No.

IN THE
Supreme Court of the United States

NATIONAL RESTAURANT ASSOCIATION;
OREGON RESTAURANT & LODGING ASSOCIATION;
WASHINGTON RESTAURANT ASSOCIATION; AND
ALASKA CABARET, HOTEL, RESTAURANT
AND RETAILERS ASSOCIATION,

Petitioners,

v.

U.S. DEPARTMENT OF LABOR;
THOMAS PEREZ, SECRETARY OF THE
U.S. DEPARTMENT OF LABOR; AND
DAVID WEIL, ADMINISTRATOR OF THE
WAGE AND HOUR DIVISION,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, prescribes the federal minimum wage. Section 3(m) of the FLSA allows an employer to pay a tipped employee a cash wage less than the full minimum wage and to count a portion of customer tips toward meeting the minimum wage obligation if the employer satisfies certain conditions. *Id.* § 203(m). One condition for taking this so-called tip credit limits the categories of employees who may participate in an arrangement to pool tips. *Id.* No other provision in the FLSA addresses tip pooling. The Department of Labor promulgated a regulation extending the conditions for taking the tip credit to all situations where customers leave tips, including where an employer elects not to avail itself of the tip credit and instead pays employees the full minimum wage directly. The sharply divided Ninth Circuit, in a 2-1 panel decision that sparked a ten-judge dissent from the denial of rehearing en banc, upheld this regulation in a ruling that conflicts with decisions of this Court and at least six courts of appeals. The questions presented—which are also presented in the certiorari petition pending before the Court in *Wynn Las Vegas, LLC* v. *Cesarz*, No. 16-163—are:

1. Whether the FLSA imposes restrictions on tip-pooling arrangements by employers who pay employees the full minimum wage and do not rely on the tip credit.

2. Whether a federal agency purporting to implement a statute may through regulation create rights and obligations that the statute does not, so long as the statute does not expressly prohibit the agency's regulation.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All petitioners in this Court, who were among the plaintiffs in the district court (No. 12-1261 (D. Or.)) and the appellees in the court of appeals (No. 13-35765 (9th Cir.)), are named in the caption. In addition, Davis Street Tavern, LLC and Susan Ponton were plaintiffs and appellees below, though they are not petitioners in this Court.

All respondents in this Court, who were defendants and appellants below, are named in the caption, with one modification. Petitioners sued the individual defendants in only their official capacity. The petition substitutes the current head of the U.S. Department of Labor's Wage and Hour Division, David Weil, for Laura Fortman, who was the head of the agency at the time the proceeding began. In addition, in the court of appeals Thomas Perez substituted for Hilda L. Solis, who was Secretary of Labor at the start of the case.

None of the petitioners has a parent corporation or is aware of any publicly held corporation that owns 10% or more of its stock.

The court of appeals consolidated this case for purposes of oral argument and decision with a separate appeal involving substantially similar issues, *Cesarz* v. *Wynn Las Vegas, LLC*, No. 14-15243 (9th Cir.) (on appeal from No. 13-109 (D. Nev.)). That case involves two defendants and more than 100 plaintiffs, and the full party disclosure for that action appears at pages ii-v of the certiorari petition pending before this Court in No. 16-163.

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REGULATIONS AND RULES

PETITION FOR A WRIT OF CERTIORARI

Petitioners the National Restaurant Association; the Oregon Restaurant & Lodging Association; the Washington Restaurant Association; and the Alaska Cabaret, Hotel, Restaurant and Retailers Association (collectively, the "Associations") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit (No. 13-35765).

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 26a-57a) is reported at 816 F.3d 1080. The district court's opinion (Pet. App. 58a-78a) is reported at 948 F. Supp. 2d 1217. The court of appeals' order denying rehearing (Pet. App. 1a-25a) is not reported but is available at 2016 U.S. App. LEXIS 16361.

JURISDICTION

The court of appeals entered judgment (No. 13-35765) on February 23, 2016. C.A. Dkt. 35. The court denied the Associations' timely rehearing petition (C.A. Dkt. 38) on September 6, 2016. Pet. App. 1a-25a. On November 28, 2016, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 19, 2017. No. 16A529. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3(m) of the FLSA, 29 U.S.C. § 203(m), provides, in pertinent part:

> 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 amount equal to—
>
> > (1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and
> >
> > (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.
>
> The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding two 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.

The Department of Labor regulation at 29 C.F.R. § 531.52 provides, in pertinent part:

> 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.

The Department's regulation at 29 C.F.R. § 531. 54 provides, in pertinent part:

> [V]alid mandatory tip pools . . . can only include those employees who customarily and regularly receive tips. However, an employer . . . may not retain any of the employees' tips for any other purpose.

The Department's regulation at 29 C.F.R. § 531. 59(b) provides, in pertinent part:

> With the exception of tips contributed to a valid tip pool as described in § 531.54, the tip credit provisions of section 3(m) also require employers to permit employees to retain all tips received by the employee.

STATEMENT

Seventy-five years ago, the Court established a bedrock principle for understanding the interplay between the FLSA and an employer's pay practice: "[I]n the absence of statutory interference, no reason is perceived for its invalidity." *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386, 397 (1942). The Court continues to embrace this rule, maintaining that a pay practice is lawful "[u]nless the FLSA *prohibits*" it. *Christensen* v. *Harris Cty.*, 529 U.S. 576, 588 (2000). Here, the Ninth Circuit upheld a Department of Labor regulation that bars employers from

engaging in a pay practice that the FLSA plainly does not prohibit, and as a matter of statutory construction implicitly endorses. In reaching its conclusion, the court of appeals created two circuit splits, one concerning the specific FLSA provision at issue and the other involving a broader question of federal agency authority to interpret statutes.

First, the Ninth Circuit held that the plain language of the FLSA does not necessarily allow the specific pay practice at issue here, which is employers who pay their employees a cash wage of at least the full minimum wage requiring tipped employees, such as restaurant wait staff, to pool tips with non-tipped employees, such as kitchen workers. In an earlier ruling, the Ninth Circuit reached the opposite conclusion, holding that the language of the FLSA is clear and that it unambiguously permits this type of tip-pooling arrangement. *See Cumbie* v. *Woody Woo, Inc.*, 596 F.3d 577, 579, 581 (9th Cir. 2010). The Fourth Circuit, relying on *Cumbie*, similarly held that the plain language of the FLSA permits this practice. *See Trejo* v. *Ryman Hosp. Props., Inc.*, 795 F.3d 442, 446 (4th Cir. 2015). The Ninth Circuit attempted to justify its current about-face from *Cumbie* by pointing to supposed statutory silence on this issue and relying on that silence to confer upon the Department the authority to issue its regulation. The court of appeals' cavalier approach to interpreting the FLSA conflicts with this Court's decisions in *Williams* and *Christensen* and creates a circuit split with the Fourth Circuit.

Second, the Ninth Circuit's rationale for upholding the Department's regulation is that because the FLSA does not expressly address tip pooling for employers that do not take a tip credit, the Department

has plenary authority to regulate that subject. This theory of federal agency authority—that agencies may enact, and obtain judicial deference to, any regulatory requirement they like so long as a statute does not specifically bar it—runs counter to essentially the entire corpus of federal appellate case law on the subject. The dissenting panel member cited several of this Court's decisions that preclude the panel majority's approach, and the dissent from the denial of rehearing en banc noted cases from six other circuits that are fundamentally irreconcilable with the rule adopted by the panel majority.

The Ninth Circuit deviated so substantially from this Court's decisions under the FLSA and concerning federal agency authority more generally that summary reversal is appropriate. At a minimum, the multiple conflicts between the Ninth Circuit's ruling and the decisions of this Court and several circuits, coupled with the dangerous consequences if the decision remains in place, call for full review.

The petition should be granted.

1. Section 6(a) of the FLSA, 29 U.S.C. § 206(a), sets forth the general federal requirement that workers receive a minimum wage of at least $7.25 per hour. Section 3(m) defines "wage" for purposes of the statute as including a number of credits an employer may take toward satisfying the minimum wage obligation, in addition to direct cash payments. *Id.* § 203(m). The original text of the FLSA did not address tips at all. *See* Fair Labor Standards Act of 1938, Pub. L. 75-718, ch. 676, § 3(m), 52 Stat. 1060, 1061 (1938).

In *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386 (1942), one of the first FLSA cases to reach

this Court, the employer and its employees agreed that customer tips would count as wages for minimum wage purposes and that the employer would make up any shortfall if the tips were insufficient. The Court upheld that practice, noting that "[i]n businesses where tipping is customary, the tips, in the absence of an explicit contrary understanding, belong to the recipient." *Id.* at 397. "Where, however, an arrangement is made by which the employee agrees to turn over the tips to the employer, in the absence of statutory interference, no reason is perceived for its invalidity." *Id.* Because there was no statutory impediment to the agreement to treat tips as wages or as the employer's property for purposes of FLSA minimum wage compliance, the employer's pay practice satisfied the FLSA. *Id.* at 408.

When Congress extended the coverage of the FLSA in 1966 to reach restaurants and hotels, it amended section 3(m) to create the tip credit. *See* Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 201, 80 Stat. 830, 833 (1966). As currently worded, section 3(m) allows an employer the option of either (1) paying an employee a direct cash wage of at least the full minimum wage or (2) paying a cash wage of at least $2.13 per hour[1] and satisfying certain conditions. Specifically, section 3(m) ends with two sentences that establish the option of taking the tip credit and limit the amount of the credit,

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[1] Section 3(m) sets the minimum cash wage for a tipped employee at the level required on August 20, 1996. 29 U.S.C. § 203(m). At that time, section 3(m) set the minimum cash wage at 50% of the then-current minimum wage of $4.25 per hour, or effectively $2.13 per hour. *See Final Rule, Updating Regulations Issued Under the Fair Labor Standards Act*, 76 Fed. Reg. 18,832, 18,834-35 (Apr. 5, 2011).

followed by a final sentence that states: "The preceding two sentences shall not apply with respect to any tipped employee unless . . . 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." 29 U.S.C. § 203(m).

2. In *Cumbie* v. *Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010), a waitress sued a restaurant that paid all employees a cash wage of at least the full minimum wage and did not avail itself of the tip credit. Her claim was that regardless of the wages she received, requiring servers to contribute tips into a tip pool that includes kitchen workers like cooks and dishwashers violates the FLSA's minimum wage requirements because those employees do not "customarily and regularly receive tips" under section 3(m). The Ninth Circuit affirmed the dismissal of the complaint for failure to state a claim, observing that the final sentence of section 3(m) "imposes *conditions* on taking a tip credit and does not state free-standing *requirements* pertaining to all tipped employees." *Id.* at 580-81. The court continued: "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." *Id.* at 581. The court noted that "[i]f Congress wanted to articulate a general principle that tips are the property of the employee absent a 'valid' tip pool, it could have done so without reference to the tip credit." *Id.* The court "decline[d] to read the third sentence in such a way as to render its reference to the tip credit, as well as its conditional language and structure, superfluous." *Id.* The court stated, no fewer than four times, that the meaning of

the statutory text is "clear," *id.* at 579 n.6, 581 n.11, or "plain." *Id.* at 580-81, 582.

3. In 2011, a year after *Cumbie*, the Department of Labor issued a Final Rule, asserting in the preamble that *Cumbie* "was incorrectly decided" and that "[t]he Ninth Circuit's 'plain meaning' construction is unsupportable." 76 Fed. Reg. at 18,841-42. Construing FLSA section 3(m) in a manner directly contrary to the court's interpretation in *Cumbie*, the Department amended three sections of 29 C.F.R. part 531 to reflect the view that "[t]ips are the property of the employee whether or not the employer has taken a tip credit" and that an "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." 29 C.F.R. § 531.52. *See also id.* §§ 531.54 ("[M]andatory tip pools . . . can only include those employees who customarily and regularly receive tips."), -.59(b) ("With the exception of tips contributed to a valid tip pool . . . , the tip credit provisions of section 3(m) also require employers to permit employees to retain all tips received by the employee.").

4. The Associations, joined below by an Oregon restaurant and one of its employees, brought this action under the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, challenging the Department's 2011 regulation. On cross-motions for summary judgment, the district court held that the regulation is invalid under step one of the framework set forth in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), based on the con-

flict between the regulation and the plain language of section 3(m). Pet. App. 58a-78a.

