Mrs. Orville Isn't Trying to Steal Tips: An FLSA Story

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INTRODUCTION

A debate over tips and tipped employees, centered on a few provisions of the Fair Labor Standards Act[1] (FLSA), has arisen among the circuits. Despite turning on only a few phrases in the FLSA, this judicial divide has massive implications for the restaurant and hospitality industries. One in ten working Americans is now employed in the restaurant industry,[2] and the Internal Revenue Service (IRS) estimates that tips account for over $27 billion in wages each year.[3] With such enormous stakes, this dispute has captured the attention of employee-rights advocates, restaurant and hospitality trade associations, and the Department of Labor (DOL).[4]

To illustrate this debate, consider a hypothetical family restaurant owned by a sole proprietor, Mrs. Orville. The restaurant has one cook, Chris, and two servers, Sam and Steph. In a typical restaurant, Sam and Steph will be the only employees interacting with customers during meals and, thus, the only employees who

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1 52 Stat 1060 (1938), codified at 29 USC § 201 et seq.

2 See *2016 Restaurant Industry Pocket Factbook* (National Restaurant Association, 2016), archived at http://perma.cc/Q28Z-NCDW.

3 Bourree Lam, *How Much Do Waiters Really Earn in Tips?* (The Atlantic, Feb 18, 2015), archived at http://perma.cc/Z9CM-WZRF. See also Jo Craven McGinty, *Tips Don't Add Up for Most Waiters and Waitresses* (Wall St J, Aug 8, 2014), online at http://www.wsj.com/articles/tips-dont-add-up-for-most-waiters-and-waitresses-1407520147?mg=id-wsj (visited June 6, 2017) (Perma archive unavailable).

4 See generally Brief for the United States as Amicus Curiae Supporting Each Party in Part regarding Affirmance or Reversal, *Jahir v Ryman Hospitality Industries, Inc*, Civil Action No 14-1485 (4th Cir filed Jan 15, 2015) (available on Westlaw at 2015 WL 191535) ("DOL *Jahir* Brief"); Brief of Amici Curiae National Restaurant Association, National Federation of Independent Business Small Business Legal Center, Oregon Restaurant & Lodging Association, Washington Restaurant Association, and Alaska Cabaret, Hotel, Restaurant, and Retailers Association in Support of Petitioners, *Wynn Las Vegas, LLC v Cesarz*, Docket No 16-163 (US filed Sept 6, 2016) (available on Westlaw at 2016 WL 4723335).

receive tips. Without any sharing arrangements, these servers will simply keep the tips they receive. However, servers often share tips with one another. Servers may do this to create a team culture in the restaurant, or to minimize the risks associated with the variance in party sizes and patron generosity. These sharing arrangements are called "tip pools." Under these informal agreements, all tips are set aside as they come in, usually in a location maintained by the employer. The pooled tips are then redistributed to employees at a later time according to a set formula. This formula is usually based on the total amount of tips received and the amount of time worked by each employee. So if Sam earns $50 in tips and Steph earns $20 in tips while working the same number of hours, the pool of $70 would be split evenly between them into cuts of $35. If one server works more hours, he or she would then receive a larger portion of the pooled tips.

The debate considered in this Comment involves a variation on this hypothetical situation. If Sam and Steph grow fearful that Chris (the cook) will begin to shirk in the kitchen, they may decide to bring Chris into the tip pool. Their hope would be that including Chris in this pool will lead him to care more about the speed and quality of his output, as his performance will contribute to a diner's experience and the eventual size of the tip (remuneration in which he now shares). This can also alleviate the disparity in take-home pay between the servers and Chris, again creating a team atmosphere among the restaurant's workers. However, adding someone like Chris, who is not customarily tipped, is problematic under the FLSA and a recent DOL regulation. These problems become clearer when someone like Mrs. Orville, who waits tables but is also the owner of the restaurant, inserts herself into the tip pool. Should she be able to share in these tips? While she may be a coworker of the servers, her tip receipts look a bit like an employer siphoning tips away from employees. Several FLSA provisions deal with such a situation in only glancing fashion, but the DOL has addressed this issue head-on with a recent regulation. Essentially, this regulation completely prevents people like Chris and Mrs. Orville—who don't normally receive tips—from participating in the tip pool. A circuit split has emerged as to the validity of this regulation.

This Comment argues that employers that pay their employees the minimum wage and do not take "tip credits" (a term discussed in Part I.C) should be able to set up tip pools that include nontipped employees. This becomes clear when, through the lens

of *Chevron* "Step Zero," an inquiry is made into whether the DOL has been delegated the authority to regulate in this arena at all. Such an examination must occur before looking at whether the statute is clear or the DOL action is reasonable at *Chevron* Steps One and Two, respectively.[5] Within the Step Zero framework, the DOL regulation falls under the "major question" exception and thus must fail under judicial scrutiny.

This Comment proceeds as follows: Part I provides background about the FLSA, how this statute has historically dealt with tips, the Ninth Circuit's *Cumbie v Woody Woo, Inc*[6] decision, and the recent DOL regulation. Part II discusses the circuit split over whether the relevant DOL regulation should stand under a *Chevron* analysis. Part III provides a more robust answer by applying the *Chevron* Step Zero framework and concludes that this initial *Chevron* inquiry points to the regulation failing under the major question exception.

I. THE FAIR LABOR STANDARDS ACT AND TIPPING

The relevant issue lies at the intersection of the FLSA, tipping, and tip pooling. Part I.A briefly outlines the history of and purpose behind the FLSA, Part I.B addresses the judiciary's historical treatment of tips, and Part I.C outlines two relevant FLSA amendments that deal with tips. Finally, Parts I.D–E discuss the recent disagreement between the Ninth Circuit and the DOL that establishes the borders of this problem.

A. The Fair Labor Standards Act

The FLSA arose out of a distinct set of "legal, political, and economic conditions," not the least of which was the Great Depression.[7] In the decade preceding the FLSA's adoption, the American economy cratered, and workers suffered immensely. In a letter addressed to Congress in 1937, President Franklin D. Roosevelt noted that one-third of the American population, many of whom worked in the agricultural and industrial sectors hit by the Depression, were "ill-nourished, ill-clad, and ill-housed."[8]

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[5] *Christensen v Harris County*, 529 US 576, 586–88 (2000).

[6] 596 F3d 577 (9th Cir 2010).

[7] Willis J. Nordlund, *A Brief History of the Fair Labor Standards Act*, 39 Labor L J 715, 719 (1988).

[8] *Wages and Hours of Labor—Message from the President of the United States*, 75th Cong, 1st Sess, in 81 Cong Rec 4983 (May 24, 1937). See also generally Steve Byas, *The Great Depression: Why It Started, Continued, and Ended*, New American 33 (Dec 5, 2016).

Roosevelt asserted that federal legislation was necessary to "effectively advance[ ]" an effort against the "national ills" of unemployment and poverty.[9]

In response to this and other calls for federal intervention,[10] Congress passed the FLSA in 1938.[11] The Act aimed to remedy "the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[12] The FLSA accomplished these goals through four innovations: a minimum wage for workers in particular industries, maximum hour and overtime pay requirements, child labor prohibitions, and the creation of an administrative apparatus to enforce the FLSA.[13]

B. Tipping and Tip Pooling: *Jacksonville Terminal*

The intersection between the FLSA minimum wage requirement and tipping was first considered in *Williams v Jacksonville Terminal Co*.[14] In this case, baggage handlers brought an action against their employer, a railroad company, for failing to pay them the federal minimum wage under the FLSA.[15] The employer argued that the handlers received an amount equal to the minimum wage when the tips that they received were summed with their employer-sourced wages.[16] The Supreme Court sided with the employer and concluded that tips could be "a component of an employee's wages under the FLSA."[17] In holding that tips could help fulfill minimum wage requirements, the Court acknowledged a baseline rule that, "[i]n businesses where tipping is customary, the tips . . . belong to the recipient."[18] However, the Court added, an "arrangement" that alters this baseline rule and leads

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[9] 81 Cong Rec at 4983 (cited in note 8).

[10] See Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, 123 Monthly Labor Rev 32, 32–34 (Dec 2000) (noting calls for labor reform from groups like the National Labor Union and the American Federation of Labor).

[11] See Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage* (DOL), archived at http://perma.cc/WES6-3EYR.

[12] FLSA § 2(a), 52 Stat at 1060, 29 USC § 202.

[13] Nordlund, 39 Labor L J at 721–22 (cited in note 7).

[14] 315 US 386 (1942).

[15] Id at 388–90.

[16] Id at 388–89.

[17] *Oregon Restaurant and Lodging Association v Perez*, 816 F3d 1080, 1083 (9th Cir 2016) ("Oregon Restaurant II") (discussing *Jacksonville Terminal*'s holding).

[18] *Jacksonville Terminal*, 315 US at 397.

employees to "turn over the tips to the employer" is presumptively valid "in the absence of statutory interference."[19]

This case conveys two important background rules pertinent to tips and the FLSA. First, tips can help satisfy the employer's minimum wage obligation under the FLSA. Justice Stanley Reed makes this clear in *Jacksonville Terminal*: "Except for that [minimum wage] requirement, the employer was left free, in so far as the [FLSA] was concerned, to work out the compensation problem in his own way," whether through cash wages or tips.[20] This ability to count tips toward the minimum wage requirement was later enacted in the FLSA,[21] but *Jacksonville Terminal* marks the first time that tips were treated this way.

Second, *Jacksonville Terminal* provides a background rule that tip-sharing arrangements are presumptively valid. This gave employers more control over their compensation structures. The Court reasoned that these tips were analogous to any other "fixed charge" that customers paid to the employer, and the employer could demand that the employee turn them over if the arrangement was agreed to up front.[22] Thus, this holding implicitly authorized tip pools. While subsequent FLSA amendments and DOL actions cut back on the extent to which an employer can control and use tips,[23] *Jacksonville Terminal*'s holding provides tip pools with a presumption of validity if they are consensual and not proscribed by statute.

C. FLSA Amendments of 1966 and 1974

After *Jacksonville Terminal*, Congress amended the FLSA in ways that effectively codified the case's holdings. The 1966 FLSA amendments[24] expanded the statute's coverage to workers in hotels and restaurants (the largest classes of tipped workers).[25]

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19 Id.

20 Id at 408.

21 See Fair Labor Standards Amendments of 1966 § 101(a), Pub L No 89-601, 80 Stat 830, codified at 29 USC § 203(m).

22 *Jacksonville Terminal*, 315 US at 398.

23 See Parts I.C–E.

24 Fair Labor Standards Amendments of 1966, Pub L No 89-601, 80 Stat 830, codified in various sections of Title 29.

25 See US Department of Labor, Updating Regulations Issued under the Fair Labor Standards Act, 76 Fed Reg 18832, 18838 (2011), amending 29 CFR § 531.52; Sylvia A. Allegretto and David Cooper, *Twenty-Three Years and Still Waiting for Change: Why It's Time to Give Tipped Workers the Regular Minimum Wage* *16 (Economic Policy Institute, July 10, 2014), archived at http://perma.cc/RS8G-FP42.

These amendments also marked the first time that the FLSA permitted employers to use employees' tips to fulfill the minimum wage requirement.[26] By amending the § 203(m) definition of "wage," employers were now *statutorily* allowed to use some of the tips received by employees as a credit toward the minimum wage.[27] This became known as the "tip credit."[28]

Later, the 1974 FLSA amendments[29] made two relevant changes. First, the DOL was delegated "the broad authority 'to prescribe necessary rules, regulations, and orders' to implement the FLSA amendments of 1974."[30] Second, the definition of "wage" was altered again to modify the requirements placed on an employer seeking to claim a tip credit. The current definition (which has been amended further since the 1974 amendments, but is substantially identical to the 1974 version in relevant respects)[31] reads as follows:

> (m) "Wage" . . . In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to—
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> (1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage

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[26] 76 Fed Reg at 18838 (cited in note 25).

[27] Id. For the current definition, see 29 USC § 203(m).

[28] See US Department of Labor, Updating Regulations Issued under the Fair Labor Standards Act, 73 Fed Reg 43654, 43659 (2008), amending 29 CFR § 531.52. See also Allegretto and Cooper, *Twenty-Three Years* at *4 (cited in note 25) ("The 1966 amendments to the Fair Labor Standards Act (FLSA) provided for a 50 percent 'tip credit' for employers of tipped workers.").

[29] Fair Labor Standards Amendments of 1974, Pub L No 93-259, 88 Stat 55, codified in various sections of Title 29.

