No. 16-1057

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AARICA ROMERO,
Plaintiff-Appellant,

v.

TOP-TIER COLORADO, LLC and RICHARD J. WARWICK,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado,
Honorable Michael E. Hegarty, Magistrate Judge,
Case No. 1:15-cv-02101-MEH

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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GLOSSARY

Pursuant to 10th Circuit Local Rule 28.2(C)(6), the following is a glossary of acronyms used in this brief:

"FLSA" means the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq*.

"FOH" means Field Operations Handbook issued by the Department's Wage and Hour Division.

"WHD" means the Department's Wage and Hour Division.

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INTEREST OF THE SECRETARY

Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of the plaintiff-appellant in this case. The Secretary has a substantial interest in the proper judicial interpretation of the Fair Labor Standards Act ("FLSA") because he administers and enforces that statute. *See* 29 U.S.C. 204, 211(a), 216(c), 217. Appropriate application of the FLSA's tip credit provision, 29 U.S.C. 203(m), is crucial to achieving FLSA compliance with respect to employees who receive tips from

customers. In particular, the Secretary has a strong interest in ensuring that courts correctly interpret and apply the "dual jobs regulation," 29 C.F.R. 531.56(e), which limits the circumstances in which employers may take a tip credit for time otherwise tipped employees spend performing non-tipped work.

ISSUE PRESENTED

Whether the district court erred by dismissing claims under the FLSA filed by an employee who alleged that her employer credited tips received from customers toward the minimum wages due for all of her hours worked even though she sometimes performed tasks unrelated to her tipped occupation and spent more than 20 percent of her work time performing tasks that were related to her tipped occupation but did not produce tips, where the court relied on case law from outside of the tip credit context rather than the Secretary's longstanding regulation and interpretation of that regulation requiring that employers directly pay the full minimum wage for such non-tipped time.

STATEMENT

A. Factual Background

Aarica Romero worked as a server at Huhot Mongolian Grill (owned and operated by defendants-appellees Top-Tier Colorado LLC and Richard J. Warwick) in Arapahoe County, Colorado. Complaint, *Romero v. Top-Tier Colorado LLC*, No. 15-cv-02101 (D. Colo. Sept. 23, 2015) ¶¶ 6-8, 16-17. In

addition to serving customers, work for which she received tips, Romero performed duties that did not generate tips. Some of this non-tipped work was unrelated to her occupation as a server, such as "scrubbing walls" and "mopping." *Id.* ¶ 22. She also performed non-tipped work—such as "brewing tea [and] coffee," "rolling silverware," and "busing tables"—that was related to being a server; Romero spent more than 20 percent of her work time on such tasks. *Id.* ¶ 21. Huhot Mongolian Grill took a tip credit toward Romero's statutorily mandated minimum wage for all of her hours worked, including those during which she performed non-tipped duties. *Id.* ¶¶ 20, 41, 48.

B. Procedural History

In September 2015, Romero filed suit in the U.S. District Court for the District of Colorado alleging that Huhot Mongolian Grill had violated the FLSA by (1) failing to pay her the full minimum wage for her hours spent performing work unrelated to her tipped occupation and (2) failing to pay her the minimum wage for hours spent performing non-tipped work related to her tipped occupation because such time was in excess of 20 percent of her total work hours. *See generally* Compl.

Huhot Mongolian Grill filed a motion to dismiss Romero's complaint, which the district court granted in February 2016. *Romero v. Top-Tier Colorado LLC*, No. 15-cv-02101, 2016 WL 497095, at *1 (D. Colo. Feb. 9, 2016). The court

began its opinion by quoting a Department of Labor ("Department") regulation that provides that if a tipped employee performs a second, non-tipped job for her employer, the employer may not take a tip credit as to time performing that job, 29 C.F.R. 531.56(e) (the "dual jobs regulation"), and a provision in the Field Operations Handbook ("FOH") issued by the Department's Wage and Hour Division ("WHD") that explains that if an employee spends more than 20 percent of her hours worked in a workweek performing non-tipped duties that are related to her tipped occupation, her employer may not take a tip credit for the time spent performing such work. *Romero*, 2016 WL 497095, at *3. The parties had made arguments about whether deference to this FOH provision was appropriate, the court explained, but the "more fundamental issue raised"—"whether [Romero]'s FLSA claim is properly pled in the first place"—resolved the case, because it was not. *Id.* at *4.[1]