5. A divided panel of the Ninth Circuit reversed.[2] Pet. App. 26a-57a.

a. The majority stated that "our characterization in *Cumbie* of the FLSA's tip credit provision as 'clear' does not necessarily foreclose agency discretion." Pet. App. 41a. Instead, in the majority's view, "[w]hat was 'clear' in *Cumbie* was that the FLSA's tip credit provision did not impose any 'statutory interference' that would invalidate tip pooling when no tip credit is taken—i.e., that the FLSA was silent regarding this practice." Pet. App. 41a. The majority "conclude[d] that step one of the *Chevron* analysis is satisfied because the FLSA is silent regarding the tip pooling practices of employers who do not take a tip credit." Pet. App. 42a.

The majority then held that the regulation is "reasonable" and that it therefore satisfies *Chevron* step two. Pet. App. 43a-46a. Electing not to discuss the statutory text, the majority's analysis focused on legislative history showing that Congress intended employers to lose the ability to take the tip credit if they do not comply with the conditions in section 3(m). Pet. App. 44a-46a. The majority opined that "it is a leap too far to conclude that Congress clearly intended to deprive the DOL the ability to later apply similar conditions on employers who do not take

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[2] The Ninth Circuit consolidated the matter for argument and decision with an appeal in a separate lawsuit involving claims by employees against their employer based on the same Department of Labor regulation at issue here, *Cesarz* v. *Wynn Las Vegas, LLC*, No. 14-15243, *petition for cert. filed*, (U.S. Aug. 1, 2016) (No. 16-163).

a tip credit." Pet. App. 44a. The majority upheld the regulation and reversed the district court's judgment. Pet. App. 46.

b. Dissenting, Judge N.R. Smith noted that "[i]f *Cumbie* did anything at all, it held that the meaning of section 203(m) was clear and unambiguous." Pet. App. 53a. Explaining that the majority's decision "turns *Chevron* on its head[,]" Judge Smith stated that "[i]nstead of requiring that administrative rulemaking be rooted in a congressional delegation of authority, ... the majority suggests an agency may regulate wherever that statute does not forbid it to regulate." Pet. App. 54a. The dissent pointed out that "[t]he Supreme Court has made it 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." Pet. App. 54a (citing *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2455 (2014)). Judge Smith concluded that "because section 203(m) is 'silent' to regulation over employers who do not take a tip credit, any such regulation falls outside of the scope of the statute and the DOL has no power to regulate there." Pet. App. 55a (citing *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868 (2013)).

6. The Ninth Circuit denied rehearing and rehearing en banc, with Judge O'Scannlain dissenting from the denial of rehearing en banc in an opinion joined by nine other judges.[3] Pet. App. 1a-25a.

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[3] Because no party to *Cesarz* v. *Wynn Las Vegas, LLC* is a federal agency or officer, Wynn's rehearing petition in the Ninth Circuit was due before that of the Associations. *See* Fed. R. App. P. 40(a)(1)(B)-(C). The Ninth Circuit originally denied Wynn's petition on April 1, 2016, before the Associations filed their petition for rehearing. Although the Ninth Circuit ulti-

Judge O'Scannlain's powerful dissent observes that "[o]ur court today rejects the most elemental teaching of administrative law: agencies exercise whatever powers they possess because—and only because—such powers have been delegated to them by Congress." Pet. App. 3a. The dissent rejected the panel majority's "startling conclusion that the Department of Labor can prohibit any workplace practice Congress has not 'unambiguously and categorically protected' through positive law[,]" noting that the Ninth Circuit's decision "opens not one, but two circuit splits[.]" Pet. App. 3a. Indeed, "[t]his new regulation . . . flips *Williams* and *Christensen* on their heads" by "tak[ing] the longstanding rule that federal law permits employers to institute any tip-pooling arrangement the FLSA does not prohibit, and turn[ing] it into a rule that employers may only institute a tip pool if the FLSA expressly authorizes it." Pet. App. 8a.

Addressing the tip-pooling practice at issue here and in *Cumbie*, the dissent noted that "[t]he only difference is that here we have a Department of Labor regulation declaring that it simply will not follow what *Cumbie* said was permitted." Pet. App. 8a. In light of the repeated determinations in *Cumbie* that the statutory text is clear and unambiguous, "[t]he problem for the Department is that the Supreme Court has prohibited an agency in its position from doing exactly that." Pet. App. 8a (citing *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 984 (2005)). Thus, "*Cumbie*'s teaching is

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mately amended its April 1 order to reflect the subsequent denial of rehearing en banc, including the dissent (Pet. App. 3a), this first rehearing denial resulted in Wynn's certiorari petition coming due several months before that of the Associations.

straightforward: § 203(m) simply does not protect an employee's tips *except* when his or her employer takes a tip credit." Pet. App. 10a. The statute "unambiguously establishes that, so far as the FLSA is concerned, employers who forgo the tip credit must be left free to institute tip pools comprising servers and line cooks, casino dealers and floor supervisors, or whatever other combination of employees the affected parties decide." Pet. App. 10a.

According to the dissent, "in the panel majority's attempt to dance around *Cumbie* and its manifestly correct reading of § 203(m), it has stumbled off a constitutional precipice." Pet. App. 10a. In light of the agreement among the panel majority and the dissent "that Congress has chosen not to regulate the tip-pooling practices of employers like the ones we have here" and "that such conduct indisputably falls beyond the outer reaches of the FLSA[,]" the dissent asks, "where does the panel majority think the Department of Labor gets authority to ban the very thing Congress has decided not to interfere with?" Pet. App. 11a.

The dissent took the panel majority to task for relying on a supposedly "crucial distinction between statutory language that affirmatively protects or prohibits a practice and statutory language that is silent about that practice[,]" and then, based on section 3(m)'s supposed silence as to tip-pooling arrangements for employers that do not take a tip credit, holding that "the Department has a free hand to prohibit it." Pet. App. 11a-12a. The dissent did not mince words: "This is a caricature of *Chevron*. Indeed, the notion is entirely alien to our system of laws." Pet. App. 12a. Judge O'Scannlain observed that "obviously, the FLSA cannot serve as a source of

authority to prohibit activities it does not cover, just as a statute reading 'No dogs in the park' cannot be said to authorize a Parks Department to ban birds as well." Pet. App. 12a. Indeed, "a statute's deliberate non-interference with a class of activity is not a 'gap' in the statute at all; it simply marks the point where Congress decided to stop authorization to regulate." Pet. App. 12a-13a. Even acknowledging the broad authority the Department has to implement the FLSA, "one does not 'implement' a statute by expanding its domain to allow interference with conduct it consciously left alone. The Department is in reality legislating, yet that is a power the Constitution does not permit executive agencies to exercise." Pet. App. 13a.

The dissent cited the well-settled rule that "[a]n agency may not issue a given regulation unless it has a 'textual commitment of authority' to do so." Pet. App. 14a (quoting *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)). With regard to section 3(m), "'Congress has clearly precluded the [Department] from asserting jurisdiction to regulate' tip pooling by employers who do not take a tip credit." Pet. App. 15a-16a (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000)). Thus, "[b]ecause 'the statutory text forecloses the agency's assertion of authority,' its attempt to prohibit tip pooling by employers like the ones before us 'is ultra vires.'" Pet. App. 16a (quoting *City of Arlington*, 133 S. Ct. at 1869). The dissent lamented that "[t]he Department, and my colleagues along with it, have yet to grasp that 'an agency's power is no greater than that delegated to it by Congress.'" Pet. App. 16a-17a (quoting *Lyng* v. *Payne*, 476 U.S. 926, 937 (1986)).

The dissent then proceeded to analyze decisions from six other circuits that "have roundly and forcefully repudiated the specious theory of agency power our court now adopts." Pet. App. 17a-19a. For example, the dissent quoted *Railway Labor Executives' Ass'n* v. *NMB*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc), where the court explained that "[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." Pet. App. 17a. From the Third Circuit, the dissent discussed *Coffelt* v. *Fawkes*, 765 F.3d 197, 202 (3d Cir. 2014), where the court stated that "[e]ven where a statute is 'silent' on the question at issue, such silence does not confer gap-filling power on an agency unless the question is in fact a gap—an ambiguity tied up with the provisions of the statute." Pet. App. 18a (internal quotation and citation omitted). Likewise from the Fourth Circuit, the dissent discussed *Chamber of Commerce* v. *NLRB*, 721 F.3d 152, 160 (4th Cir. 2013), where the court held that "[b]ecause we do not presume a delegation of power simply from the absence of an express withholding of power, we do not find that *Chevron*'s second step is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power." Pet. App. 18a (internal quotation and citation omitted).[4]

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[4] *See also* Pet. App. 18a-19a (addressing similar cases from the Fifth, Seventh, and Eleventh Circuits: *Texas* v. *United States*, 809 F.3d 134, 186 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016); *Sierra Club* v. *EPA*, 311 F.3d 853, 861 (7th Cir. 2002); *Bayou Lawn & Landscape Servs.* v. *Sec'y of Labor*, 713 F.3d 1080, 1085 (11th Cir. 2013)).

Judge O'Scannlain described the product of the majority's ruling as follows: "'Circuit split' perhaps does not fully describe the resulting state of affairs. It is more like we have spun out of the known legal universe and are now orbiting alone in some cold, dark corner of a far-off galaxy, where no one can hear the scream 'separation of powers.'" Pet. App. 20a.

Beyond its discussion of the grave flaws in the panel majority's analysis of agency authority generally, the dissent demonstrates that the court's "shoddy reasoning has opened yet another circuit split on this precise issue. By defying *Cumbie* and rejecting its obviously correct reading of § 203(m), the majority has created another split with the Fourth Circuit and has set us on a collision course with several others." Pet. App. 23a. The dissent analyzed *Trejo*, where "the Fourth Circuit held that 'it is clear that th[e] language [of § 203(m)] could give rise to a cause of action only if the employer is using tips to satisfy its minimum wage requirements.'" Pet. App. 23a-24a (quoting *Trejo*, 795 F.3d at 448). The dissent explained how "that holding necessarily forecloses the Department's effort to ban tip pooling by employers who do not take a tip credit." Pet. App. 24a. The dissent then noted that "[l]ooking beyond *Trejo*, the forecast is not encouraging for the panel majority here[,]" because "[r]elying on *Cumbie* and other cases, nearly every court that has considered the DOL Regulation has invalidated it under *Chevron*." Pet. App. 24a (quotation and citation omitted).

The dissent concluded by emphasizing that "[t]he majority ignores binding Supreme Court . . . precedent, allows the Department of Labor to defy the clear and unambiguous limits on its discretion written into the Fair Labor Standards Act, and creates

not one, but two circuit splits in the process." Pet. App. 25a. Those points, however, "might be the least offensive things about the panel majority's opinion." Pet. App. 25a. For the dissent, "[m]ore reckless is the unsupported and indefensible idea that federal agencies can regulate any class of activity that Congress has not 'unambiguously and categorically protected' through positive law." Pet. App. 25a. That view "is completely out of step with the most basic principles of administrative law, if not the rule of law itself." Pet. App. 25a.[5]

REASONS FOR GRANTING THE PETITION

In the decision below, the Ninth Circuit departed radically from both this Court's FLSA jurisprudence and, more broadly, this Court's decisions regarding the scope of federal agency rulemaking. On the specific question of whether the FLSA allows the Department of Labor to regulate tip pooling by employers that do not take a tip credit, the decision below creates a conflict with the Fourth Circuit. On the issue of agency authority to regulate when a statute is silent on a subject, the decision below conflicts with decisions of at least six circuits. Both issues are important matters that deserve this Court's attention.

The Court has already received extensive briefing on the two questions presented in connection with the certiorari petition pending in *Wynn Las Vegas, LLC* v. *Cesarz*, No. 16-163, which arises from and challenges the same Ninth Circuit ruling. In addition, the two dissenting opinions below provide a

[5] Judges Kozinski, Gould, Tallman, Bybee, Callahan, Bea, M. Smith, Ikuta, and N.R. Smith joined Judge O'Scannlain's opinion dissenting from the denial of rehearing en banc. Pet. App. 3a.

cogent and comprehensive analysis of the reasons why these issues are certworthy. The Associations, therefore, will not burden the Court with a full repetition of that material here, but instead will focus on the highlights.

