No. 22-50145

United States Court of Appeals
for the
Fifth Circuit

RESTAURANT LAW CENTER and TEXAS RESTAURANT ASSOCIATION,

Plaintiffs-Appellants,

– v. –

UNITED STATES DEPARTMENT OF LABOR; HON. MARTIN J. WALSH, Secretary of the United States Department of Labor; and JESSICA LOOMAN, in her official capacity as Acting Administrator of the Department of Labor's Wage and Hour Division,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS (AUSTIN)
NO. 1:21-cv-01106-RP

BRIEF FOR AMICI CURIAE RESTAURANT OPPORTUNITIES CENTER UNITED, ECONOMIC POLICY INSTITUTE, NATIONAL WOMEN'S LAW CENTER, MAIN STREET ALLIANCE, AND AMERICAN SUSTAINABLE BUSINESS NETWORK IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE

Jeffrey B. Dubner
Counsel of Record
Will Bardwell
DEMOCRACY FORWARD FOUNDATION
P.O. Box 34553
Washington, D.C. 20043
(202) 773-0490

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to the persons and entities listed in the Appellants' and Appellees' Certificates of Interested Persons, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants
Restaurant Law Center
Texas Restaurant Association

Attorneys for Plaintiffs-Appellants
Epstein Becker & Green, P.C.
Paul DeCamp
Angelo Amador
Kathleen Barrett

Defendants-Appellees
United States Department of Labor
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

Attorneys for Defendants-Appellees
Jennifer Utrecht
Alisa Beth Klein
Johnny Hillary Walker, III

Amici Curiae in Support of Plaintiffs-Appellants
State of Texas
State of Alabama
State of Arkansas
State of Louisiana
State of Mississippi
State of Montana
State of Oklahoma

State of South Carolina
State of Utah
National Retail Federation
National Federation of Independent Business
American Hotel and Lodging Association
American Gaming Association

Attorneys for Amici Curiae in Support of Plaintiffs-Appellants
Office of the Texas Attorney General
Ken Paxton
Brent Webster
Judd E. Stone II
Ari Cuenin
Christopher F.J. Galiardo
Littler Mendelson, P.C.
David B. Jordan
Mark A. Flores
Daniel B. Boatright
Paul J. Sopher

Amici Curiae in Support of Defendants-Appellees
Restaurant Opportunities Center United
Economic Policy Institute
National Women's Law Center
Main Street Alliance
American Sustainable Business Network

Attorneys for Amici Curiae in Support of Defendants-Appellees
Democracy Forward Foundation
Jeffrey B. Dubner
Will Bardwell

Dated: July 15, 2022

Respectfully submitted,

/s/ Jeffrey B. Dubner
Jeffrey B. Dubner
Democracy Forward Foundation
P.O. Box 34553
Washington, D.C. 20043
(202) 773-0490

STATEMENT CONCERNING MONETARY CONTRIBUTIONS

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

STATEMENT CONCERNING PARTIES' CONSENT

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

DISCLOSURE STATEMENT

Restaurant Opportunities Center United is a non-profit entity and has no parent corporation. No publicly owned corporation owns 10% or more of the stocks of Restaurant Opportunities Center United.

The Economic Policy Institute is a non-profit entity and has no parent corporation. No publicly owned corporation owns 10% or more of the stocks of the Economic Policy Institute.

The National Women's Law Center is a non-profit entity and has no parent corporation. No publicly owned corporation owns 10% or more of the stocks of the National Women's Law Center.

Main Street Alliance is a non-profit entity and has no parent corporation. No publicly owned corporation owns 10% or more of the stocks of Main Street Alliance.

The American Sustainable Business Network is a non-profit entity and has no parent corporation. No publicly owned corporation owns 10% or more of the stocks of the American Sustainable Business Network.

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STATEMENT OF INTEREST

Amici are organizations that advocate for broader workplace protections for all Americans, including minimum-wage restaurant workers who benefit from the Department of Labor's Final Rule.