The court's rationale for its conclusion was that "Plaintiff never alleges that during any particular workweek, the average of her hourly wages (*including tips*) was less than $7.25 per hour." *Id.* (emphasis added). The court explained that the

[1] The district court noted later in its decision that it did not agree with opinions from other courts that had relied on the FOH provision, *see Romero*, 2016 WL 497095, at *5 (citing *Hart v. Crab Addison, Inc.*, No. 13-cv-6458, 2014 WL 5465480, at *5 (W.D.N.Y. Oct. 28, 2014)), because it was "more persuaded" by the reasoning of courts that relied on, in its characterization, the "clear language of the [FLSA]" itself. *Id.* (citing *Zuber v. Allen*, 396 U.S. 168 (1969) and discussing *Richardson v. Mountain Range Rests. LLC*, No. CV-14-1370, 2015 WL 1279237 (D. Ariz. Mar. 20, 2015)).

FLSA permits employers to directly pay tipped employees $2.13 per hour and use customer tips as a credit toward their obligation to pay the minimum wage of $7.25 per hour. *Id.* Furthermore, "[t]he Supreme Court has stated that in order for an employment practice to violate the FLSA, the FLSA must prohibit that practice." *Id.* (citing *Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000)). Therefore, according to the court, as explained in *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487 (2d Cir. 1960), "'all that is necessary' for a defendant to comply with [the] FLSA is to show the total wage paid to an employee in a given week divided by the total hours worked that week results in an income that exceeds the minimum wage." *Romero*, 2016 WL 497095, at *4 (quoting *Klinghoffer*, 285 F.2d at 490, and citing, *inter alia*, *Adair v. City of Kirkland*, 185 F.3d 1055, 1063 (9th Cir. 1999); *Hensley v. MacMillian Bloedel Containers, Inc.*, 786 F.2d 353, 357 (8th Cir. 1986)). The court was "not persuaded" by Romero's position that tips cannot be counted as part of an employee's compensation for time spent performing non-tipped duties. *Id.* at *5.

Romero appealed the district court's opinion.

ARGUMENT

I. EMPLOYERS ARE PROHIBITED FROM TAKING A TIP CREDIT AS TO TIME AN EMPLOYEE SPENDS PERFORMING WORK UNRELATED TO A TIPPED OCCUPATION OR WORK RELATED TO A TIPPED OCCUPATION THAT DOES NOT GENERATE TIPS AND EXCEEDS 20 PERCENT OF THE EMPLOYEE'S WORK TIME

A. The FLSA permits employers to take a tip credit in certain circumstances and grants the Department broad authority to issue implementing regulations.

The FLSA is meant to "'protect all covered workers from substandard wages and oppressive working hours [and] "labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers."'" *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1187 (10th Cir. 2015) (quoting *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981)).

In 1966, Congress amended the FLSA to apply to restaurants and hotels; at the same time, it added a provision permitting employers to use tips employees receive from customers as a partial credit toward the minimum wages required by the Act. Fair Labor Standards Amendments of 1966 ("1966 FLSA Amendments"), Pub. L. No. 89-601, §§ 101, 201, 80 Stat. 830, 830, 833 (1966); *see also* S. Rep. No. 89-1487, at 137-38, 139 (Aug. 23, 1966). It also authorized the Secretary "to promulgate necessary rules, regulations, or orders with regard to the amendments made by this Act." 1966 FLSA Amendments, § 602, 80 Stat. at 844.

Section 3(m) of the FLSA, 29 U.S.C. 203(m), still allows an employer to take a tip credit toward the required minimum wage provided the employer complies with certain requirements;[2] more specifically, an employer of a "tipped employee" is permitted to directly pay the employee as little as $2.13 an hour, using tips from customers to reach the federal minimum wage of $7.25. *Id*. Section 3(t) of the Act defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. 203(t). The legislative history of the FLSA indicates that Congress contemplated that, generally, employees such as "waiters," "waitresses," and "service bartenders" would be tipped employees, whereas "janitors," "dishwashers," and "chefs" would not. S. Rep. No. 93-690, at 43 (Feb. 22, 1974) (discussing updates to the tip credit provisions made in 1974).

