

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 IN OPPOSITION

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STATEMENT OF THE CASE

I. Statutory And Regulatory Background

1. Both state and federal law establish regimes for protecting the minimum wages of employees. The federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, establishes a mandated wage floor that states may exceed. With the “health, efficiency, and general well-being of workers” in mind, *id.* § 202, Congress imposed a minimum wage obligation on all employers, *see id.* § 206. Currently, “[e]very employer shall pay to each of his employees” a minimum wage of “\$7.25 an hour.” *Id.* § 206(a)(1)(C).

FLSA further provides that “tipped employee[s]” are entitled not only to a minimum hourly wage but also to retain any “tip,” *id.* § 203(m), which is “a sum presented by a customer as a gift or gratuity in recognition of some service performed for him,” 29 C.F.R. § 531.52. The statute then provides for a limited “tip credit,” a provision that many state laws limit further and seven states do not allow at all. *See* 29 U.S.C. § 203(m); Department of Labor, *Minimum Wages for Tipped Employees*, <http://www.dol.gov/whd/state/tipped.htm> (last revised June 2011).

In states where only the federal provision applies, employers may pay tipped employees a lower minimum wage as long as the tips they earn make up the difference between that wage and the standard minimum wage. 29 U.S.C. § 203(m). The employer must, however, still pay a minimum hourly rate of \$2.13, in addition to permitting the employee to retain his tips. For example, under FLSA, an employer may pay a waiter \$2.13 per hour of tip-producing work, so long as the waiter makes at least

\$5.12 per hour in tips. For time that is not subject to the tip credit, however, the employer must pay the employee the minimum wage of \$7.25. *See* 29 C.F.R. § 531.56(e).

2. Congress defined “tipped employee” as “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). There are, of course, employees tasked with varied responsibilities and engaged in multiple occupations, but FLSA does not expressly resolve how the tip credit should be applied to them. The Secretary of the Department of Labor (DOL) is charged by Congress with the administration and enforcement of FLSA. *See id.* §§ 204(a)-(b), 211, 216(c), 217. In recognition of FLSA’s ambiguity regarding when an employee is “engaged” in multiple “occupation[s],” *see id.* § 203(t), DOL promulgated the “dual-jobs” regulation to implement the tip-credit statute and distinguish hours of work that are subject to the tip credit from those that are not. *See* 29 C.F.R. § 531.56(e).

The regulation specifies that an employee may be subject to the tip credit for some hours of work, but not for others. It provides that an employee engaged in multiple occupations – such as “a maintenance man in a hotel [who] also serves as a waiter” – “is a tipped employee only with respect to his employment as a waiter. . . . and no tip credit can be taken for his hours of employment in his occupation of maintenance man.” *Id.* In such a case, the employer must pay the employee the minimum wage for hours spent as a maintenance man, and may pay the employee as little as \$2.13 per hour for hours spent as a waiter if his tips earned for that time make up

the difference from the statutory minimum wage. The regulation then distinguishes a waitress who overwhelmingly engages in duties related to tip-producing activities – spending only “*part of her time* cleaning and setting tables, toasting bread, making coffee and *occasionally* washing dishes or glasses” – who is subject to the tip credit for all of the hours of her work. *Id.* (emphases added).

The regulation does not define “part of [the] time” or “occasionally,” leaving unspecified the maximum amount of time an employer may require an employee to spend on “related duties” and still take the tip credit for all of his hours of employment. DOL has interpreted those terms in Section 30d00(e) of its Field Operations Handbook, establishing a safe harbor that allows substantial leeway (twenty percent of a tipped worker’s shift) for the assignment of general preparation work and maintenance before the tip credit becomes unavailable for that work.¹ This allowance makes it unnecessary for the great majority of employers to have to minutely track each task their employees are doing while engaged in tip-producing work.

The Handbook reiterates that the illustrative waitress discussed in the regulation “may continue to

¹ The Handbook is the “operations manual that provides [DOL’s] Wage and Hour Division (WHD) investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance.” Department of Labor, *Field Operations Handbook*, <http://www.dol.gov/whd/FOH/> (last revised Mar. 9, 2011); see also Pet. App. 65a.

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.” Pet. App. 65a. It is only when “specific employees are routinely assigned to maintenance” or “tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance,” that “no tip credit may be taken for the time spent in such duties.” *Id.*

Thus, in states subject to the federal tip-credit regime, an employer can confidently arrange to apply the tip credit to all the hours of its tipped employees. It need only avoid routinely assigning those employees unrelated work, or requiring them to engage in non-tip-producing work more than twenty percent of the time. Even when those thresholds are exceeded, the employer still may apply the tip credit to all the hours spent on tip-producing work.

DOL has consistently applied the twenty-percent rule for the more than two decades of the Handbook’s existence. Restaurants around the country have acknowledged that standard and complied with it without apparent difficulty. An illustration of the lack of controversy over the rule is that, as petitioner has explained, “relatively few courts” have considered the question. Pet. for Interloc. Appeal on Behalf of Applebee’s 8. Petitioner has previously acknowledged the twenty-percent rule’s existence and claimed to have complied with it. For example, in 2005, a DOL investigation concluded that tipped employees at an Applebee’s location in Missouri were denied wages they were due under the twenty-percent rule. *See* Pl.’s Opp’n to Def.’s Mot. for Summ.