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

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

The National Women's Law Center ("NWLC") fights for gender justice — in the courts, in public policy, and in our society — working across the issues that are central to the lives of women and girls. NWLC uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us — especially women of color, LGBTQ people, and low-income women and families. Since its founding in 1972, NWLC has worked to advance workplace justice, income security, educational opportunities, and health and reproductive rights for women and girls and has participated as counsel or amicus curiae in a range of cases. Women — disproportionately women of color — represent more than two-thirds of tipped workers nationwide and are even more likely to experience poverty than their male counterparts. Even before the COVID-19 pandemic and its impacts on the leisure and hospitality industry, the nationwide poverty rate for women tipped workers was nearly 2.5 times the rate for workers overall. In states that follow the federal standard allowing employers to pay just $2.13 per hour to tipped employees and take a "tip credit" toward the remainder of their minimum wage obligation, women face particularly wide gender wage gaps, and women tipped workers are even more likely to live in poverty. NWLC thus has a strong interest in upholding the longstanding "80/20 rule" as promulgated by the Department of Labor, which is a critical tool to prevent abuse of the Fair Labor Standards Act's tip credit provision and ensure that tipped workers are paid all the wages they are due.

Main Street Alliance is a small business membership organization that advocates for and engages with small businesses around issues that matter the most for businesses and their employees. MSA believes employees are also customers. Strengthening employees' minimum-wage protections boosts consumer buying power – increasing sales at local businesses as employees buy products and services they could not afford before. Low pay typically means high employee turnover. With lower turnover, businesses see reduced hiring and training costs, less product waste, and lower error and accident rates. Businesses benefit from increased productivity, product quality, and customer satisfaction. Employees often make the difference between repeat customers and lost customers. Therefore, MSA has an interest in defending the minimum-wage protections secured by the Final Rule.

The American Sustainable Business Network is a multi-issue membership organization comprised of the business and investor community. It develops and advocates for solutions for policymakers, business leaders, and investors to support an equitable and just economy that benefits all. ASBN and its association members collectively represent over 250,000 businesses. ASBN has been a long-time advocate for a High Road Economy, centered on healthy, high-quality workplaces and jobs. Therefore, ASBN has an interest in ensuring that workplace protections are upheld for minimum-wage workers as a driver for a strong economy.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fair Labor Standards Act ("FLSA") permits employers to offset an employee's minimum wage to as little as $2.13 per hour, but only if the worker is "engaged in an occupation in which he customarily and regularly receives more than" a minimum amount of tips. 29 U.S.C. § 203(t). Dating back to the Reagan administration, the Department of Labor ("Department" or "DOL") has maintained nearly uninterrupted guidance establishing an "80/20 rule." Under this guidance, a minimum-wage "tip credit" has been available to employers only when non-tipped work directly supporting tipped work did not exceed 20 percent of a worker's time.

In 2021, the Department took steps to codify this guidance. After giving notice and accepting comments, the Department adopted a rule that minimum-wage tip credits are available to employers only when non-tipped work that directly supports tipped work does not exceed "a substantial amount of time" – defined as 20 percent of an employee's workweek, or more than 30 consecutive minutes. *See* Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60,114 (Oct. 29, 2021, codified at 29 C.F.R. pts. 531.65(e) and (f)) ("Final Rule").

In reaching its decision, the Department evaluated the competing points of view and evidence in the administrative record and provided reasoned explanations for the Department's actions. Contrary to the claims of Appellants Restaurant Law Center and Texas Restaurant Association (collectively, "RLC"), the Final Rule was well within the Department's discretion. Not only did the Department receive and

consider comments from the proposed rule's opponents, but in many instances, the Department incorporated their concerns into the Final Rule. Accordingly, RLC's arguments to the contrary lack foundation in the administrative record, and this Court should affirm the District Court's denial of the preliminary injunction. Amici write to provide details from the administrative record showing that the Department's decision was not arbitrary and capricious and that the Final Rule prevents real harm to workers.

