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 APPLE AMERICAN GROUP LLC AND OTHER APPLEBEE'S FRANCHISEES AS *AMICUS CURIAE* SUPPORTING PETITIONER

MELISSA L. GRIFFIN
Counsel of Record
APPLE AMERICAN GROUP LLC
225 BUSH STREET, STE. 1470
SAN FRANCISCO, CA 94104
(415) 835-0226
mgriffin@appleamerican.com

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae Apple American Group LLC (AAG) is an organization of franchisees that operates restaurants under the name Applebee's Neighborhood Grill & Bar. AAG was formed in 1999 and is made up of 335 locations. This brief is joined by 24 other franchisee organizations that operate a total of 1,235 Applebee's restaurants.

Franchisees of Applebee's Services International Inc. are in a purely contractual relationship in which royalties are paid to use the Applebee's Neighborhood Grill & Bar trademark and for advisory services. Franchisees are not parties to the lawsuit and do not stand to gain directly from a successful appeal by petitioner, Applebee's Services International, Inc.

Because the decision will devastate the restaurant industry by requiring that every employer keep all tipped employees under perpetual surveillance, Applebee's franchisees have a strong interest in its prompt review and reversal.

SUMMARY OF ARGUMENT

The decision of the Eighth Circuit Court of Appeals in this case (638 F.3d 872) represents a radical departure from both congressional intent regarding a "tip credit" under the Fair Labor Standards Act (hereinafter "the Act") and from decisions in other

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief, in whole or part, and no counsel for a party or party made a monetary contribution to fund the preparation or submission of this brief. No entity or person, aside from the amicus curiae and its counsel, made any monetary contribution for the preparation or submission of this brief. Counsel for the parties received timely notice and consented to this filing.

circuits. Further, the decision imperils the livelihood of the restaurant industry as a whole by imposing a requirement that employers observe and evaluate every minute of every shift that a tipped employee works.

The Act was passed so that American workers would be guaranteed a basic level of income. Because many tipped employees did (and do) earn more than the minimum wage, Congress allowed employers to recognize that extra income and deduct a certain amount from the minimum wages owed to tipped employees. This amount – called a "tip credit" – has changed over time, and is presently $5.12 cents per hour. To the extent that the tipped employee does not make enough in tips to constitute minimum wage, the employer has always been required to make up that difference.

Any employer that uses the tip credit has no reason to put employees to work performing excessive non-tipped tasks because the employer will be the one to make up the difference between employees' tips and minimum wage. The Act therefore does not require or contain elaborate definitions regarding what occupations or persons are "tipped" under the Act. It simply extends the tip credit to, "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t). The $30 threshold excludes the smallest of gratuities to employees, like cashiers, who sometimes receive tokens of appreciation.

The Eighth Circuit's decision in this case relies on a provision of a Department of Labor handbook that limits the amount of nontip - producing work that a tipped employee can perform. In doing so, it moves away from the purpose of the Act - to ensure a baseline of income for employees - and shifts the

focus to an accounting of every task an employee completes plus an analysis of whether such a task is tip-producing. Understanding that the ramifications of such a tracking requirement are nothing short of catastrophic for employers, other courts have refused to endorse such a position. Indeed, the Department of Labor itself has recognized that such time-tracking requirements are burdensome and unworkable.

For the foregoing reasons, this Court should grant Applebee's Services, Inc.'s petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

ARGUMENT

"[A]lthough neither controlling nor fully measuring the Court's discretion" the "character of the reasons the Court considers" when determining whether to grant a petition for a writ of certiorari includes instances where, "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." SUP. CT. R. 10.

In this case, the Eighth Circuit's opinion is at odds with decisions of the Sixth and Eleventh Circuits, as well as several lower courts. At issue is the important matter of whether employers must continually watch every action of tipped employees and calculate which actions are tip-producing.

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I. This is an important issue because the decision of the lower court is a radical departure from congressional intent that threatens the restaurant industry as a whole.