J., Ex. J at 8-9. The division of Applebee's that had recently purchased the location blamed violations on the previous owner, agreed to check other locations for "systemic" violations, and agreed to pay "all back wages due." *Id.* 9-10.

II. Factual And Procedural Background

1. The named plaintiffs in this case – respondents Gerald A. Fast, Talisha Cheshire, and Brady Gehrling – filed this collective action under FLSA in the Western District of Missouri on behalf of server and bartender employees against whose wages petitioner applied the tip credit for hours spent performing non-incidentual duties and non-tipped duties in excess of twenty percent of their time at work. Third Am. Compl. ¶¶ 19, 26; *see* 29 U.S.C. § 216(b). Respondents' wages are all governed by FLSA, as opposed to the more employee-favoring regime applicable to employees in other states.

Respondents allege that petitioner unlawfully failed to compensate them properly for hours they spent performing two different categories of work: (i) "non-tipped work, such as maintenance and/or preparatory work, in excess of twenty percent (20%) of their time at work," and (ii) "duties that are not incidental to their tipped occupation." Third Am. Compl. ¶ 23.

The district court denied petitioner's motion for summary judgment. Pet. App. 54a. The court recognized that respondent Fast – whom petitioner employed as a bartender – had sufficiently shown that he must "perform certain pre- and post-shift duties," as well as non-tip producing duties during his shift, such as to "take inventory and stock the

bar,” “clean the beer cooler,” “work on the drain pipe of the hand sink,” “take out mats and the trash,” and “fix machines.” *Id.* 44a. The court concluded that to decide whether petitioner properly applied the tip credit to all of Fast’s hours of work it would have to “determine which of Fast’s bartending duties were tip producing, and then, which, if any, of Fast’s duties are incidental to his tip producing duties.” *Id.* 54a. Such issues raised “a question of fact upon which reasonable finders of fact could disagree.” *Id.*

The district court subsequently entered a superseding opinion denying petitioner summary judgment again. *Id.* 26a. In assessing the meaning of FLSA’s tip-credit provision, the district court found at the outset that DOL’s Handbook was “*not* controlling upon the courts by reason of [its] authority.” Pet. App. 29a (emphasis added) (internal quotation marks omitted). The court nonetheless found DOL’s twenty-percent standard “persuasive and practical,” stating that “[i]n an area where reasonable minds may disagree about the meaning of the relevant statute and regulations, adopting the Department of Labor’s position on this issue provides notice, continuity, and certainty throughout the industry.” *Id.* 34a. The court identified the Handbook as constituting “a body of experience and informed judgment to which the courts and litigants may properly resort for guidance.” *Id.* 29a-30a (internal quotation marks omitted).

The district court rejected petitioner’s reliance on *Pellon v. Business Representation International, Inc.*, 528 Fed. Supp. 2d 1306 (S.D. Fla. 2007), *aff’d per curiam*, 291 F. Appx. 310 (11th Cir. 2008) (unpublished opinion), which the court found to be

“factually distinguishable” from this case. Pet. App. 34a. The court explained that “the *Pellon* court ultimately found that the [employees] in question had not presented sufficient evidence to satisfy the twenty percent rule even if it were applied.” *Id.*

The district court certified its decision for interlocutory review under 28 U.S.C. § 1292(b). Pet. App. 40a.

2. On appeal, DOL filed an amicus curiae brief defending its interpretation of its regulation, and the Eighth Circuit unanimously affirmed. *Id.* 2a. The court noted at the outset that the validity of DOL’s regulation interpreting the tip-credit statute was unquestioned, because the “parties do not dispute that § 531.56(e) is entitled to *Chevron* deference. They do disagree as to [the regulation’s] meaning.” *Id.* 8a. The court then concluded that DOL’s interpretation of the regulation – not only in opinion letters and Section 30d00(e) of the Handbook, but also in its amicus brief – is entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). Pet. App. 8a, 12a. Unlike the district court, the court of appeals found the Handbook interpretation to be controlling. *See id.* 12a-13a.

The court of appeals reasoned that Section 203(t) of FLSA does not specify when an employee is “engaged” in a tip-producing “occupation,” and DOL properly promulgated the regulation to implement the statute and resolve the resulting ambiguity. *Id.* 12a. In turn, the regulation – which petitioner did not challenge – is ambiguous because it fails to define “part of [the] time” and “occasionally.” *Id.* 15a. DOL’s interpretation of the regulation, providing that the tip credit is inapplicable when “tipped employees

spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance,” *id.* 65a, was “controlling unless plainly erroneous or inconsistent with the regulation,” *id.* 12a-13a (quoting *Auer*, 519 U.S. at 461).