I. THE DECISION BELOW THAT THE FLSA ALLOWS THE DEPARTMENT OF LABOR TO REGULATE TIP POOLING BY EMPLOYERS THAT DO NOT TAKE A TIP CREDIT VIOLATES THIS COURT'S FLSA RULINGS AND CREATES A CIRCUIT CONFLICT.

In the Fourth Circuit, an employer that does not avail itself of the tip credit and chooses to pay all of its employees a direct cash wage of at least the full minimum wage faces no restrictions under the FLSA regarding tip pooling. That employer remains free to put in place a tip pool that results in kitchen workers receiving a share of customer tips. *See Trejo*, 795 F.3d at 446. In the Ninth Circuit, however, that practice is now unlawful. Pet. App. 26a-57a. The difference in the law of these circuits involves divergent and irreconcilable interpretations of FLSA section 3(m): either its plain language reserves to employers the right to engage in this practice or it does not.

This Court's decisions in *Williams* and *Christensen* establish the rule that unless the FLSA prohibits a pay practice, that practice is lawful. Here, the text of section 3(m) could not be more clear: *if* an employer wants to take advantage of the tip credit, it must satisfy certain conditions, including the restrictions on which employees may participate in a tip pool; otherwise, the tip credit is unavailable. Congress imposed no free-standing restrictions on tip pooling untethered to the tip credit, nor did it say even a sin-

gle word in the FLSA about ownership of tips. Indeed, the necessary logical implication of the final three sentences of section 3(m) is that employers that do not take a tip credit are generally free under the FLSA to have whatever type of tip pool they choose, or else the entire phrase "and all tips received by such employee have been retained by the employee" in section 3(m) would be meaningless surplusage. The Ninth Circuit, however, failed to follow *Williams* or *Christensen*, and it interpreted section 3(m) in a manner fundamentally at odds with its plain language, and contrary to the Fourth Circuit's interpretation in *Trejo*.

The decision below is worthy of this Court's plenary review, or even summary reversal.

II. THE DECISION BELOW THAT A FEDERAL AGENCY MAY REGULATE WHENEVER CONGRESS DOES NOT EXPRESSLY PROHIBIT AGENCY ACTION CONFLICTS WITH THIS COURT'S DECISIONS AND THE DECISIONS OF AT LEAST SIX CIRCUITS.

The Ninth Circuit's decision adopts a dangerous and wholly unprecedented approach to construing federal agency authority to interpret statutes, one that substantially aggrandizes the power of the Executive Branch at the expense of Congress and the courts. The Ninth Circuit's rule that statutory silence on a subject empowers an agency to regulate unless the statute specifically prohibits the agency action finds no support in the case law or public policy. The decision below is not only novel, it is barred by this Court's precedents and flatly inconsistent with decisions of at least six circuits.

Federal agencies have only the power Congress confers upon them. *See, e.g.*, *Lyng*, 476 U.S. at 937;

La. Pub. Serv. Comm'n v. *FCC*, 476 U.S. 355, 374 (1986). Agencies may not go beyond the boundaries of their statutes and regulate in areas Congress chose not to address. *See Brown & Williamson*, 529 U.S. at 161. Although agencies may interpret ambiguous statutory language and issue guidance necessary to implement specific statutory provisions, *see Util. Air Regulatory Grp.*, 134 S. Ct. at 2445, they may not create rights or impose obligations not grounded in specific statutory language. *See City of Arlington*, 133 S. Ct. at 1868.

The Ninth Circuit's understanding of agency regulatory authority is akin to a photographic negative of the analytic framework this Court has created over the past several decades. The decision below would treat agency power as coextensive with the power of Congress to legislate, constrained only by express statutory text barring a specific regulatory act. Not surprisingly, it appears that no other court in the land shares the Ninth Circuit's expansive view of agency authority, and the decisions of numerous federal courts of appeals affirmatively reject that view. *See, e.g.*, *Ry. Labor Executives' Ass'n*, 29 F.3d at 671; *Coffelt*, 675 F.3d at 202; *Chamber of Commerce*, 721 F.3d at 160; *Texas v. United States*, 809 F.3d at 186; *Sierra Club*, 311 F.3d at 861; *Bayou Lawn & Landscape Servs.*, 713 F.3d at 1085.

The decision below calls for plenary review, if not summary reversal.

CONCLUSION

The petition for a writ of certiorari should be granted, leading to either summary reversal or plenary review together with *Wynn Las Vegas, LLC*, No. 16-163. At a minimum, the Court should hold this petition pending the Court's disposition in *Wynn Las Vegas, LLC*.

Respectfully submitted.

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January 19, 2017

APPENDIX

APPENDIX A — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED SEPTEMBER 6, 2016

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-35765, No. 14-15243

OREGON RESTAURANT AND LODGING ASSOCIATION, A NON-PROFIT OREGON CORPORATION; WASHINGTON RESTAURANT ASSOCIATION, A NON-PROFIT WASHINGTON CORPORATION; ALASKA CABARET, HOTEL, RESTAURANT & RETAILERS ASSOCIATION, A NON-PROFIT ALASKA CORPORATION; NATIONAL RESTAURANT ASSOCIATION, A NON-PROFIT ILLINOIS CORPORATION; DAVIS STREET TAVERN LLC, AN OREGON LIMITED LIABILITY COMPANY; SUSAN PONTON, AN INDIVIDUAL,

Plaintiffs-Appellees,

v.

THOMAS PEREZ, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF LABOR; LAURA FORTMAN, IN HER OFFICIAL CAPACITY AS DEPUTY ADMINISTRATOR OF THE U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF LABOR,

Defendants-Appellants.

Appendix A

JOSEPH CESARZ; QUY NGOC TANG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND ALL PERSONS WHOSE NAMES ARE SET FORTH IN EXHIBIT A TO THE FIRST AMENDED COMPLAINT,

Plaintiffs-Appellants,

v.

WYNN LAS VEGAS, LLC; ANDREW PASCAL; STEVE WYNN,

Defendants-Appellees.

September 6, 2016, Filed

Before: Harry Pregerson, N. Randy Smith, and John B. Owens, Circuit Judges. Dissent by Judge O'Scannlain.

ORDER

Judges Pregerson and Owens have voted to deny the petition for panel rehearing. Judge Owens has voted to deny the petition for rehearing en banc, and Judge Pregerson has so recommended. Judge N.R. Smith has voted to grant the petition for panel rehearing and petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the

matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

The order filed on April 1, 2016 denying rehearing in *Cesarz v. Wynn Las Vegas* is hereby amended to reflect this subsequent en banc activity, including the dissent from denial of rehearing.

DISSENT

O'SCANNLAIN, Circuit Judge, with whom KOZINSKI, GOULD, TALLMAN, BYBEE, CALLAHAN, BEA, M. SMITH, IKUTA, N.R. SMITH, Circuit Judges, join, dissenting from the denial of rehearing en banc:

Our court today rejects the most elemental teaching of administrative law: agencies exercise whatever powers they possess because—and only because—such powers have been delegated to them by Congress. Flouting that first principle, the panel majority equates a statute's "silence" with an agency's invitation to regulate, thereby reaching the startling conclusion that the Department of Labor can prohibit any workplace practice Congress has not "unambiguously and categorically protected" through positive law. The dissenting opinion had it right; the panel majority's extravagant theory is more than the Constitution will bear. And it is more than our own precedents will allow. Because the panel majority reads

our precedents out of existence, and opens not one, but two circuit splits in the process, I respectfully dissent from our refusal to rehear these consolidated cases en banc.

I

A

Here is a brief overview of the statutory and regulatory landscape. The Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, sets a minimum wage employers must pay their employees, *id.* § 206(a). Employers who have "tipped employee[s]" can meet the minimum-wage requirement in either of two ways. *Id.* § 203(m). First, they can simply pay such employees a cash wage at or above the minimum. *Id.* Second, they can pay a cash wage below the minimum, but only if such employees receive enough money in tips to make up the difference. *Id.* Employers who choose the second option are said to take a "tip credit." In addition, for many decades it has been common practice for employers across service industries to require the people who work for them to share tips with one another, a practice known as "tip pooling." But not all employees are alike. Some, like restaurant servers,[1] are "customarily and regularly tipped," *id.*; others, like the kitchen staff, are not. Section 203(m) says that *if* an employer takes a tip credit to satisfy its federal minimum-wage obligations, it is not allowed to institute a tip pool comprising *both* categories of employees. *Id.* So, if a restaurant takes a

[1] We use the term "server" to include the waiters and waitresses serving tables.

tip credit, it cannot require its servers to share their tips with the kitchen staff (but it can require the servers to share tips with their fellow servers).

Although § 203(m) speaks directly about the tip-pooling practices of employers who take advantage of the tip credit, it says absolutely nothing about tip pooling by employers who do *not* take a tip credit. In *Cumbie v. Woodie Woo, Inc.*, 596 F.3d 577, 578 (9th Cir. 2010), we addressed "whether a restaurant violates the Fair Labor Standards Act, when, despite paying a cash wage greater than the minimum wage, it requires its wait staff to participate in a 'tip pool' that redistributes some of their tips to the kitchen staff." We held it does not; instead, the statute's carefully calibrated scope evidenced Congress's clear intent to leave employers who do not take a tip credit free to arrange their tip-pooling affairs however they and their employees see fit. *Id.* at 580-83. So, if a restaurant guarantees its employees the federal minimum wage, the restaurant *can* (so far as federal labor law is concerned) force its servers to share their tips with the bussers, cooks, and dishwashers. Section 203(m) does not apply here—it is simply indifferent to the fate of the servers' tips.

Two background principles informed *Cumbie*'s construction of the statute. First, it has been settled law for three-quarters of a century that "[i]n businesses where tipping is customary, the tips, in the absence of an explicit contrary understanding, belong to the recipient. Where, however, such an arrangement is made, in the absence of statutory interference, no reason is perceived for its invalidity." *Id.* at 579 (quoting *Williams v. Jacksonville*

Terminal Co., 315 U.S. 386, 397, 62 S. Ct. 659, 86 L. Ed. 914 (1942)) (alterations omitted) (emphasis deleted). "*Williams* establishes the default rule that an arrangement to turn over or to redistribute tips is presumptively valid." *Id.* at 583. Second, the "Supreme Court has made it clear that an employment practice does not violate the FLSA unless the FLSA *prohibits* it." *Id.* (citing *Christensen v. Harris Cty.*, 529 U.S. 576, 588, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000) ("Unless the FLSA *prohibits* respondents from adopting its policy, petitioners cannot show that Harris County has violated the FLSA.")).

After examining the statute's text and structure, *id.* at 580-81, we determined that the "plain text" of § 203(m) only "imposes *conditions* on taking a tip credit and does not state freestanding *requirements* pertaining to all tipped employees," *id.* at 581. As a result, we concluded that the "FLSA does not restrict tip pooling when no tip credit is taken." *Id.* at 582. "Since Woo [the employer] did not take a tip credit, we perceive[d] no basis for concluding that Woo's tippooling arrangement violated section 203(m)." *Id.* "Having concluded that nothing in the text of the FLSA purports to restrict employee tip-pooling arrangements when no tip credit is taken, we perceive[d] no statutory impediment to Woo's" tip-pooling practice. *Id.* at 583.

B

We decided *Cumbie* in 2010. Unhappy with our decision, in 2011 the Department of Labor issued new regulations addressing the very same issue. *See* Updating

Appendix A

Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832 (Apr. 5, 2011). The preamble to those regulations confessed that *Cumbie* advanced a "'plain meaning' construction," *id.* at 18,842, but nevertheless voiced the Department's opinion that *Cumbie* was wrongly decided, *id.* at 18,841-42. The Department then announced that, statutory text and *Cumbie* notwithstanding, henceforth "tips are the property of the employee, and . . . section [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." *Id.* at 18,842 (By "valid" tip pool, the Department apparently means a tip pool consisting exclusively of employees who are "customarily and regularly tipped.") The Department replaced this language:

> In the absence of an agreement to the contrary between the recipient and a third party, a tip becomes the property of the person in recognition of whose service it is presented by the customer.

with the following:

> Tips are the property of the employee whether or not the employer has taken a tip credit under section [203(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 [203(m)]: As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

Compare 32 Fed. Reg. 13,575, 13,580 (1967), *with* 29 C.F.R. § 531.52.