[30] *Oregon Restaurant II*, 816 F3d at 1084, quoting Fair Labor Standards Amendments of 1974 § 29(b), 88 Stat at 76, 29 USC § 202 note.

[31] For the original amendment's language, see Fair Labor Standards Amendments of 1974 § 13(e), 88 Stat at 64–65, 29 USC § 203:

> The last sentence of section 3(m) is amended to read as follows: "In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips."

> required to be paid such an employee on August 20, 1996; and
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> (2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title.
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> The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, *and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips*.[32]

Importantly, these amendments mandated that employers taking the tip credit may set up tip pools only among employees "who customarily and regularly receive tips."[33] Thus, should an employer take a tip credit, she must either allow employees to keep the tips they receive, or coordinate a valid tip pool that includes only employees who are customarily tipped.[34] These requirements remain in the FLSA and form the battleground for the debate at hand.

D. *Cumbie v Woody Woo*: The Ninth Circuit's Encounter with § 203(m)

Thirty-six years after these amendments, a controversy emerged in the Ninth Circuit as to whether these tip-pooling restrictions applied *only* to employers that take the tip credit or

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[32] 29 USC § 203(m) (emphasis added).

[33] Fair Labor Standards Amendments of 1974 § 13(e), 88 Stat at 65, 29 USC § 203(m). The FLSA does not define the kinds of employees that "customarily and regularly receive tips," and the phrase has been the subject of regulation and litigation. See, for example, *Montano v Montrose Restaurant Associates, Inc*, 800 F3d 186, 189–95 (5th Cir 2015) (noting that the DOL's Field Operations Handbook lists waiters/waitresses, bellhops, busboys/girls, and service bartenders as employees who are customarily tipped); *Ford v Lehigh Valley Restaurant Group, Inc*, 2014 WL 3385128, *3 (MD Pa) ("Taken as a whole, section 203(m)'s plain meaning beckons the image of customer service employees who receive tips directly from customers in a recurring fashion [ ] as a matter of occupational custom . . . [and] have more than *de minimis* direct customer interaction."). However, the meaning of this phrase is of little consequence to the instant debate. As will become clear, the cases involved in this split presume that sharing is among employees who are "customarily" tipped and those who are not.

[34] See 29 USC § 203(m).

instead to *all* employers subject to the FLSA. The controversy in *Cumbie* arose out of a labor dispute in a restaurant. The restaurant paid servers a cash wage greater than the then-applicable federal minimum wage (that is, greater than $5.85 per hour).[35] However, the restaurant also required its servers to contribute their tips to a tip pool, which was shared with kitchen staff who did not regularly receive tips.[36] None of these tips were retained by the employer.[37]

The servers argued that this tip pool violated the FLSA, as the servers were forced to share their tips with employees who did not customarily receive tips, a practice prohibited by § 203(m).[38] The restaurant countered that its decision not to take a tip credit took it outside § 203(m)'s purview, allowing it to set up its tip-pooling arrangement however it wanted.[39] The court agreed with the restaurant, reasoning that the FLSA's tip-pooling requirements did not apply to employers that did not take a tip credit.[40]

The court began by noting the background rule from *Jacksonville Terminal* that tip pools are valid as long as no "statutory interference" exists.[41] The court then set out to determine whether the FLSA imposed any "statutory interference" and invalidated these tip pools.[42] The court proceeded to walk through § 203(m)'s requirements for taking a tip credit.[43] In rejecting the servers' arguments, the court concluded that reading § 203(m) to prevent *all* tip pools that include employees who do not "regularly receive tips" ignores that this section applies only to employers that take a tip credit, not all employers.[44] The court reasoned that the "plain text" of the statute required this conclusion: "A statute that provides that a person must do X in order to achieve Y does not mandate that a person must do X, period."[45] Following the servers' interpretation would also render the statutory language and structure surrounding tip credits "superfluous," something

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35 *Cumbie*, 596 F3d at 578 n 2.
36 Id at 578–79.
37 Id.
38 Id at 579.
39 *Cumbie*, 596 F3d at 579.
40 Id at 581.
41 Id at 579, quoting *Jacksonville Terminal*, 315 US at 397.
42 *Cumbie*, 596 F3d at 579.
43 Id at 580–81.
44 Id.
45 Id at 581 (emphasis omitted).

the court sought to avoid.[46] Finally, the court reasoned that, had Congress wanted to hold all employers to these "valid tip pool" requirements, it would not have placed this language in the "tip credit" section of § 203(m).[47] Because the employer in this case took no tip credit, and no other FLSA provision prohibited this form of tip pooling, the tip pool was valid.[48]

The servers made extensive arguments based on the FLSA amendments from the 1960s and 1970s, as well as subsequent DOL actions (such as opinion letters).[49] The court did not explicitly address these authorities and instead focused on the statute.[50] This may have resulted from the servers' shift away from § 203(m) and the DOL-regulation-based arguments that filled their initial brief and toward arguments based on the FLSA's "minimum wage section" in § 206 in their reply brief.[51] Regardless, the court did not take up their arguments that were founded on DOL action. This avoidance was short lived, however. The DOL entered the scene with a new regulation, complicating the picture and setting the final piece in this debate.

E. DOL Regulation 29 CFR § 531.52: Combating *Cumbie*

The DOL unequivocally rejected *Cumbie*'s holding and reasserted what it believed it had already made the law through opinion letters and regulations:[52] tips are presumptively the property of an employee and cannot be pooled in an "invalid"

46 *Cumbie*, 596 F3d at 581 ("It is our duty to give effect, if possible, to every clause and word of a statute."), quoting *United States v Menasche*, 348 US 528, 538–39 (1955).

47 *Cumbie*, 596 F3d at 581 (quotation marks omitted).

48 See id at 583.

49 See Appellant's Opening Brief, *Cumbie v Woody Woo, Inc*, Civil Action No 08-35718, *14–26 (9th Cir filed Feb 6, 2009) (available on Westlaw at 2009 WL 2609878) ("*Cumbie* Opening Brief").

50 See *Cumbie*, 596 F3d at 580–82.

51 See Appellant's Reply Brief, *Cumbie v Woody Woo, Inc*, Civil Action No 08-35718, *3–5 (9th Cir filed May 31, 2009) (available on Westlaw at 2009 WL 2609881) ("*Cumbie* Reply Brief"). See also *Cumbie*, 596 F3d at 581 ("Recognizing that section 203(m) is of no assistance to her, [appellant] disavowed reliance on it in her reply brief and at oral argument, claiming instead that '[t]he rule against forced transfer of tips actually originates in the minimum wage section of the FLSA, 29 U.S.C. § 206.'").

52 See 76 Fed Reg at 18840 (cited in note 25) ("Wage and Hour opinion letters . . . concluded that the 1974 Amendments clarified Congress' determination that tips are the property of the employees who receive them, not the employer, and that any agreement requiring an employee to turn over tips to the employer is, therefore, illegal."). See also id at 18841 ("The legislative history of the Act, as well as caselaw and opinion letters published shortly after the 1974 amendments, support the Department's position that section 3(m) provides the only permissible uses of an employee's tips regardless of whether a tip credit is taken.").

manner, regardless of whether or not the employer takes a tip credit. This position was laid out explicitly in a new regulation disseminated in 2011.[53]

Two years prior to *Cumbie*, the DOL began proposing new regulations to govern tipped employees. The stated goal was to "incorporate the 1974 amendments, the legislative history, subsequent court decisions, and the [DOL]'s interpretations" into the regulatory scheme.[54] The *Cumbie* decision ended up being one such court decision, as it was issued during the DOL's notice-and-comment period for these new regulations.

The DOL promulgated these new regulations in 2011. Several sections of the Federal Register explained the rationale behind the new regulation governing tip pools, and the DOL made clear that it believed that *Cumbie* was wrongly decided.[55] The DOL asserted that § 203(m) "sets forth the only permitted uses of an employee's tips—either through a tip credit or a valid tip pool—whether or not the employer has elected the tip credit."[56] The new regulation, 29 CFR § 531.52, read:

> Tips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.[57]

The DOL's rationale, provided upon the release of the regulation, stated that the 1974 FLSA amendments left a gap in the statutory scheme regarding instances in which an employer does not take a tip credit.[58] The DOL then filled this gap through "longstanding interpretation[s]" and opinion letters that *did change* the background rule from *Jacksonville Terminal*.[59] This regulation created a choice: employers may allow employees to keep their tips, or they may maintain a "valid" tip pool scheme.[60]

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53 See id at 18841.

54 73 Fed Reg at 43659 (cited in note 28).

55 76 Fed Reg at 18841 (cited in note 25).

56 Id at 18842.

57 29 CFR § 531.52.

58 See 76 Fed Reg at 18841 (cited in note 25).

59 Id at 18841–42.

60 Id at 18841 ("FLSA's tip credit provisions in 1974 [ ] clarify that section 3(m) provides the only permitted uses of an employee's tips—through a tip credit or a valid tip pool among only those employees who customarily and regularly receive tips.").

The DOL then called the Ninth Circuit's conclusion in *Cumbie* "unsupportable" and pointed to absurd results that emerge under the case's holding.[61] For example, the *Cumbie* result would allow an employer to simply pay the minimum wage to employees, and then, through a tip pool, take all of an employee's tips and "direct [the tip money] for its own purposes" (potentially realizing a profit from the tips).[62] This, the DOL reasoned, would essentially be the same in substance as allowing an employer to take a tip credit for the entire amount of an employee's wage, without the formality of taking the tip credit. As a result, "an employer that does not utilize a tip credit is permitted to use its employee's tips to a greater extent than an employer that does utilize such credit," creating an "absurd" result and rendering the 1974 amendment "superfluous."[63]

By directly opposing *Cumbie*, this new regulation shifted the debate from an argument over strict statutory interpretation to one over the validity of an administrative agency's action. The emerging question in the courts is whether this regulation is a valid exercise of the DOL's administrative power pursuant to its authority to enforce the FLSA.

II. Ensuing Circuit Split: What to Do with the DOL Regulation?

Courts now diverge on their answer to the administrative-law question raised in this circuit split: Is this regulation an appropriate measure taken by the DOL pursuant to its authority to regulate within the FLSA framework? This examination relies on the framework outlined in *Chevron U.S.A. Inc v Natural Resources Defense Council, Inc*.[64] This framework is explicitly present in several of the cases in this split, while other cases implicitly rely on it. After a brief introduction to the *Chevron* framework, this Part lays out the circuit split.

A. *Chevron* Analysis of Agency Interpretation and Regulation

Litigants may seek judicial review of regulations or adjudications delivered by administrative agencies. These challenges often assert that the agency's action is inconsistent with the statute

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[61] Id at 18842.
[62] 76 Fed Reg at 18842 (cited in note 25).
[63] Id.
[64] 467 US 837 (1984).

that outlines the agency's authority and responsibilities. The *Chevron* framework provides two "steps" that courts must take as they review agencies' interpretations of statutes:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[65]

"Step One," as it is commonly known, involves an examination of the statute's language. If the agency's interpretation and action does not accord with "clear" statutory language, the court must reject the agency's action.[66] If, however, the statute is silent or ambiguous, the court moves to "Step Two" and must "accept any reasonable agency interpretation."[67] The court may reject the agency's interpretation at Step Two only if it is "arbitrary, capricious, or manifestly contrary to the statute."[68]

While not present in the *Chevron* opinion itself, other *Chevron* "steps" have emerged through Supreme Court opinions and academic literature.[69] One such step is "Step Zero."[70] While discussed in more detail in Part III, Step Zero is an initial inquiry into whether the *Chevron* two-step analysis should apply at all.[71] Before even considering whether the statute is clear or whether

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65 Id at 842–43 (citations omitted).

66 See Note, *"How Clear Is Clear" in* Chevron*'s Step One?*, 118 Harv L Rev 1687, 1687 (2005).

67 Id.

68 *Chevron*, 476 US at 844.

69 See generally, for example, Cass R. Sunstein, Chevron *Step Zero*, 92 Va L Rev 187 (2006); Matthew C. Stephenson and Adrian Vermeule, Chevron *Has Only One Step*, 95 Va L Rev 597 (2009); Michael Pollack and Daniel Hemel, Chevron *Step 0.5* (Yale J Reg, June 24, 2016), archived at http://perma.cc/QTD5-6K6D; Daniel J. Hemel and Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U Chi L Rev 757 (2017).

70 See Sunstein, 92 Va L Rev at 211–19 (cited in note 69), citing *Christensen v Harris County*, 529 US 576 (2000), *United States v Mead Corp*, 533 US 218 (2001), and *Barnhart v Walton*, 535 US 212 (2002).