[2] The conditions an employer must meet to properly take advantage of the tip credit are specified in the statute, *see* 29 U.S.C. 203(m) (providing that the tip credit "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 [in the case of a valid tip pooling arrangement]"), and relevant regulations, *see* 29 C.F.R. 531.51-.60 (interpreting the statutory requirements, defining "tip," and providing other details regarding the operation of the tip credit). Romero has not argued that Huhot Mongolian Grill failed to meet these threshold requirements as to her tipped work.

B. The Department's dual jobs regulation and interpretation of that regulation limit the circumstances in which an employer may take a tip credit for time an employee spends performing work that does not produce tips.

Dual jobs regulation. In 1967, the Department promulgated regulations implementing the 1966 FLSA Amendments. *See* Final Rule, 32 Fed. Reg. 13,575 (Sept. 28, 1967). One of the new regulatory provisions explained that if "an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter," the employee "is a tipped employee only with respect to his employment as a waiter," and "no tip credit can be taken for his hours of employment in his occupation as a maintenance man." *Id.* at 13,680-81 (codified at 29 C.F.R. 531.56(e)). In other words, in situations in which a tipped employee also performs a second, non-tipped job for the employer, the tip credit is permitted only for hours worked in the tipped occupation, not for hours worked in the non-tipped occupation.

The regulation went on to explain that the dual jobs situation "is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses." 29 C.F.R. 531.56(e). Those types of "related duties in an occupation that is a tipped occupation," the regulation provides, "need not by themselves be directed toward producing tips." *Id.* In other words, if an employee spends "part of her time" performing duties that do not produce tips but are related to her tipped

occupation (rather than unrelated such that they constitute a separate, non-tipped job), the employer is nevertheless permitted to take the tip credit for all of her hours worked.

Opinion Letters. Since 1967, the Department has issued guidance interpreting the dual jobs regulation. In a 1979 opinion letter, the Department considered whether a restaurant-employer could take a tip credit for time waitresses spent preparing vegetables for use in the salad bar. *See* WHD Opinion Letter FLSA-895 (Aug. 8, 1979) ("1979 Opinion Letter") (attached as addendum). Citing the dual jobs regulation and the legislative history distinguishing between tipped occupations, such as waitress, and non-tipped occupations, such as chef, the Department concluded that "salad preparation activities are essentially the activities performed by chefs," and therefore "no tip credit may be taken for the time spent in preparing vegetables for the salad bar." *Id.*

A 1980 opinion letter addressed a situation in which tipped restaurant servers "clean the salad bar, place the condiment crocks in the cooler, clean and stock the waitress station, clean and reset the tables (including filling cheese, salt and pepper shakers) and vacuum the dining room carpet." WHD Opinion Letter WH-502, 1980 WL 141336 (Mar. 28, 1980) ("1980 Opinion Letter"). The Department reiterated language from the dual jobs regulation distinguishing between employees who spend "part of [their] time" performing "related duties in

an occupation that is a tipped occupation" that do not produce tips and "where there is a clear dividing line between the types of duties performed by a tipped employee, such as between maintenance duties and waitress duties." *Id.* Because in the circumstance presented the clean-up duties were "assigned generally to the waitress/waiter staff," the Department found them to be related to the employees' tipped occupation. The letter suggested, however, that the employer would not be permitted to take the tip credit if "specific employees were routinely assigned, for example, maintenance-type work such as floor vacuuming." *Id.*

In 1985, the Department issued an opinion letter addressing non-tipped duties both unrelated and related to the tipped occupation of server. *See* WHD Opinion Letter FLSA-854, 1985 WL 1259240 (Dec. 20, 1985) ("1985 Opinion Letter"). First, the letter concluded (as had the 1979 letter) that "salad preparation activities are essentially the activities performed by chefs," not servers, and therefore "no tip credit may be taken for the time spent in preparing vegetables for the salad bar." *Id.* Second, the letter explained (building on statements in the 1980 letter) that although a "tip credit could be taken for non-salad bar preparatory work or after-hours clean-up if such duties are incidental to the [waiter] or waitress regular duties and are assigned generally to the waiter/waitress staff," if "specific employees are routinely assigned to maintenance-type work or … tipped employees spend a substantial amount of time in performing general preparation

work or maintenance, we would not approve a tip credit for hours spent in such activities." *Id.* Under the circumstances described by the employer seeking an opinion—specifically, "one waiter or waitress is assigned to perform … preparatory activities," including setting tables and ensuring that restaurant supplies are stocked, and those activities "constitute[] 30% to 40% of the employee's workday"—a tip credit was not permissible as to the time the employee spent performing those activities. *Id.*

