IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RESTAURANT LAW CENTER, a non-profit District of Columbia corporation; and TEXAS RESTAURANT ASSOCIATION, a nonprofit Texas corporation, Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, Secretary of the United States Department of Labor, in his official capacity; and BRYAN JARRETT, Acting Administrator of the Department of Labor's Wage and Hour Division, in his official capacity, Defendants.	Civil Action No. 18cv567

BRIEF AMICUS CURIAE OF THE [Arkansas Hospitality Association, Missouri Restaurant Association]

IN SUPPORT OF THE PLAINTIFFS

I. INTRODUCTION

The Fair Labor Standards Act (FLSA) allows employers to pay a minimum cash wage of $2.13 per hour to employees in tipped occupations as long as the those employee's earned tips make up the difference between the $2.13 hourly cash wage and the current federal minimum wage. 29 U.S.C. § 203(m); 29 U.S.C. § 206(a)(1). The difference between the minimum wage for tipped employees and the statutory minimum wage rate is called the "tip credit." *See* U.S. DEPT. OF LABOR FIELD OPERATIONS HANDBOOK, § 30d00(d), available at http://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

In 1988 the United States Department of Labor (DOL) issued a section in its Field Operating Handbook (FOH) that stated regulations permit the taking of a tip credit for time spent performing duties related to an employee's tipped occupation that, by themselves, are not directed towards producing tips. FOH § 30d00(e) (Dec. 9, 1988). Then in 2012 the DOL revised this section of the FOH, replacing section 30d00(e) with a new provision, located in section 30d00(f). FOH § 30d00(f) (Dec. 12, 2016). This change was not disclosed publicly until July of 2016, when the DOL mentioned this change in a footnote to an *amicus curiae* brief. *See* Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants, at 12–13 n.4, *Marsh v. J. Alexander's LLC*, Nos. 15-15791 *et al.* (9th Cir. Jul. 13, 2016).

The fundamental difference between the 1988 and 2012 version of the FOH is that in the 1988 version tipped employees were allowed to spend up to 20% of their working time engaged in maintenance activities, such as rolling silverware or refilling condiment containers, without the loss of the tip credit. Compare that to the 2012 version that expressly declares that maintenance work does not count toward the 20% threshold, and instead is *per se* a separate occupation regardless of the time spent, and as such the time spent is always subject to the full minimum wage. FOH § 30d00(f) (Dec. 12, 2016).

II. INTEREST OF THE AMICUS CURIAE

The Arkansas Hospitality Association (AHA) is a non-profit organization, headquartered in Little Rock, Arkansas, and represents hundreds of members throughout the state of Arkansas. The AHA is the official voice of the restaurant, lodging, and tourism industries in Arkansas. The Missouri Restaurant Association (MRA) is a trade organization headquarter in St. Louis, Missouri, with five local chapters and hundreds of members throughout the state of Missouri. The MRA provides an effective government relations program for its members so that their interests are protected and voices are heard by state law makers. As the voices of the Arkansas and Missouri hospitality industry, the AHA and MRA (the "Amicus") represents the industry before their respective state General Assemblies, promote public awareness of the industry, and champions their member's contributions to their state economies.

Many, if not all, of the Amicus members employ tipped employees who perform varying amounts of maintenance activities, or side work that subjects them to claims under the DOL's "20% Rule," which would disallow the use of a tip credit for any time spent performing such duties by these employees. To that end, the DOL's "20% Rule" submits the Amicus members to continued liability and requires employers to essentially become time-study professional who not only account for the hours their employees work, but now will have to analyze each task a tipped employee performs and how much time is spent on those tasks.

The Amicus have a legitimate interest in the outcome of this proceeding as the majority of its members employ tipped employees. In bypassing the traditional regulatory practice of providing notice and soliciting comments, the DOL has on its own transformed the tip credit provisions of the FLSA, through its surreptitious change to the FOH, to require an hour-by-hour, minute-by-minute approach to the tip credit. What's more, the FOH is an internal guidance document that itself disclaims any basis that it is a source of interpretative policy. Yet the DOL

has repeatedly asked courts to accept this internal guidance as the law. If the "20% Rule" is allowed continued deference by courts, it threatens to expose thousands of restaurants, hotels, and others in the hospitality industry to endless litigation and liability because of an unworkable, unreasonable, and unlawful bypassing of regulatory authority on the part of the DOL.

III. BACKGROUND

A. THE STATUTORY TEXT.

Section 6(a) of the FLSA requires employers to pay their covered employees a minimum wage of at least $7.25 per hour. 29 U.S.C. § 206(a). Section 3(m), which defines the term "[w]age" under the statute, allows an employer to satisfy its minimum wage obligation to a "tipped employee" in part by taking a "credit" toward the minimum wage based on tips an employee receives. *Id.* § 203(m). Section 3(t) defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips."[1] *Id.* § 203(t). Section 3(m) requires an employer who elects to take the tip credit to pay the employee a cash wage of at least $2.13 per hour, and then the law defines the employee's tips as constituting a "wage" that counts toward the minimum wage, up to a point where the cash wage plus the employee's tips equal the minimum wage. *Id.* § 203(m). If the employee does not earn sufficient tips to bring his or her earnings up to the full minimum wage, then the employer must pay additional wages to make up the difference. *Id.*

Before 1966, the FLSA generally did not apply to employees in restaurants and hotels. *See* S. Rep. No. 89-1487, at 10 (Aug. 23, 1966); H. Rep. No. 89-1366, at 11, 14-15, 17-19 (Mar. 29, 1966); *see also Richardson v. Mountain Range Rests., Inc.*, 2015 WL 1279237, at *7 (D. Ariz. Mar. 20, 2015). In 1966, as part of the legislative compromise struck in extending the

[1] The DOL's regulations define "customarily and regularly" as a "frequency which must be greater than occasional, but which may be less than constant." 29 C.F.R. § 531.57.

coverage of the FLSA to these industries, Congress enacted the tip credit provision, modifying section 3(m) and adding section 3(t) to allow part of the minimum wage to be paid based on the tips received by employees. *Id*. This change accommodated, in part, the long-standing practice in these industries whereby workers received most or even all of their income via customer tips. Pub. L. No. 89-601, §§ 101(a), 201(a) (1966). Notably, when Congress created the tip credit, "legislative history clearly demonstrates that Congress's intent was not to disrupt the restaurant industry's 'existing practices with regard to tips.'" *Richardson*, 2015 WL 1279237 at *6 (quoting S. Rep. No. 89-1487).

