NO. 21-11249

In the United States Court of Appeals for the Fifth Circuit

RESTAURANT LAW CENTER; TEXAS RESTAURANT ASSOCIATION,
Plaintiffs-Appellants

v.

UNITED STATES DEPARTMENT OF LABOR; HONORABLE MARTIN J. WALSH, SECRETARY OF THE U.S. DEPARTMENT OF LABOR; JESSICA LOOMAN, ACTING ADMINISTRATOR OF THE DEPARTMENT OF LABORS 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 ("NFIB") is the nation's leading small business association. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

3. The American Hotel and Lodging Association 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 American Hotel and Lodging Association 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 represents the gaming industry to promote and advocate for modern gaming operations. The American Gaming Association supports the policy priorities of its members on a number of federal, state, and tribal regulatory and legislative issues. The membership of the American Gaming Association 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 May 5, 2022, 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 May 6, 2022, counsel for Defendants-

Appellees advised counsel for Hospitality Organizations that they would consent to the filing.

7. On May 6, 2022, 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 May 6, 2022, 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,

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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 612 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
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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2022, 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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4895-8854-9150.2 / 116112-1000

Exhibit A

NO. 22-50145

In the United States Court of Appeals for the Fifth Circuit

RESTAURANT LAW CENTER; TEXAS RESTAURANT ASSOCIATION,
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v.

UNITED STATES DEPARTMENT OF LABOR; HONORABLE MARTIN J. WALSH, SECRETARY OF THE U.S. DEPARTMENT OF LABOR; JESSICA LOOMAN, ACTING ADMINISTRATOR OF THE DEPARTMENT OF LABOR'S WAGE AND HOUR DIVISION, IN HER OFFICIAL CAPACITY,
Defendants-Appellees

On Appeal from the United States District Court for the Western District of Texas, Austin Division, The Honorable Robert Pittman, District Court Judge
Civil Action No. 1:21-cv-1106-RP

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

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NO. 22-50145

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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 Honorable Martin J. Walsh, Secretary of the U.S. Department of Labor Jessica Looman, acting administrator of the Department of Labor's Wage and Hour Division, in her official capacity	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

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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.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

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The American Gaming Association represents the gaming industry to promote and advocate for modern gaming operations. The American Gaming Association supports the policy priorities of its members on a number of federal, state, and tribal

regulatory and legislative issues. The membership of the American Gaming Association includes commercial and tribal casino operators, domestic gaming suppliers and other stakeholders in the gaming industry.

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 the minimum wage, and industry data shows tipped employees receive tips that far exceed minimum wage.

Section 6 of the Fair Labor Standards Act ("FLSA") requires employers to pay their employees a general minimum wage, currently $7.25 per hour. 29 U.S.C. § 206(a)(1)(c). In 1966, Congress amended the FLSA to allow employers to pay "tipped employees"[1] a cash wage less than the general minimum wage (currently at least $2.13) so long as the tips received by such employees make up the difference between the minimum cash wage ($2.13) and the general minimum wage ($7.25). 29 U.S.C. § 203(m). This is known as the FLSA's "tip credit" provision. *Montano v. Montrose Rest. Assocs., Inc.*, 800 F.3d 186, 188 (5th Cir. 2015).

The principal concern underlying the FLSA's tip credit provision is that tipped employees make sufficient tips from the work they perform to ensure they receive at least the general minimum wage—$7.25—for each hour worked. The Department of Labor's ("Department" or "DOL") October 2021 Final Rule, however, goes far beyond merely enforcing the tip credit provision in the statute. Rather, the Department purports, through the Final Rule, to protect tipped employees from "abuse" of the tip credit. Tip Regulations Under the Fair Labor Standards Act

[1] The FLSA defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 29 U.S.C. § 203(t).

(FLSA); Partial Withdrawal ("Final Rule" or "80/20 Rule"), 86 Fed. Reg. 60114-01, 60134 (providing that "bright-line quantitative limits" on "non-tipped, directly 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 Department's proposed solution exceeds its rule making authority and creates a panoply of additional, unintended consequences.

Tipped workers nationally earn an average hourly wage ($14.32) that 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 earned by their 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 not only receive pay exceeding that of their non-tipped co-workers but

also far exceeding the minimum wage.

With the misguided aim of protecting a population of employees from "abuse" of the tip credit, the Department has imposed its own view of what specific duties certain occupations should include or exclude and seeks to dictate how and when employees in those occupations may perform those duties. In doing so, the Department exceeds its rulemaking authority while putting in place an onerous, if not impossible, regulatory regime.

B. Compliance with the final rule is practically impossible.

The Final Rule adopted by the Department mandating that businesses comply with a set of regulatory requirements ill-suited to the realities of the industries they seek to regulate will result in significant litigation and compliance costs as the Final Rule is so vague and ambiguous that compliance is practically impossible. To even approach compliance with the Final Rule would require businesses to adopt (or invent) impractical and burdensome employee-monitoring systems that would come at 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 how to categorize various tasks tipped employees perform.