FOH. The Wage and Hour Division distributes the FOH, a comprehensive operations manual, to all Wage and Hour Investigators; it also makes the FOH available to the public. *See* "Field Operations Handbook," https://www.dol.gov/whd/foh/. In 1988, the Department distilled and refined its existing guidance interpreting the dual jobs regulation in the section of the FOH addressing the tip credit. *See* FOH, Ch. 30, § 30d00 (Dec. 9, 1988), available at http://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

First, the FOH affirmed that an employer of an employee with "dual jobs" may only take a tip credit "for the hours spent in the tipped occupation." FOH § 30d00(d). Second, it explained that an employer may take a tip credit for duties related to an employee's tipped occupation that do not produce tips provided that such duties "are incidental to the regular duties of the [tipped employee]" and "are generally assigned to the [tipped employees]." FOH § 30d00(e). It further noted

that a tip credit for time spent performing related, non-tipped duties would *not* be permitted if "specific employees are routinely assigned to maintenance" or "tipped employees spend a substantial amount of time (in excess of 20 percent) performing general preparation work or maintenance." *Id.* This statement, like the opinion letters from which it is derived, and in particular the 20 percent tolerance for related, non-tipped duties, arises from the regulation's reference to an employee spending "part of her time" on such duties; that language indicates that there is some limit on how much time an employee can spend performing work that does not generate tips and still receive only $2.13 per hour from her employer for all hours worked.[3]

Amicus brief. In 2010, in an amicus brief filed in the Eighth Circuit, the Secretary reiterated his interpretation that if non-tipped duties related to a tipped occupation exceed 20 percent of an employee's time in the tipped occupation in a workweek, the employer may not take a tip credit for that time. *See* Sec'y of Labor's Amicus Br., *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872 (8th Cir. 2011) (Nos. 10-1725, 10-1726) (filed Sept. 10, 2010), *available at*

[3] A January 2009 opinion letter rescinded the 20 percent limitation on related, non-tipped work, but that letter was withdrawn shortly thereafter, in March 2009. WHD Opinion Letter FLSA 2009-23 (dated Jan. 16, 2009, withdrawn Mar. 2, 2009) ("2009 Opinion Letter") (attached as addendum).

http://www.dol.gov/sol/media/briefs/fast(A)-9-15-2010.pdf.[4]

[4] In 2012, the Wage and Hour Division circulated to its investigators a revised dual jobs provision of the FOH, which provides:

(1) When an individual is employed in a tipped occupation and a non-tipped occupation – for example, as a server and janitor (dual jobs) -- the tip credit is available only for the hours spent in the tipped occupation, provided such employee customarily and regularly receives more than $30 a month in tips. (Rev. 563, 12/9/88) 29 CFR 531.56(e).

(2) 29 CFR 531.56(e) permits the employer to take a tip credit for time spent in duties related to the tipped occupation of an employee, even though such duties are not by themselves directed toward producing tips, provided such related duties are incidental to the regular duties of the tipped employees and are generally assigned to the tipped employee. For example, duties related to the tipped occupation may include a server who does preparatory or closing activities, rolls silverware and fills salt and pepper shakers while the restaurant is open, cleans and sets tables, makes coffee, and occasionally washes dishes or glasses. (Rev. 563, 12/9/88)

(3) However, where the facts indicate that tipped employees spend a substantial amount of time (in excess of 20 percent of the hours worked in the tipped occupation in the workweek) performing such related duties, no tip credit may be taken for the time spent in those duties. All related duties count toward the 20 percent tolerance. (Rev. 563, 12/9/88)

(4) Likewise, an employer may not take a tip credit for the time that a tipped employee spends on work that is not related to the tipped occupation. For example, maintenance work (e.g., cleaning bathrooms and washing windows) are not related to the tipped occupation of a server; such jobs are non-tipped occupations. In this case, the employee is effectively employed in dual jobs.

FOH § 30d00(e) (June 20, 2012). This language articulates the Department's interpretation of the dual jobs regulation more clearly than the 1988 version of the provision, but it makes no substantive change to that interpretation. The language in the 2012 version of the provision has not yet been incorporated into the public FOH, that is, it is not available on the Wage and Hour Division's web site.