This new regulation thus flips *Williams* and *Christensen* on their heads. It takes the longstanding rule that federal law permits employers to institute any tip-pooling arrangement the FLSA does not prohibit, and turns it into a rule that employers may only institute a tip pool if the FLSA expressly authorizes it.

II

The facts of these consolidated cases are straightforward and undisputed. The Appellees are employers who pay all of their employees at or above the minimum wage. *Or. Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1082 (9th Cir. 2016). That is, none of them takes a tip credit. In addition, the employers have opted to institute tip pools comprised of both customarily tipped employees and non-customarily tipped employees. Specifically, Wynn Las Vegas requires its casino dealers to share a portion of their tips with casino floor supervisors, while the employers represented by the Oregon Restaurant and Lodging Association require their servers to share a portion of their tips with the kitchen staff. *Id.* at 1085. The question for us is whether such tip pools are prohibited by § 203(m).

So far, so *Cumbie*. The facts are the same. The statute is the same. But this time the panel holds that the tip-pooling arrangements just described are illegal. The only difference is that here we have a Department of Labor regulation declaring that it simply will not follow

what *Cumbie* said was permitted. The problem for the Department is that the Supreme Court has prohibited an agency in its position from doing exactly that. That is, "a court's interpretation of a statute trumps an agency's . . . if the prior court holding 'determined a statute's clear meaning.'" *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005) (emphasis deleted) (quoting *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990)).

That is precisely what we did in *Cumbie*: we held that § 203(m) is clear and unambiguous—and that it clearly and unambiguously permits employers who forgo a tip credit to arrange their tip-pooling affairs however they see fit. We said this explicitly no fewer than six times. *Cumbie*, 596 F.3d at 579 n.6 ("[W]e conclude that the meaning of the FLSA's tip credit provision is clear . . . ."); *id.* at 581 ("[W]e cannot reconcile [Cumbie's] interpretation with the plain text of [the statute] . . . ."); *id.* at 581 n.11 ("[W]e do not resort to legislative history to cloud a statutory text that is clear." (quoting *Ratzlaf v. United States*, 510 U.S. 135, 147-48, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994))); *id.* at 582 (describing Cumbie's reading of § 203(m) as "plainly erroneous"); *id.* at 582 (refusing to "depart[] from the plain language of the statute" (quoting *Ingalls Shipbuilding, Inc. v. Dir., Office of Workers' Comp. Programs*, 519 U.S. 248, 261, 117 S. Ct. 796, 136 L. Ed. 2d 736 (1997))); *id.* at 583 (reiterating that our statutory construction proceeded "[a]bsent an ambiguity").

Remarkably, we even declined to consider then-existing Department of Labor regulations—as well as an amicus brief filed by the Secretary of Labor on Cumbie's behalf—precisely because "we conclude[d] that the meaning of the FLSA's tip credit provision is clear," and hence "we need not decide . . . what level of deference [the Department's interpretations] merit." *Id.* at 579 n.6. 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. *Id.* (citing *Metro Leasing & Dev. Corp. v. Comm'r*, 376 F.3d 1015, 1027 n.10 (9th Cir. 2004) ("Because we conclude that [the] meaning of the statute is clear, we need not decide whether this regulation should be upheld.")).

Cumbie's teaching is straightforward: § 203(m) simply does not protect an employee's tips *except* when his or her employer takes a tip credit. Hence, § 203(m) unambiguously establishes that, so far as the FLSA is concerned, employers who forgo the tip credit must be left free to institute tip pools comprising servers and line cooks, casino dealers and floor supervisors, or whatever other combination of employees the affected parties decide.

III

It would take some mighty fancy footwork to get around *Cumbie*; if *Brand X* does not foreclose a contrary agency construction here, the doctrine is a dead letter. Indeed, in the panel majority's attempt to dance around *Cumbie* and its manifestly correct reading of § 203(m), it has stumbled off a constitutional precipice.

Appendix A

A

The problems begin at the beginning. The majority acknowledges that "section 203(m) does not restrict the tip pooling practices of employers who do not take tip credits." *Or. Rest.*, 816 F.3d at 1084. That was the holding of *Cumbie*. As *Cumbie* explained, Congress wrote § 203(m) against the longstanding background norm that tip pooling is a matter of private contract. 596 F.3d at 579. Thus, given Congress's deliberate choice to subject one and only one class of employer to regulation—namely, employers who take a tip credit—the clear implication is that all other employers remain free to arrange their tip-pooling affairs without federal interference, just as they were before the statute was passed. And my colleagues say they have "no quarrel with *Cumbie*." *Or. Rest.*, 816 F.3d at 1090. So we all agree that Congress has chosen not to regulate the tip-pooling practices of employers like the ones we have here; we all agree that such conduct indisputably falls beyond the outer reaches of the FLSA. But then where does the panel majority think the Department of Labor gets authority to ban the very thing Congress has decided not to interfere with?

Here is where the panel majority's analysis goes wrong, and dangerously so. The majority claims to perceive a "crucial distinction between statutory language that affirmatively protects or prohibits a practice and statutory language that is silent about that practice." *Or. Rest.*, 816 F.3d at 1087. From that premise, it concludes that the Department of Labor can ban these employers' tip pooling because § 203(m) does not "unambiguously

and categorically *protect*" it; instead, the statute is simply "silent about that practice." *Id.* at 1086-87 (emphasis added). For that reason alone, the panel majority holds, the Department has a free hand to prohibit it. *Id.* As the majority says, any time a statute does not "unambiguously protect[] or prohibit[] certain conduct," the statute necessarily "leaves room for agency discretion" to regulate such conduct as it sees fit. *Id.* at 1088.

This is a caricature of *Chevron*. Indeed, the notion is entirely alien to our system of laws.[2]

In one sense, the panel majority is correct: § 203(m) is "silent" about whether employers who do not take a tip credit may require tip pooling, just like it is "silent" about whether I can require my law clerks to wear business attire in chambers. Section 203(m) does not "unambiguously and categorically protect" either practice. Does that mean the Department of Labor is free to prohibit them both? Of course not; obviously, the FLSA cannot serve as a source of authority to prohibit activities it does not cover, just as a statute reading "No dogs in the park" cannot be said to authorize a Parks Department to ban birds as well. The reason is basic but fundamental, and it has nothing to do with any sort of free-floating nondelegation presumption.

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[2] *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."). The point of *Youngstown* is that the Executive must always derive its authority to act either from an act of Congress or directly from the Constitution; *Youngstown* necessarily rejects the idea that the Executive may interfere with a given interest simply because Congress has not "unambiguously and categorically protected" it.

Rather, the point is that a statute's deliberate non-interference with a class of activity is not a "gap" in the statute at all; it simply marks the point where Congress decided to stop authorization to regulate. And while I do not question that Congress has given the Department "broad authority . . . to implement the FLSA," *Or. Rest.*, 816 F.3d at 1084, one does not "implement" a statute by expanding its domain to allow interference with conduct it consciously left alone. The Department is in reality legislating, yet that is a power the Constitution does not permit executive agencies to exercise. [3]

The problem here is that the majority has confused two very different types of statutory silence. Sometimes "[statutory] silence is meant to convey nothing more than a refusal to tie the agency's hands," meaning that Congress has given the agency discretion to choose between policy options Congress itself has placed on the table. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222, 129 S. Ct.

[3] As every novice learns, the official theory of the administrative state begins from the premise that "the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996). Agency rulemaking respects that constraint so long as it remains guided by an "intelligible principle" supplied by Congress. *E.g., City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 n.4, 185 L. Ed. 2d 941 (2013). But the panel majority would effectively vaporize even that flimsy constraint by holding that an agency need not justify a given rule by tracing it to a valid statutory grant of authority; instead, it need only demonstrate that Congress has not affirmatively voiced opposition to the rule in question. The majority's vision makes a fear of "delegation running riot" look quaint by comparison, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553, 55 S. Ct. 837, 79 L. Ed. 1570 (1935) (Cardozo, J., concurring), for it would dispense with even the pretense of delegation altogether.

1498, 173 L. Ed. 2d 369 (2009). But "sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion." *Id.* at 223. In other words, not all statutory silences are created equal. But you would never know that from the majority's opinion. The majority seems to think executive agencies have plenary power to regulate whatever they want, unless and until Congress affirmatively preempts them. With all due respect, that is a profoundly misguided understanding of administrative law.

An agency may not issue a given regulation unless it has a "textual commitment of authority" to do so. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001). Indeed, it is axiomatic that "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986). Thus, it should go without saying that an agency "may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Am. Trucking*, 531 U.S. at 485. And "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington*, 133 S. Ct. at 1868.

Section 203(m) speaks in plain terms, not capacious ones. To illustrate the contrast, imagine a statute that said, simply, "Unfair tipping practices are prohibited. The Secretary may promulgate rules necessary to carry into execution the foregoing prohibition." Now *that* would be a

capacious statute. I will stipulate that a reasonable person could read it to prohibit tip pooling even by employers who do not take a tip credit; on the other hand, a reasonable person could read it not to interfere with such practice. Our hypothetical statute is "silent" in the relevant sense: in the sense that we might read it to cover the practice in question, but we are not compelled to read it that way, so the choice is for the agency to make. But § 203(m) is nothing like that hypothetical statute. It regulates tip pooling by one, and only one, specific class of employer: the employer who takes a tip credit. Hence, as we put it in *Cumbie*, § 203(m) "does not restrict tip pooling when no tip credit is taken." 596 F.3d at 582. There is no question, therefore, that § 203(m) stops short of regulating employers who do not take a tip credit. The Department has no power to put words in Congress's mouth when Congress has deliberately chosen to stay quiet in the face of activity it knows is taking place.

Simply put, Congress intended to control, not to delegate, when employers may require tip pooling. And there can be no question that the Department of Labor has no power to extend the statute beyond its stopping point. As the Supreme Court has said time and again, "an administrative agency's power to regulate . . . must always be grounded in a valid grant of authority from Congress. And '[i]n our anxiety to effectuate the congressional purpose . . . , we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (quoting *United States v. Article of Drug . . . Bacto-*

Unidisk . . . , 394 U.S. 784, 800, 89 S. Ct. 1410, 22 L. Ed. 2d 726 (1969)).

Thus, as in *Brown & Williamson*, here "Congress has clearly precluded the [Department] from asserting jurisdiction to regulate" tip pooling by employers who do not take a tip credit. *Id.* at 126. "Such authority is inconsistent with the intent that Congress has expressed in the [FLSA's] overall regulatory scheme . . . . In light of this clear intent, the [Department's] assertion of jurisdiction is impermissible." *Id.* Because "the statutory text forecloses the agency's assertion of authority," its attempt to prohibit tip pooling by employers like the ones before us "is ultra vires." *City of Arlington*, 133 S. Ct. at 1871, 1869.

The majority's reasoning flies in the face of the above principles. To prop up its theory that an agency's power to regulate surges like an expansive body of water, covering everything until it bumps up against a wall erected by Congress, the majority relies on *Christensen v. Harris County*, 529 U.S. 576, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000), and "Judge Souter's [sic] concurrence," *Or. Rest.*, 816 F.3d at 1088. 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. *Christensen* says only what everybody already knows: if a statute can reasonably be read either to permit or to prohibit a given practice, then the agency has discretion to choose which reading to enforce. 529 U.S. at 587-88; *id.* at 589 (Souter, J., concurring). But the whole question is whether a particular statute *can* be read either way.

Sometimes the answer is yes; other times the answer is no, depending on the statute. In this case, *Cumbie* already said, correctly, that § 203(m) cannot be read either way—it subjects to regulation only employers who take a tip credit, and nobody else. 596 F.3d at 582. The Department has no power to enlarge the statute beyond the point where Congress decided to stop regulating. The Department, and my colleagues along with it, have yet to grasp that "an agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937, 106 S. Ct. 2333, 90 L. Ed. 2d 921 (1986).