71 See Sunstein, 92 Va L Rev at 191 (cited in note 69).

the regulation is reasonable (Steps One and Two), courts must examine whether Congress has implicitly delegated "law-interpreting power" to the agency or reserved this power of interpretation for courts.[72] The Court's opinions have offered guidance on what kinds of factors should be considered in this inquiry, including the procedures the agency uses to create rules, the expertise of the agency on the matter at hand, the importance of the question the agency attempts to answer, and whether the highest officials within the agency produced the regulation.[73]

Unfortunately, but importantly, the courts involved in the split discussed in this Part do not discuss Step Zero.[74] This may be based on the timing of these cases or the relative novelty of Step Zero as an analytical tool. This may also result from the DOL's facial appearance as the "rightly situated" regulator on this employment-related issue (a notion dispelled in Part III.D). Whatever the reason, this omission is unjustified: as discussed in Part III, many of the arguments offered by these courts fall cleanly into the Step Zero framework, as they address whether the DOL has been delegated authority to regulate in this realm at all. However, an attempt to reframe this debate in terms of Step Zero first requires laying out the relevant circuit split.

B. The Ninth Circuit Upholds 29 CFR § 531.52

The Ninth Circuit reexamined its own *Cumbie* decision after the promulgation of the 2011 DOL regulation. The court took on this question in *Oregon Restaurant and Lodging Association v Perez*[75] ("Oregon Restaurant II"), comprising two consolidated cases. In both cases, employers paid employees more than the federal minimum wage and did not take a tip credit, yet faced challenges to their tip-pooling practices under § 203(m) and 29 CFR § 531.52.[76] Both cases also involved tip pools among employees who were customarily tipped and others who were not.[77] Both district courts held the DOL regulation as invalid under the *Chevron* framework and, thus, as exceeding the statutory grant of authority.[78]

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72 See id at 192.

73 See Part III.A.

74 For the relevant cases, see Parts II.B–C.

75 816 F3d 1080 (9th Cir 2016).

76 See *Oregon Restaurant and Lodging v Solis*, 948 F Supp 2d 1217, 1220–22 (D Or 2013) ("Oregon Restaurant I"); *Cesarz v Wynn Las Vegas, LLC*, 2014 WL 117579, *1–2 (D Nev).

77 See *Oregon Restaurant I*, 948 F Supp 2d at 1218; *Cesarz*, 2014 WL 117579 at *1–2.

78 See *Oregon Restaurant I*, 948 F Supp 2d at 1222–27; *Cesarz*, 2014 WL 117579 at *2–3.

On appeal, the employee group and DOL unsurprisingly relied on the DOL regulation and its mandate against "invalid" tip pools.[79] The DOL championed the regulation, claiming that it was well within the DOL's "broad authority" to interpret and regulate under the 1974 FLSA amendments and, further, that *Cumbie* was silent on the question whether the DOL could create such a regulation.[80] Conversely, the employer groups argued that *Cumbie* declared the language in § 203(m) to be plain and unambiguous, such that agency action interpreting the statutory language differently fails under *Chevron* Step One as contrary to the statute's plain meaning.[81] These groups also asserted that, even if the regulation passed Step One, it would fail Step Two, as it was "contrary to the FLSA and would render statutory text superfluous," making it arbitrary.[82] The Ninth Circuit reversed the district courts, concluding that the DOL regulation was a valid exercise of agency authority under *Chevron*.[83]

After emphasizing the DOL's "broad authority . . . to implement the FLSA [1974] amendments" (and only cursorily addressing any Step Zero issues),[84] the court moved to the *Chevron* Step One analysis, evaluating whether Congress (through the FLSA) had spoken directly "to the precise question at issue" or, alternatively, whether "the statute is silent or ambiguous."[85] The court concluded that the FLSA was silent on this issue and that *Cumbie* did not preclude such a conclusion. Instead of holding that the FLSA unambiguously *protected* such tip pools, the court reasoned that *Cumbie* held that nothing in the FLSA unambiguously *restricted* these tip pools.[86] As a result, the Ninth Circuit

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79 *Oregon Restaurant II*, 816 F3d at 1082–83.

80 Id at 1084.

81 Id. The employer group relied on *National Cable & Telecommunications Association v Brand X Internet Services*, 545 US 967, 982 (2005), which laid down the principle that 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." The employer group argued—and the district courts below agreed—that the *Cumbie* court "determined [that] the meaning of section 203(m) is clear and unambiguous, leaving no room for agency interpretation." *Oregon Restaurant II*, 816 F3d at 1093 (Smith dissenting).

82 Appellees' Brief, *Oregon Restaurant and Lodging Association v Perez*, Civil Action No 13-35765, *3 (9th Cir filed Feb 28, 2014) (available on Westlaw at 2014 WL 912326) ("Employer Brief").

83 *Oregon Restaurant II*, 816 F3d at 1090.

84 Id at 1084, 1086 n 3.

85 Id at 1086, quoting *Chevron*, 476 US at 842–43.

86 *Oregon Restaurant II*, 816 F3d at 1086.

concluded, the FLSA was "silent" about these invalid tip pools.[87] The FLSA neither protected nor restricted the tip-pooling practices in question, so Congress had not spoken directly on the matter.[88] Thus, the DOL regulation was appropriate under the statutory scheme and passed *Chevron* Step One.

The court moved to Step Two.[89] Here the court asked whether the DOL's interpretation of the FLSA was reasonable, or "arbitrary [or] capricious."[90] To answer this, the court examined the plain language of the statute, the wider FLSA context, case law surrounding the statute, and the legislative intent.[91] The court pointed to the notice-and-comment process moderated by the DOL before creating this regulation.[92] It also noted the DOL's conclusions that there was confusion surrounding § 203(m) and that *Cumbie* created a loophole for employers.[93] The court then reasoned that the legislative history "support[ed] the DOL's interpretation of section 203(m)," as the relevant Senate report emphasized that tips were first and foremost the property of the employee.[94] Finally, the court pointed to the overall purpose of the FLSA as supporting the reasonableness of the DOL regulation. As a "broad and remedial act" that has been "expanded and extended" to protect workers in various ways, the court reasoned that a result that allowed employers that did not take tip credits to do whatever they wanted with employee tips would be

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[87] Id at 1087. The court concluded that, because *Cumbie* held the statute only to be silent (and did not unambiguously protect or restrict the practice), *Brand X* could not help the employer group. Id at 1088. The agency action did not transgress a "prior judicial construction," but rather regulated in an area in which *Cumbie* held there to be statutory silence. Id.

[88] Id at 1086–89.

[89] Id at 1089.

[90] *Oregon Restaurant II*, 816 F3d at 1089, citing *Chevron*, 467 US at 844.

[91] *Oregon Restaurant II*, 816 F3d at 1089, quoting *Natural Resource Defense Council v Environmental Protection Agency*, 526 F3d 591, 605 (9th Cir 2008).

[92] *Oregon Restaurant II*, 816 F3d at 1089. Generally, notice-and-comment periods provide soon-to-be-regulated parties with exposure to forthcoming regulations, as well as the opportunity to provide feedback on and suggest modifications to the regulations, or recommend against issuing the regulations entirely. The relevant agency is responsible for, among other things, documenting any received comments and responding to major criticisms to the regulations. Thanks to these procedural safeguards, rules promulgated after notice and comment are more likely to receive *Chevron* deference. See Charles A. Breer and Scot W. Anderson, *Regulation without Rulemaking: The Force and Authority of Informal Agency Action* *34 (Davis Graham & Stubbs LLP), archived at http://perma.cc/M624-62CD.

[93] *Oregon Restaurant II*, 816 F3d at 1089.

[94] Id at 1089–90.

strange.[95] As a result, the regulation passed Step Two, and thus received deference under *Chevron*.[96]

C. Various Courts and Dissenting Judges Find the DOL Regulation Wanting under *Chevron*

Other courts and judges examined this same question and came to the opposite conclusion, including the Fourth Circuit,[97] a number of district courts,[98] and two dissents from the Ninth Circuit *Oregon Restaurant* saga (one dissent from the original panel and one dissent from the denial for rehearing en banc).[99] These courts—or, in some cases, dissenting judges—have taken various approaches to this problem (with some explicitly applying the *Chevron* framework). Despite their differences, they essentially grounded their conclusions on three lines of reasoning.[100]

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[95] Id at 1090.

[96] See id.

[97] See generally *Trejo v Ryman Hospitality Properties, Inc*, 795 F3d 442 (4th Cir 2015).

[98] See generally *Malivuk v Ameripark, LLC*, 2016 WL 3999878 (ND Ga) ("Malivuk I"); *Brueningsen v Resort Express Inc*, 2015 WL 339671 (D Utah); *Mould v NJG Food Service Inc*, 2014 WL 2768635 (D Md); *Stephenson v All Resort Coach, Inc*, 2013 WL 4519781 (D Utah); *Trinidad v Pret A Manger (USA) Ltd*, 962 F Supp 2d 545 (SDNY 2013); *Oregon Restaurant I*, 948 F Supp 2d 1217.

[99] See *Oregon Restaurant II*, 816 F3d at 1091–95 (Smith dissenting); *Oregon Restaurant and Lodging Association v Perez*, 843 F3d 355 (9th Cir 2016) ("Oregon Restaurant III") (O'Scannlain dissenting from denial of rehearing en banc).

[100] As this Comment traversed the editing process in preparation for publication, the circuit split deepened. Two additional circuit courts have recently questioned the DOL regulation. See generally *Marlow v New Food Guy, Inc*, 861 F3d 1157 (10th Cir 2017); *Malivuk v Ameripark, LLC*, 694 Fed Appx 705 (11th Cir 2017) ("Malivuk II"). In *Marlow*, the Tenth Circuit concluded that the "regulation is beyond the DOL's authority." *Marlow*, 861 F3d at 1158. The court first noted that the FLSA's plain text does not assist the plaintiff, as the statute's tip-pooling restrictions outline only "what an employer must do *if it wishes to take [the tip] credit*." Id at 1161. The court then examined the DOL's regulation and noted that it represented "a step too far" by the agency. Id at 1162. It reasoned that the FLSA's text is unambiguous and contains no interstices within which the DOL may regulate. The lack of any "gap or silence with respect to a specific task assigned the DOL" means that the agency was "without authority" to regulate the tip pools in question. Id at 1163–64. While the court mentioned the *Chevron* framework for examining regulatory action several times, it did not articulate a conclusion regarding the *Chevron* step at which the regulation failed.

The Eleventh Circuit found the regulation wanting in *Malivuk II* under slightly different reasoning. The court concluded that the FLSA did not provide the plaintiff with a private cause of action for "improperly withheld tips." *Malivuk II*, 694 Fed Appx at 709. The court emphasized that FLSA "[§] 216(b) establishes a private right of action for violations of § 206 and § 207 of the FLSA." Id at 708. These sections outline the FLSA's minimum wage and maximum hour requirements, respectively. Because the employer paid the minimum wage, the plaintiff's claim based on withheld tips implicated neither of these FLSA sections. See id at 709. Thus no private relief under the FLSA was available to the

1. The DOL regulation runs counter to the plain language of § 203(m) and the structure of the FLSA.

Several courts and judges have concluded that the DOL regulation runs counter to the language of § 203(m) and the surrounding structure of the FLSA. Thus, the regulation represents an overreach by the agency. A Utah district court in *Brueningsen v Resort Express Inc*[101] asserted that the regulation "departs from Congress' clear intent," renders some of the "clear" language around tip pooling "superfluous," and ignores the "choice" that the statute gives employers around how to structure their compensation systems.[102] This led the court to invalidate the regulation under *Chevron* Step One.[103] Three other district courts employed similar reasoning in holding that the regulation fails under a general *Chevron* analysis (without specifying Step One or Two).[104] A fourth district court concluded that the regulation was ultra vires, as it was "incompatible" with the FLSA's plain language.[105]

Similarly, in affirming a dismissal of a restaurant server's complaint, the Fourth Circuit in *Trejo v Ryman Hospitality Properties, Inc*[106] noted that § 203(m) "'does not state freestanding *requirements* pertaining to all tipped employees,' but rather creates rights and obligations for employers attempting to use tips as a credit against the minimum wage."[107] Thus, the plain language of the statute did not support the plaintiffs' contention that § 203(m) "create[d] a free-standing right to bring a claim for lost 'tip' wages."[108] The court also noted that the wider context of the FLSA (and its status as the "minimum wage/maximum hour law"[109]) extended the application of § 203(m) only to situations in

plaintiff. While the court did not address the regulation's validity under *Chevron*, its conclusion highlights the mismatch between the FLSA and the DOL regulation. As discussed in Part III.D, this discrepancy recommends the regulation's failure at *Chevron* Step Zero.