B. THE DOL'S REGULATIONS.

After the enactment of the statutory tip credit, the DOL issued regulations addressing tipped employment, codified at 29 C.F.R. §§ 531.50–.60. Those regulations, consistent with the statute, provide that the tip credit applies based on the "occupation" of the employee. *See, e.g.*, 29 C.F.R. §§ 531.51, 531.56(a), 531.57. Moreover, like the text of the FLSA itself, the regulations do not contain any distinction between duties that are "tip-producing" and "non-tip-producing," let alone impose a 20% limitation. Indeed, the regulations explain, consistent with the text of the FLSA, that if certain positions, such as a waiter, always receive at least $30 a month in tips, they will qualify for the tip credit. 29 C.F.R. § 531.57. The regulation contrasts that circumstance with an employee who only occasionally receives tips, such as an employee who receives tips only at Christmas or New Year's, "when customers may be more generous than usual." *Id.*

The regulations also address employees who may be employed in two different occupations. *See* 29 C.F.R. § 531.56(e). Under this regulation, known as the "dual jobs" regulation, when an employee works in two separate occupations for the same employer, one tipped and one not tipped, the employer may take a tip credit only for the tipped occupation. The DOL uses examples in the

regulation to illustrate that there is a significant difference between an employee in two distinct, non-overlapping jobs and an employee who works in a single tipped job but whose duties may also include both activities that directly generate tips and activities that do not:

> In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least $30 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. ***Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.***

29 C.F.R. § 531.56(e) (emphasis added).

C. The Field Operations Handbook's "20% Rule."

The FOH is a guide used internally by the DOL for its investigations. Notably, the FOH was historically available only through a FOIA request (or viewing at a DOL office) and now appears on the DOL's website with the explicit disclaimer that it "is not used as a device for establishing interpretive policy." *See* http://www.dol.gov/whd/FOH/ (last visited Aug. 10, 2018); *Richardson*, 2015 WL 1279237 at *8 (noting that FOH is not a proper source of interpretive guidance because the handbook itself says it should not be used as a device for establishing interpretative policy) (citing *Probert v. Family Centered Servs. of Alaska, Inc.*, 651 F.3d 1007, 1012 (9th Cir. 2011); *see also Murray v. Stuckey's Inc.*, 50 F.3d 564, 569 n.5 (8th Cir. 1995).

In 1988, the DOL issued a section in its FOH that states as follows:

> Reg. 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (*i.e.*, maintenance and preparatory or closing activities). For example, a waiter/waitress, who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server

> (waiter/waitress) and are generally assigned to the servers. ***However, where the facts indicate*** that specific employees are routinely assigned to maintenance, or ***that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.***

FOH § 30d00(e) (Dec. 9, 1988) (emphases added).

In or around June 2012, the DOL substantially revised this portion of the FOH, replacing the former section 30d00(e) with a new provision, located as section 30d00(f):

> 1) When an individual is employed in a tipped occupation and a non-tipped occupation—for example, as a server and a janitor (dual jobs)—the tip credit is available only for the hours spent in the tipped occupation, provided such employee customarily and regularly receives more than $30 a month in tips. *See* 29 CFR 531.56(e).
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> 2) 29 CFR 531.56(e) permits the employer to take a tip credit for time spent in duties related to the tipped occupation of an employee, even though such duties are not by themselves directed toward producing tips, provided such related duties are incidental to the regular duties of the tipped employee and are generally assigned to the tipped employee. For example, duties related to the tipped occupation may include a server who does preparatory or closing activities, rolls silverware and fills salt and pepper shakers while the restaurant is open, cleans and sets tables, makes coffee, and occasionally washed dishes or glasses.
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> 3) However, where the facts indicate that tipped employees spend a substantial amount of time (*i.e.*, in excess of 20 percent of the hours worked in the tipped occupation in the workweek) performing such related duties, no tip credit may be taken for the time spent in those du-ties. All related duties count toward the 20 percent tolerance.
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> 4) ***Likewise, an employer may not take a tip credit for the time that a tipped employee spends on work that is not related to the tipped occupation. For example, maintenance work (*****e.g.,*** ***cleaning bathrooms and washing windows) are not related to the tipped occupation of a server; such jobs are non-tipped occupations. In this case, the employee is effectively employed in dual jobs.***

FOH § 30d00(f) (Dec. 12, 2016) (emphasis added). The most fundamental substantive difference between the 1988 version and the 2012 version is that the 1988 version allowed tipped employees to spend up to 20% of their working time engaged in maintenance activity without loss of the tip credit. The 2012 version, by contrast, expressly declares that maintenance work does not count toward the

20% threshold, and instead is *per se* a separate occupation regardless of the time spent, and that such time is always subject to the full minimum wage.

In April of 2017, three days before the Ninth Circuit heard oral argument in *Marsh v. J. Alexander's LLC* on the issue of the validity of the "20% Rule," the DOL submitted a letter to the Ninth Circuit stating, *inter alia*, that "[t]he Department wishes to clarify that there is no categorical rule that all cleaning duties are unrelated to the job of a server. Rather, . . . the inquiry into whether a particular task is related to the job of server is often fact-specific." Letter at 1 (citations omitted), *Marsh v. J. Alexander's LLC*, Nos. 16-15003 *et al.* (9th Cir. Apr. 17, 2017). In essence, the 2017 letter brief from the DOL walked back significantly the 2012 broad exclusion of maintenance work from employment subject to the tip credit.