ARGUMENT

The District Court denied RLC's requested preliminary injunction because RLC failed to show irreparable harm. As the Department explains, this holding is correct. *See* Appellee's Br. 17-29. Indeed, a preliminary injunction would be particularly inappropriate here, because the Department concluded that the rule was "especially important at this time" to prevent abuse of tipped employees – a finding amply backed up by the administrative record. *See* 86 Fed. Reg. at 60,139. Amici submit this brief in defense of the Final Rule in large part because of the potentially severe economic consequences for tipped workers if the rule is not upheld. *See, e.g.*, Nat'l Women's L. Ctr., Comment Letter on Notice of Proposed Rulemaking on Tip Regulations Under the Fair Labor Standards Act, 2 (Aug. 22, 2021), https://downloads.regulations.gov/WHD-2019-0004-2415/attachment_1.pdf ("Even before the COVID-19 pandemic, median hourly earnings for people working in common tipped jobs like restaurant server and bartender were $12 or less, including

tips, and poverty rates for tipped workers were more than twice as high as rates for working people overall."). The Department ultimately concluded that whatever costs the rule created for employers "will be a minimal share of total revenues for businesses of all sizes, and . . . the protections afforded to workers outweigh these costs." 86 Fed. Reg. at 60,139. A preliminary injunction would inflict on workers precisely the injury that the Department chose to avoid.

But even if RLC had shown an irreparable injury, it would not be entitled to a preliminary injunction because it has not shown a substantial likelihood of success on the merits. *See, e.g., Robinson v. Hunt Cnty.*, 921 F.3d 440, 451 (5th Cir. 2019) (listing requirements for issuing a preliminary injunction). As the Department explains in its brief, RLC's main argument — that the Final Rule is contrary to law — fails because the rule is consistent with the FLSA's language, as many courts have previously concluded regarding the long-standing "80/20 rule." *See* Appellees' Br. 29-35.

This brief addresses RLC's alternative argument that the Final Rule was arbitrary and capricious. *See* Appellants' Br. 39-47. RLC is not likely to succeed on this argument either, because the Final Rule was amply supported by the administrative record and the Department's reasoning. The Department considered and reasonably addressed RLC's comments, which is all RLC, or any other commenter, was due. *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 116 F.3d 520, 549 (D.C. Cir. 1997). The District Court's decision denying a preliminary injunction should be affirmed.

I. The Final Rule Responded to, and Often Incorporated, the Concerns of the Rule's Opponents.

Commenters that participate in the rulemaking process are entitled to have their comments considered, but they are not entitled to the outcome they prefer. *See Nat'l Mining Ass'n*, 116 F.3d at 549 (D.C. Cir. 1997). The Department's adoption of the Final Rule leaves no doubt that it honored its obligation to consider the comments it received. The Final Rule's announcement is replete with instances where the Department addressed industry comments. Indeed, the Final Rule changed substantially from its originally proposed form as a direct result of comments from industry commenters like RLC. *See, e.g.,* 86 Fed. Reg. at 60,121 ("In finalizing this rule, the Department has taken into consideration the need to ensure that workers do not receive a reduced direct cash wage when they are not engaged in a tipped occupation, *as well as the practical concerns of employers.*") (emphasis added).

In June 2021, when the Department issued its Notice of Proposed Rulemaking, it proposed amending the existing version of 29 C.F.R. § 531.56(e) (defining when an employee is engaged in dual jobs – i.e., in both a non-tipped and a tipped occupation) and creating a new Section 531.56(f) (defining what it means for an employee to be engaged in a tipped occupation). By the time the Department issued the Final Rule in October 2021, though, the proposal had changed meaningfully – thanks in significant part to comments submitted by RLC and other industry groups.

For instance, industry commenters argued that Section 531.56(f)(2)'s proposed definition of tip-producing work was unclear about the kinds of tip-producing work that were included within the listed occupation. *Id.* at 60,127. The Department responded to that criticism by "modif[ying] the definition of *tip-producing work* to clarify that customer service is a necessary predicate to a tipped employee's receipt of tips." *Id.* The Department also added more examples of tip-producing work in Section 531.56(f)(2)(ii) of the Final Rule. *Id.* at 60,127-28.