The Final Rule requires employers to sort tipped employees' duties into one of three 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 at the general minimum wage, an employer must determine which tasks fall into which of these categories.

Any time spent in the category of unrelated work must be compensated at full minimum wage (i.e., no tip credit may be taken). 29 C.F.R. § 531.56(f)(5). Time spent on "directly supporting" work may be paid at a tip-credit rate, but only if the work is not performed for a "substantial amount of time," defined as either: (1) more than 30 continuous minutes; or (2) more than 20% of the "hours worked during the employee's workweek." *Id.* § 531.56(f)(3), (4). All time spent in tip-producing work may be paid at a tip-credit rate. *Id.* § 531.56(f)(2). The Final Rule, however, provides employers often conflicting guidance on how to categorize the myriad tasks tipped employees perform leaving employers to guess as to their classification.

For example, the Final Rule inconsistently provides that some tasks are tip-producing for some employees, but the same tasks are directly supporting for others. If a busser clears a table and replaces table linens, that is considered tip-producing work. 29 C.F.R. § 531.65(f)(2)(ii). But if a server clears a table to prepare for the next guest, that is deemed directly supporting work. *Id.* § 531.65(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. Final Rule, 86 Fed. Reg. at 60129.[2] But if a server merely checks a restroom to ensure it is tidy, it is unrelated work. *Id.* at 60131.

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—an ambiguous, unworkable concept. For example, the Department posits that "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 potentially 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.[3] Has the

[2] 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).

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

bartender performed tip-producing work or directly supporting work in that instance?

The Preamble notes that "[t]he determination is [based on] whether the tipped employee can receive tips because they are performing that task for a customer." *Id.* That explanation is entirely 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 or will serve in the 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 unrealistic and conceptually impossible.

Other examples of ambiguity engendered by the regulations abound. A server who cuts a lemon wedge on the fly to respond to a customer's request is engaged in tip-producing work under the regulation's guidance. Final Rule, 86 Fed. Reg. at 60128. But what if the server takes a few extra seconds 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 urgency of the

need?

The Department's position on food preparation by tipped employees likewise leaves employers guessing as to how tasks commonly performed by tipped employees should be categorized. 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 has been and continues to be that general food preparation, including salad assembly, is not part of the tipped occupation of a server.") (citing WHD Opinion Letter FLSA-895 (Aug. 8, 1979)). However, the Department 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 to a pre-made dessert, in addition to ice cream, chocolate sauce and whipped cream? Minute and seemingly immaterial variations on the Department's examples demonstrate the

impossibility of categorization of myriad common 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 pre-cooked 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? Notably, many restaurant members of the Hospitality Organizations utilize a system whereby salads are assembled by a server pursuant to requests of the customers. While cooks in the kitchen busily prepare meals, the servers go to a salad bar where the pre-chopped lettuce and other ingredients prepared by the cooks, like croutons, tomatoes, eggs, and dressing, are added. The server assembles the custom-ordered salad pursuant to the customer's preferences. This method encourages efficiency but raises questions on an order-to-order basis about whether the server's work has crossed the line into "food preparation" such that it should be paid at minimum wage. This will undoubtedly lead to litigation over whether, say, placing croutons on a salad strips the employer of the ability to use the tip credit.

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

- Cleaning up a drink spilled by a customer after they have paid their bill and left a tip, but remain at the table;
- Helping deliver food/drink or otherwise attending to customer needs at a coworker's table;
- 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 for any needs that may arise.

Employers in other industries with traditionally tipped employees face a variety of tasks that also 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, heavy traffic, or traffic accident;
- A delivery driver waiting for a customer to answer a door;
- Refueling a delivery vehicle while enroute to a delivery, or between deliveries;
- Checking with the home office for pickup or delivery instructions;
- Scheduling and rescheduling spa customer appointments;
- Processing and maintaining spa treatment and billing transaction records;
- Restocking towels, linens, 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 or damage to customer vehicles;
- A housekeeper tidying the hallway immediately outside a guest room he is cleaning;
- A hotel bell captain arranging for shipment of a guest's forgotten items.

These vague and ambiguous classifications make it impracticable, if not impossible, for members of the hospitality industry to comply. Not only does the Final Rule require employees to individually categorize tasks that often require only a few seconds to complete, but it likewise requires employees and employers to predict the treatment of those tasks under the Final Rule.

Rather than allow employees the latitude to perform tasks that enhance their guests' overall dining experience (i.e., generate tips), the Final Rule places employers on edge as they struggle to come up with procedures that allow for the proper classification of time while also maintaining an efficient and well-run operation. The end result will be significant costs to the employer in the form of litigation and burdensome and perpetually imperfect compliance measures.