IV. ARGUMENT

A. THE "20% RULE" IS ARBITRARY, CAPRICIOUS, UNWORTHY OF DEFERENCE, AND CONTRARY TO LAW.

The plain language of the FLSA explicitly provides that an employer must pay its employees a minimum wage, and may take a tip credit when calculating the wages of employees in a tipped occupation. Further, the FOH, under which the DOL advances its "20% Rule," is arbitrary, capricious, unworthy of deference, and contrary to law.

If an employee in an occupation customarily and regularly receives more than $30 a month in tips, then the employer may take the tip credit. 29 U.S.C. §§ 203(m), 203(t). So long as the employer pays at least the required minimum cash wage, and the employee's cash wages plus tips equal or exceed minimum wage over the course of a workweek, the employer has satisfied its minimum wage obligations under the FLSA. *Id*. The statute draws no distinction between duties within the occupation that are tip-producing or non-tip-producing, nor does it impose any quantitative limitations on how workers allocate their time performing various duties consistent with their occupation. Moreover, there is not a single sentence in the legislative history of section

3(m) or 3(t) that mentions or supports any distinction between duties that directly generate tips and those that may not. *See* S. Rep. No. 89-1487, at 10 (1966); H. Rep. No. 89-1366 at 10-11, 19, 36-37 (1966).

The statutory focus is on the wages, the occupation, and the tips. The "20% Rule," by ignoring the statutory language and instead basing the availability of the tip credit on whether specific duties within a tipped occupation produce or do not produce tips, is contrary to the FLSA. Because the "20% Rule" runs counter to the FLSA, it is invalid. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984).

i. The "Dual Jobs" Regulation is Invalid and Does not Warrant *Chevron* Deference.

The "dual jobs" regulation, which is the regulation that the FOH purports to interpret in section 30d00(f), is not worthy of *Chevron* deference because it was not subject to notice and comment. This is because 29 C.F.R. § 531.56(e) was not in the proposed rule, but instead appeared for the first time in the final rule, and therefore was never subject to notice or comment prior to its enactment. *See* 32 Fed. Reg. 13,575 (Sept. 28, 1967) (noting that as a result of comments received by the DOL, "a new § 531.56(e) is added"); *compare with* Fed. Reg. 222 (Jan. 10, 1967) (proposed rule, not containing § 531.56(e)). As such, any interpretation of that regulation is also unworthy of deference.

Nor is the dual jobs regulation a logical outgrowth of the proposed rule such that it can still satisfy the notice-and-comment requirement and thereby qualify for *Chevron* deference. A final rule is a logical outgrowth only if affected parties should have anticipated that the relevant modification was possible. *Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986) (citing *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985)); *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (citations omitted). A final rule that "deviates too sharply" from the proposed rule deprives affected parties of the "opportunity to respond to the proposal" before its

implementation, and thus will not constitute a logical outgrowth of the proposed rule. *Nat'l Black Media Coal.,* 791 F.2d at 1022.

As courts have long recognized, "the 'logical outgrowth' doctrine does not extend to a final rule that is a brand new rule," as the dual jobs regulation is here, "since 'something is not a logical outgrowth of nothing.'" *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (holding that a proposed rule that set a "maximum" air velocity cap was not a logical outgrowth of a proposed rule that set forth only a "minimum"); *see also Kooritzky v. Reich*, 17 F.3d 1509, 1512, 1514 (D.C. Cir. 1994) (holding that the DOL improperly promulgated a rule without notice and comment where the final rule contained "a significant new provision not mentioned in the notice of proposed rulemaking"). A final rule is also not a logical outgrowth of a proposed rule where the promulgating agency's solicitation for comments is too vague to put interested parties on notice of the agency's contemplated action. *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 170 (2d Cir. 2013) ("Even if it was the FCC's intent to solicit comment on a standstill rule, 'an unexpressed intention cannot convert a final rule into a logical outgrowth that the public should have anticipated.'") (internal citation omitted); *Int'l Union, United Mine Workers of Am.*, 407 F.3d at 1260 (logical outgrowth doctrine does not apply "where interested parties would have to 'divine [the Agency's] unspoken thoughts'") (internal citation omitted).

Here, the final rule was an entirely new species. Section 531.56(e) did not appear in the proposed rule, nor was there any indication in the proposal that the DOL was considering such language. *See* 32 Fed. Reg. at 222. The section to which the DOL appended the dual jobs regulation—29 C.F.R. § 531.56—addresses only the statute's "$20 a month in tips" (now $30) requirement, which has nothing whatsoever to do with the subject matter of the dual jobs regulation. As noted, the final rule explicitly refers to § 531.56(e) as a "new" section that the DOL "added" to

the final rule. 32 Fed. Reg. at 13,575; *see Int'l Union, United Mine Workers of Am.*, 407 F.3d at 1259 ("brand new rule" not a logical outgrowth of proposed rule).

Moreover, as the Supreme Court recently emphasized, "[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Otherwise, "its action is arbitrary and capricious and so cannot carry the force of law." *Id*. Here, the final rule gives no explanation at all for why the DOL chose to add the dual jobs regulation. There is no indication, for example, that the DOL has ever encountered the main example used to illustrate the dual jobs concept—"where a maintenance man in a hotel also serves as a waiter"—even a single time in the entire history of enforcing the FLSA.

Further highlighting the fact that the "20% Rule" is arbitrary and capricious are the inconsistencies between the DOL's position and the legislative history of the 1974 legislative amendments. Congress spoke to the dual jobs issue in Senate Report No. 93-690: "In establishments where the employee performs a variety of different jobs, the employee's status as one who 'customarily and regularly receives tips' will be determined on the basis of the employee's activities over the entire workweek." S. Rep. No. 93-690, at 43 (Feb. 22, 1974). Congress thus contemplated an overall assessment of the employee's status on a week-by-week basis, not a subdivision of a single workweek into minutes of tipped employment and minutes of non-tipped employment. Therefore, the "20% Rule" is contrary to law and cannot stand. *Chevron*, 467 U.S. at 842.

Accordingly, the regulation does not warrant *Chevron* deference.

ii. The FOH is Unworthy of Deference.