101 2015 WL 339671 (D Utah).

102 Id at *5.

103 Id.

104 See *Malivuk I*, 2016 WL 3999878 at *4 ("The DOL Regulation violates the plain language of Section 203(m)."); *Stephenson*, 2013 WL 4519781 at *8 ("[The DOL] regulation runs contrary to the plain language and structure of § 203(m)."); *Trinidad*, 962 F Supp 2d at 563 ("[T]he Court is highly skeptical that DOL's regulations permissibly construe the statute.").

105 See *Mould*, 2014 WL 2768635 at *5 ("[T]he Court joins sister courts in finding that the regulation is incompatible with the plain text of the statute and is therefore *ultra vires*.").

106 795 F3d 442 (4th Cir 2015).

107 Id at 448, quoting *Cumbie*, 596 F3d at 581.

108 *Trejo*, 795 F3d at 447.

109 Id at 448, quoting *Monahan v County of Chesterfield*, 95 F3d 1263, 1266 (4th Cir 1996).

which an employer pays a wage lower than the minimum wage and takes a tip credit, *not* to situations in which the minimum wage is already being paid.[110] The Fourth Circuit did not address the DOL regulation explicitly, but its decision affirmed a district-court decision that invalidated the regulation under *Chevron* Step One through comparable reasoning.[111]

2. The DOL regulation improperly transgresses *Cumbie*'s interpretation of § 203(m).

Some courts and judges rely on *Cumbie* to assert that the language of § 203(m) had already been interpreted to be unambiguous. The statute, they reason, simply provides employers with a choice and does not mandate valid tip pools for all. The *Malivuk v Ameripark, LLC*[112] ("Malivuk I") court pointed to *Cumbie* and its statement that nothing about § 203(m) applies to employers that do not take the tip credit.[113] The court found the *Cumbie* court's reasoning more persuasive than the rationale underlying the DOL regulation.[114] In the words of the *Malivuk I* court, the *Cumbie* decision "squarely" addressed the issue when it concluded that "according to the plain text of the statute, Section 203(m) applies only to employers who *do* take a tip credit."[115] Concluding that *Cumbie* was "clear" would require subsequent Ninth Circuit courts to align their decisions, eliminating the option of finding the statute ambiguous.[116] And while not a controlling decision outside the Ninth Circuit, the determination that the FLSA is "clear" on this point would serve as persuasive authority for any court evaluating the regulation and its relationship to the FLSA.[117]

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110 *Trejo*, 795 F3d at 448, citing *Nakahata v New York-Presbyterian Healthcare System, Inc*, 723 F3d 192, 201 (2d Cir 2013).

111 *Trejo*, 795 F3d at 445 (citations omitted):

> As to the FLSA count, the [district] court held that because the Plaintiffs were paid the minimum wage, § 203(m) "does not have anything to do with this case." The [district] court noted that the Plaintiffs "do not want to" allege a violation of Department of Labor Regulations which extend § 203(m) to employers who are not utilizing the statute's tip credit, but nonetheless stated that those regulations "exceeded [the Department of Labor's] authority and . . . don't get past step 1 of the *Chevron* analysis in terms of deference."

112 2016 WL 3999878 (ND Ga).

113 Id at *4.

114 Id.

115 Id, citing *Oregon Restaurant II*, 816 F3d at 1093 (Smith dissenting).

116 For corresponding arguments on the other side of this split, see note 81.

117 *Brand X* would not require non–Ninth Circuit courts to conclude that the statute is unambiguous, as this doctrine applies only within circuits. However, the persuasive

The district-court opinion in *Oregon Restaurant I* employed similar reasoning. The court pointed to the *Cumbie* decision's repeated assertions that § 203(m) contained "clear" and "plain" language: "In rejecting the plaintiff's argument, the [*Cumbie* court] emphasized Section [20]3(m)'s 'clear' and 'plain' language at least four times."[118] The district court concluded that this language left "no room for agency discretion," leading the regulation to fail at *Chevron* Step One.[119] In addition, both the dissent on the Ninth Circuit panel[120] and the dissent in the denial of en banc rehearing[121] concluded that the language in the statute had been held to be clear in *Cumbie*: "That is precisely what we did in *Cumbie*: we held that § 203(m) is clear and unambiguous . . . . We said this explicitly no fewer than six times."[122] As already mentioned, if *Cumbie* held the language of the FLSA to be clear and unambiguous, other courts in the Ninth Circuit would be required to follow this conclusion and could not hold the statute to be ambiguous.[123]

3. The FLSA's "silence" marks a limit on the DOL's authority to act, not a statutory "interstice" within which it can regulate.

Finally, these courts and judges assert that the "silence" pointed out by the *Oregon Restaurant II* majority does not represent space within the statute in which regulation may occur, but rather marks a limit of the agency's regulatory power. The *Malivuk I* court concluded that *Cumbie* illustrated that § 203(m) applied only to tip-credit-taking employers, and not others.[124] This "silence" did not represent an area for the DOL to regulate within, but a realm that Congress chose not to govern through this statute, thus precluding agency action.

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force would remain, and a court would certainly be less likely to conclude that a statute was ambiguous if a sister circuit found the language to be unambiguous. See *Brand X*, 545 US at 982.

[118] *Oregon Restaurant I*, 948 F Supp 2d at 1223.

[119] Id at 1224.

[120] *Oregon Restaurant II*, 816 F3d at 1091–95 (Smith dissenting).

[121] *Oregon Restaurant III*, 843 F3d at 355–66 (O'Scannlain dissenting from denial of rehearing en banc).

[122] Id at 358 (O'Scannlain dissenting from denial of rehearing en banc). See also *Oregon Restaurant II*, 816 F3d at 1093 (Smith dissenting) ("Any rational reading of *Cumbie* unequivocally demonstrates that we determined the meaning of section 203(m) is clear and unambiguous, leaving no room for agency interpretation.").

[123] See text accompanying note 116.

[124] *Malivuk I*, 2016 WL 3999878 at *4.

The *Oregon Restaurant* district court and dissents spent significant time on this "silence" issue, concluding that no real gap existed in the statute such that the DOL could issue the regulation.[125] The district court concluded that "the intent of Congress in Section [203(m)] is clear: Congress intended to impose conditions on employers that take a tip credit but did not intend to impose a freestanding requirement pertaining to all tipped employees."[126] Similarly, the dissent from the panel decision emphasized that § 203(m) "only applies to employers who *do* take a tip credit . . . and therefore does not apply to employers who *do not* take a tip credit."[127] Thus, there exists no gap or silence inviting agency discretion.[128] Otherwise, the dissent added, the agency would be allowed to regulate anything that it was not expressly forbidden from regulating.[129] Such a result would be absurd in the face of Supreme Court guidance that "has made clear that it is only in the ambiguous 'interstices' *within* the statute where silence warrants administrative interpretation, not the vast void of silence on either side of it."[130]

The dissent from the denial for rehearing en banc concluded its opinion by listing six other circuits that have "roundly and forcefully repudiated the specious theory of agency power [that the majority] now adopts," noting that each court has "echoed again and again the basic reality that silence does not always constitute a gap an agency may fill, but often reflects Congress's decision not to regulate in a particular area at all, a decision that is

[125] See *Oregon Restaurant III*, 843 F3d at 359–63 (O'Scannlain dissenting from denial of rehearing en banc); *Oregon Restaurant II*, 816 F3d at 1093–94 (Smith dissenting); *Oregon Restaurant I*, 948 F Supp 2d at 1224–26.

[126] *Oregon Restaurant I*, 948 F Supp 2d at 1226.

[127] *Oregon Restaurant II*, 816 F3d at 1093 (Smith dissenting).

[128] Id (Smith dissenting).

[129] Id at 1094 (Smith dissenting) ("In other words, the majority suggests an agency may regulate wherever that statute does not forbid it to regulate. This suggestion has no validity."). See also *Oregon Restaurant I*, 948 F Supp 2d at 1226 ("For the DOL, silence is always an implicit gap to be filled by regulation. The DOL's position seems to be that Congressional silence regarding an area of economic activity is *never* a considered decision to let the economic actors make their own choices."); *Oregon Restaurant III*, 843 F3d at 362 (O'Scannlain dissenting from denial of rehearing en banc) ("But *Christensen* and Justice Souter's concurrence give absolutely no support to the majority's radical idea that an agency can regulate whatever it wants until Congress says out loud that it must stop.").

[130] *Oregon Restaurant II*, 816 F3d at 1094 (Smith dissenting), citing *Utility Air Regulatory Group v Environmental Protection Agency*, 134 S Ct 2427, 2445 (2014) ("UARG").

binding on the agency."[131] As a result, any agency action addressing this form of silence would certainly fail at Step One, as the regulation would violate the plain meaning of the statute by ignoring the statutory bounds within which the agency could promulgate regulation at all.[132] Judge Diarmuid O'Scannlain, dissenting from the denial of rehearing en banc, took another step, asserting that this same reasoning would lead the regulation to fail at Step Two:

> Even if this case were framed in terms of *Chevron* Step Two, it would not make any difference to the analysis or the outcome. Precisely because the Department has not been delegated authority to ban tip pooling by employers who forgo the tip credit, the Department's assertion of regulatory jurisdiction "is 'manifestly contrary to the statute,' and exceeds [its] statutory authority."[133]

According to these dissents, the silence of the FLSA proscribes DOL action in this arena. The combined force of this silence, the "plain text" and structure of the FLSA, and *Cumbie*'s prior construction of the statute led these courts and judges to conclude that the regulation failed under the *Chevron* framework (although at which step is not entirely clear).

III. RENEWED *CHEVRON* ANALYSIS: STEP ZERO AND THE "MAJOR QUESTION" EXCEPTION

As Part II demonstrates, courts are split on the issue of whether DOL regulation 29 CFR § 531.52 should receive *Chevron* deference. The debate turns on the language of § 203(m), the FLSA's structure and purpose, the legislative history of the FLSA amendments, and the breadth of the DOL's authority. These contested matters are crucial to the *Chevron* analysis, yet courts and

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131 *Oregon Restaurant III*, 843 F3d at 362–63 (O'Scannlain dissenting from denial of rehearing en banc) (recounting the Third, Fourth, Fifth, Seventh, Eleventh, and DC Circuits' rejections of the idea that silence in a statute confers power to an administrative agency). Judge Diarmuid O'Scannlain also noted that his own circuit had already come to a similar conclusion. Id at 363 (O'Scannlain dissenting from denial of rehearing en banc), citing *Martinez v Wells Fargo Home Mortgage, Inc*, 598 F3d 549, 554 n 5 (9th Cir 2010).

132 See *Oregon Restaurant III*, 843 F3d at 359 (O'Scannlain dissenting from denial of rehearing en banc) ("And, as if the substance of our holding were not already obvious beyond doubt, we cited a *Chevron* Step One decision to illustrate our reasoning.").

133 Id at 363 (O'Scannlain dissenting from denial of rehearing en banc), quoting *Sullivan v Zebley*, 493 US 521, 541 (1990).

judges discuss them with varying degrees of depth. As it stands, this circuit split is an analytical mess.

Part III attempts to relocate this debate to its proper doctrinal space: *Chevron* Step Zero. This threshold inquiry represents an attempt by courts to answer a preliminary question before employing the familiar two-step framework: Should *Chevron* apply at all? This question arises out of several Supreme Court precedents. Many of the open issues involved in this debate inform the Step Zero inquiry, as do other factors. In the end, this relocation provides a simple yet robust treatment of this question. Courts employing the Step Zero framework—and in particular, Step Zero's "major question" exception, discussed in Part III.C—should conclude that the DOL regulation represents an agency attempting to overreach and regulate outside of its statutory realm, such that it should be invalidated without entering *Chevron*'s two-step framework.

A. *Chevron* Step Zero: An Overview

In his exposition of *Chevron* Step Zero, Professor Cass Sunstein notes that this "threshold question"—whether a court should engage in the *Chevron* analysis at all—"has become one of the most vexing [questions] in regulatory cases."[134] This question is informed by examining various "indicia of legislative intent" to uncover whether an act of Congress "delegate[s] primary interpretative authority to the agency charged with implementing the statute."[135] Professors Thomas Merrill and Kristin Hickman summarize this idea: "[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply."[136] Should this intent be lacking, the agency action simply does not receive *Chevron* deference without entering the familiar two-step framework.