2. The 80/20 Rule imposes impractical record-keeping obligations and enormous compliance costs.

Even if employers could discern through the Final Rule which tasks fall into which category, tracking the time employees spend on the myriad tasks they perform over the course of a shift is entirely 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, down to the second, presumably through implementation of specialized timekeeping and tracking systems. Ultimately, employees must spend several minutes to capture the few seconds each task takes.

One need look no further than the Department's own examples to 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)(3)(ii).

- Each car that a valet moves around a parking lot or garage 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)(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 "food preparation," which is deemed unrelated work. *See* 86 Fed. Reg. at 60128; 29 C.F.R. § 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)(5)(ii).
- Each moment bellhops spend intermittently 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)(2)(ii); *id.* § 531.56(f)(3)(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? Is the time to be allocated to two different categories? At what point in the guest departure continuum is the employer to "flip the switch"?

The Department "believes" that 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 not possible within the realities of the service environment. The Department's belief further 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 the 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 that no practical means exist (and may never exist) to track and

record time that 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 quickly pivot back and forth between guest service and directly supporting tasks depending on customer volume and flow (and myriad other erratic factors), makes tracking and classifying all such work nearly impossible. Thus, even large businesses with ample resources cannot practically hope to comply with the regulations.

To the extent practical methods for compliance could ever be developed (perhaps in the form of advanced timekeeping and/or work-monitoring technologies that do not exist today), such tools will undoubtedly be too costly for small restaurant and hospitality businesses to adopt, presenting yet another threat to their survival. Indeed, a number of these small restaurants still struggle to survive given the lack of federal aid as part of the Restaurant Revitalization Fund in the most recent spending bills passed by Congress and signed into law. *See* Aallayah Wright, *Surviving Small Restaurants Push Forward as Pandemic Ebbs*, STATELINE, (Mar. 22, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/03/22/surviving-small-restaurants-push-forward-as-pandemic-ebbs. Roughly 2/3 of the individuals that applied for the Restaurant Revitalization Fund have not received any funding, and more than 80% of these individuals are reportedly "on the verge of permanent closure." *Id.* Adding yet another cost to comply with the Final Rule

would likely deal a fatal blow to these already-struggling businesses.

In short, the Final Rule and its inherent recordkeeping obligations are so burdensome they render the tip credit unworkable, which contravenes Congress's intent when it made the tip-credit available in the FLSA. Employers seeking continued use of the tip credit are now forced to transform occupations that have traditionally been deemed tipped into new positions devoted to performing "directly supporting" work, an impossibility for some like full service diners, at a time when many employers are struggling to find enough workers to staff their businesses under traditional labor models. Moreover, the Final Rule disproportionately affects small employers that cannot afford to hire dedicated employees to perform the "directly supporting" work. This will have devastating consequences for a critical segment of the U.S. economy and our communities.[4]

[4] According to U.S. Small Business Administration, small businesses accounted for 64% of overall employment in the food and services industry, 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://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/29105857/Small-Business-Facts-Restaurants-And-Bars-Staggered-By-Pandemic.pdf (last accessed May 6, 2022). "Restaurants, bars, and other small businesses offering on-site food and beverages are the core of our neighborhoods and propel economic activity on our Main Streets." Press Release, *Recovery for the Smallest Restaurants and Bars: Administrator Guzman Announces Latest Application Data Results for the Restaurant Revitalization Fund*, U.S. Small Business Administration (May 12, 2021), available at: https://www.sba.gov/article/2021/may/12/recovery-smallest-restaurants-bars-administrator-guzman-announces-latest-application-data-results.

3. The preamble to the 80/20 Rule takes the position that idle time is "directly supporting" work, which creates more compliance issues.

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

> In this circumstance [of "down time"], where the employee is not providing service to customers for which the tipped employee receives tips, that 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 flies in the face of settled principles about idle time in the course of an occupation.

Perhaps the most direct source for comparison 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 (29 C.F.R. § 783.31), the DOL explained "an employee will ordinarily be regarded as 'employed as a seaman' if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, ***provided he performs no substantial work of a different character***." (emphasis added). The DOL has further stated that "[f]or enforcement purposes, the Administrator's position is that such

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.

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 within an occupation. Regardless, the primary point to be made here is how idle time fits into this equation.

In *McLaughlin v. Harbor Cruises LLC*, 880 F. Supp. 2d 179 (D. Mass. 2012), a group of deckhands and galley attendants on a harbor cruise line challenged the employer's reliance on the seaman exemption. In so doing, they insisted that any idle time should fall into the 20% side of the equation. The court rejected the notion that only active work could "count" as part of the 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) ("That inactive duty may be duty nonetheless is not a new principal invented for application to this Act.")).