The FOH does not warrant heightened deference under *Auer*, in which the Supreme Court held that courts may defer to an agency's interpretation of its own ambiguous regulations unless the interpretation is plainly erroneous or inconsistent with the regulation. *See Christopher v. SmithKline*

Beecham Corp., 567 U.S. 142, 155 (2012); *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000). *Auer* deference presupposes that the regulation to which the agency is interpreting itself is entitled to *Chevron* deference. Where the regulation subject to further interpretation by the agency is not itself entitled to deference under *Chevron* (*e.g.*, if the regulation was not subject to notice and comment), then an agency's interpretation of that regulation would be afforded no deference. Otherwise, of course, an agency could, under the guise of *Auer*, demand *Chevron* deference to an interpretation of a regulation that itself is not entitled to *Chevron* deference, thereby creating a *de facto* regulation through an interpretation. *See Christensen*, 529 U.S. at 588 ("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.") *See also Decker v. N.W. Enviro. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J. dissenting) ("*Auer* deference encourages agencies to be vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and comment procedures . . . . *Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power"); *Boose v. Tri-Cnty. Metro. Transp. Dist. Of Ore.*, 587 F.3d 997, 1004 (9th Cir. 2009) ("We will not under the guise of deference, engage in an end-run around notice-and-comment rulemaking. Until the Secretary formally promulgates the proposed regulations [the defendant] is not required to follow them").

The FOH was not subject to notice and comment. Moreover, as discussed above, the "dual jobs" regulation—which the FOH allegedly interpreted—is not subject to *Chevron* deference because it also was not subject to notice and comment. Since the regulation that the FOH purportedly addresses is also not entitled to deference, the FOH cannot be accorded deference.

Even if the "dual jobs" regulation had been subject to notice and comment, however, and therefore subject to deference under *Chevron*, the DOL's interpretation of that regulation in its

FOH is not entitled to any deference because the "20% Rule" is inconsistent with the unambiguous text of the FLSA and its regulations. It is well settled that deference is not owed to an agency interpretation of a regulation when the interpretation is plainly erroneous or inconsistent with the regulation. *Christopher*, 567 U.S. at 155. Here, as detailed above, the "20% Rule" is not contained in the statute, the legislative history, or regulations. Indeed, the concept of dividing the duties of servers into two groups—duties that directly generate tips and those that do not—and then aggregating the allegedly non-tipped duties and determining whether they exceed 20% of the total duties, is in direct conflict with the regulation. *See Cumbie v. Woody Woo, Inc.*, 596 F.3d 577, 580 (9th Cir. 2010) (rejecting the DOL's interpretation because it could not be reconciled with the plain text of FLSA section 3(m)).

The dual jobs regulation clearly distinguishes between a worker engaged in two occupations—one tipped and the other non-tipped—and a worker engaged in a single occupation that involves both tip-producing duties and duties that do not necessarily produce tips. The regulation expressly provides that servers engaging in activities that do not directly lead to tips are still "tipped employees" for whom a tip credit can be taken and are not engaged in a dual occupation. The FOH turns this on its head.

Indeed, other courts have already specifically declined to defer to the FOH. In *Probert v. Family Centered Services of Alaska, Inc.*, 651 F.3d 1007 (9th Cir. 2011), the Court considered and rejected the argument that an interpretation contained in the FOH should receive particular weight: "[It]does not appear to us that the FOH is a proper source of interpretative guidance. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). The handbook itself says that it 'is not used as a device for establishing interpretative policy.'" *Probert*, 651 F.3d at 1012. Even now, the FOH contains the identical quoted language. *See* www.dol.gov/whd/FOH/index.htm (last visited Aug. 10,

2018). Rather, the FOH is merely a manual the DOL uses as an internal reference for Wage and Hour Division investigators while performing their investigations.

The court in *Chavez v. T&B Mgmt, LLC*, 2017 WL 2275013 (M.D.N.C. May 24, 2017), took note of this language, remarking that it, and the disclaimer language included in Fact Sheet #15, "would be strange caveats to add to documents intended to be interpretative guidance." *Chavez*, 2017 WL 2275013 at *6 (finding that the FOH and Fact Sheet #15 are not the DOL's official interpretive guidance on the matter and are not entitled to *Auer* deference). The court further noted that "[o]nly one court has expressly taken note of the FOH's disclaiming language and deferred to the twenty percent rule nevertheless[.]" *Id.* at *6 (citing *Irvine v. Destination Wild Dunes Mgmt., Inc.*, 106 F. Supp. 3d 729, 732 (D.S.C. 2015)).

iii. Even Where the *Auer* Deference Might Otherwise Apply, the Supreme Court has Established that Agencies Forfeit *Auer* Deference when their Positions Waiver.

In *Christopher*, the Supreme Court declined to give deference to the DOL's interpretation of its own regulations regarding the FLSA's outside salesperson overtime and minimum wage exemption because, among other things, the DOL's position had shifted over time. *See Christopher*, 567 U.S. at 155–56 (noting that agency interpretation should be given less deference if it has been inconsistent over time as this demonstrates that the interpretation does not reflect the agency's fair and considered judgment on the issue). This decision is critical to courts' analysis of the DOL's "20% Rule," given the DOL's shifting positions on this issue.

As with the DOL's position reviewed by the Supreme Court in *Christopher*, over the years the DOL has taken shifting and contradictory positions with respect to the "20% Rule." In 1980, the DOL was asked to opine whether the tip credit applies to a server in a restaurant who, as part of her closing duties, cleaned the salad bar, placed condiment crocks in the cooler, cleaned and stocked the waitress station, cleaned and reset the tables (including filling cheese,

salt and pepper shakers), and vacuumed the dining room carpet. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 1980 WL 141336, 1 (Mar. 28, 1980). The DOL stated that the employee would be considered a tipped employee for this period and the tip credit would apply because the employee was not engaged in a dual occupation. *Id*. The DOL noted that there was no "clear dividing line" between the work of the server and the work of another occupation. *Id*. The letter makes no mention of any percentage limitation on tipped versus non-tipped duties or that this would be the appropriate analysis.

