STATEMENT
OF
PAUL DECAMP

ON: **"EXAMINING THE BIDEN-HARRIS ATTACKS ON TIPPED WORKERS"**

TO: **THE UNITED STATES HOUSE OF REPRESENTATIVES,**
COMMITTEE ON EDUCATION AND THE WORKFORCE,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

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BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
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HEARING

"EXAMINING THE BIDEN-HARRIS ATTACKS ON TIPPED WORKERS"

SEPTEMBER 18, 2024

Good morning, Chairman Kiley, Ranking Member Adams, and distinguished members of the Subcommittee.

Thank you for inviting me to testify[1] at this hearing to address the treatment of tipped workers under the Fair Labor Standards Act (the "FLSA").[2] My testimony will focus on the concept of the tip credit; the Department of Labor's efforts to regulate the tip credit based on time and tasks; how those efforts have fared in court; and various recent proposals relating to the tip credit, including H.R. 1612, the "Tipped Employee Protection Act."

I am a member of the law firm Epstein, Becker & Green, P.C., where I co-chair the national Wage and Hour Practice and serve on the firm's Employment, Labor & Workforce Management Steering Committee.[3] I have devoted most of my professional efforts over the past three decades to wage and hour issues. In 2006 and 2007, I served as Administrator of the U.S. Department of Labor's Wage and Hour Division, the chief federal officer appointed by the President of the United States responsible for enforcing and interpreting the Nation's wage and hour laws, including the FLSA. While at the Department, I was personally involved in evaluating compliance issues relating to tipped workers.

My practice focuses on helping businesses pay their people correctly. I have advised clients across the country in a broad range of industries regarding virtually every significant area of wage and hour compliance, including classifying workers as exempt or non-exempt for purposes of overtime and minimum wage requirements, employee versus independent contractor status, identifying compensable work, calculating overtime, providing meal and rest breaks, and more. I also regularly represent businesses in state and federal administrative agency proceedings, as well as class action and

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1 I am testifying today in my individual capacity. The opinions expressed in my written and oral testimony are my own and do not necessarily reflect the views of my firm, its attorneys, its clients, or anyone else.

2 29 U.S.C. §§ 201-219.

3 Epstein, Becker & Green, P.C. is a national law firm with approximately 360 attorneys focusing in our core practice areas of employment, labor, and workforce management; health care and life sciences; and litigation. We have roughly 160 attorneys in offices across the country advising, counseling, and litigating on behalf of employers large and small, including with respect to the full range of wage and hour issues arising under federal, state, and local laws.

other complex litigation matters throughout the United States. Since returning to private practice in 2008, much of my client work has involved litigating claims relating to the Department's tip credit standards, as well as challenging those standards directly. Those efforts have, among other things, resulted in the recent unanimous decision by the United States Court of Appeals for the Fifth Circuit vacating the current administration's 2021 final rule regarding tipped employees, the tip credit, and supposedly non-tipped tasks.[4]

I have testified before Congress on several prior occasions—both during and after my time with the Department—concerning wage and hour policy and enforcement issues, including before this Subcommittee in 2007, 2014, 2021, 2022, and 2023. I speak and write on these topics frequently, and I am a member of the *Law360* Employment Editorial Advisory Board and the American Employment Law Council.

Today I testify in support of H.R. 1612 and against proposals to eliminate the tip credit for the following reasons:

- First, the tip credit—meaning the provision of the law that allows an employer to count a worker's tips as satisfying a portion of the employer's minimum wage obligation and to pay a direct wage below the minimum wage so long as the total earnings including tips equal or exceed minimum wage—acknowledges the common-sense notion that a dollar in a worker's pocket has the same economic value regardless of whether it originated from an employer as wages or from a customer as a tip. For purposes of protecting a worker's minimum wage rights, it is eminently fair and reasonable to treat tips received in connection with a worker's job as satisfying a portion of the minimum wage rights. Doing so places the tipped worker on the same footing as a non-tipped worker with respect to the minimum level of earnings allowed, no better and no worse.

- Second, tipped employees benefit from current law. Including tips, they have total earnings more than twice the federal minimum wage. When presented with the choice of tipped employment subject to the tip credit versus all-in menu pricing with no tipping, workers overwhelmingly prefer the tipping option.