Similarly, the Department modified the Final Rule based on industry comments regarding the definition of "waiting tables," *id.* at 60,128; the treatment of "the tip-producing work of a tipped employee who both prepares and serves food to customers," *id.* at 60,129; and the definition of "work that is not part of the tipped occupation," *id.* at 60,130-31, among other changes.

In other words, the Department gave industry commenters, including RLC, a fair hearing and made several modifications at their urging. This belies RLC's claim that the rule is "not the product of reasoned decision-making." Appellants' Br. 47. *See, e.g.*, *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 232–33 (5th Cir. 2006) (agency action not arbitrary and capricious where agency "clearly took under consideration" adverse comments).

II. The Department of Labor Considered and Reasonably Addressed the Same Arguments that RLC Raises in This Appeal.

RLC offers four ways in which (in its view) the Final Rule lacks support. RLC is incorrect as to each of them. The Department considered industry comments as to each of these points, and its decision was not arbitrary or unreasoned.

A. The Department Was Not Obligated to Undertake Additional "Fact-Finding" Procedures Beyond Notice and Comment.

RLC's lead argument that the Final Rule is arbitrary and capricious is that the Department purportedly "conducted no fact-finding." Appellants' Br. 40. In RLC's view, the supposed lack of formal fact-finding left the Department without a basis to determine "(a) whether the supposed problem actually exists, and (b) the factual basis of and background for the supposed problem." *Id.* RLC does not explain what it means by "fact-finding," but apparently it means some procedure beyond traditional notice-and-comment rulemaking.

RLC's one-paragraph argument does not cite any provision of the Administrative Procedure Act ("APA") – presumably because the APA creates no such requirement. *See Home Box Off., Inc. v. Fed. Commc'ns Comm.*, 567 F.2d 9, 36 (D.C. Cir. 1977) ("The APA sets out three procedural requirements: notice of the proposed rulemaking, an opportunity for interested persons to comment, and 'a concise general statement of (the) basis and purpose' of the rules ultimately adopted.") (quoting 5 U.S.C. § 553(b)-(c)). Courts are not permitted to impose procedures beyond those required by the APA. *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*,

435 U.S. 519, 549 (1978) ("The court should . . . not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' . . . ."). RLC ignores a basic underpinning of administrative rulemaking: reviewing comments *is* fact-finding. *See, e.g.*, *Oakbrook Land Holdings, LLC v. Comm'r of Internal Rev.*, 28 F.4th 700, 714 (6th Cir. 2022) ("A comment must provide enough facts and reasoning to show the agency what the issue is and how it is relevant to the agency's aims.") (citing *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 553).

To the extent that RLC's insistence on formal fact-finding is a suggestion that the Department was required to conduct formal hearings or adjudication on top of notice-and-comment rulemaking, that argument is foreclosed by the APA and Supreme Court caselaw. The APA expressly allows for notice-and-comment rulemaking unless "rules are required by statute to be made on the record after opportunity for an agency hearing[.]" 5 U.S.C. § 553(c); *see, e.g.*, *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 553 ("[R]ulemaking need not be based solely on the transcript of a hearing held before an agency. Indeed, the agency need not even hold a formal hearing"); *City of Arlington v. Fed. Commc'ns Comm.*, 668 F.3d 229, 240 (5th Cir. 2012) ("Agencies typically enjoy 'very broad discretion [in deciding] whether to proceed by way of adjudication or rulemaking") (quoting *Time Warner Ent. Co., L.P. v. Fed. Commc'ns Comm.*, 240 F.3d 1126, 1141 (D.C. Cir. 2001)). RLC identifies no such statutory requirement, and the FLSA contains none. "There is a strong presumption

that the procedural guarantees of section 553 of the APA are sufficient unless Congress specifically indicates to the contrary." *Nat'l Classification Comm. v. United States*, 765 F.2d 1146, 1150 (D.C. Cir. 1985) (Bork, J.) (citing *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 240 (1973)); *see also, e.g.*, *Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 326 n.7 (5th Cir. 1988) (refusing to apply the "substantial evidence" test of 5 U.S.C. § 706(2)(E) where the statute "does not prescribe compliance with the formal procedures required by 5 U.S.C. § 556"). RLC offers no basis for setting aside this presumption.

