No. 11-425

IN THE

Supreme Court of the United States

APPLEBEE'S INTERNATIONAL, INC.,
Petitioner,

v.

GERALD A. FAST, et al.,
Respondents.

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

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL COUNCIL OF CHAIN RESTAURANTS / NATIONAL RETAIL FEDERATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. The Chamber directly represents 300,000 members and indirectly represents the interests of over 3 million business, trade, and professional organizations of every size, in every business sector, and from every geographic region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber files briefs as *amicus curiae* in cases that raise issues of vital concern to the Nation's business community.

The National Council of Chain Restaurants (NCCR) is the Nation's leading trade association for chain restaurant businesses and a division of the National Retail Federation, the world's largest retail trade group. NCCR's members include large national chain restaurant brands, most of which consist of local multi-unit operators and franchisees. Together, NCCR's member companies own and operate more than 50,000 restaurant facilities, and another 70,000 facilities operate under members' trademarks through franchising agreements. Member companies and

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae*, their members, or *amici*'s counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least ten days prior to the due date of *amici curiae*'s intention to file this brief.

their franchisees employ more than 2.8 million workers in the United States. NCCR advocates sound public policy on behalf of chain restaurant operators and regularly takes particular interest in court cases, like this one, that would adversely impact the business operations of its members.

The Eighth Circuit's decision below, if left uncorrected, will upset decades of settled practice by *amici*'s members in the restaurant industry and other significant American business sectors. The result would be to impose enormous unworkable burdens and uncertainty.

INTRODUCTION

Since the enactment of the federal tip credit in 1966, restaurants and other businesses consistently have paid waiters, bartenders, and other workers as "tipped employees," pursuant to 29 U.S.C. § 203(t). *See* Fair Labor Standards Amendments of 1966 (FLSA), Pub. L. No. 89-601, 80 Stat. 830. Under the FLSA, tipped employees are guaranteed to earn at least the federal minimum wage, currently $7.25 per hour, in combined cash wages and tips. 29 U.S.C. § 203(m), (t). These employees generally earn more than the federal minimum wage. According to recent U.S. government data, waiters in 2010 earned on average $9.99 per hour. U.S. Bureau of Labor Statistics, *Occupational Employment and Wages: Waiters and Waitresses*, May 2010. Bartenders earned $10.25 per hour. U.S. Bureau of Labor Statistics, *Occupational Employment and Wages: Bartenders*, May 2010. There is no dispute that Respondents—current and former Applebee's waiters and bartenders—

earned more than the federal minimum wage at all times. Pet. App. 3a.[2]

The FLSA tip credit applies to "any employee engaged in an *occupation* in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t) (emphasis added). For the last forty-five years, employers have applied the tip credit based on an employee's occupational *status*. The word occupation connotes a status-based test. "Occupation" means "a person's usual or principal work or business, [especially] as a means of earning a living." *Random House Webster's Unabridged Dictionary* 1339 (2d ed. 2001). *Webster's* gives the following illustration: "*Her occupation was dentistry.*" *Id.*

In common usage, a dentist is engaged in a single occupation whether she is filling cavities, advising patients on oral hygiene, cleaning the room between patients, making appointments, or paying the rent on her office—even though those tasks might otherwise be performed by a dental hygienist, receptionist, or office manager. In the same way, a waiter or bartender is engaged in a single "occupation," notwithstanding that he or she may perform duties besides those that directly produce tips from specific customers, even if those duties incidentally overlap with activities of a non-tipped employee.

Before this case, no court had ever held that the "tip credit" available to employers under the FLSA turns on the percentage of time that an employee spends performing "tip-producing" versus "nontip-producing" duties. Pet. App. 3a, 6a. For more than four decades, the American food and beverage service

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[2] Internet addresses, where available, are included in the Table of Authorities.

industry and other business sectors that pay tipped employees have operated without regard to this amorphous and unworkable distinction.

The decision below upends the uniform and longstanding interpretation of the tip credit as well as nationwide industry practice for compensating "tipped employees" under the FLSA. Deferring to a Department of Labor internal field operations manual, the Eighth Circuit held that when a waiter spends 20% or more of his or her time performing "nontip-producing duties," that person is no longer a waiter, and thus a restaurant may not take the tip credit for that portion of the person's time. The Eighth Circuit likewise held that restaurants may not take the tip credit for time that bartenders spend performing "nontip-producing duties," since for that time, a bartender ceases being a bartender.