One early Step Zero case was *Christensen v Harris County*.[137] The Supreme Court examined the validity of a DOL opinion letter and concluded, without applying the two-step framework, that it

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[134] Sunstein, 92 Va L Rev at 190 (cited in note 69). Professors Thomas W. Merrill and Kristin E. Hickman describe this threshold inquiry similarly, as Step Zero involves the question "whether courts should turn to the *Chevron* framework at all, as opposed to the *Skidmore* framework or deciding the interpretational issue de novo." Thomas W. Merrill and Kristin E. Hickman, Chevron*'s Domain*, 89 Georgetown L J 833, 836 (2001).

[135] Note, 118 Harv L Rev at 1688–89 (cited in note 66).

[136] Merrill and Hickman, 89 Georgetown L J at 872 (cited in note 134).

[137] 529 US 576 (2000).

should not receive *Chevron* deference.[138] The case made clear that some agency actions do not even get their foot in the *Chevron* "door" due to a lack of congressionally delegated interpretative power. Writing in dissent, Justice Stephen Breyer noted that *Chevron* deference is "inapplicable . . . where one has doubt that Congress actually intended to delegate interpretive authority to the agency (an 'ambiguity' that *Chevron* does not presumptively leave to agency resolution)."[139] Importantly, Breyer notes here that the presence of statutory ambiguity does not necessarily require, or even allow, an agency to resolve it.[140]

United States v Mead Corp[141] offered additional insight into Step Zero. In concluding that a US Customs Service opinion letter subjecting "day planners" to a tariff would not receive *Chevron* deference, the Court reasoned that administrative action may be analyzed according to *Chevron*'s two-step framework when an agency can "make rules carrying the force of law."[142] The Court went on to point out other factors that suggested an agency's actions should pass *Chevron* Step Zero. For instance, the appropriateness of *Chevron* deference depended on "the degree of the agency's care, its consistency, formality, and relative expertness, and [ ] the persuasiveness of the agency's position," as well as whether the agency's action could bind "third parties."[143]

Barnhart v Walton[144] added texture to the Step Zero analysis. In upholding a Social Security Administration regulation, the Court noted that "whether a court should give such deference depends in significant part upon the interpretive method used and the nature of the question at issue."[145] The Court again pointed to a variety of factors that could influence whether *Chevron* applied. These included "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."[146]

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[138] Id at 588.

[139] Id at 596–97 (Breyer dissenting).

[140] Id at 597 (Breyer dissenting).

[141] 533 US 218 (2001).

[142] Id at 226–27. The Court noted that an agency's "power to engage in adjudication or notice-and-comment rulemaking" was a signal of congressional intent that the agency could act with the "force of law" and potentially receive *Chevron* deference. Id.

[143] Id at 228, 233.

[144] 535 US 212 (2002).

[145] Id at 222.

[146] Id.

Importantly, *Barnhart* marked the adoption of something close to a case-by-case inquiry when determining whether *Chevron* should apply, resembling a test that then-Judge Breyer advocated for in a 1986 article.[147] Breyer emphasized that whether *Chevron* applies depends on whether the relevant debate is "important" or "interstitial" in nature, whether the debate involved legal interpretation or agency administration, whether the language of the statute is imprecise (such that it invites agency action), and what Congress explicitly discussed in the legislative history.[148] Breyer added that an examining court should "ask itself whether the agency can be trusted to give a properly balanced answer"[149] without seeking "to expand [its] power beyond the authority that Congress gave [it]."[150] Thus, a variety of factors are involved at Step Zero, and *Chevron* deference should be given when it "makes sense" given the "particular circumstance[s]," the particular statute involved, and the "practical facts surrounding the administration of" the relevant statute.[151]

B. The Initial (and Naïve) Application of Step Zero

If one applies this framework to the FLSA debate, it quickly becomes clear that several Step Zero factors lend themselves to straightforward answers. For example, the DOL regulation was released after a notice-and-comment rulemaking process.[152] The DOL came to its decision after careful consideration over time.[153] A cursory look at these factors might suggest that the DOL should prevail at Step Zero, as the regulation facially resembles agency action pursuant to congressionally delegated rulemaking authority. These easy answers may have led some of the courts in the FLSA debate to skip past a close examination of Step Zero and, instead, focus their debate within the classic two-step framework.

However, an analysis that fails to look beyond these factors wrongly ignores the major question exception, which is composed

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[147] See Sunstein, 92 Va L Rev at 217, 239 (cited in note 69), citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin L Rev 363, 373 (1986).

[148] See Breyer, 38 Admin L Rev at 370–71 (cited in note 147).

[149] Id at 371.

[150] Id, citing *Hi-Craft Clothing Co v National Labor Relations Board*, 660 F2d 910, 916 (3d Cir 1981).

[151] Breyer, 38 Admin L Rev at 370 (cited in note 147).

[152] For the Court's treatment of the relevance of this factor, see *Mead*, 533 US at 226–27.

[153] Id at 228.

of a subset of Step Zero factors.[154] Importantly, this exception can be dispositive on the question whether the agency action should move on to the two-step inquiry, regardless of which way other Step Zero factors cut. The weighty factors composing the major question exception can be summed up by several Step Zero questions: Is the relevant question a "major" one on the boundaries of a statutory scheme or more interstitial in nature? Is the agency a well-suited "expert" that should address the question at hand? Does the question involve important policy considerations that affect numerous groups of people or large portions of the economy, or rather involve more minor considerations that are related to day-to-day administration?[155] The answers to these questions often work in tandem with one another and point toward similar conclusions. In addition, these major question factors can provide a dispositive answer to the Step Zero inquiry, and do so in the instant FLSA debate.

C. *Chevron* Step Zero and the Major Question Exception: An Overview

Recent Supreme Court precedent provides a robust treatment of the major question exception at Step Zero. As the cases outlined in this Section demonstrate, the major question exception can be dispositive in the Step Zero analysis, regardless of what the other factors outlined in *Barnhart* or *Mead* might dictate. This Section outlines these cases, and the next Section will apply the cases' principles to the FLSA debate at hand. This application leads to the conclusion that the DOL regulation prohibiting tip pools among nontipped employees fails under the major question exception and thus that the *Chevron* inquiry ends at Step Zero.

Concerns about agencies addressing major questions date back to Breyer's 1986 article: "Does the question [at issue] . . . concern common law or constitutional law, or does it concern matters of agency administration? A court may also ask whether the

[154] For discussion of the major question doctrine as applied by the Court, see Sunstein, 92 Va L Rev at 236–42 (cited in note 69).

[155] For an in-depth discussion of these factors, see Part III.C.

legal question is an important one."[156] Breyer advocated for a presumption that Congress had answered significant questions and left relatively minor and "interstitial" matters to the agency.[157]

This concern has emerged in Court opinions as well and (at first) was considered at each of the two traditional *Chevron* steps. For example, the Court in *MCI Telecommunications Corp v American Telephone & Telegraph Co*[158] invalidated an FCC regulation that subjected only one company (AT&T) to tariff-filing requirements. This occurred at Step One. The Court made much of the fact that it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion," as the rate filings were "the essential characteristic of a rate-regulated industry."[159]

Later, in *Food and Drug Administration v Brown & Williamson Tobacco Corp*,[160] the Court concluded that the Food and Drug Administration (FDA) did not have the authority to regulate tobacco, despite facially appearing to be the agency best suited for this task.[161] The Court noted that "[i]n extraordinary cases, [ ] there may be reason to hesitate before concluding that Congress has intended [ ] an implicit delegation" to an agency.[162] The Court pointed back to *MCI* and to Breyer's caution against allowing agencies to decide major questions.[163] The Court also

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[156] Breyer, 38 Admin L Rev at 370 (cited in note 147).

[157] Id. A recent Supreme Court case, *City of Arlington v Federal Communications Commission*, 569 US 290 (2013), facially merits mention in this Section. The Court examined an Federal Communications Commission (FCC) declaratory ruling that, in effect, interpreted the FCC's own jurisdiction to regulate municipal zoning decisions. Id at 293–95. The Court allowed the FCC's ruling to get into the *Chevron* two-step framework, holding that an agency's interpretive determination of its own jurisdiction is not precluded from receiving deference if it passes the two-step inquiry. See id at 296–98. While the present FLSA debate could be cast as a "jurisdictional" debate, this is not the heart of the issue. The DOL should fail at Step Zero (as will be demonstrated) not because it is interpreting its own jurisdiction but because it transgresses the major question exception and the Step Zero factors that it comprises. Further, *City of Arlington* does not *exempt* agency action dealing with its own jurisdiction from *Chevron* examination. The case merely holds that there is not automatic *Chevron* failure when such questions are involved.

[158] 512 US 218 (1994).

[159] Id at 231.

[160] 529 US 120 (2000).

[161] Id at 126.

[162] Id at 159. The Court located this reasoning under the umbrella of Step One: "Finally, our inquiry into whether Congress *has directly spoken* to the precise question at issue is shaped, at least in some measure, by the nature of the question presented." Id (emphasis added).

[163] Id.

noted the enormity of the already-existing congressionally created regulatory scheme respecting tobacco.[164] In finding a Step One failure, the Court concluded that, "[a]s in *MCI*, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[165]

More recently in *Utility Air Regulatory Group v Environmental Protection Agency*[166] ("UARG"), the Court invalidated several Environmental Protection Agency (EPA) regulatory actions while upholding others.[167] In both analyses, the major question exception drove the Court's reasoning. The majority expressed concern that some aspects of the agency's interpretation and action "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[168] The Court pointed to the fact that these interpretations would lead the EPA "to regulate 'a significant portion of the American economy,'"[169] such that they merited judicial "skepticism."[170] These concerns, coupled with the fact that this action gave the EPA increased regulatory power over "millions" of small factories and power plants, caused the Court to locate this agency interpretation in the "major question" bucket, leading to its failure at Step Two.[171] The Court went on to give other EPA actions *Chevron* deference, as they did not transgress the major question exception. Instead of expanding agency authority dramatically, these actions only "moderately increas[ed] the demands [the] EPA . . . can make of entities already subject to its regulation."[172] Further, the new demands made by the EPA were not "of a significantly different character from those traditionally" imposed.[173]

Finally, the Court employed the major question doctrine explicitly at Step Zero in *King v Burwell*.[174] This case involved a

[164] *Brown & Williamson*, 529 US at 159–60.

[165] Id at 160. See also *Gonzales v Oregon*, 546 US 243, 267 (2006) ("The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable.").

[166] 134 S Ct 2427 (2014).

[167] Id at 2449.

[168] Id at 2444.

[169] Id, quoting *Brown & Williamson*, 529 US at 159.

[170] *UARG*, 134 S Ct at 2444.

[171] Id at 2442–44.

[172] Id at 2448.

[173] Id at 2449.

[174] 135 S Ct 2480 (2015).

challenge to the IRS's interpretations of the Affordable Care Act[175] (ACA). The Court gave the IRS's interpretation no deference, without embarking on the two-step analysis.[176] While noting the customary use of the two-step framework, the Court held that "extraordinary cases" did not merit its use.[177] With "billions of dollars in [government] spending" and the "price of health insurance for millions of people" at stake, the question at issue was one of "deep 'economic and political significance.'"[178] Congress, the Court continued, would not have implicitly assigned this question to the IRS, "which has no expertise in crafting health insurance policy of this sort."[179] As a result, the Court assumed responsibility for interpreting the statute and gave no deference to the IRS.[180]

King represents the latest use of the *Chevron* major question exception by the Court, employing it at Step Zero. Thus, the *King* Court used the major question exception before entering the *Chevron* two-step analysis.[181] In addition, *King* demonstrates that the Step Zero factors that fall under this major question exception can be dispositive at Step Zero, regardless of how other factors come out. In *King*, the IRS's interpretation addressed a question of immense sociopolitical importance outside of the agency's expertise, affected large numbers of people and large portions of the economy, and tackled an issue that fell on the periphery of their statutorily authorized zone of influence rather than one interstitial to their empowering statutes.[182] Because of these major question factors, the fact that the IRS's rules were published after a notice-and-comment period and arose from careful consideration was not enough to save them.[183]

Relocating the major question exception to Step Zero is helpful for the present FLSA tipping debate, as it offers a reorganization and synthesis of the confused judicial treatment of the matter. All the courts in this debate make arguments that address Step Zero concerns, yet they struggle as they attempt to locate the debate in Steps One and Two.[184] The major question exception

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[175] Patient Protection and Affordable Care Act, Pub L No 111-148, 124 Stat 119 (2010).

[176] *King*, 135 S Ct at 2488–89.

[177] Id at 2488.

[178] Id at 2489, quoting *UARG*, 134 S Ct at 2444.