B

It should come as no surprise that our sister circuits have roundly and forcefully repudiated the specious theory of agency power our court now adopts. Those circuits have 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 binding on the agency.

As the D.C. Circuit has explained, "[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671, 308 U.S. App. D.C. 9 (D.C. Cir. 1994) (en banc) (as amended); *id.* at 659 ("[T]he Board would have us *presume* a delegation of power from Congress absent an express *withholding* of such power. This comes close to saying that the Board has the power to do whatever it pleases

merely by virtue of its existence, a suggestion that we view to be incredible."); *id.* at 671 ("To suggest, as the Board effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.* when the statute is not written in 'thou shalt not' terms), is both flatly unfaithful to the principles of administrative law . . . , and refuted by precedent."); *see also Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174-75, 355 U.S. App. D.C. 221 (D.C. Cir. 2003) ("[T]he Postal Service's position seems to be that the disputed regulations are permissible because the statute does not expressly foreclose the construction advanced by the agency. We reject this position as entirely untenable under wellOREGON established case law."); *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 805, 353 U.S. App. D.C. 405 (D.C. Cir. 2002) (same).

Likewise, the Third Circuit has recognized that "[e]ven where a statute is 'silent' on the question at issue, such silence 'does not confer gap-filling power on an agency unless the question is in fact a gap—an ambiguity tied up with the provisions of the statute.'" *Coffelt v. Fawkes*, 765 F.3d 197, 202, 61 V.I. 786 (3d Cir. 2014) (quoting *Lin-Zheng v. Attorney Gen.*, 557 F.3d 147, 156 (3d Cir. 2009) (en banc)).

The Fourth Circuit, as well, has held that "[b]ecause we do not presume a delegation of power simply from the absence of an express withholding of power, we do not find that *Chevron*'s second step is implicated 'any time a statute does not expressly *negate* the existence of a claimed administrative power.'" *Chamber of Commerce v. NLRB*, 721 F.3d 152, 160 (4th Cir. 2013) (quoting *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468, 368 U.S. App. D.C. 368 (D.C. Cir. 2005)).

The Fifth Circuit agrees. *See Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015) (as revised) ("The dissent repeatedly claims that congressional silence has conferred on DHS the power to act. To the contrary, any such inaction cannot create such power." (citation omitted)).

Same for the Seventh Circuit: "Courts 'will not presume a delegation of power based solely on the fact that there is not an express withholding of such power.'" *Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002) (quoting *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120, 311 U.S. App. D.C. 268 (D.C. Cir. 1995)).

The Eleventh Circuit piles on: "[I]f congressional silence is a sufficient basis upon which an agency may build a OREGON REST. & LODGING 20 ASS'N V. PEREZ rulemaking authority, the relationship between the executive and legislative branches would undergo a fundamental change and 'agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* . . . and quite likely with the Constitution as well.'" *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1085 (11th Cir. 2013) (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060, 311 U.S. App. D.C. 163 (D.C. Cir. 1995)).

Notice what the panel majority has not produced: a citation to a single case endorsing the extravagant theory of executive lawmaking our court adopts today. Meaningful silence?

At any rate we, too, once knew all of this. In *Martinez v. Wells Fargo Home Mortgage, Inc.*, 598 F.3d 549, 554

n.5 (9th Cir. 2010), we were asked to defer to an agency's regulation of certain bank "overcharges" on the theory that the Real Estate Settlement Procedures Act did "not specifically address the situation at bar" and was therefore "sufficiently silent on the precise matter as to be ambiguous." Nonsense, we said; statutory "'silence' on the subject of overcharges does not mean that Congress's actions were ambiguous on that subject. Congress simply did not legislate at all on overcharges." *Id.* So, too, with tip pooling by employers who do not take a tip credit, or so I would have thought.

Oh well. Add *Martinez* to the heap of controlling authorities the panel majority has so casually tossed aside, placing us, here as elsewhere, directly at odds with our colleagues in the rest of the country.[4]

IV

A

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." *Sullivan*

[4] "Circuit split" perhaps does not fully describe the resulting state of affairs. It is more like we have spun out of the known legal universe and are now orbiting alone in some cold, dark corner of a far-off galaxy, where no one can hear the scream "separation of powers."

v. Zebley, 493 U.S. 521, 541, 110 S. Ct. 885, 107 L. Ed. 2d 967 (1990) (quoting *Chevron U.S.A. Inc.*, 467 U.S. at 844).

My panel-majority colleagues prove the point themselves. Notwithstanding their conviction that the Department of Labor can regulate any private activity Congress has not "unambiguously and categorically protect[ed]" through positive law, they still undertake to reassure themselves that the Department's interpretation of § 203(m) is "reasonable." *Or. Rest.*, 816 F.3d at 1089. Yet their analysis on this score is so perfunctory that it only confirms they must really believe what they have repeatedly said, namely, that an agency does not need a discernible grant of regulatory power over a given subject matter before it can insert itself into the affairs of ordinary citizens.

Unsurprisingly, the majority never mentions the text the Department is (purportedly) executing, not even once. Here is what the majority offers instead:

First, that it was reasonable for the Department of Labor to conclude "that, as written, [§] 203(m) contain[s] a 'loophole' that allow[s] employers to exploit FLSA tipping provisions." *Id.* Which quite obviously begs the question. But not only is it entirely question-begging, it unwittingly *concedes* that the statute "as written" limits the agency to regulating only those employers who take a tip credit. As explained above, an agency "may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion," *Am. Trucking*, 531 U.S. at 485, for otherwise it would be exercising "the

lawmaking function [which] belongs to Congress . . . and may not be conveyed to another branch or entity," *Loving*, 517 U.S. at 758.

Second, the majority invokes the FLSA's legislative history, even though in *Cumbie* we explicitly refused to do so, explaining that "[o]f course, 'we do not resort to legislative history to cloud a statutory text that is clear.'" 596 F.3d at 581 n.11 (quoting *Ratzlaf*, 510 U.S. at 147-48). In any event, the primary source the majority quotes implicitly *disavows* the Department of Labor's interpretation. The very Senate Committee Report the majority relies on explains that an "employer will lose the benefit of [the tip credit] exception if tipped employees are required to share their tips with employees who do not customarily and regularly receive tips." *Or. Rest.*, 816 F.3d at 1089 (quoting S. Rep. No. 93-690, at 43 (1974)). That 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. All the majority can muster in response is a more general statement from the same report that § 203(m) "requir[es] . . . that all tips received be paid out to tipped employees." *Id.* at 1090. That's it. Even fans of legislative history should hold their noses before allowing one vague statement from one committee report to trump not only the clear text of the statute, *but also the express interpretation of that text as set out in the very same report*.

Third and finally, the majority says that "the FLSA is a broad and remedial act that Congress has frequently

expanded and extended." *Id.* Here we have yet one more frank admission that the Department of Labor is "expand[ing] and extend[ing]," not "executing," the statute Congress enacted. But notice that even on the majority's telling, *Congress* is the one empowered to expand and extend the statute; the Department of Labor emphatically is not. And whatever the majority thinks "the purpose of the FLSA" happens to be, *id.*, the Supreme Court has told us that "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone," *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98, 111 S. Ct. 1138, 113 L. Ed. 2d 68 (1991). In this case there is no doubt that Congress resolved to leave employers like the ones before us alone, at least as far as their tip-pooling practices are concerned. Neither we nor the Department have any power to "expand or extend" Congress's decision.

B

Predictably enough, such shoddy reasoning has opened yet another circuit split on this precise issue. By defying *Cumbie* and rejecting its obviously correct reading of § 203(m), the majority has created another split with the Fourth Circuit and has set us on a collision course with several others.

Most immediately, in *Trejo v. Ryman Hospitality Props., Inc.*, 795 F.3d 442 (4th Cir. 2015), the Fourth Circuit expressly agreed with *Cumbie* 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." *Id.* at 448 (quoting *Cumbie*, 596 F.3d at 581). Accordingly, the Fourth Circuit held that "it is clear that th[e] language [of § 203(m)] could give rise to a cause of action only if the employer is using tips to satisfy its minimum wage requirements." *Id.* For the reasons explained above, that holding necessarily forecloses the Department's effort to ban tip pooling by employers who do not take a tip credit. *Brand X*, 545 U.S. at 984 ("[A] precedent holding a statute to be unambiguous forecloses a contrary agency construction.").

Looking beyond *Trejo*, the forecast is not encouraging for the panel majority here. In fact, "[r]elying on *Cumbie* and other cases, nearly every court that has considered the DOL Regulation has invalidated it under *Chevron*." *Malivuk v. Ameripark, LLC*, No. 1:15-CV-2570-WSD, 2016 U.S. Dist. LEXIS 97093, 2016 WL 3999878, at *4 (N.D. Ga. July 26, 2016); *see, e.g., id.; Brueningsen v. Resort Express Inc.*, No. 2:12-CV-00843-DN, 2015 U.S. Dist. LEXIS 9262, 2015 WL 339671, at *5 (D. Utah Jan. 26, 2015) ; *Mould v. NJG Food Serv. Inc.*, No. CIV. JKB-13-1305, 2014 U.S. Dist. LEXIS 84441, 2014 WL 2768635, at *5 (D. Md. June 17, 2014); *Stephenson v. All Resort Coach, Inc.*, No. 2:12-CV-1097 TS, 2013 U.S. Dist. LEXIS 121766, 2013 WL 4519781, at *8 (D. Utah Aug. 26, 2013); *see also Trinidad v. Pret A Manger (USA) Ltd.*, 962 F. Supp. 2d 545, 563 (S.D.N.Y. 2013) ("Because the Court is highly skeptical that DOL's regulations permissibly construe the statute, and because it is undisputed that Pret paid its employees the minimum wage without taking into account the tip credit, the Court, in its discretion, declines to conditionally certify a class based on plaintiffs' tip-pooling claims.").

The only court in the land to misread *Cumbie* is our own!

V

Never let a statute get in the way of a tempting regulation. That, at any rate, seems to be the prevailing mood on our court. I cannot go along with such a breezy approach to the separation of powers, and I regret our decision to let stand the majority's catalog of errors. The majority ignores binding Supreme Court and circuit precedent, allows the Department of Labor to defy the clear and unambiguous limits on its discretion written into the Fair Labor Standards Act, and creates not one, but two circuit splits in the process. Amazingly, however, those might be the least offensive things about the panel majority's opinion.

More reckless is the unsupported and indefensible idea that federal agencies can regulate any class of activity that Congress has not "unambiguously and categorically protected" through positive law. Such notion is completely out of step with the most basic principles of administrative law, if not the rule of law itself.

I respectfully dissent.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 23, 2016

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-35765, No. 14-15243

OREGON RESTAURANT AND LODGING ASSOCIATION, A NON-PROFIT OREGON CORPORATION; WASHINGTON RESTAURANT ASSOCIATION, A NONPROFIT WASHINGTON CORPORATION; ALASKA CABARET, HOTEL, RESTAURANT & RETAILERS ASSOCIATION, A NON-PROFIT ALASKA CORPORATION; NATIONAL RESTAURANT ASSOCIATION, A NON-PROFIT ILLINOIS CORPORATION; DAVIS STREET TAVERN LLC, AN OREGON LIMITED LIABILITY COMPANY; SUSAN PONTON, AN INDIVIDUAL,

Plaintiffs-Appellees,

v.

THOMAS PEREZ, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF LABOR; LAURA FORTMAN, IN HER OFFICIAL CAPACITY AS DEPUTY ADMINISTRATOR OF THE U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF LABOR,

Defendants-Appellants.

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JOSEPH CESARZ; QUY NGOC TANG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND ALL PERSONS WHOSE NAMES ARE SET FORTH IN EXHIBIT A TO THE FIRST AMENDED COMPLAINT,

Plaintiffs-Appellants,

v.

WYNN LAS VEGAS, LLC; ANDREW PASCAL; STEVE WYNN,

Defendants-Appellees.

July 10, 2015, Argued and Submitted, Portland, Oregon*; February 23, 2016, Filed

Appeal from the United States District Court for the District of Oregon. D.C. No. 3:12-cv-01261-MO. Michael W. Mosman, District Judge, Presiding.