The decision below will dramatically and adversely change the operations of the food and beverage service industry and other business sectors with tipped employees. The decision thus raises a question of exceptional and recurring importance that warrants this Court's review.

ARGUMENT

I. THE DECISION BELOW WILL PROFOUNDLY AND IMMEDIATELY HARM ONE OF THE NATION'S LARGEST INDUSTRIES

The food and beverage service industry is the nation's third largest business sector. U.S. Bureau of Labor Statistics, *Occupational Employment Statistics (OES) Highlights*, Sept. 2009. The 580,000 restaurants throughout the United States employ seven percent of the U.S. workforce. *Id.* More than one-

fourth of those restaurant employees are waiters and bartenders. *Id.* Roughly 3 million waiters, bartenders, and other tipped restaurant employees currently work in the United States. U.S. Bureau of Labor Statistics, *Occupational Outlook Handbook, 2010-11 Edition: Food and Beverage Serving and Related Workers*.

Other American business sectors likewise employ millions of additional tipped employees in other occupations. Those occupations include bellhops, doormen, valets, concierges, housekeepers, parking attendants, hairdressers and other salon workers, food and pizza deliverymen, coatroom attendants, car wash workers, baggage porters, casino workers, movers, gas station attendants, and tour guides. The decision below calls into question the ability of employers in all of these industries to continue relying on the federal tip credit to calculate wages, as they have done for more than four decades.

In light of decades of settled industry practice, restaurants have never monitored or kept track of the time tipped employees spend performing various tasks. Nor have restaurants categorized those tasks as either "tip-producing" or "nontip-producing," assuming such categorization is even possible. Waiters, for instance, perform dozens of diverse duties in the course of a single shift, often spending just a few seconds on a particular task before rapidly shifting gears to another task.

An online database sponsored by the Department of Labor catalogs more than two dozen duties associated with the occupation of a waiter. Occupational Information Network, *Waiters and Waitresses* (updated 2010). Some of a waiter's duties may overlap with the duties of a restaurant's host, cook, bar-

tender, or busboy. *See id.* The myriad duties of a bartender similarly may overlap with the duties of a bouncer, waiter, or dishwasher. Occupational Information Network, *Bartenders* (updated 2010). But restaurants do not track waiters' and bartenders' time as if those employees were simultaneously engaged in all of these different occupations.

Waiters and bartenders do not lose their occupational status during the course of a single work shift. Rather, restaurants treat waiters as waiters, and bartenders as bartenders, without regard to whether they are directly serving customers or performing the other ordinary duties of a waiter or bartender. The practical import of the Eighth Circuit's decision, then, is to fundamentally and adversely change the way that restaurants and other industries pay millions of their employees and record time.

The financial impact of this change on restaurants alone would be staggering. For waiters that spend marginally over 20% of their time performing "nontip-producing duties" (the minimum time required to trigger the Eighth Circuit's new rule), restaurants must pay those employees *48% more* in cash wages based on the decision below.[3] For waiters that spend 25% of their time on such duties, the restaurants' cost to pay those waiters increases by 60%. For non-franchise chain restaurants that employ thousands of waiters across the country, the immediate financial impact of this decision would be

[3] Currently, a waiter is paid $2.13 per hour, or $85.20 for a 40-hour week. Under the Eighth Circuit's ruling, the restaurant must pay the waiter $7.25 per hour for the 20% of his time dedicated to nontip-producing duties. That result would increase his weekly cash wage to $126.16, a 48% increase in payroll cost for that employee.

crippling. The restaurant industry is extremely competitive, and operators have narrow profit margins. Restaurant operators can establish menu prices only in light of payroll costs. The tip credit for decades has ensured that tipped employees receive the federal minimum wage through a combination of cash wages and tips. If the Eighth Circuit's decision is allowed to stand, the entire business model for restaurants that employ tipped workers will be upended, with the likely result that menu prices will rise dramatically. Not only would this outcome put dining out beyond the reach of more Americans, it also could result in far fewer restaurants being in business.