- Third, customers of restaurants with table service prefer, and by a wide margin, having a tipping option over not having that option. And in states with lesser tip credits and higher cash wage requirements, customers tend to leave smaller tips. The current system, with a significant tip credit under federal law, maximizes both customer and worker satisfaction.

- In the end, eliminating the tip credit would reduce workers' total earnings, while at the same time creating a uniquely privileged class of workers with greater protections under the FLSA than any other category of workers in the country. Instead, leaving the tip credit in place, while allowing employers maximum flexibility to avail themselves

[4] *See* Rest. Law Ctr. v. Dep't of Lab., — F.4th —, No. 23-50562, 2023 WL 3911308 (5th Cir. Aug. 23, 2024) (vacating Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60,114 (Oct. 29, 2021) (the "2021 Final Rule")).

of that credit so long as workers receive at least minimum wage in total earnings, will lead to the highest overall incomes for tipped workers, lower menu prices and greater satisfaction for customers, all while reducing administrative and compliance burdens for businesses and fully protecting tipped workers' minimum wage rights.

In light of the title of this hearing[5], I will begin with a review of the history of the FLSA's provisions relating to tipped employees, including the Department of Labor's efforts to regulate so-called "dual jobs."

I. HISTORY OF THE TIPPED WORKER PROVISIONS OF THE FLSA PERTINENT TO THE "DUAL JOBS" ISSUE

The FLSA generally requires payment of a minimum wage, currently $7.25 per hour.[6] In 1966, Congress extended the FLSA's coverage to apply the minimum wage requirement to employees in the hotel and restaurant industries for the first time, and simultaneously created what is "commonly referred to as a 'tip credit.'"[7] Congress designed the tip credit "to permit the continuance of existing practices with respect to tips."[8] The "tip credit" is "an exception that permits employers to pay less than the general minimum wage—$2.13 per hour—to a 'tipped employee' as long as the employee's tips make up the difference between the $2.13 minimum wage and the general minimum wage."[9] The tip credit thus does not operate to reduce an employee's pay below minimum wage, but instead recognizes as "wages" certain tips that employees earn for their work and credits those tips toward the minimum wage those employees must receive.

Under section 3(m) of the FLSA, an employer may take a tip credit with respect to a "tipped employee."[10] Congress defined "tipped employee" in section 3(t) as "any employee **engaged in an occupation** in which he **customarily and regularly receives more than $30 a month in tips**."[11] Thus, so long as the employee is engaged in an occupation in which he or she customarily and regularly receives tips in excess of $30 a month, the tip credit is available.

Contemporaneous dictionary definitions define "engaged" as "occupied; employed"[12] and "occupation" as "the principal business of one's life: a craft, trade, profession or other means of

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5 The official title of the hearing is "Examining the Biden-Harris Attacks on Tipped Workers." I will limit my remarks today to the legal and policy implications of various recent proposals, as well as discussing several court rulings. My testimony is not meant to incorporate, and should not be construed as incorporating, any particular normative characterization of any legislative or regulatory proposal.

6 29 U.S.C. § 206(a)(1)(c).

7 Montano v. Montrose Rest. Assocs., Inc., 800 F.3d 186, 188 (5th Cir. 2015).

8 *See* S. Rep. No. 89-1487, at 12 (Aug. 23, 1966), *as reprinted in* 1966 U.S.C.C.A.N. 3002, 3014.

9 *Id.* (citing 29 U.S.C. § 203(m)).

10 29 U.S.C. § 203(m)(2)(A).

11 *Id.* § 203(t) (emphases added).

12 *See* 1 WEBSTER'S THIRD INTERNATIONAL DICTIONARY 751 (1961 ed.); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 473 (1967 ed.); *Engage*, BLACK'S LAW DICTIONARY 622 (4th ed. 1957).

earning a living[.]"[13] Reading the ordinary meanings together with the statute, it is clear Congress intended the phrase "engaged in an occupation" to mean participating in the field of work and job as a whole, and did not intend to authorize the Department to eliminate the tip credit based on the time spent on different tasks within the job.[14] Accordingly, so long as the employee is engaged in an occupation in which he or she customarily and regularly receives tips in excess of $30 a month, the employee is a "tipped employee," and the employer may take the tip credit under the plain text and ordinary meaning of the terms in the statute.