The court of appeals rejected petitioner’s argument that DOL’s twenty-percent standard was impermissible because “neither the statute nor the regulation places a quantitative limit on the amount of time a tipped employee can spend performing duties related to her tipped occupation (but not themselves tip producing).” *Id.* 13a. In the court’s view, the terms “part of [the] time” and “occasionally” in the regulation “clearly place[] a temporal limit on the amount of related duties an employee can perform and still be considered to be engaged in the tip-producing occupation.” *Id.* Further, DOL uses the twenty-percent threshold “to delineate the line between substantial and nonsubstantial work” in several other contexts within FLSA. *Id.* 15a. According to the court of appeals, the twenty-percent standard is thus “a reasonable interpretation of the regulation.” *Id.*

Like the district court, the court of appeals explained that its ruling was consistent with *Pellon*’s holding that “where the [employee’s] related duties are performed intermittently and as part of the primary occupation, the duties are subject to the tip credit.” *Id.* And it recognized that questions “concerning which duties the 20 percent rule applies to” were beyond the scope of the interlocutory appeal. *Id.* 17a.

REASONS FOR DENYING THE WRIT

DOL interprets its own regulation to provide that an employer cannot take the tip credit for all of an employee's work if the employee spends twenty percent or more of his time on non-tip-producing work. Petitioner argues that the Eighth Circuit incorrectly deferred to that interpretation. There is no circuit conflict on that question, as the only other court of appeals to address the twenty-percent rule did so in a non-binding, unpublished order that did not consider the same question as the Eighth Circuit: whether DOL's interpretation is entitled to deference. The Eighth Circuit's decision was moreover a straightforward application of this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997), that does not conflict with any other court of appeals' application of *Auer*. The decision below approved a rule that is reasonable, administrable, and consistent with the underlying regulation and statute. Furthermore, because this case comes to this Court on interlocutory appeal, any decision by this Court at this time would be premature and lack the factual development required for this Court's thorough consideration of the question presented. Further review is accordingly unwarranted.

I. There Is No Circuit Conflict Regarding The Validity Of The Twenty-Percent Rule.

No other court of appeals has ruled on the question decided by the Eighth Circuit, and no court of appeals would be bound by its precedent from holding as the Eighth Circuit did here.

1. The Eighth Circuit held that DOL's interpretation of its tip-credit regulation is entitled to

Auer deference. Pet. App. 12a. Petitioner alleges that decision conflicts with *Pellon v. Business Representation International, Inc.*, 291 Fed. Appx. 310 (11th Cir. 2008) (per curiam). But *Pellon* is not binding on the Eleventh Circuit, did not consider the question presented here, and correctly distinguished this case.

The district court in *Pellon* held that the defendant employer had properly applied FLSA's tip credit to all the hours worked by the plaintiff skycaps in that case because all the work in question was "part of the normal duties of a skycap." 528 F. Supp. 2d at 1314. The court was critical of DOL's twenty-percent standard and declined to apply it, but ruled in any event that the standard was irrelevant on the facts before it because the "overwhelming majority of [the duties complained of did] not qualify as general preparation work or maintenance." *Id.* The Eleventh Circuit summarily affirmed the district court's opinion in an unpublished order. 291 Fed. Appx. at 311.

Under the Eleventh Circuit's rules, the unpublished order in *Pellon* is "not considered binding precedent." 11th Cir. R. 36-2. *Pellon* thus does not bind a later Eleventh Circuit panel, which would be free to adopt the same rule as the Eighth Circuit did in this case. *See, e.g., Bravo v. United States*, 532 F.3d 1154, 1163 n.5 (11th Cir. 2008) (unpublished affirmance of a district court decision gave "no additional weight to the district court's opinion" and was "not binding precedent" "[b]ecause . . . [it] [wa]s unpublished"); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1345 n.7 (11th Cir. 2007) ("[W]e emphasize that as an unpublished case, [its]

analysis does not bind us.”). Furthermore, the order was a summary disposition that devoted only one sentence to affirming the district court’s decision.

The *Pellon* court moreover did not consider the same question as the Eighth Circuit: whether DOL’s interpretation of Section 531.56(e) should receive *Auer* deference. Indeed, the plaintiffs in *Pellon* did not make the argument that the twenty-percent rule should receive *Auer* deference. *Pellon* instead addressed *only* the legally distinct question of how the court itself would construe FLSA’s tip-credit provision.

Nor – in contrast to this case – did either the district court or the court of appeals in *Pellon* have before it an amicus curiae brief from DOL that would itself have required *Auer* deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (granting “controlling” deference to the Secretary of Labor’s amicus brief interpreting an ambiguous DOL regulation). Such a brief would have, among other things, informed the court of DOL’s longstanding commitment to the twenty-percent rule, a point that the Eighth Circuit found convincing but of which the Eleventh Circuit was seemingly unaware.