In 1985, the DOL issued an opinion letter addressing whether a server who performed 1.5 to 2 hours of prep work prior to opening during a five-hour shift could be paid the tip credit rate for the time spent performing preparatory activities, which amounted to "30%–40%" of the employee's workday. The DOL concluded that because only one employee was assigned to the opening duties, the employee was responsible for prepping the entire restaurant, not just her area, and because the amount of time was 30% to 40% of the entire shift, the tip credit could not be applied. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 1985 WL 12592409 at *2 (Dec. 20, 1985).

In 1988, the DOL, without prior notice to the public or comment, modified the FOH by adding the 20% limitation in what was then section 30d00(e). In providing guidance to internal investigators, the FOH discusses the dual jobs regulation, and explains, consistent with the regulation, that where an employee is engaged in two occupations, one a tipped occupation and one a non-tipped occupation, the tip credit may only apply to the tipped occupation. The FOH, like the regulation, contrasts that situation with one where a worker in a tipped occupation performs duties that are incidental to the occupation, but might not be directly tip-generating. However, without any explanation, analysis, or citation to any authority, the DOL invented a

new requirement in addition to those appearing in the FLSA and its regulations, stating that "where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20%) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties." FOH § 30d00(e) (Dec. 9, 1988). This addendum, and the comparable language currently appearing at section 30d00(f), inserted without notice, comment or explanation, in an internal guidebook to investigators, is the entire basis for a 20% claim.

Acknowledging that the 20% guideline was unworkable and confusing, the DOL expressly withdrew it in a January 16, 2009 Opinion letter. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2009-23 (Jan. 16, 2009). In that letter, the DOL observed that the FOH had created "confusion and in-consistent application" and explained that the 20% limitation does not apply to related duties of a server and that "no limitation shall be placed on the amount of these [related] duties that may be performed, whether or not they involve direct customer service, as long as they are performed contemporaneously with the duties involving direct service to customers or for a reasonable time immediately before or after performing such direct-service duties." *Id.* at 3. FLSA2009-23 further explained that, consistent with the text of the FLSA and the regulation, so long as the duties performed by the employees are part of their tipped occupation, those employees are not engaged in "dual jobs." *Id.* at 1.

The DOL's sub-regulatory guidance morphed yet again when, some six weeks later, and shortly after the Obama administration came into office, the DOL withdrew FLSA2009-23. The DOL stated that, although the acting Wage and Hour Administrator under the Bush administration signed FLSA2009-23 prior to leaving office, it had not been mailed, so it was

being withdrawn for "further consideration." *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2009-36 (Mar. 2, 2009).

Further fueling the confusion, the DOL issued another opinion letter, dated January 15, 2009. In that letter, the DOL concluded that a "barback," who was responsible for "restocking the bar and ensuring that the bar area remains clean and organized" and "clean[ing] empty glasses sitting on the bar, tak[ing] out the trash from behind the bar and clean[ing] the floor of the bar area" was also a "tipped employee" and eligible for the tip credit. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2009-12 (Jan. 15, 2009). This opinion makes no mention of the "20% Rule" and, although the subsequent administration withdrew FLSA2009-23, it did not withdraw this opinion letter issued just one day earlier.

If discrepancies between publicly available documents were not enough, the Secretary of Labor revealed in an *amicus curiae* brief to the Ninth Circuit that the publicly available version of the FOH differed from the version of the FOH that the DOL's investigators received: beginning in or about June 2012, the agency issued to its investigators an entirely revised section 30d00(e). While the then-publicly available version of FOH section 30d00(e) stated that tipped employees could engage in "maintenance and preparatory or closing activities" for up to 20 percent of their working time without putting the tip credit at risk, the June 2012 version cut back even further on the activities previously allowed, and still listed in the public version at the time: "[A]n employer may not take a tip credit for the time that a tipped employee spends on work that is not related to the tipped occupation. For example, maintenance work (e.g., cleaning bathrooms and washing windows) are not related to the tipped occupation of a server; such jobs are non-tipped occupations." *See* Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants, at 12-13 n.4, *Marsh v. J. Alexander's LLC,* Nos. 15-15791 *et al.* (9th Cir.

Jul. 13, 2016) (citing FOH § 30d00(e)(4) (June 20, 2012)). Though the Secretary assured the court in his brief that the new version "makes no substantive change," *id.* at 13 n.4., that could not have been true, as the 1988 version expressly allowed maintenance activities for a tipped employee, while the 2012 version expressly disallowed them. The DOL later made the revisions public, renumbered as § 30d00(f).

Finally, in April 2017, three days before a Ninth Circuit panel was scheduled to hear oral argument in *Marsh v. J. Alexander's LLC*, the DOL sent a letter to the court abandoning much of the 2012 FOH revision by stating that there is no categorical rule that cleaning is unrelated to a server's duties. *See* Letter at 1 (citations omitted), *Marsh v. J. Alexander's LLC*, Nos. 16-15003 *et al.* (9th Cir. Apr. 17, 2017).

Thus, in summary, the DOL's position on this issue has shifted significantly over time:

- **1980:** The DOL concludes that the tip credit applies to a server in a restaurant who, as part of her closing duties, cleaned the salad bar, placed condiment crocks in the cooler, cleaned and stocked the waitress station, cleaned and reset the tables (including filling cheese, salt and pepper shakers) and vacuumed the dining room carpet. The DOL makes no mention of any limitation on tipped versus non-tipped duties.

- **1985:** The DOL determines that the tip credit does not apply to a server who per-formed 1.5-2 hours of prep work prior to opening during a five hour shift because she was the only employee assigned the duties, she was responsible for prepping the entire restaurant, and the amount of time was 30%–40% of the entire shift.

- **1988:** The DOL, without prior notice to the public or comment, adds the "20% Rule" to the FOH.