A. Congress focused on guaranteeing a minimum wage and never contemplated a "duties test."

In 1966, Congress expanded coverage of the Fair Labor Standards Act to food service establishments and hotels, which had previously been exempt. Fair Labor Standards Act Amendments of 1966, § 201, 80 Stat. 830, 833 (1966); S. Rep. 89-1487, at 10 (1966). The issue of whether to include a credit against the minimum wage for tips received by those newly-covered employees (a "tip credit") was hotly debated from 1962 until 1966.[2] For example, the following is

[2] *See* congressional debates at 112 CONG. REC. H1126-11309 (May 24, 1966), H11360- 11406 (May 25, 1966), H11605- 11653 (May 26, 1966), H21934 – 21949 (September 7, 1966), and S22648 - 22669 (September 14, 1966). *See also* congressional hearings at *Investigation of Extension of Coverage to Laundry, Hotel, Restaurant, Bar and Hospital Workers, Hearing Before the H. Comm. on Education and Labor*, 87th Cong. (1962); *Amendments to the Fair Labor Standards Act, Hearing Before the Subcomm. on Labor of the Comm. on Labor and Public Welfare*, 88th Cong. (1963); *Bills to Amend the Fair Labor Standards Act of 1938, as Amended to give its Protection to Employees of Certain Large Hotels, Motels, Restaurants, and Laundries, and for Other Purposes, Hearing Before the General Subcomm. on Labor of the H. Comm. on Education and Labor*, 88th Cong. (1963); *A Bill to Amend the Fair Labor Standards Act to Extend its Protection to Additional Employees, and for Other Purposes, Hearings Before the General Subcomm. on Labor of the H. Comm. on Education and Labor*, 88th Cong. (1964); *Id.* at 1965; *A Bill to Amend the Fair Labor Standards Act to Extend its Protection to Additional Employees to Improve its Maximum Hours Standards, and for Other Purposes, Hearing Before the General Subcomm. on Labor of the H. Comm. on Education and Labor*, 89th Cong. (1965); and *A Bill to Amend the Fair Labor Standards Act of 1938 to Extend its Protection to Additional Employees, to Raise the Minimum Wage, and for Other Purposes, Hearing before the H. Comm. on Rules*, 89th Cong. (1966).

an exchange from a December 3, 1963 hearing of the House of Representatives Committee on Education and Labor:

> **Walter Simcich, California Labor Federation**: I do not think it is a function of the Fair Labor Standards Act, in effect, to worry about the ceiling. This is hardly Congress' function, whether or not some employees who are covered by the Fair Labor Standards Act might be making more.
>
> **Rep. James Roosevelt (D-CA)**: No, my good friend, but what the Fair Labor Standards Act is trying to do is to make sure that an individual does not make less than x amount of dollars. You and I will agree that what we have done is not to put it at a level perhaps, as high as it ought to be, but what we have said is that they must not make less. If it is shown to us that they are making more than that by other means, such as a tip in this industry, which makes it a very unusual one, the basic theory of the act then must be that they have reached a

> level of income which we have said below which they shall not come. ***We are talking about income.***

Hearing Before the General Subcomm. on Labor of the H. Comm. on Education and Labor, 88th Cong., 216-217 (1963).

Congress settled on a compromise that allowed employers to count 50 percent of the minimum wage as a tip credit. CONF. REP. NO. 89-2004, at 10 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3014.

On the question of "who is a tipped employee?" the decision was made to use the same definition used by the Social Security Administration – "any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips."[3] S. REP. NO. 89-1487, at 10 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3014.

The Eighth Circuit in this case decided that the Act did not define "occupation" and so the Department of Labor rightfully stepped in to do so, using the 20 Percent Rule. 638 F.3d 872, 876. But the statute did not need to define an "occupation" because limiting the scope of who gets the tip credit was achieved by implementing the $20 (now $30) threshold. Regardless of how much time an employee in a tipped occupation spends in non-tip-producing duties, he or she would get the minimum wage, which was the goal of the Act. Complicated and detailed definitions were (and are) not necessary, as explained

[3] According to the Congressional Research Service, this prevents counting "the occasional tips received by cashiers, clerks, or kitchen help toward their minimum wage, as tips are not ordinarily regularly received in such occupations." CONG. RESEARCH SERVICE, RESTAURANTS, HOTELS AND MOTELS UNDER THE FAIR LABOR STANDARDS ACT, AS AMENDED, at 4 (1966).

in the following exchange from a congressional hearing on the matter of the tip credit:

> **Rep. Charles E. Goodell (R-NY):** I recognize, as all people who have tried to legislate in this field recognize, that there is a very serious problem with reference to tips. However, it seems to me that you have exaggerated the problem of distinguishing employees who are under the law, tip employees, from those who are nontip employees.
>
> That is, I am referring to the bill as proposed. The bill exempts those whose tips constitute a major part of their compensation. Now, isn't this really a fairly simple distinction to make? You cite a great many others who might occasionally get tips, but, as an employer, you pretty well know which ones are getting most of their income from tips, don't you?
>
> **Arthur J. Packard, American Hotel and Motel Association:** Yes, we know who gets the tips.
>
> **Goodell:** I am referring to those whose tips are a major part of their income.

