No. 11-425

In the
Supreme Court of the United States

APPLEBEE'S INTERNATIONAL, INC.,
Petitioner,

v.

GERALD A. FAST, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN HOTEL AND LODGING ASSOCIATION IN SUPPORT OF PETITIONER

NOAH A. FINKEL*
ALEXANDER J. PASSANTINO
C.J. EATON
SEYFARTH SHAW LLP
131 S. DEARBORN STREET
SUITE 2400
CHICAGO, ILLINOIS 60603
(312) 460-5000
nfinkel@seyfarth.com

*Counsel of Record
Counsel for Amicus Curiae American Hotel and Lodging Association

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTERESTS OF *AMICUS CURIAE*[1]

This brief *amicus curiae* in support of petitioner is filed on behalf of the American Hotel and Lodging Association (AHLA). AHLA is a 101-year-old dual membership association of state and city partner lodging associations throughout the United States. AHLA's membership is comprised of hotels and motels in all areas of the industry regardless of size, type, location, services offered, clientele, ownership, status as an independent or chain affiliate, or franchise or independent owner status. With approximately 10,000 property members nationwide, AHLA represents more than 1.4 million guest rooms and over 1.1 million employees in the United States.

These hotels and motels employ thousands of employees who earn tips in the course of their employment, most of whom are paid wages taking into account the "tip credit" discussed in this brief. In addition to the waiters, waitresses, and bartenders who work in the hotel bars and restaurants, bellmen, porters, housekeepers, concierges, casino employees, in-room dining attendants, spa service providers, and valet attendants are among the employees who earn tips at hotels and motels around the country.

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[1] Pursuant to Rule 37.6 of this Court, *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus*, its members, and its counsel made such a monetary contribution. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

The ruling below limiting the ability of employers to use the statutory tip credit in satisfying their minimum wage obligations for tipped employees will have a profound impact – financially and operationally – on AHLA members and the hotel industry in general. Moreover, AHLA advocates sound public policy on behalf of its members, and takes an interest in cases and laws that could adversely impact the hotel industry. Accordingly, AHLA has a significant interest in urging this Court to grant Applebee's Petition for Writ of Certiorari and reverse the Eighth Circuit's decision restricting the statutory application of the tip credit. The decision conflicts significantly from the text of the statute and governing regulations and creates an unworkable standard, and it will have widespread financial impact on the hotel industry if allowed to stand.

STATEMENT OF CASE

Petitioner's questions presented address the scope of an employer's ability to use the statutorily permissible "tip credit" in satisfying its obligations under the Fair Labor Standards Act (FLSA) and the appropriate level of deference to be afforded a subregulatory interpretation of a federal agency.

The FLSA generally requires covered employers to pay their non-exempt employees a minimum wage (currently $7.25 per hour) for each hour of work. 29 U.S.C. § 206(a)(1)(C). Under the statute, the "wage" for a "tipped employee" includes (among other items) a cash wage of $2.13 per hour and an "additional amount on account of the tips received by [the tipped] employee which amount is equal to the difference between" $2.13 per hour and the minimum wage in

effect at the time. 29 U.S.C. § 203(m). The latter amount is commonly referred to as the "tip credit."

At issue here is the determination of which employees are "tipped employees" for the purposes of an employer using the tip credit to satisfy its minimum wage obligation.[2] The statute provides a concise definition of "tipped employee": "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." *Id.* § 203(t).[3]

In *Fast vs. Applebee's International, Inc.*, Pet. App. 1a, the Eighth Circuit determined that the ability of an employer to use the tip credit to satisfy its minimum wage obligations was subject to a 20% limitation on that employee's performance of "non-tip-producing" work. In reaching that determination, the Eighth Circuit created a split between itself and the Sixth and Eleventh Circuits. *See* Pet. Br. 17. That split has been further exacerbated by a recent Fifth Circuit decision that adopts the rationale of the Eighth Circuit. *See* Pet. Br. 17.

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[2] Certain procedural issues related to an employer's ability to take the tip credit are not at issue in this case. *See* 29 U.S.C. § 203(m) (setting forth requirements for using the tip credit).

[3] Despite numerous amendments to the FLSA since that time, section 203(t) has not been amended since 1977, when Congress increased the monthly tip requirement from $20 to $30. The Fair Labor Standards Amendments of 1977, Pub. L. 95-151, 91 Stat. 1245.

SUMMARY OF ARGUMENT

The resolution of the questions presented by petitioner is crucial to the economic viability of employers of "tipped employees," including employers in the hotel industry. If this Court does not resolve the circuit split, employers and employees will be subject to different rules regarding the federal minimum wage based entirely on the jurisdictions in which they do business.

The 20% rule adopted by the Eighth Circuit will severely burden employers of tipped employees, including hotels. To comply with the 20% rule, employers will have to track in minute-by-minute detail the amount of time each employee spends performing particular tasks, then classify those tasks as either "tip-producing" or "non-tip-producing." If the "non-tip-producing" work exceeds the 20% limit, the employer must make an additional wage payment to compensate the employee at the full minimum wage for the time spent performing "non-tip-producing" duties, even though the employee was already paid at least the minimum wage (in wages and tips combined) for all hours worked.