Finally, the Department's consideration of comments did precisely what RLC claims the Department didn't do: namely, consider the extent of the problem it sought to fix. *See* Appellants' Br. 40 ("The Department therefore entirely failed to consider . . . whether the supposed problem actually exists . . . ."). The Department received and considered comments detailing the extent of the problem created by tipped employees being required to perform untipped, directly supporting work for a substantial amount of time. *See, e.g.*, Rest. Opportunities Ctr. United, Comment Letter on Notice of Proposed Rulemaking on Tip Regulations Under the Fair Labor Standards Act, 2 (Apr. 14, 2021), https://downloads.regulations.gov/WHD-2019-0004-0524/attachment_1.pdf (citing *One Fair Wage: Women Fare Better in States with Equal Treatment for Tipped Workers*, Nat'l Women's L. Ctr. (Feb. 2021), https://nwlc.org/wp-content/uploads/2021/02/OFW-Factsheet-2021-v3.pdf); 86 Fed. Reg. at 60,136 ("Many individual commenters who worked as tipped employees

stated that their employers frequently scheduled them to perform long continuous blocks of uninterrupted non-tipped work. These tipped workers noted that their employers often scheduled them to perform directly supporting work for periods of an hour or longer both before or after their establishment was open to customers"); Nat'l Women's L. Ctr., Comment Letter on Notice of Proposed Rulemaking on Tip Regulations Under the Fair Labor Standards Act (Aug. 22, 2021), https://downloads.regulations.gov/WHD-2019-0004-2415/attachment_1.pdf (providing data on economic precarity of women tipped workers and explaining how "weakening the regulatory barriers to abuse of the tip credit — and tipped employees — would . . . incentivize employers to require working people to do more work for less pay," thereby exacerbating this precarity). After considering these comments, the Department concluded that the Final Rule's benefits outweighed its costs. 86 Fed. Reg. at 60,139 ("The Department acknowledges that this final rule will lead to some costs to employers . . . ; however, . . . we believe that the protections afforded to workers outweigh these costs."). The Department's decision to adopt the Final Rule on this administrative record was reasonable.

B. The Department Reasonably Concluded that O*NET Was Not an Appropriate Tool for Defining Employees' Duties for Purposes of FLSA.

Second, RLC argues that the Department's O*NET program – a database of occupational information overseen by the Department – lists several types of "side work" that do not generate tips but are nonetheless typically performed by tipped

employees. Appellants' Br. 41. In RLC's view, O*NET proves that these untipped duties are a regular part of work as a tipped employee, and that the Final Rule's distinction between tip-producing work and untipped duties does not exist in practice. *Id.*

The Department considered RLC's arguments, and even cited RLC's comment specifically. 86 Fed. Reg. at 60,123 ("Landry's stated that '[i]f the DOL finds O*NET imperfect, it should convene subject matter experts to refine those duties.' Similarly, RLC/NRA asserted that '[t]he Department has never undertaken a factual examination or study of the tasks performed by these occupations[.]'"). But based on the record presented to it and reasoning it made plain in the administrative record, the Department reasonably rejected those arguments.

First, the Department considered and rejected the request to define employees' duties by relying on O*NET. The Department explained that using O*NET to define the FLSA's legal requirements would be comparing apples to oranges. *See* 86 Fed. Reg. at 60,127 ("O*NET was not created to identify an employer's legal obligations under the FLSA").[1] The Department is well positioned to know O*NET's purpose

[1] The Department's website describes O*NET as follows: "The 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." O*NET, U.S. Dep't of Lab., http://dol.gov/agencies/eta/onet (last visited July 14, 2022).

and limitations because the Department administers O*NET. Furthermore, the Department pointed out that "O*NET only reflects what tipped employees are required to do by their employers, not the tasks that actually make up part of their tipped occupation." *Id.* That is a reasoned explanation, and RLC provides no legal basis for concluding that the duties outlined in O*NET must control the definition of "tipped occupation" for purposes of the FLSA.