[179] *King*, 135 S Ct at 2489.

[180] Id.

[181] See Adam White, *Symposium: Defining Deference Down* (SCOTUSblog, June 25, 2015), archived at http://perma.cc/9H59-ZLEA.

[182] See *King*, 135 S Ct at 2489.

[183] See id.

[184] See, for example, text accompanying notes 97–133.

(and the Step Zero factors that it comprises) summarizes what these courts address in their arguments and represents the appropriate battleground for evaluating the DOL regulation. In the end, this regulation fails under the major question exception. Thus, as *King* demonstrates, it also fails at Step Zero and merits no judicial deference under *Chevron*.

D. 29 CFR § 531.52 Is an Agency Attempt to Address a "Major Question" and Fails at Step Zero

There is no debate that the DOL has broad authority to fill gaps and address ambiguities in the FLSA. "[T]he FLSA explicitly leaves gaps . . . [and] provides the [DOL] with the power to fill these gaps through rules and regulations."[185] However, as this Section demonstrates, 29 CFR § 531.52 is an inappropriate attempt by the DOL to answer a major question. This regulation that proscribes tip pools between tipped and nontipped employees (i) fails to align with the FLSA's purpose, structure, and plain language, (ii) does not accord with the legislative history of the relevant FLSA amendments, and (iii) will have an immense impact on employers. All of this points to the regulation failing under the Step Zero major question exception, without getting into the *Chevron* two-step analysis.

1. Mismatch between the FLSA's purpose and § 531.52.

The FLSA's purpose (as described by commentators, judges, and the statute itself) demonstrates that it does not provide the necessary statutory "cover" to make this regulation an appropriate gap-filling act. The FLSA aims to set forth and guarantee a fixed minimum wage for qualified workers. The DOL regulation, on the other hand, improperly transgresses this purpose by creating new "super-minimum" wages for distinct classes of employees. As such, the regulation should fail under the major question exception at Step Zero.

The FLSA's declaration of policy notes that the statute aims to ensure a "minimum standard of living" for workers.[186] President Roosevelt's pleas to Congress prior to the enactment of the FLSA echo this idea, as he asked that Congress extend government control over "maximum hours, minimum wages, the evil of

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[185] *Long Island Care at Home, Ltd v Coke*, 551 US 158, 165 (2007).
[186] 29 USC § 202(a).

child labor, and the exploitation of unorganized labor."[187] Later amendments to the FLSA restated this goal of ensuring a minimum wage.[188]

Judges across the spectrum have affirmed this idea. As the court in *Trejo* noted, "[t]he FLSA is best understood as the 'minimum wage/maximum hour law.'"[189] As such, it "is clearly structured to provide workers with specific minimum protections against excessive work hours and substandard wages."[190] However, its "substantive sections . . . narrowly [focus] on minimum wage rates and maximum working hours, [which] bear out its limited purposes."[191]

Even those courts (including the Ninth Circuit in *Oregon Restaurant II*)[192] that assert that the "FLSA should be given a broad reading" do so *only* in terms of "coverage," or what groups of employees should fall under its purview, *not* in terms of what rights should be protected or remedies provided.[193] Further, this "broad reading" is constrained by the requirement that the interpretation of the provisions be "consistent with congressional direction."[194] Again, this points back to the stated purpose of ensuring the payment of minimum wages. Thus, a broad reading that increases the minimum wage guaranteed by the FLSA has little grounding in the statute's purpose.

Crucially, the DOL's overbroad proscription on "invalid" tip pools regulates employers that *already* pay employees the minimum wage before requiring their employees to pool tips. Thus, the statute's purpose has been fully satisfied in the case of these employers and employees. The concern raised in the *Oregon*

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187 81 Cong Rec at 4984 (cited in note 8).

188 See Fair Labor Standards Amendments of 1974, 88 Stat at 55 (stating the purpose of the amendments to be "[t]o amend the [FLSA] to *increase the minimum wage rate* under that Act, to expand the coverage of the Act, and for other purposes") (emphasis added).

189 *Trejo*, 795 F3d at 446, quoting *Monahan v County of Chesterfield*, 95 F3d 1263, 1266 (4th Cir 1996).

190 *Monahan*, 95 F3d at 1267, citing *Barrentine v Arkansas-Best Freight System, Inc*, 450 US 728, 739 (1981).

191 *Monahan*, 95 F3d at 1267, quoting *Lyon v Whisman*, 45 F3d 758, 764 (3d Cir 1995).

192 See *Oregon Restaurant II*, 816 F3d at 1090 ("As previously noted, the FLSA is a broad and remedial act that Congress has frequently expanded and extended.").

193 See *Kelley v Alamo*, 964 F2d 747, 749–50 (8th Cir 1992) ("The FLSA should be given a broad reading, in favor of coverage. . . . A generous reading, in favor of those whom congress intended to benefit from the law, is also appropriate when considering issues of time limits and deadlines.").

194 Id at 750 ("[The FLSA] is a remedial statute that 'has been construed liberally to apply to the furthest reaches consistent with congressional direction.'"), quoting *Mitchell v Lublin, McGaughy & Associates*, 358 US 207, 211 (1959).

Restaurant employer group's petition for rehearing is therefore relevant: this DOL action creates a new "class of singularly favored employees with rights greater than those of any other workers in the country, contrary to what Congress intended."[195] These "super-employee rights" are entirely outside of and foreign to the FLSA's purpose as a statute that simply guarantees a fixed minimum wage. This stark inconsistency between the statute's purpose and the regulation illustrates the regulation's failure to fall within the interstices of the statute, and instead situates the regulation outside the statutory framework entirely. Again, this runs into problems with the concerns raised in *Barnhart* and Breyer's article, and fails to heed the dichotomy between interstitial and major questions. While the DOL has certainly been charged with implementing and enforcing a minimum wage law, this regulation represents something far beyond that purpose.

Rather than enforcing the payment of minimum wages, this regulation allows the DOL to provide policy-driven answers to the question, "What wage is right?" Answering such a question does not align with the purpose of the FLSA, and the presence of another decision-maker—Congress—to answer this question makes the DOL's self-insertion even more suspect. This question has always been answered by Congress, *not* the DOL, since the inception of the FLSA. This is evidenced by 29 USC § 203(m) and its historical antecedents. In a sense, setting the minimum wage has always occurred prior to and outside of the FLSA scheme, and thus outside of the DOL's authority. This alarming feature of the debate mirrors the Court's concern in *King*, in which it noted that the IRS did not have "expertise in crafting health insurance policy" as an agency whose focus is on revenue and taxation.[196] This concern about agency expertise is echoed in *Mead*, *Barnhart*, and Breyer's article, and it arises again here. While the DOL certainly has expertise in ensuring the payment of minimum wages and providing remedies for failures to pay, requiring wages exceeding these amounts (and setting these amounts appropriately) is not the DOL's bread and butter, and thus represents an attempt to address a major question.

Brown & Williamson is also applicable here. There, the Court noted that the "essential purpose" of the Food and Drug Cosmetic

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[195] Appellees' Petition for Panel Rehearing or Rehearing En Banc, *Oregon Restaurant and Lodging Association v Perez*, Civil Action No 13-35765, *1 (9th Cir filed Apr 6, 2016) ("*Oregon Restaurant* En Banc Petition").

[196] *King*, 135 S Ct at 2489.

Act[197] (FDCA)—the FDA's organic statute—was to "ensure that any product regulated by the FDA is 'safe' and 'effective' for its intended use."[198] However, such a purpose could not be fulfilled through potential FDA regulation of tobacco. Because of tobacco's severe health effects and the lack of any "reasonable assurance of safety" in using it, nothing short of an outright ban by the FDA would suffice as lawful regulation.[199] The court concluded that such a ban would be improper, as Congress had "foreclosed the removal of tobacco products from the market" through other legislation.[200] This mismatch between potential regulatory action and the empowering statute's purpose led the FDA to be ruled out as a proper regulatory body.

Similar reasoning invalidates § 531.52 at Step Zero. This regulation creates new employee rights and sets a new minimum wage, and therefore the regulation fails to align with the FLSA's purpose of simply guaranteeing and enforcing the wage that is already set by Congress. This regulation attempts to answer a question Congress has reserved for itself ("What should the minimum wage be?"), just as the FDA would have answered a question Congress reserved for itself ("Should tobacco be banned?"). This misalignment between the regulation and the statutory purpose reveals the degree to which the agency's action departs from both the agency's area of expertise and from the interstices of the statute. This leads to a Step Zero failure under the major question exception.

2. Mismatch between the FLSA's structure and § 531.52.

The FLSA's structure confirms that the statute is designed to ensure that minimum wages are paid, not to set up an apparatus for the DOL to decide what the minimum wage should be. Thus, the discrepancy between this structure and § 531.52 demonstrates that this regulation represents an attempt to address a major question. Rather than falling within the interstices of the statute and filling a gap, the DOL regulation operates well outside of the FLSA's structure, and thus represents an attempt to address a major question outside the realm of this statute. As such, it should fail at Step Zero.

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197 52 Stat 1040 (1938), codified as amended at 21 USC § 310 et seq.

198 *Brown & Williamson*, 529 US at 133.

199 Id at 136–37.

200 Id at 137.

Everything in the FLSA's statutory scheme related to wages focuses only on guaranteeing minimum wages and little else. Section 203(m)'s language aims to define "wage" with rule-like precision, such that it provides a consistent measure in determining whether an employee has received the minimum wage (as defined in § 206).[201] This definition leaves no room for interpretation or argument about how to measure a wage, as it simply sets up a minimum bar that employers must meet. Close to § 203(m) are other definitions, all of which aim to define and guarantee minimum wages, maximum hours, and other related protections for workers.[202] Section 206, one of the FLSA's cornerstones, outlines the various requirements around paying qualified workers the federal minimum wage, while § 207 deals with maximum hour requirements. Other sections deal with overtime requirements[203] and penalties for violations.[204] However, the entire scheme revolves around guaranteeing these minimum and maximum protections and nothing beyond that, particularly when it comes to hourly wages.

The penalties section of the FLSA is also illuminating, as it provides a private cause of action *only* to workers seeking a remedy for a violation of the minimum wage or maximum hour laws. The *Oregon Restaurant* employer group's recent (and still pending) petition for certiorari picks up on this: "There can be no dispute that Congress did not create a cause of action for the claim [that the employee group and DOL] . . . purport to assert. The FLSA provides a private right of action *only* for workers seeking 'unpaid minimum wages' or 'unpaid overtime compensation.'"[205]

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[201] See 29 USC § 203(m) ("'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees.").

[202] See, for example, 29 USC § 203(o) (defining "hours worked"); 29 USC § 203(d) (defining "employer").

[203] See 29 USC § 207(h), (o).

[204] See 29 USC § 216.

[205] Petition for a Writ of Certiorari, *Wynn Las Vegas, LLC v Cesarz*, Docket No 16-163, *24 (US filed Aug 1, 2016). The DOL has acknowledged this as well. See DOL *Jahir* Brief at *12 (cited in note 4):

> DOL is constrained to point out that because plaintiffs are not pursuing minimum wage claims or overtime claims, but instead seek only to collect improperly withheld tips, they do not have a cause of action under the FLSA. There is no cause of action under the relevant provision, 29 U.S.C. § 216(b), for a freestanding "tip" claim under 29 U.S.C. § 203(m) that is divorced from a minimum wage claim or an overtime claim.

Again, this statute's entire structure (from the employer requirements to the private remedies and penalties) focuses only on minimum wages and maximum hours.

With this structure in mind, the DOL's regulation clearly represents a significant deviation from the FLSA, and thus must be deemed an attempt to answer a major question. This regulation does not aim to enforce the minimum wage, or calculate the relationship between tips and an employee's take-home pay to ensure the minimum wage is paid. Rather, this regulation simply guarantees that employees' take-home sums are *necessarily* above the minimum wage, as the only employees affected are those who are already paid the minimum wage and are now guaranteed remuneration above that level. The regulation's failure to align with the statutory structure reveals that it does not address a matter "interstitial" to the FLSA (as *Barnhart* says would be permissible).[206] Rather, the regulation inappropriately seeks to address an "important" and "major" issue, something Breyer's article and the *MCI–UARG–King* line of cases proscribe.[207] Put another way, instead of protecting minimum wage requirements, the DOL regulation actually "create[s] a new category of workers with superminimum-pay rights beyond anything Congress ever envisioned."[208] As an endeavor in creating rights, this regulation fails to sit within the bounds of the FLSA's minimum wage provisions, and instead lands outside the statutory scheme altogether. The *Oregon Restaurant* petition for en banc rehearing explains this point: "Such a right exists nowhere in the FLSA, and no other employee in the Nation has such extraordinary rights. The minimum wage exists to ensure that employees receive at least the level set by Congress as a floor; in no sense does the FLSA authorize remedies beyond that level."[209]

Brown & Williamson is instructive again. There, the Court determined that the FDA was not the proper agency to regulate tobacco products. In making this determination, the Court pointed to incongruities between the structure of the FDA's authorizing statute (the FDCA) and what potential FDA tobacco regulation would look like.[210] Had the FDA regulated tobacco

[206] See *Barnhart*, 535 US at 222.