If the Eleventh Circuit were asked in a future case to consider whether DOL’s interpretation of its dual-jobs regulation deserves *Auer* deference, it accordingly would not be bound by the order in *Pellon* from deferring to the twenty-percent rule, even if *Pellon* were (contrary to fact) binding circuit precedent. *See, e.g., In re Lovin*, 652 F.3d 1349, 1353-54, 1356 (Fed. Cir. 2011) (granting deference to PTO’s interpretation of its own regulation that differed from a prior Federal Circuit holding,

applying *National Cable & Telecommunication Ass’n v. Brand X Internet Service*, 545 U.S. 967 (2005)); see also *Brand X*, 545 U.S. at 982 (“A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”); *Levy v. Sterling Holding Co.*, 544 F.3d 493, 502 (3d Cir. 2008) (concluding that “a judicial opinion construing an agency’s regulation does not necessarily bar a court from giving effect to a subsequent, different interpretation *by the agency*, unless, according to the earlier opinion, the judicial construction flowed unambiguously from the terms of the regulation” (emphasis added)).²

Pellon is moreover factually distinguishable from this case, as the courts in both cases explained. The district court in *Pellon* – the only court that issued an opinion in that case – stated that “[t]he overwhelming majority of tasks complained of by Plaintiffs in this case do not qualify as general preparation work or maintenance even if the Court found the *Fast* case persuasive.” 528 F. Supp. 2d at 1314. Similarly, the *Fast* district court explained that, because the court in *Pellon* “ultimately found that the sky caps in question had not presented sufficient evidence to satisfy the 20-percent rule even

² In addition, the order in *Pellon* predates this Court’s recent decisions addressing the application of *Auer*. See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254 (2011); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871 (2011).

if it were applied,” “*Pellon* is, therefore, factually distinguishable.” Pet. App. 34a.

2. The other cases petitioner cites as supposedly implicating a circuit split are inapposite; they do not concern the twenty-percent rule, much less whether DOL’s interpretation of its tip-credit regulation is entitled to *Auer* deference. *Myers v. Copper Cellar Corp.*, 192 F.3d 546 (6th Cir. 1999), and *Roussell v. Brinker International, Inc.*, 2011 WL 4067171 (5th Cir. 2011), concerned the interpretation of a different statutory provision governing “the pooling of tips among employees who customarily and regularly receive tips,” 29 U.S.C. § 203(m). In both of those cases, the plaintiffs complained that certain employees were wrongly included in the tip pools to which the plaintiffs were required to contribute. *Myers*, 192 F.3d at 549; *Roussell*, 2011 WL 4067171, at *1. The employees who allegedly should not have been included in the tip pools performed solely back-of-house duties during the challenged shifts. *Myers*, 192 F.3d at 548; *Roussell*, 2011 WL 4067171, at *10. Both courts held that the employers’ decision to include these employees invalidated the tip pools, precluding the employers from applying the tip credit to the plaintiffs’ wages. *Myers*, 192 F.3d at 551; *Roussell*, 2011 WL 4067171, at *1, *10. Contrary to petitioner’s characterization of these cases, *see* Pet. 21, neither court addressed whether the employer improperly claimed the tip credit for the employees who performed non-tip-producing duties. In fact, the *Roussell* court made clear that the employer had not applied the tip credit to the back-of-the-house employees, who received the full minimum wage. 2011 WL 4067171, at *9.

Accordingly, were the Fifth and Sixth Circuits to face the distinct question of whether DOL's twenty-percent rule is subject to *Auer* deference, both would be free to agree with the Eighth Circuit's ruling in this case.

3. To the extent additional courts of appeals are later called upon to consider whether DOL's twenty-percent standard deserves *Auer* deference, this Court will benefit from their further analysis of that issue, which has been considered by only the Eighth Circuit. As petitioner emphasized in seeking interlocutory review, "[d]espite the fact that the tip credit provision has been part of the FLSA for over 40 years, relatively few courts have been called upon to construe its provisions." Pet. for Interloc. Appeal on Behalf of Applebee's 8.³

II. The Eighth Circuit's Application Of *Auer* Deference Is Correct And Is Not The Subject Of Any Circuit Conflict.

Petitioner wrongly contends that the Eighth Circuit erred in deferring to DOL's longstanding twenty-percent standard under *Auer v. Robbins*, 519 U.S. 452 (1997). DOL never publicly reversed its position on the twenty-percent rule. And petitioner's contention that the Eighth Circuit failed to explicitly

³ The fact that there has been so little litigation over the twenty-percent standard since DOL promulgated it roughly a quarter-century ago is substantial evidence that it is a well-settled standard with which employers have been familiar and followed without difficulty. A court's deference to an agency's established and infrequently challenged interpretation is not an issue deserving of this Court's consideration.

ask whether its interpretation was consistent with the underlying statute is no more than a thinly disguised challenge to the regulation itself – a challenge that petitioner, by never raising it below, has waived. Moreover, given petitioner’s acknowledged adherence to the rule and the more stringent requirements that exist in other states, DOL’s interpretation is obviously practicable.

A. The Eighth Circuit’s *Auer* Analysis Is In Accord With This Court’s Precedent And Decisions Of Other Circuits.

1. This Court has repeatedly instructed courts to defer to an agency’s interpretation of an ambiguous regulation, *see Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000), if the regulation does not merely parrot the statutory language, *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). The agency’s interpretation is controlling unless “plainly erroneous or inconsistent with the regulation.” *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011) (internal quotation marks omitted). An agency may state its controlling interpretation in the form of an amicus brief that “reflect[s] the agency’s fair and considered judgment on the matter in question.” *See Auer*, 519 U.S. at 462.