Appeal from the United States District Court for the District of Nevada. D.C. No. 2:13-cv-00109-RCJ-CWH. Robert Clive Jones, District Judge, Presiding.

Harry Pregerson, N. Randy Smith, and John B. Owens, Circuit Judges. N.R. SMITH, Circuit Judge, dissenting.

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* We heard oral argument in these two cases together, and we now consolidate them for disposition. See Fed. R. App. P. 3(b)(2); Mattos v.Agarano, 661 F.3d 433, 436 n.1 (9th Cir. 2011) (*en banc*).

Appendix B

OPINION

PREGERSON, Senior Circuit Judge:

Under the Fair Labor Standards Act of 1938 ("FLSA"), as amended in 1974, an employer may fulfill part of its hourly minimum wage obligation to a tipped employee with the employee's tips. 29 U.S.C. § 203(m). This practice is known as taking a "tip credit." Section 203(m) of the FLSA obligates employers who take a tip credit to (1) give notice to its employees, and (2) allow its employees to retain all the tips they receive, unless such employees participate in a valid tip pool. *Id.* Under section 203(m), a tip pool is valid if it is comprised exclusively of employees who are "customarily and regularly" tipped. *Id.*

In both cases before this court, Employer-Appellees did not take a tip credit against their minimum wage obligation; they paid their tipped employees at least the federal minimum wage. Employer-Appellees required their employees to participate in tip pools. Unlike the tip pools contemplated by section 203(m), however, these tip pools were comprised of both customarily tipped employees and non-customarily tipped employees.

In 2010, we held in *Cumbie v. Woody Woo, Inc.* that this type of tip pooling arrangement does not violate section 203(m) of the FLSA, because section 203(m) was silent as to employers who do not take a tip credit. 596 F.3d 577, 583 (9th Cir. 2010). In 2011, shortly after *Cumbie* was decided, the Department of Labor ("DOL") promulgated a formal rule ("the 2011 rule") that extended the tip pool

restrictions of section 203(m) to all employers, not just those who take a tip credit. 76 Fed. Reg. 18,832, 18,841-42 (April 5, 2011).

The United States District Court for the District of Oregon held that *Cumbie* foreclosed the DOL's ability to promulgate the 2011 rule and that the 2011 rule was invalid because it was contrary to Congress's clear intent. *Or. Rest. & Lodging v. Solis*, 948 F. Supp. 2d 1217, 1218, 1226 (D. Or. 2013). The United States District Court for the District of Nevada followed suit. *Cesarz v. Wynn Las Vegas, LLC*, No. 2:13-cv-00109-RCJ-CWH, 2014 U.S. Dist. LEXIS 3094, 2014 WL 117579, at *3 (D. Nev. Jan. 10, 2014). For the reasons set forth below, we reverse both district court decisions.

BACKGROUND

In 1937, President Franklin Delano Roosevelt challenged Congress "to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work. A self-supporting and self-respecting democracy can plead no justification for . . . chiseling workers' wages . . . ." H.R. Rep. No. 93-913 at 5-6 (1974). One year later, in 1938, Congress passed the FLSA. 29 U.S.C. § 201. "[T]he FLSA was designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act . . . would be protected from the 'evil of overwork as well as underpay.'" *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981) (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S.

572, 578, 62 S. Ct. 1216, 86 L. Ed. 1682 (1942)) (internal quotation marks omitted). The FLSA was intended to provide "greater dignity and security and economic freedom for millions of American workers." H.R. Rep. No. 93-913 at 6 (1974) (quoting President Kennedy).

In 1942, the Supreme Court in *Williams v. Jacksonville Terminal Co.* addressed the question whether tips are a component of an employee's wages under the FLSA. 315 U.S. 386, 388, 62 S. Ct. 659, 86 L. Ed. 914 (1942). The petitioners, who worked as "red caps" or baggage handlers, earned a combination of wages and tips that equaled the FLSA prescribed minimum wage. *Id.* They sued their employer, arguing that the FLSA required that they be paid the minimum wage without regard to their earnings from tips. *Id.* at 389. The Court held that "where tipping is customary, the tips, in the absence of an explicit contrary understanding, belong to the recipient." *Id.* at 397. However, when "an arrangement is made by which the employee agrees to turn over the tips to the employer, in the absence of statutory interference, no reason is perceived for its invalidity." *Id.* Because the baggage handlers continued to work after being notified that tips would constitute part of their wages, the Court held that they accepted this new compensation arrangement. *Id.* at 398.

After *Jacksonville Terminal*, the FLSA underwent a series of amendments, which "extended the Act's coverage." H.R. Rep. 93-913 at 4. These amendments raised the federal minimum wage and expanded the FLSA's coverage to various public and private sector employees. In 1966, the FLSA was amended to include

hotel and restaurant employees. 73 Fed. Reg. 43,654, 43,659 (July 28, 2008). To alleviate the new minimum wage obligations of hotels and restaurants, "the 1966 amendments also provided for the first time, within section [20]3(m)'s definition of a 'wage,' that an employer could utilize a limited amount of its employees' tips as a credit against its minimum wage obligations . . . through a so-called 'tip credit.'" 76 Fed. Reg. at 18,838.

In 1974, the FLSA was again amended. First, Congress expressly delegated to the DOL the broad authority "to prescribe necessary rules, regulations, and orders" to implement the FLSA amendments of 1974. Pub. L. No. 93-259, § 29(b), 88 Stat. 55 (1974). Second, Congress revised the language in 29 U.S.C. § 203(m) to read:

> 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—
>
> (1) the cash wage paid such employee which for purposes of such determination shall not be less than the cash wage required to be paid such an employee on [August 20, 1996]; and
>
> (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.[1]

[1] In other words, under section 203(m) there are two components of the employer's wage obligation to tipped employees: the employer's cash

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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.

29 U.S.C. § 203(m). As amended in 1974, section 203(m) required employers to give their employees prior notice of their intent to use a tip credit and "made it clear that tipped employees must receive at least minimum wage and must generally retain any tips." 73 Fed. Reg. at 43,659.

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wage obligation to the employee and the employee's tips. The combination of the employer's cash wage and the employee's tips must equal at least the federal minimum wage. Currently, the employer's minimum cash wage obligation to the employee is $2.13 per hour and the federal minimum wage is $7.25 per hour.

If the employee earns at least $5.12 per hour in tips, then the employer has no further cash wage obligation because the employer's minimum wage obligation of $2.13 plus the employee's tips of at least $5.12 equals the minimum wage. In this example, the employer would be taking a tip credit of $5.12 per hour.

If the employee earns less than $5.12 per hour in tips, the employer would be responsible for making up the difference between the tip credit and the minimum wage. For example, if an employee receives $1.00 per hour in tips, the employer would be required to pay $6.25 per hour. In this example, the employer would be taking a tip credit of $1.00 per hour.

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In 2010, we held in *Cumbie v. Woody Woo, Inc.* that section 203(m) does not restrict the tip pooling practices of employers who do not take tip credits. 596 F.3d at 583. The employer, Woody Woo, Inc., paid its servers a cash wage that exceeded the federal minimum wage but required its servers to contribute their tips to a "tip pool" that included employees who were not regularly or customarily tipped. *Id.* at 578-79. The servers claimed that Woody Woo's tip pooling practice violated section 203(m) because the practice included non-customarily tipped employees. *Id.* at 579. We applied the "default" rule from *Jacksonville Terminal*, and found that "in the absence of statutory interference, no reason is perceived for [Woody Woo's tip pooling practice's] invalidity." *Id.* (quoting *Jacksonville Terminal*, 315 U.S. at 397) (emphasis and internal quotation marks omitted).

In *Cumbie*, we read section 203(m) to apply only to employers who did take a tip credit; for these employers, section 203(m) is considered "statutory interference." 596 F.3d at 581. In contrast, for an employer that meets its minimum wage obligation without taking a tip credit, section 203(m) is silent; therefore, there is no statutory interference. Without statutory interference, *Jacksonville Terminal's* default rule controlled, and we concluded that Woody Woo's tip pooling practice was valid. *Id.* at 583.

In 2008, two years *before* the *Cumbie* decision, the DOL published a notice of proposed rulemaking and request for comments under the Administrative Procedure Act, 5 U.S.C. §§ 556-557. The lengthy notice set forth specific revisions to sections that governed tipped employees in order "to incorporate . . . legislative history, subsequent

court decisions, and the [DOL's] interpretations" into the FLSA. 73 Fed. Reg. at 43,659. More than ten different organizations submitted comments. These comments and the *Cumbie* decision disclosed that section 203(m)'s tip pooling restrictions could be read to apply *only* to employers who take a tip credit. The comments also revealed that section 203(m) could encourage abuse in an already "high-violation industry." *See* 76 Fed. Reg. at 18,840-42.

In 2011, in response to these comments and the statutory silence that *Cumbie* exposed, the DOL promulgated new rules to make it clear that tips are the property of the employee. *Id.* at 18,841-42; 29 C.F.R. §§ 531.52, 531.55, 531.59. Specifically, the DOL revised 29 C.F.R. § 531.52 by replacing the sentence:

> In the absence of an agreement to the contrary between the recipient and a third party, a tip becomes the property of the person in recognition of whose service it is presented by the customer.

with the following language:

> Tips are the property of the employee whether or not the employer has taken a tip credit under section [20]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 [20]3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

Compare 32 Fed. Reg. 13,575, 13,580 (Sept. 28, 1967), *with* 29 C.F.R. § 531.52 (2011). The 2011 rule expressly prohibits the use of a tip pool that violates section 203(m) regardless of whether an employer uses a tip credit.

These revisions to 29 C.F.R. § 531.52 are the subject of the two cases before us. The Oregon Restaurant and Lodging Association, consisting of restaurants, taverns, and one individual, brought suit against the DOL, challenging the validity of the 2011 rule and seeking to enjoin its enforcement. Later, a group of casino dealers brought suit against their employer, Wynn Las Vegas, LLC, challenging Wynn's tip pooling practice as violating the 2011 rule. In both cases, the employers paid the employees at least the federal minimum wage and did not take a tip credit. The employers also instituted tip pools, in which customarily tipped employees, i.e., servers and casino dealers, were required to share tips with non-customarily tipped employees, i.e., kitchen staff and casino floor supervisors. Both district courts sided with the employers, relying in large part on our holding in *Cumbie*.[2] The DOL and the casino dealers appealed.

DISCUSSION

I. Standard of Review

We review a district court's grant of summary judgment *de novo*. *Los Coyotes Band of Cahuilla &*

[2] In Oregon, the district court granted summary judgment in favor of the Oregon Restaurant and Lodging Association. In Nevada, the district court granted Wynn's motion to dismiss under 12(b)(6) for failure to state a claim.

Cupeño Indians v. Jewell, 729 F.3d 1025, 1035 (9th Cir. 2013). We also review a district court's grant of a motion to dismiss *de novo*. *Fayer v. Vaughn*, 649 F.3d 1061, 1063-64 (9th Cir. 2011).

We review the validity of an agency's regulatory interpretation of a statute under the two-step framework set forth in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).[3] The first step is to ask, "has [Congress] directly spoken to the precise question at issue." *Id.* at 842. If Congress's intent is clear, then that is the end of our inquiry. *Id.* at 842-43. If, however, "the statute is silent or ambiguous with respect to the specific issue," we proceed to step two and ask if the agency's action is "based on a permissible construction of the statute." *Id.* at 843. Even if we believe the agency's construction is not the *best* construction, it is entitled to "controlling weight unless [it is] arbitrary, capricious, or

[3] At *Chevron* step zero, we ask whether the *Chevron* framework applies at all. An "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). In 1974, Congress granted the Secretary of Labor the authority to "prescribe necessary rules, regulations, and orders with regard to the [1974] amendments" to the FLSA, which included section 203(m). Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76. The DOL exercised its rulemaking authority within its substantive field when it promulgated the 2011 rule. This is sufficient to satisfy the *Chevron* step zero inquiry. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1874, 185 L. Ed. 2d 941 (2013).

manifestly contrary to the statute." *Id.* at 844; *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.("Brand X")*, 545 U.S. 967, 980, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

II. Analysis

When the Oregon district court and the Nevada district court conducted their *Chevron* analysis, both held that *Cumbie* left "no room" for the DOL to promulgate its 2011 rule and thus granted Oregon Restaurant & Lodging's motion for summary judgment, *Or. Rest. & Lodging*, 948 F. Supp. 2d at 1226, and Wynn's motion to dismiss, *Cesarz*, 2014 U.S. Dist. LEXIS 3094, 2014 WL 117579, at *3. We disagree with the district courts' applications of *Cumbie* and their *Chevron* analyses.