[207] See Breyer, 38 Admin L Rev at 370 (cited in note 147); *MCI*, 512 US at 159; *UARG*, 134 S Ct at 2444; *King*, 135 S Ct at 2488–89.

[208] *Oregon Restaurant* En Banc Petition at *13 (cited in note 195).

[209] Id at *14.

[210] *Brown & Williamson*, 529 US at 135–40.

products, the FDCA's provisions and structure would have required the agency "to remove [tobacco products] from the market" and classify them as unsafe for general use.[211] However, the Court noted that Congress had "foreclosed the removal of tobacco products from the market" through "recent, tobacco-specific legislation."[212] This mismatch between potential FDA regulation, the authorizing statute's structure, and Congress's intent led the Court (despite the agency's name) to prohibit the FDA from regulating tobacco products.[213]

The case at hand presents a similar problem, as the regulation, the FLSA's structure, and the intent of Congress are in conflict. The FLSA's statutory structure aims solely to ensure that minimum wages are paid and to provide remedies when they are not. The DOL regulation, on the other hand, attempts to create entirely new wage rights for tipped workers. The employees regulated by § 531.52 are already paid the minimum wage required by the FLSA. With this regulation layered on top of that statutory scheme, these employees are now entitled to sums of money *above* that minimum wage, unlike any other class of employees. Further, this regulation, like a potential FDA ban on tobacco, would attempt to answer anew a question that Congress has repeatedly answered already by setting the minimum wage through legislation.[214] The statute's structure clearly sketches the outer limits of the DOL's authority, and this regulation inappropriately operates outside of them, such that Step Zero failure is proper.

This departure from the statutory structure gives rise to related concerns discussed in other Step Zero cases. Allowing the DOL to create these new rights and offer new remedies under the FLSA resembles the kind of cryptic delegation that concerned the Court and has led regulations to fail under the major question exception.[215] Similar to the concern in *UARG*, giving this regulation deference would "bring about an enormous and transformative expansion in [the agency's] regulatory authority without clear congressional authorization," as the regulation seeks to address an issue well outside the statutory structure established by

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[211] Id at 135–36.

[212] Id at 137, 143.

[213] See id at 161.

[214] See 29 USC § 203(m); Small Business Job Protection Act of 1996 § 2105(b), Pub L No 194-188, 110 Stat 1755, 1929; Fair Labor Standards Amendments of 1974 § 13(e), 88 Stat at 64–65.

[215] See *Brown & Williamson*, 529 US at 160.

Congress.[216] Rather than enforcing and monitoring, this regulation creates new entitlements for employees. This concerning transformation of authority further demonstrates that this regulation is an improper attempt to address a major question wholly outside the FLSA.

Finally, the misalignment between regulation and statutory structure gives rise to a concern raised in *Mead*, *Barnhart*, and Breyer's article: the expertise of the agency. The DOL's empowerment by the FLSA and its ongoing operations[217] reflect the fact that the agency is certainly an "expert" at enforcing minimum wage laws and monitoring compliance. However, enforcing these rights and creating them are starkly different endeavors. The provisions and structure of the FLSA illustrate this idea clearly. As discussed, the statute contains language defining minimum wages, outlining how they must be paid, and detailing remedies for failures to pay. As an agency interpreting and enforcing this empowering statute, typical DOL regulations and actions make specific provisions concrete by offering detailed explanations about how the agency will define wages and expect them to be paid, or explain how minimum wage requirements will be enforced and monitored. This certainly makes the agency an expert at ensuring these requirements are met. However, the regulation at issue does not represent an instance of the DOL enforcing such rights; instead, § 531.52 represents an attempt to *create* new minimum wage rights, something Congress has reserved for itself since the FLSA's inception. Again, this regulation's departure from the statutory structure demonstrates that this is an attempt to address a major question, and thus the DOL's quest for deference must fail at Step Zero.

3. Mismatch between § 203(m)'s plain language and § 531.52.

The plain language of § 203(m) also demonstrates the DOL's significant departure from the statute. In fact, the text's implicit features directly oppose the DOL action, laying bare the agency's attempt to answer a major question outside of its expertise and outside of the statute's interstices.

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216 *UARG*, 134 S Ct at 2444.

217 See generally, for example, US Department of Labor, Wage and Hour Division, *Field Operations Handbook* (Jan 13, 2017), archived at http://perma.cc/4JNM-FU95.

As the courts invalidating § 531.52 point out, the plain language of § 203(m) offers an implicit choice to employers: take a tip credit and meet various requirements, or pay the minimum wage.[218] The statute accomplishes this by placing limits on employers seeking to credit employees' tips toward the minimum wage requirement and by making clear that the benefits of this credit "*shall not apply*" to those employers that include nontipped employees in tip pools.[219] While implicit, another universe of employers (those who do not take tip credits) exists in this statutory framework, and these extra requirements do not apply to them.

The implicit nature of this choice makes it no less relevant, as implicit features of statutory text have been discussed and honored in past Court opinions. For example, in *Christensen*, the Court examined an employee challenge to an employer practice that limited the amount of compensatory time employees could accrue.[220] The employees' challenge was premised on an FLSA provision that stated that an employee with accrued compensatory time off "shall be permitted by the employee's employer to

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[218] See *Brueningsen*, 2015 WL 339671 at *5:

> However, the statutory language is clear. It gives employers the choice of how they will pay their employees a minimum wage—either by taking a tip credit or not. If employers take a tip credit to supplement and meet the minimum wage requirement, employees are entitled to retain all tips, unless there is a valid tip pool that distributes the tips among the employees. If employers do not take a tip credit, they must pay their employees the full hourly minimum wage because they are not using a tip credit to make up the difference between the employees [sic] earnings and minimum wage requirements.

See also *Stephenson v All Resort Coach, Inc*, 2013 WL 4519781, *8 (D Utah), quoting *Oregon Restaurant I*, 948 F Supp 2d at 1225 (citations omitted):

> Had Congress wanted to create such a requirement it could have easily mandated that all tips belong to the employee, without tying it to a tip credit. Congress did not impose such a requirement. Rather, Congress created a situation where employers can "either pay the full minimum wage free and clear of any conditions, or take a tip credit and comply with the conditions imposed by Section 3(m)." The regulations take away this Congressionally created choice and mandate that tips are property of the employee. This construction cannot be supported by § 203(m).

[219] 29 USC § 203(m) (emphasis added):

> The [tip-credit provisions in the] preceding 2 sentences *shall not apply* with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

[220] *Christensen*, 529 US at 580–81.

use such time within a reasonable period after making the request," as long as the time off did not "unduly disrupt the operations of the public agency."[221] The employees argued that this statute marked the only appropriate manner of handling employee "comp time," such that employers could not add other requirements or means of the time being used.[222] The employer asserted that this set forth only one safeguard for employees and allowed for other structures and practices to be put in place around comp time.[223] In deeming the employer practice lawful, the Court made much of the fact that nothing in the FLSA implicitly prohibited the employer from setting out the requirements in question.[224] Rather, the relevant statute[225] set out only "minimal guarantee[s]" to the employee and corresponding requirements on an employer,[226] without restricting the employer from setting up other structures related to compensatory time.[227] Importantly, the Court searched for implicit prohibitions within the text of the FLSA, revealing a willingness to read between the lines of the statute to uncover prohibitions.[228]

In the case at hand, the implicit features of the FLSA's text reveal a choice offered to employers, without any hint of wholesale prohibitions on tip pools that include nontipped employees. While an explicit restriction exists in § 203(m), this requirement applies only to tip-credit-taking employers, without explicitly or implicitly requiring anything of employers that do not take the

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[221] 29 USC § 207(o)(5).

[222] *Christensen*, 529 US at 578, 581.

[223] Id at 583–84.

[224] See id at 588.

[225] See id at 582, quoting 29 USC § 207(o)(5):

> An employee . . . (A) who has accrued compensatory time off . . . , and (B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

[226] *Christensen*, 529 US at 583.

[227] Id at 585–86.

[228] See id at 588 ("As we have noted, no relevant statutory provision expressly or implicitly prohibits Harris County from pursuing its policy of forcing employees to utilize their compensatory time.").

tip credit (aside from the background minimum wage requirement).[229] Viewing the FLSA as a progressive encroachment on employment practices for which silence matters,[230] and with *Jacksonville Terminal*'s permissive stance on tip sharing in the background, the decision of Congress to address tip pools only in the context of employers that take a tip credit implicitly suggests that Congress deliberately chose not to encroach on employers that do not take the credit, at least regarding their tip-pooling practices. Without any other explicit or implicit restrictions here or elsewhere in the FLSA, employers that forgo the tip credit remain untouched by the restrictions outlined in the statute's definitional section. The DOL's action thus represents a wholesale replacement of the plain language and the choice it offers to employers.

This explicit conflict with the plain language, coupled with the statutory mismatches outlined above, reveals that this regulation departs from the DOL's expertise, generating concerns under the major question exception. The extent of this departure from the statutory language also illustrates that this agency action addresses a major question wholly outside the statute's framework, not one interstitial to it. As a result, the DOL's regulation should fail at Step Zero.

4. Legislative history of the relevant FLSA amendment.

As Breyer's article and various Court opinions make clear, legislative history always informs an inquiry into the congressional intent behind a delegation of authority to an agency, thus influencing the Step Zero inquiry.[231] The legislative history of the

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[229] See *Cumbie*, 596 F3d at 580–81 (some emphasis omitted):

> However, we cannot reconcile this interpretation with the plain text of the third sentence, which imposes *conditions* on taking a tip credit and does not state freestanding *requirements* pertaining to all tipped employees. A statute that provides that a person must do X *in order to achieve* Y does not mandate that a person must do X, period.

[230] See *Christensen*, 529 US at 588 (citation omitted):

> In its opinion letter siding with the petitioners, the Department of Labor opined that "it is our position that neither the statute nor the regulations *permit* an employer to require an employee to use accrued compensatory time." But this view is exactly backwards. Unless the FLSA *prohibits* respondents from adopting its policy, petitioners cannot show that Harris County has violated the FLSA. And the FLSA contains no such prohibition.

[231] See Breyer, 38 Admin L Rev at 371 (cited in note 147):

1974 amendments supports a conclusion that the DOL overstepped its authority, such that its action represents an improper attempt to address a major question. In particular, the relevant Senate report illuminates the plain language and purpose of the FLSA amendment dealing with tipping.

First, the principal focus of the 1974 amendment is § 203(m): The first sentence of the Senate report's discussion of tipped employees reads, "S. 2747 modifies section [203(m)] of the Fair Labor Standards Act," with the passage going on to list the modifications.[232] Importantly, § 203(m)'s only connection to tipped employees is through the tip credit; it does not discuss or deal with tipped employees through any other language. This table-setting sentence thus suggests that the amendments that follow need to be viewed within the world of employers that take tip credits, not the universe of all employers. To treat this discussion as directed at all employers covered by the FLSA simply does not follow from the logic of the amendment and is unfaithful to the text of the report. As a result, attempts to regulate all employers via this statutory language represent a wholesale departure from the text and its background, in contrast to a regulation emerging from the interstices of the statute.

Second, defenders of the regulation point to the Senate report's call for "stronger protection"[233] for tipped employees as evidence that the amendments proscribed all tip pools involving nontipped employees, as such a prohibition would in fact be a

> Of course, reliance on any or all of these factors as a method of determining a "hypothetical" congressional intent on the "deference" question can quickly be overborne by any tangible evidence of congressional intent, for example, legislative history, suggesting that Congress did resolve, or wanted a court to resolve, the statutory question at issue.

See also *Brown & Williamson*, 529 US at 146–47 ("The FDA's position was also consistent with *Congress' specific intent* when it enacted the FDCA. . . . And, as the FDA admits, there is no evidence in the text of the FDCA or *its legislative history* that Congress in 1938 even considered the applicability of the Act to tobacco products.") (emphasis added); *UARG*, 134 S Ct at 2454 (Breyer concurring in part and dissenting in part) ("Nothing in the statutory text, the legislative history, or common sense suggests that Congress . . . was trying to undermine its own deliberate decision to use the broad language 'any air pollutant' by removing some substances . . . from the [ ] program's coverage.").

