface with customers, address questions and concerns, and deliver food to customers waiting in their vehicles. In some instances, hosts, servers, and bartenders are called upon to assist in the delivery of curbside to-go orders during peak times. The Final Rule does not even begin to address these new variations in practice. When customers order online, pick up food curbside, and include a tip with their payment, precisely who was the intended recipient of that tip, and for what service? What was tip producing versus directly supporting?

The role of tips in society continues to expand to other non-traditional settings. From food delivery apps to sports arenas to food trucks, point-of-sale devices regularly include a means for customers to add a tip. The Final Rule is hopelessly ill-equipped to address these issues, leaves everyone to flail in the dark for answers, and invites litigation to fill the void.

III.
CONCLUSION

For the foregoing reasons, the Court should reverse the District Court and remand.

Respectfully submitted,

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I hereby certify that on November 2, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit through the appellate CM/ECF system resulting in electronic service on the following attorneys of record:

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