II. THE DEPARTMENT'S 1967 "DUAL JOBS" REGULATION

In 1967, the Department issued regulations addressing tipped employment.[15] Those regulations provided that the tip credit applies based on the "occupation" of the employee. One portion of the 1967 regulation, known as the "dual jobs" regulation, addressed situations in which an employee works in two separate occupations for the same employer, one that results in tips and one that does not.[16] That initial version of the regulation specified that the employer may take the tip credit for only the occupation in which the employee customarily and regularly receives tips.[17] The regulation used an example of an employee working in two separate and distinct occupations: "maintenance man" and "waiter":

> 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 or her 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.***[18]

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[13] *See* 2 WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1560 (1961 ed.); *Occupation*, Black's Law Dictionary 1230 (4th ed. 1957).

[14] Congress itself has long viewed several tipped occupations as sufficiently established and well-known that it felt comfortable describing them as occupations that "customarily and regularly receive tips—*e.g.*, waiters, bellhops, waitresses, countermen, busboys, service bartenders, etc."—without reservation and without limiting inclusion in that list to specific hours of work or to particular duties that directly and immediately produce tips. S. Rep. No. 93-690, at 43 (Feb. 22, 1974) (legislative history to the 1974 amendments to the FLSA's tip credit, quoted in the Final Rule, 86 Fed. Reg. at 60,116).

[15] The Department codified these regulations at 29 C.F.R. §§ 531.50-.60 (1967).

[16] *See* 29 C.F.R.§ 531.56(e) (1967).

[17] *See id.*

[18] *Id.* (emphasis added).

The emphasized sentences make clear that the Department knew and understood that side work—*i.e.*, duties that do not directly and immediately produce tips—was part and parcel of "engaging" in an "occupation" that "customarily and regularly receives more than $30 a month in tips," as Congress defined "tipped employee" in FLSA section 3(t). This is so because "cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses" is side work performed by a waitress, and "prepar[ing] his or her own short order" is side work for a counterman. Both Congress and the Department have long recognized employees working as a "waitress" and as a "counterman" to be "tipped employees" because they are "engaged in an occupation" that "customarily and regularly" receives the requisite amount of tips.[19]

Indeed, the original dual jobs regulation makes explicit the Department's recognition and understanding that performing side work duties is an integral part of being a "tipped employee" under the FLSA—*i.e.*, "engaging in an occupation" that "customarily and regularly receives" the requisite amount of tips. This is so because the final sentence of § 531.56(e) specified that "such related duties . . . **need not by themselves be directed toward producing tips**" in order for the tip credit to apply.[20]

III. EMERGENCE OF THE 80% STANDARD

The Department first applied its 1967 "dual jobs" regulation to tasks performed by an employee with a *single* job in a 1979 opinion letter issued by the Wage and Hour Division. In that letter, "the department considered whether a restaurant employer could take a tip credit for time servers spend preparing vegetables for use in the salad bar before the establishment was open to the public."[21] The Department decided that "salad preparation activities are essentially the activities performed by chefs" and thus "no tip credit may be taken for time spent in preparing vegetables for the salad bar."[22]

In a 1980 opinion letter, the Wage and Hour Division addressed restaurant servers spending time "cleaning and resetting tables, cleaning and stocking the server station, and vacuuming the dining room carpet after the restaurant was closed."[23] The Department reiterated the distinction in the 1967 dual jobs regulation between (1) "employees who spend 'part of [their] time' performing 'related duties in an occupation that is a tipped occupation' that do not produce tips" and (2) situations "where there is a clear dividing line between the types of duties performed by a tipped employee, such as between maintenance duties and waitress duties."[24] Because in the situation under review the "duties were 'assigned generally to the waitress/waiter staff,' the Department found them to be related to the employees' tipped occupation" and, thus, subject to the tip credit.[25] The Department cautioned that the

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19 *See* S. Rep. No. 93-690, at 43.

20 29 C.F.R. § 531.56(e) (1967) (emphasis added).