[232] *Fair Labor Standards Amendments of 1974*, S Rep No 93-690, 93d Cong, 2d Sess 42–43 (1974).

[233] Id at 42 ("After reviewing the estimates in this report, the Committee was persuaded that the tip allowance could not be reduced at this time, but that the tipped employee should have *stronger protection* to ensure the fair operation of this provision.") (emphasis added).

stronger protection.[234] However, this reference to "stronger protection" actually refers to other protections mentioned throughout the remainder of the report that Congress adopted at that time, not a new statutory mandate that all employees must retain all tips in the absence of a valid tip pool. One example of additional protection was a reiteration that the DOL "should take every precaution to insure that the employee does in fact receive tips amounting to 50 percent of the applicable minimum wage" before giving the employer the tip credit.[235] Another protection was a burden-shifting move, requiring employers (not employees) to "prov[e] the amount of tips received by tipped employees and the amount of tip credit, if any, which [such employers are] entitled to claim."[236] Finally, the amendments provided that employers were now "responsible for informing the tipped employee of how [such employee's] wage is calculated" and that employers need to "explain the tip provision of the Act to the employee and that all tips received by such employee must be retained by the employee."[237] This last example not only marks another instance of "stronger protection," but also demonstrates that these requirements deal *only* with the world of tip-credit-taking employers, not employers in general. Thus, the courts upholding the regulation erred in reasoning that the congressionally articulated "stronger protection" took the form of a new prohibition on certain tip pools, as plenty of other protective measures are mentioned explicitly in this report.

Finally, the Senate report concludes with the following passage:

> Nor is the requirement that the tipped employee retain his own tips intended to discourage the practice of pooling, splitting or sharing tips with employees who customarily and regularly receive tips—*e.g.*, waiters, bellhops, waitresses, countermen, busboys, service bartenders, etc. On the other hand, the employer will lose the benefit of this exception if tipped employees are required to share their tips with employees who do not customarily and regularly receive tips—*e.g.*, janitors, dishwashers, chefs, laundry room attendants, etc.[238]

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[234] See *Oregon Restaurant I*, 816 F3d at 1090.

[235] S Rep No 93-690 at 43 (cited in note 232).

[236] Id.

[237] Id.

[238] Id.

This section of the Senate report makes explicit mention of an employer requiring employees to share their tips with other employees who are not customarily tipped. However, the language of the report does not make any gesture toward this practice being prohibited writ large; it merely says that doing this results in losing the benefit of the tip credit. It would be strange to interpret the preceding sections of this report to first rule out "invalid" tip pools altogether and to then presume such pools can exist, as the language here does. As one of the *Oregon Restaurant* dissenters wrote, this "statement makes sense only on the assumption that employers who forgo the tip credit *can* require tip pooling among customarily and non-customarily tipped employees, just as *Cumbie* had said."[239]

This legislative history makes clear that these changes were located within the § 203(m) world of tip-credit-taking employers and were wholly unrelated to employers that did not take tip credits. This demonstrates how far this regulation deviates from the statute's plain language and the legislative intent behind it. This significant departure from the text, in turn, makes clear that this agency action addresses a novel and major question. With legislative background like this, arguing that this regulation emerges from the interstices of the statute is indefensible, leading to Step Zero failure.

5. Immense impact on employers and employees, and disruption in significant industries.

In addition to the statutory side of this issue, the Step Zero major question exception requires an inquiry into how large the effects of the regulation will be. The *King* majority conducted such an inquiry when discussing the IRS's attempt to interpret the ACA,[240] while the *UARG* Court expressed concern over the regulation touching a "significant portion of the American economy."[241] In similar fashion, the relevant DOL regulation places a novel and hefty requirement on employers, one that involves the redirection of huge sums of money and affects significant portions of the American economy and workforce. Thus, this question

[239] *Oregon Restaurant and Lodging Association v Perez*, 843 F3d 355, 364 (9th Cir 2016) ("Oregon Restaurant III") (O'Scannlain dissenting from denial of rehearing en banc).

[240] *King*, 135 S Ct at 2489 ("The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people.").

[241] *UARG*, 134 S Ct at 2444, quoting *Brown & Williamson*, 529 US at 159.

implicates a question of deep "economic and political significance" that should not be left to agency action.[242]

First, while few would argue that this question is of greater importance than the ACA debate, this issue still implicates large sums of money (here, in the form of wages), a consideration important to the *King* majority.[243] The restaurant industry alone grossed over $780 billion in sales in 2016 (representing 4 percent of the US GDP) and was responsible for the employment of over fourteen million individuals (one in ten working Americans),[244] many of whom receive tips.[245] Tips, even if only a small percentage of that $780 billion sales figure, represent a significant amount of compensation that is shifted by this agency action in the restaurant industry alone, leaving aside other service industries.[246] Further, *King* primarily implicated government spending (money about which one government entity or another would eventually make a decision), while this regulation affects the flow of private dollars between private parties that has not been regulated in the past. This only adds to the significance of the matter.

Second, this constraint significantly affects compensation structures that are long established and maintained by employers for the benefit of all employees. Restaurants (and other organizations with tipped employees) have long organized tip pools between tipped and nontipped employees. This DOL regulation requires a significant restructuring of these systems, even those tip pools that were created by employees.[247] Again, the magnitude of

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[242] *UARG*, 134 S Ct at 2444, quoting *Brown & Williamson*, 529 US at 160.

[243] See text accompanying note 178.

[244] See *2016 Restaurant Industry Pocket Factbook* (cited in note 2). These numbers are the product of 85 percent growth in the "full-service restaurant industry" since 1990, which has greatly outpaced "overall private-sector employment" growth (24 percent). See Allegretto and Cooper, *Twenty-Three Years* at *2 (cited in note 25).

[245] Allegretto and Cooper, *Twenty-Three Years* at *7 (cited in note 25). In their 2014 study, Sylvia A. Allegretto and David Cooper found that there were 4.3 million tipped workers in the American workforce (3.4 percent of the total workforce), with 2.5 million coming in the form of waiters and bartenders (2.0 percent of the total American workforce). Id at *7–8. These numbers have likely increased since 2014 due to the growth of the hospitality and restaurant industries.

[246] Allegretto and Cooper discuss other tipped workers in their study, including "gaming service workers[, taxi drivers], barbers, hairdressers, and other personal appearance workers." See id at *7, 23. And even though some restaurants (and other employers) do not pay the minimum wage and thus already have to abide by the tip-pooling rules, such a shift forecloses an available option for constructing compensation structure, thus limiting organizations' operational choices in the future.

[247] The affected compensation structures include employer-mandated tip pools that include nontipped employees, as well as identical tip pools created entirely by employees

the required shift is exacerbated by the fact that the restaurant and hospitality industries (in which tipping is most common) represent a sizeable portion of the entire US economy.[248] As in *MCI*, the compensation structure of restaurants is an "essential" feature of the industry, and without specific statutory authorization, an agency reconstruction of this area should be suspect as an improper answer to a major question.[249] This issue also parallels a concern in *UARG* that the regulation at issue would affect a "significant portion of the American economy,"[250] as well as Breyer's concern that agencies should not answer "question[s] of great importance" that implicate "political, as well as policy, concerns."[251] These required changes have already proven to be a disruptive force within these industries, causing confusion within restaurants and other organizations.

Some restaurants have responded to changing attitudes toward tipping by eliminating tipping altogether and replacing it with higher prices in order to compensate both tipped and nontipped employees with higher wages.[252] Others have implemented explicit and distinct "kitchen tipping" policies to prevent servers from benefiting disproportionately from restaurant success over cooks and busboys.[253] While these may represent creative solutions, they also represent unnecessary upheaval in the restaurant industry triggered by the inability to mandate (or even

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and simply maintained by the employer. See, for example, *Oregon Restaurant* En Banc Petition at *15 (cited in note 195):

> This is why a *server* approached management in the Davis Street Tavern to ask the restaurant to begin including the kitchen staff in the tip pool in the first place. The restaurant put the matter to a vote of the dining room staff, and the consensus was to include the kitchen employees in the tip pool.

[248] See *Facts at a Glance* (National Restaurant Association, 2016), archived at http://perma.cc/9K3K-QJLU.

[249] See *MCI*, 512 US at 231.

[250] *UARG*, 134 S Ct at 2444, quoting *Brown & Williamson*, 529 US at 159.

[251] Breyer, 38 Admin L Rev at 371 (cited in note 147).

[252] See Ryan Sutton, *Danny Meyer Is Eliminating All Tipping at His Restaurants and Significantly Raising Prices to Make Up the Difference, a Move That Will Raise Wages, Save the Hospitality Industry, and Forever Change How Diners Dine* (New York Eater, Oct 14, 2015), archived at http://perma.cc/4JBM-XYC5 (noting that restauranteur Danny Meyer is eliminating tipping because of the restrictions on tip pooling and the pay disparities between servers and "back of the house" staff).

[253] See Hillary Dixler, *Why LA Chef Zach Pollack Implemented a Kitchen Tipping Policy* (Eater, Dec 5, 2014), archived at http://perma.cc/Q5L9-WU9K (explaining that chef Zach Pollock instituted this policy in part because of the inability to mandate tip pooling between servers and kitchen staff).

allow) tip sharing between tipped and nontipped employees. Further, these changes may only be possible at high-end establishments, whose clientele may be able to tip *both* the kitchen and servers and are more likely to be comfortable paying higher food and drink prices if the restaurant replaces tipping. The same flexibility may not exist for lower-end restaurants frequented by many Americans, and such an alteration to tip-sharing structures may force these restaurants into difficult decisions regarding their workforces.

Finally, preventing tip pools may cause intraorganizational rifts. These pools are often set up by servers, and eliminating this option entirely could deepen divides between tipped and nontipped employees.[254] The restaurant and casino groups' petition for rehearing en banc in *Oregon Restaurant* makes this point: "[T]here is generally a divide in restaurants between kitchen staff and dining room staff, with the dining room employees often earning twice the total income of kitchen workers when one considers both cash wages and tips."[255] Thus, the petition continues, the inability to mandate *or even allow* these pools may make these rifts worse, harming the institution.[256]

With such massive economic and organizational implications for industries and companies, it is highly unlikely that Congress intended for the DOL to be the decision-maker that initiated such a shift. Congress is more politically accountable than the agency and provides a space in which competing interests and policy aims may vie with one another. Thus, it is the best locus of decision-making power for this matter.

* * *

These factors demonstrate that the DOL's regulation addresses a major question. As a result, *Chevron* deference is inappropriate due to a Step Zero failure. A court examining this regulation should instead decide the matter de novo based on the relevant text of the FLSA, which should lead it to conclude that these tip pools are permitted under the statute for many of the same reasons already discussed.[257] The statute's plain language,

[254] See note 247 and accompanying text.

[255] *Oregon Restaurant* En Banc Petition at *14 (cited in note 195).

[256] See id at *14–15.

[257] It is unclear after *King* whether *Skidmore* deference, articulated in *Skidmore v Swift & Co*, 323 US 134 (1944), applies after an agency action fails at Step Zero under the major question exception. See generally *King*, 135 S Ct 2480 (making no mention of

structure, purpose, and legislative history all point toward the conclusion that the statutory requirements around tip pools govern *only* those employers that take tip credits. As such, the regulation and its interpretation should fail.

CONCLUSION

This debate is one of great significance. Every day, servers like Sam and Steph go to work, seeking to earn a living primarily on the tips they receive from customers. However, these servers are not alone, as cooks and busboys like Chris work hard and depend on these same funds to provide for their families. Their story, and thousands of others like it, illustrates the magnitude of this debate and informs the caution with which the federal judiciary should address it.

As has been demonstrated, the relevant DOL regulation fails to do this. Its failure to do justice to the text of the FLSA, its wide deviation from the statute's long-standing structure and purpose, and the seismic shift it will require within immense industries all point toward the regulation's failure at *Chevron* Step Zero and its ultimate invalidation. Congress, rather than the DOL, is best suited to address this novel question regarding tip pools managed by non-tip-credit-taking employers. In this arena, competing policy ends may struggle against one another, and a thoughtful solution that reflects political compromise may emerge.

Skidmore and instead deciding the question de novo). However, many of the factors already examined, including the agency's expertise and the mismatch between the statute and regulation, demonstrate that the agency has little "power to persuade" and thus should not receive *Skidmore* deference. See *Skidmore*, 323 US at 140 ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").