II. THE DISTRICT COURT ERRED BY DISMISSING ROMERO'S COMPLAINT BASED ON INAPPLICABLE CASELAW AND WITHOUT DEFERRING TO THE DEPARTMENT'S INTERPRETATIONS OF THE RELEVANT STATUTORY AND REGULATORY PROVISIONS

A. *Klinghoffer* is not relevant to the issues raised in this case.

The district court erred by dismissing Romero's complaint based on the principle announced in *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487 (2d Cir. 1960). *See Romero*, 2016 WL 497095, at *4. In *Klinghoffer*, guards who worked at their employer's building were also made to work for an affiliated company without additional pay. 285 F.2d at 489-90. The guards alleged that the arrangement violated the FLSA's minimum wage requirement because they were paid nothing—that is, less than the minimum wage—for the extra hours. *See id.* The Second Circuit rejected their claim, reasoning that based on the wages paid for the originally scheduled hours, which exceeded the minimum wage, "the total wage paid to each guard … during any given week … divided by the total time he worked that week" results in an "average hourly wage [that] exceeds [the minimum wage]." *Id.* at 490. Other circuits have adopted *Klinghoffer*'s reasoning in cases involving similar circumstances. *See, e.g.*, *Adair v. City of Kirkland*, 185 F.3d 1055, 1063 (9th Cir. 1999) (explaining that police officers who were not paid for time spent in ten-minute briefings had not suffered FLSA minimum wage violations because "their salary, when averaged across their total time worked, still

[paid] them above minimum wage" (citing *Hensley v. MacMillan Bloedel Containers, Inc.*, 786 F.2d 353, 354, 357 (8th Cir. 1986))); *Hensley*, 786 F.2d at 357 (holding that a truck driver who did not receive pay for "time spent on inspections and paperwork" had not suffered an FLSA minimum wage violation because based on his pay for driving time, he received compensation each week that exceeded the minimum hourly wage rate even taking into account his uncompensated work time (citing, *inter alia*, *Klinghoffer*, 285 F.2d at 490)).

Romero's claims arise in a different context. The question presented in this case is whether Huhot Mongolian Grill can properly treat Romero as a tipped employee for every working hour or must instead directly pay the full minimum wage for some portions of time. In other words, the court should have considered whether, as to Romero's time performing duties that did not generate tips, the tips she received from customers were properly considered part of her compensation or instead Huhot Mongolian Grill violated the FLSA by paying her less than $7.25 per hour for that time. *Klinghoffer*, which addresses the averaging of compensation across a workweek to meet minimum wage requirements, does not have any bearing on the issue of which hours and for what tasks an employer can

make use of the tip credit. This case presents the distinct issue of whether an employer has met the requirements for taking a tip credit.[5]

B. The Department's guidance addressing the issues raised in this case is controlling.

The district court did not address the application of the dual jobs regulation or the Department's interpretation of that regulation other than to reject their relevance because it had reached its conclusion that dismissal was appropriate based on *Klinghoffer*. *Romero*, 2016 WL 497095, at *4-5. To the extent such reasoning implies that there is no need to consider whether an employer may take a tip credit for all hours worked when an employee performs both a tipped and a non-tipped job for the same employer, or when an employee spends substantial work time performing duties related to a tipped job that do not produce tips, such

[5] Similarly, the suggestion that under *Christensen v. Harris County*, 529 U.S. 576 (2000), Romero's complaint does not allege a violation of the FLSA and therefore does not state a claim for relief, *see Romero*, 2016 WL 497095, at *4, erroneously sidesteps the issues presented in these cases. *Christensen* held that because the FLSA does not prohibit a public employer from requiring employees to use their compensatory time and the Department had not issued a regulation addressing the issue, the employer had not violated the FLSA by imposing such a requirement. *See* 529 U.S. at 585, 587-88. It does not detract from the Department's rulemaking authority, *see Or. Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1087-89 (9th Cir. 2016) (affirming that where the FLSA does not prohibit conduct because it is silent, the Department has "'gap-filling power'" (quoting *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (2012))), *petition for reh'g filed* (Apr. 6, 2016) (No. 13-35765); address any issue related to the tip credit; or in any other way suggest that Romero's claims, which are based on statutory requirements, regulatory text, and the Department's guidance, are not properly pled.

that the Department's dual jobs regulation issued after notice-and-comment need not be considered, the Department strongly disagrees and notes that no circuit court has reached such a conclusion.