21 86 Fed. Reg. at 60,116.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

tip credit would be unavailable "if 'specific employees were routinely assigned . . . maintenance work such as floor vacuuming'", as opposed to these tasks being assigned to the wait staff generally.[26]

In 1985, the Department issued an opinion letter considering a scenario in which a restaurant assigned one specific server "to perform preparatory activities" such as "setting tables and ensuring that restaurant supplies are stocked," with those activities amounting to "30% to 40% of the employee's workday[.]"[27] The Department concluded that in that instance, based on the dual jobs regulation then in effect, as well as the earlier opinion letters, "a tip credit was not permissible as to the time the employee spent performing those activities."[28]

In 1988, the Wage and Hour Division amended its Field Operations Handbook (the "FOH"), which is a manual that guides the agency's investigators in applying the various laws the agency enforces when conducting investigations, to address the dual jobs concept.[29] The Wage and Hour Division added FOH section 30d00(e), which stated that the dual jobs regulation "'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),' if those duties are 'incidental' and 'generally assigned' to tipped employees."[30] Section 30d00(e) further stated 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 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties."[31]

IV. COMPLETE POLICY REVERSALS IN FOUR CONSECUTIVE ADMINISTRATIONS

The Department's 20% limit on side work, which equates to a requirement of actively seeking tips during at least 80% of an employee's working time and has come to be known as the "80/20 Rule", initially was not widely known among workers or employers. The FOH was not originally available via a website as it is today, nor did third parties publish the contents of the FOH. In 1988, and for the first nearly two decades that the 80% requirement represented the Department's policy, the main avenue for a member of the public to even see FOH section 30d00(e) was to submit a Freedom of Information Act request to the Department. That all changed in May of 2007, when the Western District of Missouri issued its decision in *Fast v. Applebee's International, Inc.*[32], allowing an employee's claim of a minimum wage violation based on FOH section 30d00(e) to proceed, denying

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26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.* Judge Graber's partial dissent in *Marsh v. J. Alexander's LLC*, 905 F.3d 610 (9th Cir. 2018) (en banc), carefully examines this portion of the FOH and demonstrates in detail why that statement of the 20% limit on side work rested on a clear misunderstanding of the 1967 dual jobs regulation. *See id.* at 635-36 (Graber, J., concurring in part and dissenting in part).

32 502 F. Supp. 2d 996 (W.D. Mo. 2007)

the employer's motion for summary judgment.[33] That decision received broad attention in the media and kicked off a wave of class and collective actions across the country that continues to this day.

Once the 80% issue achieved broad attention, every administration since that time has done a 180-degree reversal of its predecessor's position. The George W. Bush Administration rescinded the 80% interpretation through an opinion letter issued in early 2009.[34] The Obama Administration withdrew that letter within the first few months of taking office.[35] In November 2018, the Trump Administration reissued the 2009 opinion letter from the Bush years and promulgated further guidance noting that the agency had updated the FOH to eliminate the 80% requirement.[36] In 2020, that same administration issued a final rule to codify in the regulations an interpretation of the dual jobs concept consistent with the 2009 opinion letter.[37] That rule had an effective date of March 1, 2021.[38] Upon taking office in January 2021, the current administration extended the effective date for the 2020 rule and then proceeded with the rulemaking currently at issue, which nullified the key portions of the Trump-era rule.[39]

V. THE DEPARTMENT'S MOST RECENT STATEMENT OF ITS POSITION: THE 2021 FINAL RULE

The Department issued the 2021 Final Rule after a notice and comment period. The 2021 Final Rule changes the Department's prior regulations by concocting a previously unknown framework—the "tipped occupation"—for evaluating availability of the tip credit. That concept, however, does not appear, and finds no support, in the statute, and imposes a regulatory regime in conflict with the plain language Congress wrote into the FLSA.

A. The 2021 Final Rule replaced the 1967 dual jobs regulation, which focused on two distinct, non-overlapping jobs, with a new standard focused solely on whether each task within a *single* job directly and immediately generates tips.