Hearing Before the General Subcomm. on Labor of the H. Comm. on Education and Labor, 88th Cong., 89 (1963).

At no point during the consideration of the 1966 amendments to the Act was there a discussion about parsing duties within an occupation or limiting hours

for which one could receive a tip credit to time spend in "tip producing" activities.[4]

B. The Department of Labor regulation and handbook provision that are at issue in this case have unclear origins.

When the Department of Labor first issued a "Proposed Rule Making" for the section of federal regulations dealing with "Crediting Tips as Wages", there was no reference to a "dual jobs" provision. 32 Fed. Reg. 222 (proposed Jan. 9, 1967). The following "dual jobs" section appeared in the final version, after additional, unexplained commentary had been received.

> *Dual jobs.* 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 $20 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.

Crediting Tips as Wages, 32 Fed. Reg. 13,580-13,581 (Sept. 28, 1967)(codified at 29 C.F.R. § 531.56(e)(1966)).

In 1988, the Department of Labor issued a Field Operations Handbook that contained the following guidance regarding the "dual jobs" provision. The handbook specifically states that it is "not used as a device for establishing interpretative policy." http://www.dol.gov/whd/FOH/index.htm. In it, for the first time, and without explanation, time a tipped employee can spend performing tasks that, while related to the tipped occupation, are not themselves tip producing (hereinafter the 20 Percent Rule). It reads:

[4] In fact, when debating the tip credit amendment of 1966, the legislature shot down the closest reference to specific duties of tipped employees, refusing to require "snooping" on employees. On the floor of the House of Representatives, Rep. John Anderson (R-IL) proposed an amendment to the bill that would specifically exclude from the definition of "working time" "any time of any employees of a restaurant, hotel or motel, spent in changing clothes or washing at the beginning or end of each workshift and any time spent eating meals at the premises of the employer." 89 CONG. REC. 11364 (1966). Rep. John Dent (D-PA) explained his opposition to the amendment thusly, "I do not feel we should have a setup where a 'snooper,' as it were-as they are called by some-would have to go to every restaurant to find out whether a trip to the bathroom was legitimate or just one to waste time." *Id.*, at 11365. Rep. Roman Pucinski (D-IL) went on, "If I understand the gentleman's amendment correctly, this will probably be the first time that I know of that we will start keeping a time record of the number of times somebody went to the washroom and how long he spent there." *Id.*, at 11366. Rep. Anderson's amendment failed. Pub. L. 89-601 (1966).

> Reg 531.56(e) permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips (i.e., maintenance and preparatory or closing activities). For example, a waiter/waitress, who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses may continue to be engaged in a tipped occupation even though these duties are not tip producing, provided such duties are incidental to the regular duties of the server (waiter/waitress) and are generally assigned to the servers. However, where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.

Id., at § 30d00(d).

C. The Department of Labor removed the 20 Percent Rule and "dual job" reference in the context of exempt employees because it is burdensome.

Aside from the tip credit regulations, the only other place where the term "dual job" and 20 Percent Rule were used was in the test to determine whether an employee is exempt as an administrative, executive or professional worker. In 2004, the "dual job" regulation and 20 Percent Rule were removed from that test. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 F. Reg. 22122-22128 (April 23, 2004). In doing so the Department of Labor noted that the 20 Percent Rule had not been in use for years, and further stated:

> Reintroducing these effectively dormant requirements now would **add new complexity and burdens** to the exemption tests that do not currently apply. For example, employers are not generally required to maintain any records of daily or weekly hours worked by exempt employees (see 29 CFR 516.3), nor are they **required to perform a moment-by-moment examination of an exempt employee's specific duties to establish that an exemption is available**. Yet reactivating the former strict percentage limitations on nonexempt work in the existing "long" duties tests **could impose significant new monitoring requirements (and, indirectly, new recordkeeping burdens) and require employers to conduct a detailed analysis of the substance of each particular employee's daily and weekly tasks in order to determine if an exemption applied.**

Id., at 22126-22127.