1. The Department's dual jobs regulation, 29 C.F.R. 531.56(e), is entitled deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The 1966 FLSA Amendments authorize the Secretary "to promulgate necessary rules, regulations, or orders with regard to the amendments made by this Act." Pub. L. No. 89-601, § 602, 80 Stat. at 844. Such a broad grant of authority plainly "provides the Department with the power to fill … gaps through rules and regulations." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007) (interpreting effectively identical authorizing language in amendments made to the FLSA in 1974, Pub. L. No. 93-259, § 26(b), 88 Stat. 55, 76 (1974)); *see Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084, 1092 (D.C. Cir. 2015) (reiterating the broad scope of the grant of authority in the 1974 regulations and noting that it allows an agency "'broad power to enforce *all* provisions'" of the statutory text (quoting *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006))), *cert denied*, No. 15-683, 2016 WL 3461581 (June 28, 2016).

Under *Chevron*, a court first considers whether "Congress directly spoke to the precise question at issue" and if it did not, the court must "uphold an agency's construction of a statute it administers so long as it is not arbitrary, capricious, or

manifestly contrary to the statute at issue." *Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 727 (10th Cir. 2006) (citing *Chevron*, 467 U.S. at 842, 843-44).

Here, the FLSA defines a "tipped employee" as to whom a tip credit can be permissible as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. 203(m), (t). But Congress did not define "engaged in an occupation" or otherwise address circumstances in which an employee who receives tips for some of her work also performs duties for which she does not receive tips. The Department filled that gap by promulgating, by notice-and-comment rulemaking, the dual jobs regulation to explain that if an employee performs some duties that constitute a tipped job and other duties that constitute a non-tipped job, her employer may only take the tip credit for time she spends performing the tipped occupation. *See* 32 Fed. Reg. 13,575, 13,580-81; 29 C.F.R. 531.56(e). The regulation distinguishes dual jobs situations (involving non-tipped duties *unrelated* to the tipped occupation) from circumstances in which an employee spends "part of her time" performing duties *related* to the tipped occupation that do not generate tips, thereby allowing an employer to take a tip credit even if an employee spends a portion of her time on certain non-tipped duties. *Id.* The regulation is consistent with the statute, which

permits employers to take a tip credit only with respect to tipped occupations, and is reasonable.

2. The Department's interpretation of the dual jobs regulation is in turn entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). When the Department interprets its own regulations, it is "entitled to judicial deference." *Ellis*, 779 F.3d at 1195 (citing *Ackerman v. Coca-Cola Enters., Inc.*, 179 F.3d 1260, 1264 (10th Cir. 1999), and affirming a district court's grant of *Auer* deference to an FLSA regulation). Specifically, a court should defer to such an interpretation even if it is not the only reasonable reading of the regulation; indeed, it must defer "unless the interpretation is 'plainly erroneous or inconsistent with the regulations' or there is any other 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'" *Qwest Corp. v. Colo. Pub. Utils. Comm'n*, 656 F.3d 1093, 1098 (10th Cir. 2011) (quoting *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 59 (2011)).

Opinion letters, FOH provisions, and amicus briefs have been among the Department's tools for issuing interpretations of regulations to which *Auer* deference is due. *See, e.g., In re Wal-Mart Stores, Inc.*, 395 F.3d 1177, 1184 (10th Cir. 2005), *as amended on denial of reh'g* (Feb. 28, 2005) ("Given their provenance and legal effect, these opinion letters are entitled to great weight when they interpret the [Department]'s own (ambiguous) regulations." (citing

Auer, U.S. at 461)); *Qwest Corp.*, 656 F.3d at 1098 ("We must defer to the [agency's] interpretation of its own ambiguous regulation, even if that interpretation is reflected only in an amicus brief." (citing *Talk Am.*, 564 U.S. at 59))); *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 880-81 (8th Cir. 2011) (deferring, as explained below, to the FOH provision interpreting the dual jobs regulation); *Belt v. EmCare, Inc.*, 444 F.3d 403, 415 (5th Cir. 2006) ("We conclude that *Auer* applies [to this case], so we give controlling weight to the [Department]'s position adopted in the 1974 opinion letter, 1994 [Field Operations] Handbook, and *amicus* brief.").