The 2021 Final Rule modified subsection (e) and added new subsection (f) to 29 C.F.R. § 531.56, creating a multi-layered definition of a term found nowhere in the statute: "tipped occupation." The 2021 Final Rule defined "tipped occupation" in an entirely circular manner: "An employee is engaged in a tipped occupation when the employee performs work that is part of the tipped occupation."[40] That linguistic legerdemain allows the Department to create a brand new standard for what it views as "performing work that is part of the tipped occupation," and to decree that "[a]n employer may only take a tip credit for work performed by a tipped employee that is part of the employee's

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33 *See id.* at 1001-04.

34 86 Fed. Reg. at 60,117.

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.* at 60,118.

40 All references to § 531.56(f) refer to the version that took effect on December 28, 2021.

tipped occupation."[41] The Department then proceeded to devise three distinct categories of "work" that it deems to fall within or outside of the non-statutory term "tipped occupation."

First, the 2021 Final Rule posited a category of activity it calls "tip-producing work."[42] According to the 2021 Final Rule, this is work that actually "produces tips," and "includes all aspects of the service to customers for which the tipped employee receives tips," such as a server "providing table service" and a bartender "making and serving drinks."[43] The 2021 Final Rule allowed employers to take a tip credit for all time an employee spends on "tip-producing work."[44]

Second, the 2021 Final Rule established a category referred to as "directly supporting work."[45] According to the 2021 Final Rule, this is work "performed by a tipped employee in preparation of or to otherwise assist tip-producing customer service work," such as a server "refilling salt and pepper shakers and ketchup bottles, rolling silverware, folding napkins, sweeping or vacuuming under tables in the dining area, and setting and bussing tables."[46] The 2021 Final Rule also created a new multi-part "substantial amount of time" limitation for "directly supporting work":

> An employer can take a tip credit for the time a tipped employee spends performing work that is not tip-producing, but directly supports tip-producing work, provided that the employee does not perform that work for a substantial amount of time. For the purposes of this section, an employee has performed work for a substantial amount of time if:
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> (i) The directly supporting work exceeds a 20 percent workweek tolerance, which is calculated by determining 20 percent of the hours in the workweek for which the employer has taken a tip credit. The employer cannot take a tip credit for any time spent on directly supporting work that exceeds the 20 percent tolerance. Time for which an employer does not take a tip credit is excluded in calculating the 20 percent tolerance; or
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> (ii) For any continuous period of time, the directly supporting work exceeds 30 minutes. If a tipped employee performs directly supporting work for a continuous period of time that exceeds 30 minutes, the employer cannot take a tip credit for any time that exceeds 30 minutes. Time in excess of the 30 minutes, for which an employer may not take a tip credit, is excluded in calculating the 20 percent tolerance in paragraph (f)(4)(i) of this section.[47]

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41 29 C.F.R. § 531.56(f).

42 *Id.* § 531.56(f)(2).

43 *Id.* § 531.56(f)(1)(i), (f)(2)(i)-(ii).

44 *Id.* § 531.56(f).

45 *Id.* § 531.56(f)(3).

46 *Id.* § 531.56(f)(3)(i), (ii).

47 *Id.* § 531.56(f)(4).

The Department explained that under the 2021 Final Rule, idle time when business is slow and an employee is waiting to perform the core tasks of his or her occupation, such as a restaurant server waiting for customers to arrive between when the lunch crowd leaves and the dinner crowd arrives, counts not as "tip-producing work," but rather as "directly supporting work" subject to the 20% limitation:

> In response to comments asking how to categorize a tipped employee's down time, when the employee has started their shift and is waiting for customer service to commence but is otherwise not performing any customer service work or work in support of customer service work, the Department notes that this question is answered by the revised definitions in the final rule. In this circumstance, where the employee is not providing service to customers for which the tipped employee receives tips, **that time cannot be categorized as tip-producing work under the revised definition**. Because the tipped employee is available to immediately provide customer service when the customer arrives, however, the time is being spent in preparation of the customer service, **and is therefore properly categorized as directly supporting work**.[48]

Third, the 2021 Final Rule referred to work "that is not part of the tipped occupation." According to the 2021 Final Rule, this is work that the Department has deemed "does not provide service to customers for which tipped employees receive tips, and does not directly support tip-producing work."[49] The Department deemed "[p]reparing food, including salads," to be "not part of the tipped occupation" of a server, and "[c]leaning the dining room" to be "not part of the tipped occupation" of a bartender.[50] The 2021 Final Rule provided zero tolerance for "not part of the tipped occupation" work: "If a tipped employee is required to perform work that is not part of the employee's tipped occupation, the employer may not take a tip credit for that time."[51] The 2021 Final Rule carved all work the Department deems "not part of the tipped occupation" from the tip credit even though employees falling within the statute's definition of "tipped employee"—*i.e.*, "engaged in an occupation that customarily and regularly" receives the requisite amount in tips—frequently perform such duties and activities.