- **January 15, 2009:** The DOL holds that a "barback," who was responsible for "restocking the bar and ensuring that the bar area remains clean and organized" and "clean[ing] empty glasses sitting on the bar, tak[ing] out the trash from behind the bar and clean[ing] the floor of the bar area" is a "tipped employee" and eligible for the tip credit. This opinion makes no mention of the "20% Rule." and it remains in force as an official guidance document.

- **January 16, 2009:** The DOL issues an opinion letter acknowledging that the "20% Rule" is unworkable and confusing, and expressly withdraws that rule.

- **March 2, 2009:** The DOL withdraws the January 16, 2009 Opinion Letter, without expressing agreement or disagreement with the analysis in the now-withdrawn letter.

- **June 2012:** The DOL updates section 30d00(e) in the version of the FOH that it distributes to its investigators, but continues to publicly display the 1988 text of the section in the version of the FOH accessible via the DOL's website. The new language expressly disallows performance of maintenance activities for a tipped employee. The DOL later updates the public FOH and the renumbered section becomes 30d00(f).

- **April 2017:** The DOL sends a letter to the Ninth Circuit Court of Appeals, three days before the scheduled oral argument in a case involving the validity (or not) of the "20% Rule." The letter undoes much of the 2012 revision by stating that there is *no* categorical rule that cleaning is unrelated to a server's duties.

In light of this chaotic zig-zag approach to the issue, the "20% Rule" in the FOH should receive no deference.

B. THE "20% RULE" CANNOT ACCOUNT FOR OCCUPATIONS CONGRESS SPECIFICALLY IDENTIFIED AS TIPPED.

For the DOL's "20% Rule" to have any plausible claim to consistency with the FLSA, much less any hope of achieving entitlement to deference, as a threshold matter it must be able to correctly sort out those positions Congress unambiguously views as tipped occupations. If the DOL's framework incorrectly excludes positions Congress intended to be tipped under the FLSA, then that is an undeniable indicator that the framework itself is fatally flawed and contrary to the statute. Here, exactly that inconsistency is evident.

The Court must give effect to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 482. The "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). In the Senate report accompanying the 1974 FLSA Amendments, Congress indicated that it views certain occupations as tipped: "Nor is the requirement that the tipped employee retain such employee's own tips intended to discourage the practice of pooling, splitting or sharing tips with employees who customarily and

regularly receive tips—*e.g.*, waiters, bellhops, waitresses, countermen, bus-boys, service bartenders, etc." S. Rep. No. 93-690, at 43 (Feb. 22, 1974).

Two of those roles, however—busboys and service bartenders—involve little or no customer interaction, meaning that they engage in few if any tasks that under the Secretary's framework would qualify as "tip-producing." Instead, those roles consist predominantly, if not exclusively, of activities the Secretary would deem, at best, "related" to tip-producing activities, if not simply "unrelated" to any tip-producing tasks. As one court has observed, "busboys do not necessarily interact directly with restaurant patrons . . . because a busboy's duties normally do not come into play until the patrons have concluded their dining experience. Nor does a busboy normally directly receive tips from customers or directly interact with them; yet, busboys are still considered as employees who customarily and regularly receive tips." *Lentz v. Spanky's Rest. II, Inc.*, 491 F. Supp. 2d 663, 670–71 (N.D. Tex. 2007).

Under the "20% Rule," employers of busboys and service bartenders would not be able to apply the tip credit for most, if not all, of the time these employees spend on the core duties of their occupation. Congress, however, has directed exactly the opposite result, calling out these occupations specifically as examples of tipped employees. This basic inability of the "20% Rule" to account for two of the core occupations Congress had in mind as illustrative examples of tipped employees demonstrates that the DOL's position is fundamentally misguided and leads to results contrary to the expressed will of Congress.

C. THE "20% RULE" PREVENTS EMPLOYERS FROM TAKING A TIP CREDIT FOR DUTIES O*NET EXPRESSLY LISTS AS THOSE OF THE SERVER OCCUPATION.

According to ETA, "[t]he O*NET system is maintained by a regularly updated database of occupational characteristics and worker requirements information across the U.S. economy. It describes occupations in terms of the knowledge, skills, and abilities required as well as how the work is performed in terms of tasks, work activities, and other descriptors." *See*

www.doleta.gov/programs/onet (last visited Aug. 10, 2018). According to the agency, "[t]he O*NET database is collected and updated through ongoing surveys of workers in each occupation supplemented in some cases by occupation experts. These data are incorporated into new versions of the database on an annual schedule to provide up-to-date information on occupations." *Id.*

O*NET provides a great deal of detailed information about a number of occupations within the "accommodation and food services" industry, including specifically "waiters and waitresses." The O*NET Summary Report for 35-3031.00, Waiters and Waitresses, lists servers' tasks as inclusive of but not limited to: "roll[ing] silverware, set[ting] up food stations or set[ting] up dining areas to prepare for the next shift," "clean[ing] tables or counters after patrons have finished dining," "stock[ing] service areas with supplies such as coffee, food, tableware, and linens," "prepar[ing] tables for meals, including setting up items such as linens, silverware, and glassware," and "perform[ing] cleaning duties, such as sweeping and mopping floors, vacuuming carpet, tidying up server station[s], taking out trash, or checking and cleaning bath-room[s]." https://www.onetonline.org/link/summary/35-3031.00 (last visited Aug. 10, 2018).

Given that O*NET, sponsored by the DOL, represents a deep dive into the specifics of the server occupation, whereas the DOL's Wage and Hour Division, which issued the FOH and its "20% Rule," has no particular experience or expertise differentiating and categorizing various tasks in a restaurant, the DOL's "20% Rule" and "dual jobs" rules are utterly arbitrary and capricious, and unworthy of any deference. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

D. MULTIPLE COURTS HAVE REJECTED CLAIMS BASED ON THE "20% RULE."

The Eleventh Circuit in *Pellon v. Bus. Representation Int'l, Inc.*, 528 F. Supp. 2d 1306 (S.D. Fla. 2007), aff'd, 291 Fed. App'x 310 (11th Cir. 2008), found the 20% limitation was unworkable and inappropriate. In *Pellon*, airport skycaps argued that they should have been paid full minimum wage for certain tasks that they contended did not produce tips. The court rejected that contention,

finding that "[t]he duties that Plaintiffs have performed in this case are not those of another occupation, even if there is some overlap among tasks between different occupations." *Id.* at 1313. Addressing the inherent practical challenges of trying to apply a 20% limitation, the Eleventh Circuit held that a "determination whether 20% (or any other amount) of a skycap's time is spent on non-tipped duties is infeasible" and that "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." *Id.* at 1313–14. The Eleventh Circuit affirmed summary judgment in favor of the employer "on the basis of the district court's well-reasoned order." 291 Fed. App'x 310.