2. In this case, the Eighth Circuit correctly found that the prerequisites for *Auer* deference were met. The statute, Section 203(t), is ambiguous in that it does not define the phrase “engaged in an occupation.” In turn, DOL’s dual-jobs regulation elucidates the meaning of this phrase in a way that does not merely parrot the statutory language, placing an undefined temporal limit on the

preparation and maintenance duties an employer may require a tipped employee to perform at a wage reduced by the tip credit. *See* Pet. App. 6a-8a. In the court of appeals, petitioner did not challenge that the regulation is subject to deference under this Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See, e.g., Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007).

The dual-jobs regulation itself is ambiguous in its use of the phrases "occasional" and "part of [the] time." The regulation thus leaves unsettled the exact limit to the amount of time a tipped employee may spend on related, non-tipped tasks for purposes of the tip credit. Pet. App. 8a (citing *Barnhart v. Walton*, 535 U.S. 212, 218 (2002)).

The court of appeals correctly concluded that DOL's interpretation of the dual-jobs regulation, as expressed in the DOL Handbook and its amicus brief, is permissible. Pet. App. 15a.⁴ Section 30d00(e) of

⁴ The Handbook is an enforcement guide used by all compliance staff in the Wage and Hours Division. To guide and encourage compliance, DOL makes the Handbook available to the public on its website. Department of Labor, *Field Operations Handbook*, <http://www.dol.gov/whd/FOH/> (last updated Mar. 9, 2011). The Handbook "reflects policies established through changes in legislation, regulations, court decisions, and the decisions and opinions of the WHD Administrator." *Id.* Without regard to *Auer*, the Handbook is accordingly entitled to *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 231 (2001) (noting that this Court has found *Chevron* deference even in the absence of the formal notice-and-comment procedure used to promulgate regulations).

the Handbook provides that when “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.* 65a. The interpretation clarifies ambiguity in the language of the agency’s own regulation. *See Gonzales*, 546 U.S. at 257. In an amicus brief submitted in the court of appeals, DOL reaffirmed this “longstanding and reasoned interpretation of the dual jobs/related duties legislative rule” and urged the court to give its interpretation deference. Br. for the Sec’y of Labor as *Amicus Curiae* in Supp. of Pls.-Appellees 15.

A quantified temporal limitation is far preferable to ad hoc determinations by the courts of what constitutes performing non-tip-producing duties more than “occasionally” or “part of [the] time.” A single standard provides employers with consistency and predictability. And, if one limit is to govern, DOL rather than the courts should be the institution to establish it, especially in light of DOL’s acknowledged expertise in this area. *See Gonzales*, 546 U.S. at 256-57 (recognizing the “considerable experience and expertise the Department of Labor ha[s] acquired over time with respect to the complexities of the Fair Labor Standards Act”).

DOL’s twenty-percent standard is a reasonable interpretation of the regulation’s temporal limit. It provides an effective safe harbor for employers who wish to assign their tipped employees a non-negligible amount of non-tip-producing duties. Because such duties can only be done “occasionally,” twenty percent is a sensible line for determining when employees cross that threshold. Indeed, DOL

has long used a twenty-percent rule in a variety of other contexts under FLSA to draw the line between substantial and non-substantial work. *See* 29 C.F.R. § 783.37 (applying the twenty-percent standard to determine whether a worker is a seaman or a nonseaman; promulgated in 1962); *id.* § 552.6 (same to determine whether a worker providing “companionship services” and performing general household work defeats the overtime exemption; promulgated in 1975); *id.* § 553.212 (same to determine whether a fire protection or law enforcement officer who performs nonexempt work has defeated the overtime exemption; promulgated in 1987). Given this consistent use across FLSA for almost fifty years, the twenty-percent standard is reasonable when applied to the dual-jobs regulation. *Auer* requires no more.

3. Petitioner argues that *Auer* deference was inappropriate because DOL has purportedly vacillated in its position. Pet. 28-29. That assertion is substantially overstated. DOL merely briefly contemplated revising its position during the closing days of the Bush administration in a 2009 opinion letter to an inquiring party. *See* Pet. App. 84a. But DOL withdrew the letter before it was sent, *id.* 80a, and DOL did not remove the twenty-percent requirement from the Handbook.

In any event, a change in an agency’s interpretation of its own regulation does not disqualify that interpretation from receiving deference under *Auer*. *See Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 296 n.7 (2009). Instead, when an agency changes its position, the decisive factor is whether “interpretive changes

create . . . unfair surprise.” *Long Island Care*, 551 U.S. at 170. Here, there are no such concerns. First, Petitioner’s subsidiary, GSI, admitted its knowledge of – and commitment to – the twenty-percent rule in a 2005 DOL investigation. Pl.’s Opp’n to Def.’s Mot. for Summ. J., Ex. J. Second, DOL never publicly reversed its position, so no reliance interests could arise from its deliberations. *See Long Island Care*, 551 U.S. at 170. After composing the letter apparently questioning the twenty-percent rule, DOL did not even mail it to the inquiring party. Pet. App. 80a. DOL only disclosed the letter’s existence when withdrawing it two months later in a superseding opinion letter. *Id.* All the allegations of respondents’ complaint arise during a period in which DOL’s public commitment to the twenty-percent rule was unwavering. Petitioner in any event cites to no case where such internal agency deliberations on an interpretation have defeated *Auer* deference.