By taking the position that idle time, like directly supporting work, is not truly part of a tipped employee's occupation, the DOL ignores this established legal principle painting employers into an impossible corner. The Final Rule states that, if business is slow, an employer cannot ask employees to spend too much time preparing for the next rush of business. But DOL also contends that employees cannot merely stand and wait. Such a position is untethered to the real world, and finds no support in the statute.

The Final Rule provides no flexibility for those in the hospitality industry who cannot predict with certainty the idle time caused by customer traffic patterns over which employers have no control (*e.g.*, higher than average crowds following late-scheduled playoff games, lower than average crowds due to severe weather, etc.).

The arbitrary and capricious nature of this rule is even more apparent when considering tipped employees in occupations that have significant idle time built into their duties, such as table game dealers in a casino. 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 also must 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 that 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 idly waiting for customers to be seated. This does not, however, mean that all customer interaction comes to a screeching halt, as customers approach idle dealers to ask questions about the casino's amenities. Moreover, dealers must remain at the ready for the next wave of business (such as when a tour bus arrives). But the DOL's view on idle time would require casino operators to either force dealers to take fewer breaks (which benefits no one) or pay dealers full minimum wage to perform no work at all. Neither option makes sense nor is required by statute. In short, the DOL's unsupportable view of idle time will make the use of the tip credit unworkable, leading to less lucrative minimum wage paying positions. *Cf.* 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/ (noting tips could range from $30,000 to $40,000 a year).

In short, members of the hospitality industry simply cannot maintain accurate records of intermittent and fleeting moments of idle time. The entire regulatory scheme created by the Final Rule will force members of the hospitality industry to

abandon the tip credit and create more lower-paying non-tipped jobs—undermining the purposes of the FLSA.

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 the work of a restaurant server shows the impracticality associated with not only classifying the time spent but also the impossibility associated with tracking time for purposes of complying 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 at the ballpark 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 their 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 being 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

Time	Activity
4:03:30 PM	Kitchen serves up ice cream next to sundae bar in the serving area with already prepared fixings standing by for the server to assemble. Kitchen makes server aware of ice cream.
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 that the server is coming back.
4:07:00 PM	Server assesses the situation in the restroom and realizes that the reported vomit does not exist. Server notices, however, that there are paper towels on the floor. Server picks up the paper towels and places them in the waste receptacle.
4:07:30 PM	Server notices that 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 the drink stand to prepare drinks for party of five. At the drink stand, the server notices a spill and wipes it up with a towel.

Time	Activity
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.
4:13:00 PM	On the way to the POS, party of two informs server that they have completed the ice cream. The father asks the server if she can arrange for the staff to sing a birthday song for 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 that 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 that the staff is ready to do 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 a mountain of tasks that require classification and meticulous timekeeping to comply with the Final Rule. Exactly when and how is a server supposed to take the time to classify the tasks as tip-producing, directly supporting or non-tip producing, and record the

corresponding minutes or seconds devoted to each task?

Although a large chain restaurant would undoubtedly struggle trying to comply with the 80/20 Rule, a small business would find compliance nearly impossible. 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. Moreover, 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 impossible compliance challenges.

D. The 80/20 Rule fails to provide sufficient 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 of 2021, the number of online transactions that included a tip rose to 84%. As stated in the Business Insider:

> Mobile orders drove Starbucks' recovery and grew to an "all-time high" in 2021, making up over 25% of all orders, and at Chipotle they now make up nearly half of all orders. Even restaurants that traditionally concentrated more on dine-in business have emphasized online orders, and Cheesecake Factory doubled them in 2021 to $3 million in sales per restaurant.

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 been forced 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 of tipped employees, or how employers are supposed to divvy up their work activities into the three categories. 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 around in the dark for answers, and invites litigation to fill the void.

III.
CONCLUSION

The FLSA permits taking of a tip credit for employees engaged in occupations in which they customarily and regularly receive tips, and the FLSA simply cannot be read to require employers to splinter a job into myriad sub-tasks and meticulously record the fleeting seconds and minutes devoted to each task. The Final Rule's attempt to categorize some ill-defined aspects of an occupation in this novel manner will cause substantial costs to the hospitality industry and create an onslaught of litigation over insignificant details like whether an employee sliced one too many lemons or placed chocolate syrup on the ice cream on the brownie. The net result will be a decrease in often higher-paying jobs for tipped employees, and an increase in lower paying minimum wage jobs. The Final Rule finds no support in the statute, and imposes irreparable harm on business and employees alike. The Court should

reverse the district court and remand with instructions that the district court enter a preliminary injunction enjoining the Department and its pertinent officials from enforcing the Final Rule pending final judgment in this case.

Respectfully submitted,

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I hereby certify that on May 16, 2022, 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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