Having declared the 20 Percent Rule unworkable in the only other "dual job" context, the department

and the Eighth Circuit maintains the 20 Percent Rule as applied to the tip credit where it was never contemplated by Congress and remains a practical impossibility.

D. The implications of failing to review the Eighth Circuits decision are dire.

In this case, the lower court summarized the respondent's position as follows:

> The plaintiff servers and bartenders claim that Applebee's requires them to perform nontip-producing duties for significant portions of their shift while compensating them at the lower $2.13 tipped rate. The plaintiff bartenders claim that they were required to perform such duties as wiping down bottles, cleaning blenders, cutting fruit for garnishes, taking inventory, preparing drink mixers, and cleaning up after closing hours. The servers claim that they performed such duties as cleaning bathrooms, sweeping, cleaning and stocking serving areas, rolling silverware, preparing the restaurant to open, and general cleaning before and after the restaurant was open.
>
> 638 F.3d 872 at 875.

Any person concerned with fairness, congressional intent or the continued health of the American economy should be greatly disturbed by the foregoing list of duties. While the policies and practices of delegating duties to tipped employees vary among Applebee's restaurants, the petitioner in

this case is not unique among food service establishments.

If, as the Eighth Circuit ruling states, the 20 Percent Rule is properly invoked in this case, employers will have to monitor how much time a bartender spends wiping down bottles and how many minutes a waiter spends rolling silverware – a plainly impossible task.

Even for compliant employers it only requires an allegation of impropriety to force a costly and cumbersome inquiry into how many minutes a tipped employee spent performing various routine tasks for the prior three years. This is true even where, as in this case, the employees at issue are waitstaff and bartenders - the very service employees Congress had in mind when it passed tip credit provisions of the Act. The result of the floodgates opened by the Eight Circuit's invitation to expensive litigation - even for employers who prevail - will be nothing less than devastating to the restaurant community.

Whether it be the expense of compliance, litigation or both, forcing the 20 Percent Rule on employers will result in higher labor costs which will lead to layoffs and restaurant closures. In the current economic climate, the effects would be felt in multiple sectors including food providers/delivery persons, landscaping and plowing services and even construction, not to mention increased pressure on social services for laid off workers.

II. The Eighth Circuit's deference to the Department of Labor's 20 Percent Rule conflicts with rulings of this and other courts.

Incredibly, in the Eighth Circuit, employees who take home minimum wage may still claim a violation

of the minimum wage act. This is the height of disdain for legislative intent, clear statutory language and caselaw. It also puts the circuit at odds with other courts.

Petitioner's Application for a Writ of Certiorari in this case sets forth the conflict that now exists between the Eighth Circuit and other circuits regarding the 20 Percent Rule and deference to the Department of Labor's regulations. Amicus will not repeat those arguments but instead offers the foregoing supplemental information in order to demonstrate how important it is for the restaurant industry (and thus the American economy as a whole) for the Eight Circuit's erroneous holding to be reviewed. Specifically, the ruling failed to determine:

1) whether the "dual job" regulation is consistent with the Act;

2) whether *Chevron* deference should be afforded where the "dual job" regulation was not subject to public notice and comment;

3) whether *Chevron* deference should be afforded where (as here) the statute "directly addressed the precise question at issue";

4) whether *Auer* deference is appropriate where the Department of Labor has, under the guise of interpreting a regulation, created an entirely new piece of legislation; and

5) whether it is a "permissible" interpretation of the Act under *Chevron* to create a cause of action for every tipped employee that is not under constant surveillance.

Making sure all employees get the minimum wage, not ferreting out every second that the employer benefits from the tip credit, was the

purpose of the Act. By shifting the focus from what the employee receives to how many minutes a bartender cuts garnishes, the Department of Labor and the Eighth Circuit have run afoul of the text and purpose of the Act, as well as decisions of other courts. The circuit court in this case invented ambiguity regarding the terms "occupation" and "occasionally" and then relied on a handbook provision to issue a ruling that threatens an entire industry. The decision warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MELISSA L. GRIFFIN
Counsel of Record
APPLE AMERICAN GROUP LLC
225 BUSH STREET, STE. 1470
SAN FRANCISCO, CA 94104
(415) 835-0226
mgriffin@appleamerican.com

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