ARGUMENT

I. THE SPLIT AMONG THE FEDERAL COURTS WILL CREATE A SIGNIFICANT DISPARITY AMONG HOTEL OPERATIONS IN DIFFERENT STATES

The decision of the Court of Appeals for the Eighth Circuit creates a clear split in the federal circuit courts regarding the determination of which employees

qualify as "tipped employees" for the purposes of using the tip credit to satisfy the FLSA's minimum wage requirements. This split of authority creates fundamentally different federal minimum wage obligations for different hotel employers – or even different hotels operated by the same employer – based almost entirely on the location of the hotel.

The Eighth Circuit's decision in this case conflicts most directly with the Eleventh Circuit's decision in *Pellon v. Business Representation International, Inc.*, 291 F. App'x 310 (11th Cir. 2008). In *Pellon*, the plaintiffs, who were airport skycaps, alleged that their employers had improperly taken the tip credit for time they spent performing non-tipped duties, including transporting luggage to screening locations, collecting baggage fees, assisting disabled passengers, and keeping the baggage-claim and check-in areas clean. *Pellon v. Bus. Representation Int'l, Inc.*, 528 F. Supp. 2d 1306, 1314 (S.D. Fla. 2007). The district court held, and the Eleventh Circuit affirmed, that because the non-tipped duties were related to a skycap's occupation, the duties "need not by themselves be directed toward producing tips." *Id.*, 528 F. Supp. 2d at 1313 (quoting 29 C.F.R. § 531.56(e)); *Pellon*, 291 F. App'x at 311. The court rejected the 20% rule, holding that "a determination whether 20% (or any amount) of . . . time is spent on non-tipped duties is infeasible" and that it would be "impractical or impossible" to divide the workday among the various tasks performed. *Pellon*, 528 F. Supp. 2d at 1314.

As noted in petitioner's brief, Pet. Br. 20, the Sixth Circuit has also held that the relevant question is whether the duties at issue are related to the tipped employee's occupation or a different occupation, and at

least two district courts have rejected the 20% rule. *See Myers v. Copper Cellar Corp.*, 192 F.3d 546 (6th Cir. 1999); *Driver v. AppleIllinois*, 265 F.R.D. 293, 311 (N.D. Ill. 2010); *Townsend v. BG-Meridian, Inc.*, No. 04-1162, 2005 WL 2978899, at *7 (W.D. Okla. Nov. 7, 2005).[4]

The "infeasible" and "impractical" rule adopted by the Eighth Circuit's decision inescapably results in different federal minimum wage standards in different states or regions. Under the Eighth Circuit's decision, a single employer will be required to apply completely different rules to two employees who hold the same position and perform identical duties. An employee in Memphis, Tennessee, will be subject to different federal minimum wage rules if transferred to a hotel a short drive away in Little Rock, Arkansas, or Tunica, Mississippi. A hotel in Kansas City, Missouri, is subject to the 20% rule; a hotel in Kansas City, Kansas, may not be. And the rule applicable to a hotel in the Quad Cities may be entirely dependent upon the particular bank of the Mississippi on which the hotel sits. This situation is illogical and imposes unnecessary costs and burdens on hotels and other employers of tipped employees who operate in more than one state or region. Moreover, as described in more detail below, because those costs and burdens may result in costs that may have to be passed on to the consumers, these differences among the circuits may create competitive disadvantages for hotels based

[4] In addition, as petitioner notes, the Fifth Circuit also has recently ruled in a case that is consistent with the Eighth Circuit's decision. Pet. Br. 21.

not on a difference in the applicable law, but only because of differing courts' interpretations of that law.

Review of the first question presented by petitioner is thus necessary to resolve a split among the circuits. If the Eighth Circuit's decision stands, employers who currently operate in the states in that circuit will be forced to change their current compensation practices – and thus the way in which they operate their businesses – even though their current practices comply with the relevant statute and the regulations, as well as the applicable law in other circuits.

II. THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT ADOPTED A STANDARD THAT IS INFEASIBLE, IMPRACTICAL, AND IMPOSSIBLE FOR HOTEL EMPLOYERS TO IMPLEMENT

The decision below places restrictions on hotel employers that, as noted in the *Pellon* case, are unworkable as a practical matter. If the Eighth Circuit's decision is permitted to stand, it will require that an employer prevent the employees for whom it seeks to use the tip credit from spending more than 20% of their time on "non-tip-producing" activities, even when those duties are indisputably part of the occupation in which the employee is working.

When an employee works in two jobs – waitress and janitor, or valet and maintenance, for example – the regulations provide a clear, common-sense requirement for employers to follow: the tip credit calculation may not be used for the time spent by the employee in the non-tipped occupation. *See* 29 C.F.R. § 531.56(e). Although it may be difficult to do so in

particular circumstances, an employer who employs a worker in multiple occupations often has the ability to limit an employee's tasks to those within the occupation in which the employee is working; in other words, to ensure that the employee is performing work associated with a particular occupation. Whether this is accomplished by reassigning work to other employees or requiring an individual employee to perform specified work only on particular shifts, an employer has the tools at its disposal to comply with the requirements of section 531.56(e).