A. *Chevron* Step One

The precise question before this court is whether the DOL may regulate the tip pooling practices of employers who do not take a tip credit. The restaurants and casinos argue that we answered this question in *Cumbie*. We did not.

Our task in *Cumbie* was to decide whether a restaurant's tip pooling practice violated the FLSA. 596 F.3d at 578. We did not hold that the FLSA unambiguously and categorically protects the practice in question. Rather, we held that "nothing in the text purports to restrict" the practice in question. *Id.* at 583. In reaching this holding, we relied on *Christensen*, in which the "Supreme Court

. . . made clear that an employment practice does not violate the FLSA unless the FLSA *prohibits* it." *Id.* (citing *Christensen v. Harris Cty*, 529 U.S. 576, 588, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000)). *Christensen* illustrates the crucial distinction between statutory language that affirmatively protects or prohibits a practice and statutory language that is silent about that practice.

In *Christensen*, the plaintiffs-employees worked a substantial amount of unpaid overtime for their employer, Harris County, for which the employees accumulated "compensatory time" in lieu of cash compensation at a rate of one and a half hours for every hour of overtime worked. 529 U.S. at 579-80. The FLSA expressly authorized the use of the compensatory time but also set a statutory cap on the amount of compensatory time an employee could accrue, after which the employer would be required to pay monetary compensation for every additional hour of overtime worked. *Id.* To avoid having to pay large sums of monetary overtime compensation, Harris County enacted a policy whereby it could force its employees to use their compensatory time so that they would not reach the statutory cap. *Id.* at 580-81. The employees sued and argued that Harris County's policy violated a provision of the FLSA that required employers to reasonably accommodate employee requests to use compensatory time. *Id.* at 581 (citing 29 U.S.C. § 207(o)(5)).

The Supreme Court rejected the employees' argument because "no relevant statutory provision expressly or implicitly prohibits" the employer's policy. *Id.* at 588. As we held in *Cumbie*, the Court in *Christensen* held that

the employer's policy did not violate the FLSA because nothing in the FLSA prohibited the employer's policy. *Id.* at 585-86. The Court reasoned that "[b]ecause the statute is *silent* on this issue and because Harris County's policy is entirely compatible with [the statute]," there was no violation. *Id.* at 585 (emphasis added). Thus, just as we did in *Cumbie*, the Court in *Christensen* construed the FLSA's silence in favor of the employer.

But, critically, the Court in *Christensen* did not preclude the DOL from enacting future regulations that prohibited the challenged policy. Indeed, the Court suggested that were the agency to enact future regulations, *Chevron* deference would apply. *See id.* at 586-87. The Court noted that "[o]f course, the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation. But in this case the Department of Labor's regulation does not address the issue of compelled compensatory time." *Id.* at 587. The Court also acknowledged that the DOL had issued an opinion letter on the subject, but noted that an interpretation in an opinion letter is not entitled to *Chevron* deference because it is "not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking." *Id.* Five Justices joined this portion of the Court's opinion, including Justice Souter, who filed a single-sentence concurrence:

> I join the opinion of the Court on the assumption that it does not foreclose a reading of the Fair Labor Standards Act of 1938 that allows the Secretary of Labor to issue regulations limiting forced use.

Id. at 589 (Souter, J., concurring). The Court's comments regarding *Chevron* deference, along with Justice Souter's concurrence, suggest that the DOL, by regulation, could prohibit the very practice the Court held to be neither explicitly nor implicitly prohibited by the FLSA. Following that reasoning, *Cumbie* should not be read to foreclose the DOL's ability to subsequently issue a regulation prohibiting the challenged tip pooling practice.

Here, the Oregon district court, the Nevada district court, the parties, and the dissent overlook the part of *Christensen* that discussed *Chevron* deference and Judge Souter's concurrence. Instead, the district courts, the parties, and the dissent focus their attention on the rule from *Brand X*.

In *Brand X*, the Supreme Court held 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." 545 U.S. at 982. Relying on *Brand X*, the restaurants and casinos argued that *Cumbie* trumps the 2011 rule because *Cumbie* relied on the "clear" language of the FLSA. The district courts adopted this position. *Or. Rest. & Lodging*, 948 F. Supp. 2d at 1223; *Cesarz*, 2014 U.S. Dist. LEXIS 3094, 2014 WL 117579 at *3.

But as *Christensen* strongly suggests, there is a distinction between court decisions that interpret statutory commands and court decisions that interpret

statutory silence. Moreover, *Chevron* itself distinguishes between statutes that directly address the precise question at issue and those for which the statute is "silent." *Chevron*, 467 U.S. at 843. As such, if a court holds that a statute unambiguously protects or prohibits certain conduct, the court "leaves no room for agency discretion" under *Brand X*, 545 U.S. at 982. However, if a court holds that a statute does not prohibit conduct because it is silent, the court's ruling leaves room for agency discretion under *Christensen*.

Cumbie falls precisely into the latter category of cases—cases grounded in statutory silence. When we decided *Cumbie*, the DOL had not yet promulgated the 2011 rule. Thus, there was no occasion to conduct a *Chevron* analysis in *Cumbie* because there was no agency interpretation to analyze.[4] The *Cumbie* analysis

[4] In *Cumbie*, after citing *Jacksonville Terminal* for the "background principle" that an arrangement to turn over or redistribute tips is valid "in the absence of statutory interference," we noted that we "need not decide whether" the DOL's over forty-year-old regulations governing tips "are still valid and what level of deference they merit" "because we conclude that the meaning of the FLSA's tip credit provision is clear." 596 F.3d at 579 & n.6. However, the DOL regulations at the time did not specifically address the issue of employers who require tip pooling and do not take a tip credit. *See* 32 Fed. Reg. at 13,580; *see also Christensen*, 529 U.S. at 587. Moreover, contrary to the dissent's assertion, our characterization in *Cumbie* of the FLSA's tip credit provision as "clear" does not necessarily foreclose agency discretion. What was "clear" in *Cumbie* was that the FLSA's tip credit provision did not impose any "statutory interference" that would invalidate tip pooling when no tip credit is taken - i.e., that the FLSA was silent regarding this practice.

was limited to the text of section 203(m). After a careful reading of section 203(m) in *Cumbie*, we found that "nothing in the text of the FLSA purports to restrict employee tip-pooling arrangements when no tip credit is taken" and therefore there was "no statutory impediment" to the practice. 596 F.3d at 583. Applying the reasoning in *Christensen*, we conclude that section 203(m)'s clear silence as to employers who do not take a tip credit has left room for the DOL to promulgate the 2011 rule. Whereas the restaurants, casinos, and the district courts equate this silence concerning employers who do not take a tip credit to "repudiation" of future regulation of such employers, we decline to make that great leap without more persuasive evidence. *See United States v. Home Concrete & Supply, LLC*, 132 S. Ct 1836, 1843, 182 L. Ed. 2d 746 (2012) ("[A] statute's silence or ambiguity as to a particular issue means that Congress has . . . likely delegat[ed] gap-filling power to the agency[.]"); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222, 129 S. Ct. 1498, 173 L. Ed. 2d 369 (2009) ("[S]ilence is meant to convey nothing more than a refusal to tie the agency's hands . . . ."); *S.J. Amoroso Constr. Co. v. United States*, 981 F.2d 1073, 1075 (9th Cir. 1992) ("Without language in the statute so precluding [the agency's challenged interpretation], it must be said that Congress has not spoken to the issue.").

In sum, we conclude that step one of the *Chevron* analysis is satisfied because the FLSA is silent regarding the tip pooling practices of employers who do not take a tip credit. Our decision in *Cumbie* did not hold otherwise.

Appendix B

B. *Chevron* Step Two

Having found that the statute is silent as to the precise question at issue, we continue to step two. At *Chevron* step two, we must determine if the DOL's interpretation is reasonable. *Chevron*, 467 U.S. at 843-44. This is a generous standard, requiring deference "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 545 U.S. at 980. We may reject an agency's construction only if it is arbitrary, capricious, or manifestly contrary to the statute. *Chevron*, 467 U.S. at 844. To determine whether the DOL's interpretation is reasonable, "we look to the plain and sensible meaning of the statute, the statutory provision in the context of the whole statute and case law, and to the legislative purpose and intent." *NRDC v. United States EPA*, 526 F.3d 591, 605 (9th Cir. 2008) (citation omitted).

The DOL promulgated the 2011 rule after taking into consideration numerous comments and our holding in *Cumbie*. The AFL-CIO, National Employment Lawyers Association, and the Chamber of Commerce all commented that section 203(m) was either "confusing" or "misleading" with respect to the ownership of tips. 76 Fed. Reg. at 18840-41. The DOL also considered our reading of section 203(m) in *Cumbie* and concluded that, as written, 203(m) contained a "loophole" that allowed employers to exploit the FLSA tipping provisions. *Id.* at 18841. It was certainly reasonable to conclude that clarification by the DOL was needed. The DOL's clarification—the 2011 rule—was a reasonable response to these comments and relevant case law.

Appendix B

The legislative history of the FLSA supports the DOL's interpretation of section 203(m) of the FLSA. An "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen [and women] involved in drafting and studying proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76, 105 S. Ct. 479, 83 L. Ed. 2d 472 (1984) (citation and internal quotation marks omitted). On February 21, 1974, the Senate Committee published its views on the 1974 amendments to section 203(m). S. Rep. No. 93-690 (1974).

Employer-Appellees argue that the report reveals an intent contrary to the DOL's interpretation because the report states that an "employer will lose the benefit of [the tip credit] exception if tipped employees are required to share their tips with employees who do not customarily and regularly receive tips[.]" In other words, Appellees contend that Congress viewed the ability to take a tip credit as a benefit that came with conditions and should an employer fail to meet these conditions, such employer would be ineligible to reap the benefits of taking a tip credit. While this is a fair interpretation of the statute, it is a leap too far to conclude that Congress clearly intended to deprive the DOL the ability to later apply similar conditions on employers who do not take a tip credit.

Moreover, the surrounding text in the Senate Committee report supports the DOL's reading of section 203(m). The Committee reported that the 1974 amendment "modifies section [20]3(m) of the Fair Labor Standards Act

by requiring . . . that all tips received be paid out to tipped employees." S. Rep. No. 93-690, at 42. This language supports the DOL's statutory construction that "[t]ips are the property of the employee whether or not the employer has taken a tip credit." 29 C.F.R. § 531.52. In the same report, the Committee wrote that "tipped employee[s] should have stronger protection," and reiterated that a "tip is . . . distinguished from payment of a charge . . . [and the customer] has the right to determine who shall be the recipient of the gratuity." S. Rep. No. 93-690, at 42.

In 1977, the Committee again reported that "[t]ips are not wages, and under the 1974 amendments tips must be retained by the employees . . . and cannot be paid to the employer *or* otherwise used by the employer to offset his wage obligation, except to the extent permitted by section [20]3(m)." S. Rep. No. 95-440 at 368 (1977) (emphasis added). The use of the word "or" supports the DOL's interpretation of the FLSA because it implies that the only acceptable use by an employer of employee tips is a tip credit.

Additionally, we find that the purpose of the FLSA does not support the view that Congress clearly intended to permanently allow employers that do not take a tip credit to do whatever they wish with their employees' tips. The district courts' reading that the FLSA provides "specific statutory protections" related only to "substandard wages and oppressive working hours" is too narrow. As previously noted, the FLSA is a broad and remedial act that Congress has frequently expanded and extended.

Considering the statements in the relevant legislative history and the purpose and structure of the FLSA, we find that the DOL's interpretation is more closely aligned with Congressional intent, and at the very least, that the DOL's interpretation is reasonable.