4. Petitioner also contends that the Eighth Circuit misapplied *Auer* by failing to ask whether DOL’s interpretation was consistent with the underlying statute. Pet. 23-26. Petitioner is incorrect. The question under *Auer* is whether the agency has reasonably construed its *regulation*, not whether it has properly construed the *statute*. After concluding that a regulation is “ambiguous as to the question presented,” courts ask whether the agency’s further interpretation of that regulation is “plainly erroneous or inconsistent” with the regulation itself. *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011).

Whether the regulation, so construed, is a permissible interpretation of the statute is a question

under *Chevron* – a question petitioner has waived in this case. Before the court of appeals, petitioner challenged only the validity of DOL’s interpretation of Section 531.56(e) in adopting the twenty-percent standard. Petitioner did not assert that the regulation itself was an invalid interpretation of the tip-credit statute under *Chevron*. To the contrary, petitioner argued below that the regulation supported its so-called “occupation-based” standard. Def.’s C.A. Br. 20-22. The court below accordingly proceeded on the basis that “[t]he parties do not dispute that § 531.56(e) is entitled to *Chevron* deference.” Pet. App. 8a. To the extent the validity of the regulation is a substantial issue, this Court should await a case in which that question is properly preserved and presented.⁵

Even if this Court chooses to address petitioner’s argument, the Eighth Circuit correctly recognized that the statute does not define the meaning of

⁵ Accordingly, petitioner’s citation to cases considering two forms of administrative law challenges to *regulations* is inapt. See Pet. 23-24 (discussing cases addressing whether a regulation is invalid as contrary to a statute: *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 95-96 (1995); *United States v. Larionoff*, 431 U.S. 864 (1977)); Pet. 24 (discussing cases addressing whether a regulation and its interpretation by an agency are valid: *United States v. Johnson*, 437 F.3d 157, 177-78 (1st Cir.), *vacated on other grounds*, 467 F.3d 56 (1st Cir. 2006); *United States v. Deaton*, 332 F.3d 698, 709 (4th Cir. 2003)). In the latter cases, courts first determine the regulation’s meaning in light of the agency’s interpretation (applying *Auer*); they then ask whether the regulation, as interpreted in that fashion, is consistent with the underlying statute (applying *Chevron*). See *Johnson*, 437 F.3d at 177-78, 180.

“engaged in an occupation,” and concluded that both the dual-jobs regulation and the twenty-percent tip-credit rule offer permissible interpretations of that phrase. Pet. App. 12a, 15a.

For this reason, there is no merit to petitioner’s related claim that the Eighth Circuit impermissibly allowed DOL to “adopt *de facto* a new regulation under the guise of interpreting an existing one.” Pet. 26 (citing *Christensen*, 529 U.S. 576). The FLSA regulation in *Christensen*, by contrast, unambiguously made compensatory-time redemption policies in employee-employer agreements permissive, precluding the agency’s interpretation that such policies were required. 529 U.S. at 588. There is no such statutory mandate here.

Under petitioner’s contrary view, FLSA unambiguously authorizes employers to take a tip credit for any and all hours worked by an employee as long as the employee is given one job title (i.e., if the employer labels the employee as having a single nominal “occupation”) – regardless of the diversity of the employee’s actual responsibilities. In states subject to FLSA’s tip-credit provision, that interpretation would allow employers to evade their responsibility to pay the full minimum wage to those performing non-tipped work, and would convert a wage floor into a wage ceiling for a significant number of employees. For example, an employer could have a server wait tables until he earns a little less than a shift’s equivalent of the minimum wage in tips, and then assign that server to clean bathrooms for the remainder of his shift at the tip-credit wage of \$2.13 per hour. For every additional dollar of tips received by the employee, the employer could deduct

an equivalent amount from his paycheck so that the employee received *no more* than the minimum wage. Such an outcome conflicts with Congress's mandate in FLSA that employees would retain their tips, including when the employees' total income will exceed the minimum wage.⁶

Section 203(t)'s barebones definition of "tipped employee" does not prescribe that illogical result. Even if petitioner could establish that its interpretation were as plausible as (or even better than) DOL's, the question is not whether the rule adopted by the agency is the *best* interpretation of the statute (the one a court would adopt if reviewing the question de novo) but whether it is a *permissible* one.

⁶ Petitioner claims that result is unobjectionable because the employee will still receive the minimum wage. Pet. 32. But petitioner's suggestion that, because respondents bargained for the pay they received, they should have no complaint as long as they are receiving on net the minimum wage, conflicts with this Court's recognition that FLSA "forbid[s] waiver" of the statutory right to receive the pay guaranteed by FLSA. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945). Congress recognized that "the unequal bargaining power as between employer and employee . . . required federal compulsory legislation to prevent private contracts . . . which endangered national health and efficiency." *Id.* at 706. Furthermore, today's minimum wage, when adjusted for inflation, falls far short of the minimum in 1968, when employers were required to pay \$10.38 per hour in today's dollars. Chris Isidore, *Not Getting by on Minimum Wage*, CNNMoney (Sept. 27, 2011, 9:39 AM), http://money.cnn.com/2011/09/27/news/economy/minimum_wage_jobs/index.htm. And even if an American today receives \$10.65 per hour – well above the minimum wage – for forty hours of work per week, a year's pay is less than \$22,314, the poverty level for a four-person family. *Id.*

And, given the ambiguity in the definition of “tipped employee,” the statute can “comfortably bear[] the meaning the [DOL] assigns” it. *Auer*, 519 U.S. at 461.