In this case, the interpretations set forth in opinion letters, the FOH, and the Secretary's briefs filed in 2010 and in this case are consistent with the dual jobs regulation. In particular, they provide detail not offered in the regulation itself about the types of duties so unrelated to the tipped occupation that a dual job situation exists, such as by concluding that salad preparation is a duty of a non-tipped chef rather than a tipped server. *See* 1979 Opinion Letter; 1985 Opinion Letter. They also elaborate on the meaning of the regulation's reference to "related duties in … a tipped occupation" that are non-tipped, such as by concluding that employers may take a tip credit for time spent performing clean-up tasks generally assigned to wait staff. *See* 1980 Opinion Letter. And they interpret the regulation's statement that tips may be credited toward wages for related, non-

tipped duties when such duties are performed "part of [the] time," first by concluding that an employer of an employee who spent 30 to 40 percent of her workday on such duties was precluded from taking the tip credit for that time (without specifying whether a smaller percentage of time would lead to the same result), *see* 1985 Opinion Letter, and then by setting out the 20 percent tolerance in the FOH and amicus briefs.[6] Moreover, the interpretations protect against employer manipulation of an ostensibly tipped employee's schedule to include duties, or significant time performing duties, for which an employer would normally directly pay the full minimum wage.

3. Other courts have adopted the positions the Department expressed in the dual jobs regulation, the FOH, and the 2010 amicus brief. Most notably, in *Fast v. Applebee's International, Inc.*, 638 F.3d 872 (8th Cir. 2011), the Eighth Circuit

[6] The Department's interpretation of "part of [an employee's] time" in the dual jobs regulation to mean no more than 20 percent of an employee's hours worked in a workweek is both reasonable and consistent with various other FLSA provisions, interpretations, and enforcement positions setting a 20 percent tolerance for work that is incidental to but distinct from the type of work to which an exemption applies. *See, e.g.*, 29 U.S.C. 213(c)(6) (permitting 17-year-olds to drive under certain conditions, including that the driving be "occasional and incidental," and defining "occasional and incidental" to, *inter alia*, mean "no more than 20 percent of an employee's worktime in any workweek"); 29 C.F.R. 552.6(b) (defining "companionship services" that are exempt from FLSA requirements to include "care" only if such "care … does not exceed 20 percent of the total hours worked per person and per workweek"); 29 C.F.R. 786.100, 786.150, 786.1, 786.200 (permitting employers to claim exemptions for switchboard operators, rail or air carriers, and drivers in the taxicab business unless different, nonexempt work "occupies more than 20 percent of the time worked by the employee during the workweek").

explicitly deferred to the 20 percent tolerance expressed in the FOH. The court first explained that the dual jobs regulation, which the parties agreed was entitled to *Chevron* deference, appropriately interprets section 3(t) of the FLSA, which "does not define when an employee is 'engaged in an occupation.'" *Id.* at 877, 879 (citing *Barnhart v. Walton*, 535 U.S. 212, 218 (2002)). The opinion letters and FOH provision, in turn, give meaning to the terms "occasionally" and "part of [the] time" in the dual jobs regulation, which "is itself ambiguous" but plainly consistent with some "temporal limitation" on an employee's related, non-tipped duties. *Id.* at 879-80. The 20 percent limitation was therefore entitled to controlling deference under *Auer*, and the Eighth Circuit affirmed the district court's reliance on it. *Id.* at 879-81.

In addition, in addressing class certification in a case raising claims about payment for non-tipped work, the Seventh Circuit described the underlying substantive legal issues by relying on the Department's guidance and the holding in *Applebee's*. *See Driver v. AppleIllinois, LLC*, 739 F.3d 1073, 1075 (7th Cir. 2014). The court explained that "of course if the tipped employees … perform non-tipped duties (provided those duties are unrelated to their tipped duties …), such as, in the case of restaurant servers, washing dishes, preparing food, mopping the floor, or cleaning bathrooms, they are entitled to the full minimum wage for the time they spend at that work." *Id.* It also approvingly noted that "the Department

of Labor … has decided that as long as the tipped employee spends no more than 20 percent of his workday doing non-tipped work related to his tipped work (such as a waiter's setting or clearing a table that he waits on), the employer doesn't have to pay the full minimum wage … for the time the employee spends doing that work." *Id.* (citing 29 C.F.R. 531.56(e); FOH § 30d00(e); *Applebee's*, 638 F.3d 872)). Just days ago, the Seventh Circuit again reached a holding based on an acceptance of the Department's guidance in this area. *See Schaefer v. Walker Bros. Enters., Inc.*, No. 15-1058, slip op. at 3-6 (7th Cir. July 15, 2016) (noting that the parties had not disagreed about the significance of the dual jobs regulation or relevant FOH provision; citing *Applebee's*, 638 F.3d at 877-79; and affirming a district court's grant of summary judgment to restaurants where servers had not shown they spent more than 20 percent of their work time performing non-tipped duties related to their tipped occupation and had not presented evidence adequate to merit relief with regard to duties unrelated to that occupation).