When faced with the presumably easier scenario of an employee who works in a single occupation, the Eighth Circuit's decision makes an employer's obligations far more complicated. Because the Eighth Circuit's decision addresses those tasks that are part-and-parcel of a tipped occupation, they cannot be simply "spun off" to another worker or another shift. The tasks at issue are the tipped occupation, integrally related to job being performed by the employee. Thus, the decision forces hotels into a dilemma: track in minute detail each individual task performed by the employee or forego use of the tip credit.

If the employer chooses the former, it must tackle the Herculean task of monitoring and tracking every task performed by every tipped employee to determine whether each employee spent at least 80% of his or her time on tip-producing tasks.[5] This would require

[5] In addition, because "violating" the Eighth Circuit's 20% tolerance for non-tip-producing work would result in an increased cash wage obligation of up to $5.12 per hour for the time spent in "non-tip-producing" work, hotels would need to track this information on a real-time or nearly real-time basis to ensure that they would not have a large and unexpected financial obligation at the end of a particular workweek.

either constant surveillance of tipped employees by their managers or a person hired specifically to conduct monitoring, or detailed timekeeping by employees themselves. Neither option is workable.

Managers cannot possibly observe every task completed by every employee, and any attempt to do so is likely to detract from their ability to complete their own tasks. Nor is the hiring of "monitors" a workable solution. First, because tipped employees in a hotel may perform their tasks in more than one room, several monitors would likely be required for even a small hotel. Second, this "solution" would increase overhead, in some cases significantly, and is likely not a financially feasible option for most hotels.

Alternatively, employers could require employees to track their own time down to the minute or second. This presents several problems. First, to accurately track the time spent on each task, employees will necessarily need to take time to record tasks as they are performed, a system that will interfere with customer service. Second, under this system, the employer must rely on employees' accounting of their time spent on tip-producing versus non-tip-producing tasks. Without following one of the monitoring procedures above, employers simply cannot verify the accuracy of those records or defend against later claims by employees that they actually spent more time performing non-tip-producing tasks than the records indicate.

Of course, even if the hotel was somehow able to track the amount of time every tipped employee spent on each and every task with some measure of certainty, under the Eighth Circuit's decision, the hotel would then need to determine which of the tasks was "tip-producing" and which of the tasks was "non-tip-producing." Unfortunately, the Eighth Circuit did not define or otherwise provide guidance as to which activities are "tip-producing" and which are "non-tip-producing." The terms are not defined in the statute, the implementing regulations, or any other interpretive guidance by the Department of Labor.

Thus, the Eighth Circuit's decision creates a rule that hotel employers must follow, but no guidance on how to comply with that rule. The line between "tip-producing" and "non-tip-producing" is less than clear. The majority of duties performed by a waiter, for example, contribute to a customers' dining experience and are thus arguably tip-producing. Some of those duties are, however, more obvious to the tip-providing customer than others. For example, placement by a server of food on the table in front of customers is most certainly tip-producing, direct customer service, but what about the behind-the-scenes placement of the same food on a tray or cart by the same server before bringing to the table? Both duties undeniably contribute to the customer experience. Does the fact that the customer directly observes one and not the other matter? An employer's miscategorization of even a single duty could have significant consequences by tipping the 80/20 balance, thus causing the employer to lose the ability to use the tip credit. When multiplied over time for all potentially-impacted employees, the financial impact on an employer could be devastating.

Facing these potentially staggering costs, hotels may opt to choose the second option: foregoing the tip credit. If a hotel does so, it may have to fundamentally alter the way in which it does business. It is hard to imagine that an increase in cash wages from $2.13 per hour to (at least) $7.25 per hour for all tipped employees could be achieved without such an alteration. Such an increase in wage costs could result in increased customer costs or a decision to implement mandatory service charges. Because service charges are not considered tips under federal law, employers are not required to distribute them to employees and can instead use those funds to cover increased wage payments. *See* 29 C.F.R. §§ 531.52, 531.55.

In establishing the tip credit, Congress allowed "an employer to pay a 'tipped employee' a reduced direct wage of $2.13 per hour as long as the employee receives at least the minimum wage in wages and tips combined." 29 U.S.C. § 203(m). The Eighth Circuit's decision makes it nearly impossible for an employer to take advantage of this statutory provision. Review of the first question presented is thus necessary to ensure that the Congressionally-authorized tip credit exists in practice as well as theory.

CONCLUSION

For the reasons stated above, the Court should grant Applebee's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

NOAH A. FINKEL*
ALEXANDER J. PASSANTINO
C.J. EATON
SEYFARTH SHAW LLP
131 S. Dearborn Street
Suite 2400
Chicago, Illinois 60603
(312) 460-5000
nfinkel@seyfarth.com

*Counsel of Record
Counsel for Amicus Curiae