B. DOL’s Interpretation Is Practicable.

1. The Handbook (including its twenty-percent provision) has been a guide to DOL enforcement of FLSA’s tip credit for almost a quarter-century without administrative difficulty. The twenty-percent standard is well-settled and understood by employers. It “provides notice, continuity, and certainty throughout the industry.” Pet. App. 34a. Petitioner nevertheless argues that the twenty-percent safe harbor is “utterly unworkable.” Pet. 30. That argument is unpersuasive.

As the *Fast* district court recognized, petitioner’s “own history with FLSA enforcement in this case indicates that it is capable of enforcing the twenty percent limitation.” Pet. App. 32a. In response to the 2005 DOL investigation, petitioner’s subsidiary GSI assured DOL that it adhered to the twenty-percent tip-credit rule, and explained that the restaurants that failed to observe the rule had been recently acquired and would promptly come into compliance. Pl.’s Opp’n to Def.’s Mot. for Summ. J., Ex. J. GSI had a written policy that non-tipped duties such as portioning food “should not exceed 20 percent of the shift and should be performed only as necessary and on a de minimus [sic] basis.” Erin Bradley Dep. Mar. 7, 2007 at 103. Another company memo reminded management that “if a front of the house associate was doing prep work, then they need to be paid the minimum wage.” Erin Bradley Dep. Sept. 17, 2008 at

76; *see also id.* at 81-82 (Bradley reading the memo: “FOH [front-of-house] associates should NOT . . . perform BOH [back-of-house] duties including dishwashing.”).

Furthermore, petitioner’s claim that the twenty-percent rule is inadministrable is belied by the fact that petitioner and other employers assertedly abide by numerous disparate state restrictions. Petitioner’s complaint that it is “simply intolerable for an employer, such as Applebee’s, to face fundamentally different rules on minimum wage for two identically situated employees solely because one works in a restaurant in Des Moines, Iowa, and the other in Savannah, Georgia,” Pet. 22, glaringly ignores that states have different minimum wage laws, and that employers must follow the tip-credit provision most favorable to employees. *See* 29 U.S.C. § 218(a) (“No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter.”).

A number of states have no tip credit, or stricter standards limiting the use of the tip credit. In New York, for example, employers cannot take a tip credit for service employees and food service workers for any day in which those employees work more than twenty percent or two hours, whichever is less, of the workday in a non-tipped occupation. New York Department of Labor, *Hospitality Wage Order Frequently Asked Questions* 6-7, <http://labor.ny.gov/sites/legal/counsel/pdf/tips-frequently-asked-questions.pdf> (last visited Dec. 12, 2011). In Connecticut, an employer may take the tip

credit only for the time a server spends engaging in service duties, which specifically exclude duties such as cleaning the rest rooms, preparing food, washing dishes, host or hostess work, general set-up work before the restaurant opens, kitchen clean-up, general cleaning work, and waiting on take-out customers. Connecticut Department of Labor, *Gratuities in the Restaurant Industry*, <http://www.ctdol.state.ct.us/wgwkstnd/wage-hour/restaurant.htm> (last updated Apr. 22, 2010). Arizona disallows the tip credit for time spent on general preparation and maintenance work when employees are routinely assigned to this work. Industrial Commission of Arizona, *Arizona Minimum Wage Act FAQs* 4, http://www.ica.state.az.us/Labor/Forms/Labor_MinWag_FAQs_English.pdf (last revised Jan. 3, 2011).

At any rate, if petitioner and other employers believe the twenty-percent rule is difficult to apply, they should present their concerns to the Department of Labor, not to this Court. DOL is the expert agency tasked by Congress with implementing FLSA's tip-credit provision. *See* 29 U.S.C. § 204(a); *Gonzales*, 546 U.S. at 256. There is no basis for overturning DOL's considered, long-established judgment and upsetting the status quo based on petitioner's self-interested assertions.

2. Petitioner and its amici assert that they will incur "financial burdens" as a result of being required to pay workers minimum wage for time spent performing non-tip-producing duties, going so far as to claim that compliance with the longstanding twenty-percent rule "will almost certainly lead to shuttered windows, increased menu prices, or both."

Pet. 32. There is no evidence to support that assertion, which is belied by present practice and the ability of almost every other employer in the nation to comply with the minimum wage. Further, as explained above, Applebee's and other restaurants are already responsible for complying with state tip-credit laws, many of which require a higher net wage than the DOL rule. Indeed, petitioner's position fails to explain restaurants' ability to operate without the cataclysmic collapse predicted by the petition – indeed, without any difficulty at all – in the seven states that allow *no tip credit at all*. Department of Labor, *Minimum Wages for Tipped Employees*, <http://www.dol.gov/whd/state/tipped.htm> (last revised June 2011).