The 2021 Final Rule's brand new, and completely different, regulatory regime is untethered to Congress's definition of "tipped employee." Nothing in the statute purports to limit the availability of the tip credit to whether an employee performs specific job duties or tasks that directly and immediately produce tips. Instead, if the employee regularly receives at least $30 a month in tips from his or her job, regardless of how or why the employee gets those tips, the employee is a "tipped employee," and the employer may take the tip credit under the plain text and ordinary meaning of the terms in the statute. That is the law Congress wrote, and it precludes the Department's new standard for the tip credit in the Final Rule.

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48 86 Fed. Reg. at 60,130 (emphases added).

49 29 C.F.R. § 531.56(f)(5)(i).

50 *Id.* § 531.56(f)(5)(ii).

51 *Id.* § 531.56(f)(5)(i).

VI. HOW THE COURTS ADDRESSED DUAL JOBS BEFORE *LOPER BRIGHT*

The first federal appeals court to consider the Department's 80/20 approach to dual jobs and the tip credit was the United States Court of Appeals for the Eighth Circuit, which in 2011 upheld the Department's position in *Fast v. Applebee's International, Inc.*[52] In short, the Eighth Circuit concluded that the Department's 1967 dual jobs regulation was ambiguous and that the Department's interpretation of that regulation in the form of the 1988 version of the Field Operations Handbook is controlling under *Auer v. Robbins*.[53]

In 2017, a divided three-judge panel of the United States Court of Appeals for the Ninth Circuit determined that the 80/20 standard was not a reasonable interpretation of the 1967 dual jobs regulation and rejected it as unworthy of *Auer* deference.[54] The following year, however, an en banc panel of that same court reached the opposite conclusion, determining that the statutory phrase "engaged in an occupation" is sufficiently ambiguous to trigger deference to the 1967 dual jobs regulation under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*[55], and that the Department's 80/20 standard was a reasonable interpretation of that regulation entitled to deference under *Auer*.[56] Three judges dissented from the en banc ruling.

In 2021, while the Department's position was in flux amid the withdrawal of the 1988 Field Operations Handbook verbiage setting forth the 80/20 concept, the Trump Administration's efforts to codify into regulations a position very different from the 80/20 rule, and the Biden Administration's efforts to negate that rulemaking and to replace it with what would eventually become the 2021 Final Rule, the United States Court of Appeals for the Eleventh Circuit adopted the 80/20 concept as its own interpretation of the 1967 dual jobs regulation, with one member of the three-judge panel rejecting that approach.[57]

In each of these three cases—*Fast*, *Marsh*, and *Rafferty*—the starting point was *Chevron* deference to the 1967 dual jobs regulation, followed by *Auer* deference to the Department's views about that regulation.

VII. DUAL JOBS LITIGATION AFTER *LOPER BRIGHT*: THE FIFTH CIRCUIT REJECTS THE 2021 FINAL RULE

On June 28, 2024, the Supreme Court of the United States handed down its decision in *Loper Bright Enterprises v. Raimondo*[58], one of the most consequential administrative law rulings of the past forty years. Generations of lawyers had become accustomed to courts viewing *Chevron* as a command to abandon statutory interpretation at the first hint of textual ambiguity, at which point the courts

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52 638 F.3d 871 (8th Cir. 2011).

53 519 U.S. 452 (1997).

54 *See* Marsh v. J. Alexander's LLC, 869 F.3d 1108 (9th Cir. 2017).

55 468 U.S. 837 (1984).

56 *See* Marsh v. J. Alexander's LLC, 905 F.3d 610 (9th Cir. 2018) (en banc).