Furthermore, the Fifth Circuit explicitly deferred to the dual jobs regulation in concluding that servers who spent full shifts as "'Quality Assurance' workers" rather than in their usual roles were not tipped employees for those shifts because they were "not spending 'part of [their] time' on [Quality Assurance] work," but rather were spending *all* of their time during certain shifts on such duties. *Roussell*

v. Brinker Int'l, Inc., 441 F. App'x 222, 225, 233 (5th Cir. 2011) (unpublished) (quoting *Applebee's*, 638 F.3d 880).[7]

III. ROMERO'S COMPLAINT STATED CLAIMS OF FLSA VIOLATIONS SUFFICIENT TO SURVIVE A MOTION TO DISMISS

The question presented to the district court was whether Romero's complaint sufficiently alleged that Huhot Mongolian Grill violated the FLSA by improperly claiming the tip credit as to certain hours worked. Under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Burnett v. Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1235 (10th Cir. 2013) (quoting

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[7] Additionally, in a case regarding a tip pool (in which the employer requires certain employees to share tips), the Sixth Circuit held—without citing to, but consistent with, the dual jobs regulation—that wait staff who spent full shifts preparing salads were not tipped employees during those shifts because they did not interact with customers and the duties they performed were "traditionally classified as food preparation or kitchen support work." *Myers v. Copper Cellar Corp.*, 192 F.3d 546, 548, 550 (6th Cir. 1999).

The only circuit court that has arguably expressed a contrary view did so without written analysis in a one-page, unpublished decision. *Pellon v. Bus. Representation Int'l, Inc.*, 291 F. App'x 310 (11th Cir. 2008) (unpublished), *aff'g* 528 F. Supp. 2d 1306 (S.D. Fla. 2007). The district court in that case had granted summary judgment based in part on a finding that the employees' non-tipped duties were related to their tipped jobs (so the employees did not have dual jobs) and in part on the infeasibility of determining whether the employees spent more than 20 percent of their work time on such duties; significantly, however, the court believed such a determination was unnecessary because the employees had not shown that their non-tipped work exceeded that threshold. *See* 528 F. Supp. 2d at 1313-15.

Iqbal, 556 U.S. at 678). Although "'labels and conclusions'" do not meet this standard, *id.* (quoting *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011)), "'[s]pecific facts are not necessary,'" *id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)).

Here, the complaint included facts sufficient to support claims of two types of minimum wage violations. First, Romero alleged that she spent time performing certain duties—including "scrubbing walls" and "mopping," Compl. ¶¶ 21-22—unrelated to her tipped occupation. These tasks are those of a maintenance worker or janitor. And Romero specified that Huhot Mongolian Grill took a tip credit for all of her work time, directly paying only "the reduced tip credit rate." Compl. ¶¶ 26-27, 41, 47. Because under the dual jobs regulation, an employer must directly pay the full minimum wage for any time spent performing unrelated, non-tipped duties, these allegations raise "above the speculative level," *Twombly*, 550 U.S. at 545, the possibility that Huhot Mongolian Grill violated the FLSA.

Second, Romero alleged that she spent more than 20 percent of each work shift performing duties related to her tipped occupation that did not themselves produce tips, naming particular duties including "brewing tea [and] coffee," "rolling silverware," and "busing tables," Compl. ¶¶ 21, 26-27. And again, Romero's complaint specified that Huhot Mongolian Grill took a tip credit for all of her work time. Compl. ¶¶ 26-27, 41, 47. Based on the Department's

interpretation that the dual jobs regulation means that an employer may not take the tip credit for time spent performing related, non-tipped duties if such duties exceed 20 percent of an employee's hours worked in a workweek, Romero has alleged facts that make out this second "'claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal of the above-captioned case.

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This brief complies with the length limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it is 6,368 words long (excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii)).

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Dated: July 18, 2016

__/s/_Sarah Marcus_____
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