In addition, the decision below requires employers to differentiate between "tip-producing" versus "nontip-producing" duties and to monitor and record their employees' time accordingly. But drawing such inherently unclear lines is antithetical to the practical experience of working in a restaurant. For example, if a waiter sets a table before a customer sits down, is that a tip-producing task? What if the customer is already seated at the table when the waiter sets down the napkin and utensils? Cleaning up a customer's spilled beverage at a waiter's own table might lead to a larger tip, but cleaning up an identical spill at another waiter's nearby table or from the floor might not produce a tip. As these common examples illustrate, it is a matter of degree, perspective, and guesswork as to how to categorize the varied tasks of tipped employees. These practical realities led another court to conclude that such line-drawing is "infeasible," "impractical," "impossible," and "unsolvable"—in sum, a "nightmare." *Pellon v. Bus. Representation Int'l, Inc.*, 528 F. Supp. 2d 1306, 1314 (S.D. Fla. 2007), *aff'd*, 291 F. App'x 310 (11th Cir. 2008). The Eighth Circuit inexplicably ignored

the concerns expressed by Applebee's, NCCR, and the National Restaurant Association that Respondents' interpretation of the FLSA is unworkable, overly burdensome and leaves employers with no clear guidance.

The Eighth Circuit also held that restaurants must "maintain sufficient records from which the employees can differentiate between when they performed tipped duties and when they performed related but nontip-producing duties." Pet. App. 19a. Restaurants have never attempted to micro-monitor their employees in this manner, and doing so would be unmanageable. One option would be for businesses to force tipped employees to record their own time spent on each task. Like lawyers who bill in six-minute intervals, waiters and bartenders would be forced to "maintain precise time logs accounting for *every minute* of their shifts." *Pellon*, 528 F. Supp. 2d at 1314 (emphasis added). But unlike lawyers who regularly spend several consecutive hours on a single task, waiters are constantly shifting gears. This requirement inevitably would interfere with the quality of customer service, as waiters would be preoccupied with constantly memorializing their tasks.

For example, a waiter would need to record the time spent pouring a drink behind the counter (arguably a nontip-producing duty) and then separately record the time spent delivering that drink to a customer (which clearly is tip-producing). Assuming that waiters spend an average of 25 seconds per task, *see* Dist. Ct. Dkt. 179 at 15, every waiter will be forced to record 1,152 separate tasks per eight-hour shift. Such a regime is bizarre and untenable for businesses and their tipped employees.

The Department of Labor's new smartphone application (or "app") illustrates the extreme practical difficulties of implementing the Eighth Circuit's 20% rule. On May 9, 2011, the Department launched an app designed to "help employees independently track the hours they work and determine the wages they are owed." U.S. Dep't of Labor, *Keeping track of wages: The US Labor Department has an app for that!* (May 9, 2011). The Department touted that the app would allow workers to "keep their own records," "instead of relying on their employers' records." *Id.* Of course, the specter of waiters and waitresses walking around the restaurant, inputting each task they perform into an iPhone roughly every 25 seconds, is absurd and obviously unworkable. Service surely would suffer or probably grind to a halt.

In addition to the unmanageable record-keeping required under the decision below, employers are left to speculate about how a court or jury might decide *post hoc* which tasks are tip-producing or not. Given the protean determinations that would surely result from judicial second-guessing, employers would have no reliable way of ensuring *ex ante* compliance with the FLSA or assessing their potential liability. The only safe way for restaurants and other businesses to guarantee compliance would be to forego the federal tip credit altogether. If such a change is to be made, it must be left to Congress, not the lower courts or the Department of Labor.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RULING IN *CHANDRIS* AND THE DEPARTMENT OF LABOR'S POSITION IN *PACIFIC OPERATORS*

1. In an analogous employment context, this Court in *Chandris, Inc. v. Latsis* established a test for determining a person's occupational status as a "seaman" under the workers' compensation provision of the Jones Act. 515 U.S. 347 (1995). The Jones Act at that time "provide[d] a cause of action in negligence for 'any seaman' injured 'in the course of his employment.'" *Id.* at 354 (quoting 46 U.S.C. App. § 688(a)); *see also* 46 U.S.C. § 30104 (current version).

As relevant here, the Court rejected an "activity-based" test for determining seaman status and instead adopted a "status-based standard that . . . determines Jones Act coverage *without regard to the precise activity in which the worker is engaged*." 515 U.S. at 358 (emphasis added). A worker is thus a seaman if he has "a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature." *Id*. at 368.