57 *See* Rafferty v. Denny's, Inc., 13 F.4th 1166 (11th Cir. 2021).

58 144 S. Ct. 2244 (2024).

were to give controlling deference to the agency's interpretation of the statute, even if it differed from how the court would construe the statute. The agency's views would control unless its construction were patently unreasonable, which in practice was a nearly insurmountable standard for a party challenging a regulation to meet.

Simply put, *Loper Bright* overruled *Chevron*. Now, when faced with ambiguous statutory text, "instead of declaring a particular party's reading 'permissible' in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity."[59] No longer must courts allow agencies to define their own authority to regulate; the role of determining the agency's authority now rests squarely with the courts, even where the statutory text contains a measure of ambiguity, as so many statutes do.

While *Loper Bright* was working its way through the courts, the Restaurant Law Center and the Texas Restaurant Association brought a challenge to the Department's 2021 Final Rule, contending that the regulation is contrary to the FLSA as well as being arbitrary and capricious. The district court upheld the regulation under *Chevron*, concluding that the statutory phrase "engage in an occupation" is ambiguous, and that the Department's interpretation in the 2021 Final Rule is permissible.[60]

Loper Bright came down about two months after the United States Court of Appeals for the Fifth Circuit heard oral argument in the challenge to the 2021 Final Rule. On August 23, 2024, the Fifth Circuit issued its unanimous decision rejecting the 2021 Final Rule.[61] The court performed its own careful, complete, and independent analysis of the statutory language and concluded that the Department's attempt to parse availability of the tip credit based on the amount of time spent on tip-producing tasks was "contrary to the Fair Labor Standards Act's clear text" and thus "it is not in accordance with law" under the Administrative Procedure Act.[62] The court also held that because the 2021 Final Rule "imposes a line-drawing regime that Congress did not countenance, it is arbitrary and capricious."[63] The court concluded its opinion as follows: "Accordingly., we REVERSE both the district court's order granting summary judgment to DOL and its order denying summary judgment to the Associations. We RENDER summary judgment for the Associations and VACATE the Final Rule."[64]

VIII. H.R. 1612, THE "TIPPED EMPLOYEE PROTECTION ACT"

In March of 2023, lawmakers introduced H.R. 1612, known as "The Tipped Employee Protection Act." The bill would, if enacted into law, eliminate the ambiguous "engaged in an occupation" verbiage from section 3(t) of the FLSA, the phrase that the Department used as the basis for its 80/20 standard. In its place, the bill would define "tipped employee" as anyone, regardless of job duties,

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59 *Id.* at 2266.

60 *See* Rest. Law Ctr. v. Dep't of Lab., No. 1:21-CV-1106-RP, 2023 WL 4375518 (W.D. Tex. July 6, 2023). The author was lead counsel for the plaintiffs in that litigation, joined by Kathleen Barrett of Epstein, Becker and Green and Angelo Amador of the Restaurant Law Center.

61 Rest. Law Ctr. v. Dep't of Lab., — F.4th —, No. 23-50562, 2023 WL 3911308 (5th Cir. Aug. 23, 2024)

62 2023 WL 3911308, at *1.

63 *Id.*

64 *Id.* at *11.

who receives enough in tips to cover any tip credit the employer takes, so long as the employer pays at least the minimum cash wage specified in the FLSA for tipped employees. The bill would also allow the employer some flexibility with regard to the time period, ranging from one day to as much as a month, for determining whether the tips plus cash wages qualify the worker as a tipped employee.

If enacted, this bill would once and for all get the Department out of the business of trying to micromanage restaurant, hotel, and casino work at the task level. It would make clear that the whole point of the tip credit is to make sure that tipped workers are on an equal footing with non-tipped workers. The FLSA has never been about conferring upon tipped employees minimum wage rights beyond those of other workers, even though the Department has for more than 30 years tried to take a contrary position in that regard.

I strongly support H.R. 1612 as being in line with the purpose of the tip credit. It also happens to line up well with that the Fifth Circuit declared just last month in rejecting the Department's 80/20 standard as contrary to the current statutory text.