Second, the Department pointed out that its dual jobs regulation at Section 531.56(e) has recognized since 1967 "that an employee may be employed by the same employer in both a tipped occupation and in a non-tipped occupation." *Id.* at 60,124. And since the Department began issuing the "80/20 guidance" during the Reagan administration, it has not only distinguished between tipped work and non-tipped work, but also obligated employers that take tip credits to ensure that any non-tipped work performed by tipped employees is limited to tasks that are related to their tipped work and that such non-tipped, related tasks constitute no more than 20 percent of a tipped employee's time. *Id.* Even if one were to assume that O*NET could bear the significance RLC gives it, the Department would still be entitled – if not obligated – to weigh the information in O*NET against its and employers' long-standing practice under the FLSA. Given that the Department and employers have understood the FLSA to distinguish between different types of duties for decades, the Department did not act arbitrarily or capriciously in following that approach over RLC's novel suggestion to adhere strictly to a rubric created for a different purpose.

Ultimately, as the Department explained, employees are entitled by the FLSA to earn a minimum wage – and employers' use of tip credits must therefore be limited to tipped work (or a nominal amount of work directly supporting tipped work) to ensure that minimum compensation is received. *Id.* at 60,125. Otherwise, employees earn far less than minimum wage on work for which they receive no tips. The distinctions created by the Final Rule to avoid that outcome were reasonable.

C. Relying on Pre-Pandemic Data Was Reasonable Because Using Data from the Height of the Pandemic Might Have Distorted the Final Rule's Costs.

RLC also argues that when the Department calculated the Final Rule's costs, its reliance on pre-pandemic data rendered the entire analysis unreliable. Appellants' Br. 43. Specifically, RLC pointed to the Department's acknowledgment that "[t]he labor market has likely changed for tipped workers during the pandemic, and could continue to change following the recovery from the pandemic, especially in the restaurant business." 86 Fed. Reg. at 60,150 (cited by Appellants' Br. 43).

The Department's decision to use pre-pandemic data was reasonable. In calculating the likely costs of the Final Rule's adoption, the Department "looked at whether employees' wages and tips changed following the 2018-2019 guidance [adopting an undefined reasonableness standard in lieu of the "80/20" guidance] to help inform the analysis of transfers associated with this rule." *Id.* at 60,148. The Department explained that "[i]f there was a significant drop in tips, it could mean that employers were having employees do more non-tipped work in response to the

guidance." *Id.* That analysis revealed a "lack of a significant decline in tips and total wages," *id.* at 60,149, suggesting that industry wage costs under the Final Rule would not be dramatically different than under the guidance it replaced. *See id.* ("The lack of a significant decline in tips and total wages could imply that employers had not directed employees to do more non-tipped work following the guidance, and that there will also be little to no transfers associated with the requirement put forth in the rule.").

In performing that analysis, the Department declined to examine 2020 data, because pandemic-induced unemployment among low-wage workers resulted in higher average wages. *Id.* This anomaly "ma[de] meaningful comparisons difficult." *Id.* The Department's decision not to introduce that difficulty into its calculations was reasonable. It certainly did not render the entire analysis of the Final Rule's costs unreliable, and RLC offers no recalculation to show that including 2020 data would have made a meaningful difference.

Moreover, the differences in pre-pandemic data and pandemic-contemporary realities undermine RLC's claims by showing that *tipped employees' economic situation is even more tenuous now than it was before the pandemic*.[2] In the same breath that the

[2] The paragraph that RLC selectively quotes is worth considering in full:

> The labor market has likely changed for tipped workers during the pandemic, and could continue to change following the recovery from the pandemic, especially in the restaurant business. The full-service restaurant industry lost

Department made the statement that RLC quotes, the Department cited a survey finding that 83 percent of tipped employees had seen their tips decrease during the pandemic, and that two-thirds of tipped employees had seen their tips fall by at least 50 percent. *Id.* at 60,150 ("For example, a survey from One Fair Wage found that 83 percent of respondents reported that their tips had decreased since COVID-19, with 66 percent reporting that their tips decreased by at least 50 percent."). Furthermore, the Department noted that the restaurant industry lost more than a million jobs since the pandemic began – leaving even fewer job opportunities for tipped workers vulnerable to wage theft. *Id.* And these realities only compound the economic insecurity that many tipped workers experienced even prior to the pandemic, as noted elsewhere in the record. *See, e.g.*, *id.* at 60,139, 60,148.