III. This Is A Poor Vehicle To Decide The Question Presented.

1. Certiorari should be denied for the further reason that this case comes to this Court on interlocutory appeal, Pet. App. 2a, and material factual questions that would aid this Court's disposition of the question presented are still in dispute, *see id.* 16a-17a (court of appeals), 54a (district court). Further fact-finding is necessary to determine, for example, whether this case even implicates the twenty-percent rule, and also how the twenty-percent rule functions in practice.

Respondents' complaint related two distinct categories of work excluded from the tip credit: (i) "non-tipped work, such as maintenance and/or preparatory work, in excess of twenty percent (20%) of [plaintiffs'] time at work," and (ii) "duties that are not incidental to [plaintiffs'] tipped occupation."

Third Am. Compl. ¶ 23. But the petition concerns only the first category. It is settled, and petitioner does not dispute, that the tip credit is unavailable for unrelated responsibilities, yet it is unknown in this case (and still hotly contested) to what extent petitioner required respondents to engage in such activities.

The parties continue to dispute which duties are unrelated to plaintiffs' occupation and thus not subject to the tip credit at all. For example, the lower courts have not decided how to categorize the following tasks that Fast is required to perform during his shift: "tak[ing] inventory and stock[ing] the bar," "clean[ing] the beer cooler," "work[ing] on the drain pipe of the hand sink," "tak[ing] out mats and the trash," and "fix[ing] machines." Pet. App. 44a. As a consequence, even a decision by this Court invalidating DOL's long-settled twenty-percent standard would not end this case, and might not even significantly affect its outcome.⁷

Furthermore, the lower courts have yet to decide – and the parties still dispute – what proportion of

⁷ While petitioner "has consistently claimed that cleaning bathrooms is related to the occupation of servers and bartenders" and is subject to the tip credit, Pet. App. 32a, the district court concluded that "[t]here is no reasonable argument that cleaning bathrooms is related to occupations where food and beverages are handled even if both the bathroom and the food promote a customer's enjoyment of the restaurant," *id.* n.7. The district court did not, however, resolve *any* other disputes regarding which responsibilities of respondents are sufficiently unrelated to tip-producing work that they would per se be excluded from the tip credit.

respondents' workdays is spent on non-tip-producing activities. As the district court explained, "[w]ithout knowing which of Fast's duties are tip producing, the Court cannot conduct the subsequent analysis as to which, if any, of Fast's duties are incidental to his tip producing duties and how much time Fast spent on incidental duties." Pet. App. 54a. But questions of "which duties the 20 percent rule applies to . . . [were] beyond the scope of th[e] interlocutory appeal, and" the court of appeals did "not address them." *Id.* 17a.

For this case to implicate the twenty-percent standard, the proportion of respondents' workday spent on non-tip-producing activities must of course be twenty percent or more. While petitioner has argued that Fast spent thirteen to eighteen percent of his time on non-tip-producing duties, Sugg. in Supp. of Def.'s Mot. for Summ. J. 15, respondents allege that the time spent on those duties was in excess of twenty percent and that petitioner incorrectly excluded in its analysis duties performed between opening and closing time, Pl.'s Opp'n to Def.'s Mot. for Summ. J. 28. If petitioner were correct about the facts of the case, then this Court's answer to the question of whether the twenty-percent rule should apply would be merely advisory.

In addition, the undeveloped factual record would inhibit this Court's understanding of the critical question of how the twenty-percent rule functions in practice, which is seemingly at the heart of petitioner's own contention that the rule is inadministrable. The lower courts have not yet determined even "[w]hat duties were actually performed by class members." Pet. App. 26a n.3.

2. Finally, even if this case does implicate the twenty-percent rule, the question of whether that rule deserves *Auer* deference is not dispositive. The district court properly concluded that it would adopt DOL’s twenty-percent standard as persuasive, without regard to whether it was bound to do so under *Auer*. See Pet. App. 34a (finding the rule “persuasive and practical”); see also *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Even if this Court concluded that *Auer* does not compel adherence to DOL’s interpretation, there is every reason to believe the district court would inevitably apply the identical standard at trial after the case were remanded.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.⁸

⁸ The question presented here is distinct from that presented in *Christopher v. SmithKline Beecham Corp.*, No. 11-204, *cert. granted*, --- S. Ct. ---- (Nov. 28, 2011). The employer in *Christopher* challenges DOL’s interpretation of a FLSA exemption to overtime pay requirements, 29 U.S.C. § 213(a)(1). *Christopher* involves the proper interpretation of the term “sales” in FLSA Section 203(k), which has no bearing on the meaning of the phrase “engaged in an occupation” in Section 203(t)’s definition of “tipped employee.” The employer in *Christopher* alleges that the agency interpretation in that case is not owed deference because the relevant regulation merely parrots the relevant provision of FLSA, and because the agency’s interpretation reverses seventy years of prior agency practice. Because petitioner does not make substantial analogous claims, there is no reasonable basis to believe that any ruling by this Court in *Christopher* would cause the court of appeals to revisit its decision in this case.

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December 14, 2011

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