The Court determined that a status-based standard for determining a worker's occupation was "important to avoid engrafting upon the statutory classification . . . a judicial gloss so protean, elusive or arbitrary as to permit a worker to walk into and out of coverage in the course of his regular duties." *Id.* at 363 (internal quotation marks omitted). In other words, a worker should not be deemed to "oscillate back and forth . . . depending upon the activity." *Id.* Any such activity-based standard would undermine "the interests of employers and maritime workers

alike in being able to predict who will be covered by" the statute "before a particular workday begins." *Id.*

The Eighth Circuit's adoption of the government's activity-based test cannot be squared with the logic of *Chandris*'s status-based test. The decision below produces the precise practical problems this Court sought to avoid in *Chandris*. Under the Department of Labor's task-by-task inquiry, tipped employees "walk into and out of coverage," *id.* at 363, and they do so hundreds or thousands of times in the course of a single shift. As a result, rather than determining the applicability of the FLSA's tip-credit provision "before a particular workday begins," *id.*, restaurant operators and their employees would have to track every task performed throughout a shift, categorize each as "tip-producing" or "nontip-producing," and determine payroll retrospectively.

In stark contrast, *Chandris* directed that "courts should not employ a 'snapshot' test for [employment] status, inspecting only the situation as it exists at the instant of [alleged] injury; a more enduring relationship is contemplated in the jurisprudence." *Id.* (internal quotation marks omitted). There is no good reason for a different approach to compensating tipped employees under the FLSA.

2. The Department of Labor embraces *Chandris* in another analogous employment case that is pending before this Court. In *Pacific Operators Offshore, LLP v. Valladolid*, No. 10-507, the government urges this Court to apply "the status test developed in *Chandris*" to determine an employee's occupational status under the workers' compensation provision of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 *et seq*. Brief for the Federal Respondent at 15, *Pac. Operators Offshore, LLP v. Vallado-*

lid, No. 10-507 (U.S. Aug. 2011) (DOL Br.). While *amici* take no position on the merits of *Pacific Operators*, the Labor Department's position in that case is fundamentally irreconcilable with its interpretation of the FLSA in this case.

Under OCSLA, an employee is entitled to compensation for "any injury occurring as the result of operations conducted on the outer Continental Shelf . . . ." 43 U.S.C. § 1333(b). In *Pacific Operators*, the employee "spent approximately 98% of his time working on the [Shelf]," but he was injured by happenstance during the "remaining two percent of his working time" off of the Shelf. DOL Br. 8. The case thus turns on whether the employee was injured "as the result of operations conducted on the outer Continental Shelf." 43 U.S.C. § 1333(b).

"To determine whether an employee is a member of this class, the [Department of Labor] suggests using a test analogous to that developed in [*Chandris*] for making parallel determinations under the Jones Act." DOL Br. 33. Thus, OCSLA is "most sensibly" and "best interpreted" to mean that "[e]mployees who spend a *substantial* portion of their work time on the Shelf should be covered for *all* their work-related injuries, even if those injuries occur in a different location." *Id.* at 12, 15, 17 (emphasis added). The government argues that "[t]his class of Shelf workers would be covered for all work-related injuries, no matter where they occur, and *the workers would thus not move in and out of coverage throughout the work day* depending on their location." *Id.* at 35 (emphasis added).

The Department explained that a status-based test "would be easy to administer and would not make coverage determinations contingent on what em-

ployment-related task the worker was performing." *Id.* at 14-15. The test thus would provide the benefit of "predictability to employees and employers." *Id.* at 15; *see also id.* at 36 n.11 ("The [Department's] test for covered work off the Shelf would therefore be straightforward to administer and predictable in its application."). Workers would "know what benefits to expect" and "employers would have a greater degree of certainty about which employees would be covered . . . *without those employees' moving in and out of coverage throughout the work day*." *Id.* at 36 (emphasis added); *see also id.* at 37-38 (Under the Department's test, "workers would not 'walk into and out of coverage in the course of [their] regular duties.'" (alteration in original) (quoting *Chandris*, 515 U.S. at 363)).

The Department urged this Court to reject tests "that would make the coverage determination depend on what the employee was doing at the time of the injury." *Id.* at 38. Any such test, the Department explained, would be impractical because "the employee could oscillate in and out of coverage throughout the work day," and it also could present "line-drawing problems about what tasks are sufficiently related to [Shelf] operations to qualify." *Id.*

3. An activity-based test under the FLSA is equally "protean, elusive or arbitrary." *Chandris*, 515 U.S. at 363. Like seamen, waiters and bartenders simply do not "walk into and out of coverage in the course of their regular duties." *Id.* Simply put, a waiter is a waiter, and he does not cease being a waiter for the time he spends performing tasks that are not directed to producing tips from specific customers. A waiter thus may be paid as a tipped employee under the FLSA for the waiter's entire shift. In contrast, the Eighth Circuit's decision flouts the statutory text

and, if left uncorrected, will create administrative nightmares for the restaurant industry and other employers.

CONCLUSION

The Chamber and NCCR respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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