In a similar vein, RLC argues that the Department should have deferred to the Small Business Administration's concerns – which, RLC says, made a better case for rejecting the Final Rule than the 2018 and 2019 data made for adopting the Final

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> over 1 million jobs since the beginning of the pandemic, and by the end of 2020, over 110,000 restaurants had closed permanently. *Although employment in the leisure and hospitality industries recovered rapidly in the spring and early summer of 2021, employment in this sector is still below its February 2020 level. These industry changes could impact workers' wages, as well as their ability and willingness to change jobs.* There may also be other factors such as safety influencing workers' choice of workplace, which could distort labor market assumptions and behavior. *Workers that value the security and safety of their job could be less willing to leave for another job, even if their net earnings decreased*, and this could have an impact on the outside-option analysis. 86 Fed. Reg. at 60,150 (emphases added and footnotes omitted).

Rule. Appellants' Br. 43. RLC favors the SBA's view that the Department's rule would have a significant economic impact, and that the rule "lacks an adequate factual basis." *Id.* at 44. RLC also relies on the SBA's belief that the Department "omitted some and underestimated other compliance costs of this rule for small employers," and that the proposed rule "fail[ed] to estimate small business compliance for increased wages." *Id.*

The Department is, of course, not obligated to defer to the views of another agency. *See, e.g.*, *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2571 (2019) (the APA does not require a decisionmaker to "defer[ ] to [another agency] or . . . offer[ ] some special justification for drawing his own inferences and adopting his own assumptions"). Even so, the Department explained in detail where it did and did not agree with the SBA's concerns, and why. *See* 86 Fed. Reg. at 60,142-43, 60,154-55. Among other things, the SBA's concern was based on an inaccurate belief that the Final Rule required "minute-by-minute tracking," as well as other premises that were inconsistent with the Final Rule. *Id.* at 60,154. RLC does not provide any reason to conclude that the Department's response to the SBA was unreasonable; indeed, RLC does not acknowledge the Department's response at all. *See* Appellants' Br. 43-45. At any rate, the Department reasonably concluded that its changes to the proposed rule addressed the SBA's concerns by reducing the amount of time that the industry would need to familiarize itself with the Final Rule. 86 Fed. Reg. at 60,142 ("Furthermore, in this final rule, the Department has made changes and clarifications in response to comments, which could limit the time necessary for rule familiarization.").

Moreover, the SBA comment to which RLC points was largely relaying what it had heard from employers, not providing data or first-hand analysis. As the Department noted in the Final Rule, no commenter provided actual data to support the concern that familiarization or management costs may have been underestimated. *Id.* at 60,142-43. It was reasonable for the Department not to credit such unsupported assumptions. At bottom, RLC's argument is merely "second-guessing the [Department's] weighing of risks and benefits and penalizing [the Department] for departing from the [SBA's] inferences and assumptions" — exactly what the Supreme Court has instructed courts not to do. *Dep't of Com.*, 139 S. Ct. at 2751.

D. The Final Rule Is Internally Consistent.

According to RLC, the Final Rule is "internally inconsistent" because it applies distinctions that RLC finds unpersuasive. Appellants' Br. 45-47. Specifically, RLC takes issue with the fact that ostensibly similar types of work might be treated differently under the Final Rule, depending on the work's context. For example, RLC points to the Final Rule's distinction between a bartender retrieving a particular beer from a storeroom at a customer's request, and a bartender retrieving a case of beer to stock a bar in preparation for serving customers. *Id.* at 46.