In 2014, a case in the District of Arizona filed against Landry's alleged that servers spent more than 20% of their time performing non-tipped duties and therefore the employer could not to take a tip credit. The district court rejected the 20% limitation and dismissed the claim. *See Richardson*, 2015 WL 1279237 at *9 ("The Court agrees with *Pellon* and will not give deference to a policy having the net effect of allowing a server to do nothing during slow periods at a restaurant or require the restaurant to pay the server additional sums to help out around the restaurant. The law does not require that result. On the basis of the foregoing, Count 2 will also be subject to dismissal."). The court explained further:

> [Section] 531.56(e) is not ambiguous. The dual jobs regulatory framework identifies an employee performing two or more entirely distinct, non-overlapping jobs. The facts do not present a situation contemplated in the regulation regarding "dual jobs" in which an individual is assigned two identifiable, separate occupations. Richardson was engaged in one occupation, server. Section 531.56(e) specifically allows a server to engage in incidental related duties. Thus, the server occupation inherently includes side work. The regulation does not identify this "duties" dichotomy or cap incidental duties at 20%. Based on the regulation, the Court need not identify the duties that Richardson performed in her server occupation and then classify some as related tipped duties and some as non-related non-tipped duties, and then implement a different occupational standard for the non-tipped duties as compared with her tipped occupation server duties.

Id. at *8 (emphasis added). Referring to the FOH guideline as a "sub-regulation," *Richardson* further found that:

> [T]the sub-regulation is neither persuasive nor entitled to deference for several reasons. First, it is undisputed that the DOL's Wage and Hour Division in its opinion letters regarding the dual jobs regulation has inconsistently provided guidance, first taking one position, then reversing course, reversing course again, then withdrawing the original position. . . . By engaging in such an inconsistent approach in its opinions regarding the dual jobs regulation, § 531.56(e), the DOL's 1988 sub-regulation on the same issue is neither persuasive nor entitled to deference. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012) (affording no deference to the DOL's interpretation of its own regulations regarding the outside salesperson exemption because, among other things, the DOL's position had shifted over time); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (stating that an agency's interpretation of a regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view).
>
> Next, the DOL sub-regulation does not interpret § 531.56(e) but arbitrarily adds additional requirements to it. . . . The Court . . . will not give deference to a policy having the net effect of allowing a server to do nothing during slow periods at a restaurant or require the restaurant to pay the server additional sums to help out around the restaurant. The law does not require that result.

Id. at *9. *See also Kirchgessner v. CHLN, Inc.*, 174 F.Supp.3d 1121 (D. Ariz. 2016) (same); *Townsend v. BG-Meridian, Inc.*, No. CIV-04-1162-F, 2005 WL 2978899, at *6–7 (D. Okla. Nov. 7, 2005) (applying tip credit to waitress whose "primary duty" was a waitress but spent time performing non-tipped duties holding, "a tipped employee's status does not change simply because she is called upon to perform non-tipped duties related to her job"); *Saitta v. Brinker Fla., Inc.*, (Arbitration Order, Mar. 28, 2016) (granting motion to dismiss and rejecting application of 20% Rule); *Murray v. Brinker Fla., Inc.*, (Arbitration Order, April 2, 2016) (rejecting 20% Rule as "unpersuasive" on the grounds that "Congress made no distinction between tipped and non-tipped duties within a tipped employee's occupation" and noting that "nothing in the statute, its legislative history or its implementing regulations, DOL's FOH or opinion letters" suggests the 20% Rule is applicable).

Even more recently, in September 2017, a Ninth Circuit Panel ruling in *Marsh v. J. Alexander's LLC* rejected the "20% Rule," holding that the plaintiff could not state a minimum wage claim under the FLSA "by alleging that discrete 'related' tasks or duties, which were performed

intermittently over the course of the day and were intermingled with his duties directed at generating tips comprise a dual job when aggregated together over the course of a workweek." *Marsh v. J. Alexander's LLC*, 869 F.3d 1108, 1127 (9th Cir. 2017), vacated, 882 F.3d 777 (9th Cir. 2018) (granting *en banc* rehearing).[2] Speaking specifically to FOH § 30d00(f), the court noted that:

> to the extent the FOH § 30d00(f) approach provides an interpretation of the dual jobs regulation at all, it provides one that is inconsistent with both the regulation's approach to determining whether an employee has two distinct jobs and with the statute's direction that any person engaged in a job that generates the requisite amount of tips is a "tipped employee." In effect, the FOH § 30d00(f) creates an alternative regulatory approach with new substantive rules that regulate how employees spend their time. This is "*de facto* a new regulation" masquerading as an interpretation, and we decline to defer to it.

Id. at 1123-24.