IX. EFFORTS TO ELIMINATE THE TIP CREDIT

In April of 2021, the President issued Executive Order 14026, entitled "Increasing the Minimum Wage for Federal Contractors." Section 3 of that Executive Order phased out the tip credit for workers on covered contracts as of January 1, 2024. In addition, there have been various legislative efforts in recent years to eliminate the tip credit from the FLSA generally.

These efforts are, in my view, misguided, mainly because they are unnecessary and would not make tipped employees better off; to the contrary, they would earn less as a result. Restaurant workers have repeatedly demonstrated that they prefer the tip credit.

Three recent studies examine the data regarding tipped employees, taking into consideration not only the hourly wages and tip credit, which together constitute the employees' "wages" under the FLSA, but also their tips, thereby painting a much more complete picture of their economic circumstances.[65] These reports make several key findings:

First, tipped workers have *total* earnings (i.e., including tips) that average $15.51 per hour, more than twice the current federal minimum wage.[66]

Second, as tipped minimum wages increase, customer tipping decreases. States with lower tipped minimum wages see higher average tip percentages than states with higher tipped minimum wages.[67]

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[65] *See* David Neumark & Emma Wohl, *Do Higher Tipped Minimum Wages Reduce Race, Ethnic, or Gender Earnings Gaps for Restaurant Workers?* (Employment Policies Institute Sept. 2024); Rebekah Paxton, *The Case for the Tip Credit: From Workers, Employers, and Research* (Employment Policies Institute (June 2023); David Neumark & Maysen Yen, *Tipped Workers, Minimum Wage Workers, and Poverty: Analyzing the Redistributive Impact of Eliminating Tip Credits* (Employment Policies Institute Feb. 2021).

[66] Paxton at 3.

[67] *Id.* at 8.

Third, when the tipped minimum wage increases, restaurants shift their hiring preferences and elect to hire "higher-educated or higher-skilled workers, pricing out lower-skilled workers[,]" thereby harming "young, lower-educated workers[.]"[68]

Fourth, when faced with the alternatives of tipped employment subject to the tip credit or all-in menu pricing with no tipping, *97 percent* of tipped employees prefer the tipping option.[69]

Fifth, 81% of restaurant customers prefer traditional tipping to "no-tip alternatives."[70]

Sixth, numerous restaurants that have shifted to a no-tip approach have found themselves forced to return to a tipping model due to high numbers of employees leaving to pursue other employment opportunities that allow for tips.[71]

Seventh, tipped workers are approximately 40% less likely than other nominally minimum wage workers to fall below the poverty line.[72]

Eighth, there is a broad consensus among American labor economists, with approximately three out of four agreeing that reducing the tip credit, and thereby increasing the cash wage tipped workers must receive, reduces employment.[73]

Lastly, the available economic evidence does not support the conclusion that raising the tipped minimum wage reduces disparities in weekly earnings among female, Hispanic, or African-American tipped workers as compared to Caucasian male tipped workers. To the contrary, regression analysis demonstrates that "none of the demographic groups have their weekly earnings raised by [increases in] tipped minimum wages."[74]

Taken together, these findings confirm that the tip credit does not harm workers; it helps them. When given the choice, tipped employees prefer tipped employment to non-tipped employment. The tip credit provisions of the FLSA ensure that tipped employees are no worse off than other minimum wage employees, and the reality of tipping practices leads to tipped employees receiving total earnings nearly double those of the typical minimum wage employee. Ending the tip credit will help no worker or consumer. Moreover, no worker who wants an hourly wage at or above minimum wage needs to choose a tipped position. Workers seek out tipped jobs precisely because these positions offer the opportunity to achieve significant total earnings.

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68 *Id.* at 9.

69 *Id.* at 3.

70 *Id.* at 4.

71 *Id.* at 14-16 (discussing experiences at nine different restaurant concepts that tried a no-tipping approach).

72 Neumark & Yen at 1, 9-11.

73 Paxton at 6.

74 Neumark & Wohl at 24-25.

X. CONCLUSION

For these reasons, I encourage the Subcommittee to give consideration to H.R. 1612 and to reject efforts to eliminate or to reduce the tip credit. Chairman Kiley, Ranking Member Adams, and members of the Subcommittee, thank you for the opportunity to share these views with you today. Please let me know what else I can do to help you in this matter.