This argument ignores one of the Final Rule's fundamental underpinnings. The touchstone of tip-producing work, the Department explained, is "provid[ing] service to customers for which tipped employees receive tips." 86 Fed. Reg. at 60,131. When a bartender retrieves beer to stock a bar in *preparation* for service, the bartender is not

yet providing service to customers. On the other hand, when a customer asks for a particular beer and the bartender retrieves it, the bartender *is* providing service to the customer. Appellee's Br. 39-40. This is a reasonable distinction. Similarly, when a busser assists a waiter by clearing a table or wiping it down, the busser's work supports waiters and, therefore, is tipped work; in contrast, when a busser cleans a bathroom, the busser is not supporting a waiter, and that work is not tipped work. *See id.*

Again, this is a straightforward, reasonable distinction. The fact that RLC does not like that distinction does not make it "unworkable," Appellants' Br. 45, or "in conflict with the plain language of the [FLSA] and congressional intent." *Id.* at 47. To the contrary: the FLSA permits employers to apply a tip credit in the limited situations when a worker is "engaged in an occupation in which he customarily and regularly receives more than" a minimum amount of tips. 29 U.S.C. § 203(t). Bartenders do not customarily receive tips for stocking bars; they do customarily receive tips for serving customers. The Final Rule therefore reasonably applies the FLSA's limitations on the use of tip credits.

RLC's argument also ignores the Department's consideration of comments explaining that the industry regularly paid subminimum wages for work that did not produce tips. For instance, workers reported that "their employers frequently scheduled them to perform long continuous blocks of uninterrupted non-tipped work." 86 Fed. Reg. at 60,135. One commenter explained:

> I have spent years working in restaurants and bars where my 'side work' amounted to hours every shift of scheduled labor when the restaurant or bar was closed. This means I might spend 3 hours of a 6 hour shift cutting fruit, juicing, setting up the bar, deep cleaning, sweeping, all while the bar is closed and doors are locked, meaning I have zero potential to make tips.

Id.

The commenter's account is anecdotal but representative. *Id.* ("Many individual commenters who worked as tipped employees stated that their employers frequently scheduled them to perform long continuous blocks of uninterrupted non-tipped work . . . ."). The administrative record shows the danger of unchecked use of the tip credit, allowing employers to pay tipped workers as little as $2.13 per hour for shifts in which they may take home few tips to supplement their poverty wages. ROC's comment, for instance, cited a 2021 NWLC study finding that the poverty rate among tipped workers is more than twice as high as for working people overall. Rest. Opportunities Ctr. United, Comment Letter on Notice of Proposed Rulemaking on Tip Regulations Under the Fair Labor Standards Act, 2 (Apr. 14, 2021), https://downloads.regulations.gov/WHD-2019-0004-0524/attachment_1.pdf (citing *One Fair Wage: Women Fare Better in States with Equal Treatment for Tipped Workers*, Nat'l Women's L. Ctr. (Feb. 2021), https://nwlc.org/wp-content/uploads/2021/02/OFW-Factsheet-2021-v3.pdf). The Department found this persuasive: "If the rule results in transfers to tipped workers, it could also lead to increased earnings for underserved populations." 86 Fed. Reg. at 60,148.

The Department thus had ample factual basis for its conclusions. RLC may not like the Department's conclusion, but its decision was well within its discretion and supported by the administrative record.

CONCLUSION

The District Court's denial of RLC's Motion for Preliminary Injunction should be affirmed, and the case should be remanded to District Court.

RESPECTFULLY SUBMITTED this Fifteenth day of July 2022.

/s/ Jeffrey B. Dubner
Jeffrey B. Dubner
Will Bardwell*
DEMOCRACY FORWARD FOUNDATION
P.O. Box 34553
Washington, DC 20043
Telephone: (202) 448-9090
jdubner@democracyforward.org
wbardwell@democracyforward.org

*Not licensed to practice law in District of Columbia; practicing under supervision of Democracy Forward attorneys while application to D.C. Bar is pending

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jeffrey B. Dubner

Jeffrey B. Dubner

Counsel for Amici Curiae Restaurant Opportunities Center United, Economic Policy Institute, National Women's Law Center, Main Street Alliance, and American Sustainable Business Network

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,357 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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/s/ Jeffrey B. Dubner

Jeffrey B. Dubner

Counsel for Amici Curiae Restaurant Opportunities Center United, Economic Policy Institute, National Women's Law Center, Main Street Alliance, and American Sustainable Business Network