The court also rejected Plaintiff's reliance on *Fast v. Applebee's International, Inc.*, highlighting several grounds:

> The Eighth Circuit did not explain why using 20 percent (rather than some other percent of the workweek) was reasonable, other than to reference DOL regulations in other contexts that had imposed a 20 percent temporal limitation.
>
> We disagree with the Eighth Circuit's *Auer* analysis on several grounds. Most important, the Eighth Circuit failed to consider the regulatory scheme as a whole, and it therefore missed the threshold question whether it is reasonable to determine that an employee is engaged in a second "job" by time-tracking an employee's discrete tasks, categorizing them, and accounting for minutes spent in various activities. The [court] focused on a few words in the regulation ("part of her time" and "occasionally") . . . out of context, [and with its narrow focus] it failed to grapple with the crucial question whether the FOH's time sheet approach is a reasonable interpretation of "job" (in the regulation) or "occupation" (in the statute).
>
> Moreover, the very cases that the Eighth Circuit cited to support its ruling, *Myers* and *Pellon*, suggest that the FOH's approach is unreasonable. . . .
>
> Finally, we disagree with *Fast's* conclusion (and the DOL's argument) that the DOL's prescription of a specific temporal limit on certain duties (*i.e.*, 20 percent of the total time worked) is a reasonable method for determining when an employee has a second job. The Eighth Circuit upheld this arbitrary temporal limitation in part because it is consistent with temporal limitations in other parts of the FLSA's

[2] The full Ninth Circuit subsequently granted *en banc* review, thereby vacating the panel's opinion. This holding, while no longer considered Ninth Circuit binding precedent, is still noteworthy as a rejection of the "20% Rule" by a three-judge panel (divided 2-1) of a federal appellate court.

> regulatory regime. But this fact is irrelevant because each example of a temporal cap that the DOL and Fast cite was either legislatively enacted or promulgated through notice and comment rulemaking. By allowing the DOL to impose a substantive 20 percent cap on the performance of certain duties under the guise of interpreting the word 'occasionally,' the Eighth Circuit contravened the rule that agencies not be allowed to create new substantive regulations through interpretation.

Id. at 1124–25 (internal citations omitted).

E. *FAST* IS NO LONGER BINDING CIRCUIT PRECEDENT IN LIGHT OF SUBSEQUENT DEVELOPMENTS.

In *Fast v. Applebee's International, Inc.*, 638 F.3d 872 (8th Cir. 2011), the Eighth Circuit affirmed the district court's decision to defer to the DOL's "20% Rule" from the FOH. Because of legal developments subsequent to the Eighth Circuit's ruling in *Fast*, however, that decision is no longer binding circuit precedent. Specifically, two events have significantly altered the legal landscape relevant to the Eighth Circuit's analysis of whether to defer to the "20% Rule." First, the Supreme Court's decision in *Christopher*, which post-dated *Fast* by approximately fourteen months, denied *Auer* deference—and, indeed, any deference at all—to the DOL's interpretation of its regulations because the DOL's interpretations had not remained consistent. 567 U.S. at 155–56. As a result, the Eighth Circuit did not have the benefit of the Supreme Court's subsequent refinement of its *Auer* jurisprudence rejecting deference where the DOL flip-flops in its interpretations, as happened with the "20% Rule."

Second, as noted above, the DOL has made at least two substantial rounds of changes to its "20% Rule" since *Fast*. The first was the 2012 reclassification of maintenance work as *per se* not subject to a tip credit regardless of the amount of time spent on that activity. The second was the 2017 rescission of that 2012 position, effectively returning the "20% Rule" to its 1988 state.

Because of the Supreme Court's revised standard for when to afford *Auer* deference when an agency's position on an issue meanders, as well as the post-*Fast* meanderings by the DOL with respect to the "20% Rule," the legal bases for the Circuit's decision in *Fast* no longer apply. *See Passmore v. Astrue*, 533 F.3d 658, 660 (8th Cir. 2008) ("when an issue is not squarely addressed in

prior case law, we are not bound by precedent through *stare decisis*"); *Burton v. Ark. Secy. Of State*, 2015 WL 632216 (E.D. Ark. Feb. 13, 2015) (ruling that "inferior tribunals are bound to honor the mandate of superior courts within a single juridical system" does not apply when "a party presents 'substantially different evidence on remand,'" or "if the prior appellate decision was 'clearly erroneous and works manifest injustice.'") (internal citations omitted).

In addition, other considerations suggest that the Eighth Circuit today would reach a very different conclusion from how it ruled in *Fast*. In *Fast*, neither party questioned whether the dual jobs regulation should receive *Chevron* deference. As a result, the Eighth Circuit incorrectly applied *Chevron* deference to the regulation, evidently believing that the regulation had been subject to notice and comment rulemaking, and sidestepping the analysis that otherwise would have properly prohibited such deference. As explained above, while many of the regulations implementing section 3(m) were subject to notice and comment, the specific section at issue here, 29 C.F.R. § 531.56(e), was not; it appeared in the final rule after the fact and without opportunity for notice and comment.

The Eighth Circuit gave *Auer* deference to the "20% Rule" in *Fast* based on, among other things, the parties' erroneous assumption that the regulation was entitled to *Chevron* deference. Because the improper *Chevron* deference served as the Court's basis for thereafter according *Auer* deference to the FOH,[3] the Eighth Circuit has not yet considered whether the FOH warrants *Auer* deference, absent a foundation of *Chevron* deference to the regulation.

Further, the Eighth Circuit's decision in *Fast* has been criticized for "declin[ing] to decide which duties the 20% rule applie[s] to." *Roberts v. Apple Sauce, Inc.*, 945 F. Supp. 2d 995, 1002 (N.D. Ind. 2013). This is an important distinction that must be addressed because it speaks to the reasonableness and feasibility of the guidance to which the court would defer. In so declining, the *Fast* court did not directly address the glaring incompatibility of the "20% Rule" with occupations

[3] And indeed, the district court in *Fast* acknowledged that it need not follow the FOH. *Fast*, 502 F. Supp. 2d at 1002 (W.D. Mo. 2007) ("Though not binding on the Court, the Handbook is a persuasive authority." (*citing Myers v. Copper Cellar Corp.*, 192 F.3d 546, 554 (6th Cir. 1999))).

involving little or no customer interaction that Congress viewed as tipped, such as busboys and service bartenders.

V. CONCLUSION

For the forgoing reasons, the *amicus* respectfully submits that the basis of the relief sought by the Plaintiffs is well-founded, and that the relief they seek should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by CM/ECF on August XX, 2018, on all counsel or parties of record on the service list via the Court's electronic mailing system.