CONCLUSION

To be clear, we have no quarrel with *Cumbie v. Woody Woo Inc.*, 596 F.3d 577 (9th Cir. 2010). Our conclusion with respect to *Cumbie* is only that its holding was grounded in statutory silence. Following *Christensen v. Harris Cty.*, 529 U.S. 576, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000), we find that *Cumbie* does not foreclose the DOL's ability to regulate tip pooling practices of employers who do not take a tip credit.

Applying *Chevron*, we conclude that Congress has not addressed the question at issue because section 203(m) is silent as to the tip pooling practices of employers who do not take a tip credit. There is no convincing evidence that Congress's silence, in this context, means anything other than a refusal to tie the agency's hands. In exercising its discretion to regulate, the DOL promulgated a rule that is consistent with the FLSA's language, legislative history, and purpose.

Therefore, having decided that the regulation withstands *Chevron* review, we reverse both judgments and remand for proceedings consistent with this opinion.

REVERSED and REMANDED.

Appendix B

DISSENT

N.R. SMITH, Circuit Judge, dissenting:

Colleagues, even if you don't like circuit precedent, you must follow it. Afterwards, you call the case *en banc*. You cannot create your own contrary precedent.[1]

This case is nothing more than *Cumbie II*. Because the majority ignores our precedent in *Cumbie v. Woody Woo, Inc.* ("*Cumbie*"), 596 F.3d 577 (9th Cir. 2010), I begin by describing it in some detail. I will then compare *Cumbie* to this case.

In *Cumbie*, a waitress working at an Oregon restaurant sued the restaurant, alleging that its tip-pooling arrangement violated 29 U.S.C. § 203(m). *Id.* at 579.

> [The restaurant] paid its servers a cash wage at or exceeding Oregon's minimum wage, which at the time was $2.10 more than the federal minimum wage. In addition to this cash wage, the servers received a portion of their daily tips. [The restaurant] required its servers to contribute their tips to a "tip pool" that was

[1] As a three-judge panel of this circuit, we are bound by prior panel opinions and can only reexamine them when "the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (*en banc*). Here, our circuit precedent is clear and there has been no intervening higher authority. Therefore, we are bound to follow precedent.

> redistributed to all restaurant employees. The largest portion of the tip pool (between 55% and 70%) went to kitchen staff (*e.g.*, dishwashers and cooks), who are not customarily tipped in the restaurant industry. The remainder (between 30% and 45%) was returned to the servers in proportion to their hours worked.

Id. at 578-79 (footnotes omitted). The district court dismissed the waitress's complaint for failure to state a claim, and she timely appealed. *Id.* at 579.

On appeal, the waitress argued the restaurant's tip-pooling arrangement was invalid, because it included employees who were not "customarily and regularly tipped employees" under section 203(m). *Id.* The restaurant argued that this interpretation of section 203(m) was correct only "vis-à-vis employers who take a 'tip credit' toward their minimumwage obligation," and that, because the restaurant had not taken a tip credit, it had not violated section 203(m). *Id.*

We affirmed the district court, relying on the precedent established by the Supreme Court in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 62 S. Ct. 659, 86 L. Ed. 914 (1942). *Cumbie*, 596 F.3d at 579. In *Williams*, the Supreme Court held that "[i]n businesses where tipping is customary, the tips, in the absence of an explicit contrary understanding, belong to the recipient. Where, however, [such] an arrangement is made . . . , in the absence of statutory interference, no reason is perceived for its invalidity." *Williams*, 315 U.S. at 397 (internal citations

omitted). Thus, "*Williams* establish[ed] the default rule that an arrangement to turn over or to redistribute tips is presumptively valid." *Cumbie*, 596 F.3d at 579.

We also held, as a matter of first impression, that section 203(m) did not interfere with the default rule articulated in *Williams*. *Id.* at 580-81. Employers (who do not take a tip credit) remain free to contract with their tipped employees to redistribute tips among all employees, including those who are not customarily tipped. *Cumbie*, 596 F.3d at 579-81. We reasoned that section 203(m) did not impose statutory interference, because the plain text of section 203(m) had only imposed a *condition* on employers who take a tip credit, rather than a blanket *requirement* on all employers regardless of whether they take a tip credit. *Cumbie*, 596 F.3d at 581. As we concluded, "[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." *Id.* We continued:

> If Congress wanted to articulate a general principle that tips are the property of the employee [when the employer does not take a tip credit], it could have done so without reference to the tip credit. "It is our duty to give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-39, 75 S.Ct. 513, 99 L.Ed. 615 (1955) (internal quotation marks omitted). Therefore, we decline to read [section 203(m)] in such a way as to render its reference to the tip credit, as well as its conditional language and structure, superfluous.

Id. Because the restaurant in *Cumbie* did not take a tip credit, there was no basis for concluding that the restaurant's tippooling arrangement violated section 203(m). *Id.*

Lastly, we addressed the waitress's argument that the restaurant was functionally taking a tip credit by using a tippooling arrangement to subsidize the wages of its non-tipped employees. *Id.* at 582. We said, even if this were the case, this "de facto" tip credit was not "so absurd or glaringly unjust as to warrant a departure from the plain language of the statute." *Id.* (quoting *Ingalls Shipbuilding v. Director, Office of Workers' Compensation Programs, DOL*, 519 U.S. 248, 261, 117 S. Ct. 796, 136 L. Ed. 2d 736 (1997)). We recognized that "[t]he purpose of the [Fair Labor Standards Act ("FLSA")] is to protect workers from 'substandard wages and oppressive working hours,'" and concluded that the restaurant's tip-pooling arrangement did not thwart that purpose. *Id.* (quoting *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981)). Thus, because "[t]he Supreme Court has made it clear that an employment practice does not violate the FLSA unless the FLSA *prohibits* it," we rejected the waitress's argument and concluded that the FLSA does not restrict employee tip-pooling arrangements when the employer does not take a tip credit. *Id.* at 583.

We now decide a case identical to *Cumbie*. Once again, an Oregon restaurant (named aptly enough "Oregon Restaurant") is defending its practice of pooling the tips of its tipped employees and redistributing those tips

among all of its employees, including those who are not customarily tipped. Exactly like *Cumbie*, the restaurant is paying all of its employees above minimum wage and has not taken a tip credit. Again, its tipped employees are challenging that practice—not under a new theory, but under the same theory advanced in *Cumbie*. Again, they argue that section 203(m) prohibits the redistribution of tips.[2] Because we are obligated to follow precedent, this case should have ended with a memorandum disposition.

Instead, the majority ignores our circuit precedent and pretends this case is different, because this time the Department of Labor ("DOL") has promulgated a new rule interpreting section 203(m) differently than we interpreted it in *Cumbie*. However, the DOL's promulgation of this new rule changes nothing. As the majority notes, if Congress's intent behind a statute is clear, that is the end of our inquiry. We need not defer to an agency's interpretation of this statute. Maj. Op. at 13-14; *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

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[2] Technically, rather than waiting to be sued by its tipped employees, Oregon Restaurant is instead suing the Department of Labor in response to its newly promulgated rule reinterpreting section 203(m). Nonetheless, in *Cesarz v. Wynn Las Vegas* (the other case in this appeal), involving a casino instead of a restaurant, the tipped casino dealers are indeed suing the casino just as the waitress in *Cumbie* sued the restaurant. Thus, the facts and procedural posture in both cases remain functionally identical to those in *Cumbie*.

Appendix B

No one disputes that the courts can determine whether a statute is clear. In fact, the Supreme Court has held that a prior judicial construction of a statute "trumps an agency construction otherwise entitled to *Chevron* deference" when "the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.* ("*Brand X*"), 545 U.S. 967, 982, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005). The majority wants to dodge the *Brand X* bullet by saying *Cumbie* did not determine that the meaning of section 203(m) is clear and unambiguous, but instead only determined that "nothing in the text purports to restrict" the practice of redistributing tips, thereby leaving room for agency interpretation. Maj. Op. at 15, 18-19 (quoting *Cumbie*, 596 F.3d at 583). This interpretation of *Cumbie* has no merit. 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. We explicitly concluded that section 203(m) is "clear" or "plain" multiple times—not only in the footnotes to the opinion, but also in the text of the opinion itself. *Cumbie*, 596 F.3d at 579 n.6, 580-81, 581 n.11. Moreover, because the language of the statute was clear and unambiguous, we expressly concluded there was no need to refer to the legislative history. *Id.* at 581 n.11. If there were any remaining question concerning the plain language of the statute, we clearly stated that any alternate reading would render its language and structure superfluous. *Id.* at 581. Indeed, there has not been penned a stronger application of the *Brand X* standard than the majority encounters in

Cumbie. If *Cumbie* did anything at all, it held that the meaning of section 203(m) was clear and unambiguous.[3]

The majority next tries to dodge *Cumbie* by suggesting section 203(m) is silent as to whether the DOL can regulate tip pooling arrangements of employers who do *not* take a tip credit. *Cumbie* addressed this "statutory silence" argument squarely: according to the plain text of the statute, section 203(m) only applies to employers who *do* take a tip credit (because they are not paying the minimum wage), and therefore does not apply to employers who *do not* take a tip credit. Nowhere in its text, either explicitly or implicitly, does section 203(m) impose a blanket tipping requirement on all employers. We explained, "[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." *Cumbie*, 596 F.3d at 581. There is no contrived ambiguity to address in section 203(m). Contrary to the majority opinion, *Christensen* has no validity here. Maj. Op. at 15; *see Christensen v. Harris Cty.*, 529 U.S. 576, 588, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000).[4]

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[3] The majority counters that "[w]hat was 'clear' in *Cumbie* was that the FLSA's tip credit provision did not impose any 'statutory interference' that would invalidate tip pooling when no tip credit is taken." Maj. Op. at 18-19, n.4. Read *Cumbie;* the majority is wrong. Instead, we explicitly held in *Cumbie* that section 203(m) does not apply to employers who do not take a tip credit, and that any alternate reading would render its language and structure superfluous. *Cumbie*, 596 F.3d at 581.

[4] The majority states "the dissent overlook[s] the part of *Christensen* that discussed *Chevron* deference and Judge Souter's concurrence." Maj. Op. at 17.

Even if *Christensen* were relevant, the majority's interpretation of *Christensen* turns *Chevron* on its head. Instead of requiring that administrative rulemaking be rooted in a congressional delegation of authority, the majority claims that, where a statute is "silent," administrative regulation is not prohibited. In other words, the majority suggests an agency may regulate wherever that statute does not forbid it to regulate. This suggestion has no validity. The Supreme Court 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. *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2445, 189 L. Ed. 2d 372 (2014) ("Agencies exercise discretion only in the interstices created by statutory silence or ambiguity . . . ."). If it were otherwise, within each statute granting administrative authority, Congress would need to erect walls, making it clear that the agency is limited to regulating only that which the statute expressly addresses, or implies *within* those parameters. As the district court below correctly noted, "[t]o express its intention that certain activities be left free from regulation, Congress need not lace the United States Code with the phrase,

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Again, the majority is wrong. In *Christensen*, the Supreme Court allowed the DOL to enact further regulation over compensatory time, because the DOL had been given the express authority to do so. *Christensen*, 529 U.S. at 580-81. However, under section 203(m), the DOL has only been given authority to regulate the tips of employers who take a tip credit. The DOL has not been given authority to regulate the tips of employers who pay their employees a minimum wage and do not take a tip credit. Therefore, unlike *Christensen*, there was no statutory silence permitting the DOL further regulation of this issue.

'You shall not pass!'" *Oregon Rest. & Lodging v. Solis*, 948 F.Supp. 2d 1217, 1225-26 (D. Oreg. 2013). Thus, because section 203(m) is "silent" to regulation over employers who do not take a tip credit, any such regulation falls outside of the scope of the statute and the DOL has no power to regulate there. *See City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1868, 185 L. Ed. 2d 941 (2013) ("No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.* ").

It is curious why the majority seizes on the DOL's newly promulgated rule as the basis for its decision. The argument the DOL makes now was the same argument made in *Cumbie*.[5] However in *Cumbie*, the waitress ultimately "recogniz[ed] that section 203(m) [was] of no assistance" in prohibiting employers (who do not take a tip credit) from pooling their employees' tips and "disavowed reliance on it in her reply brief and at oral argument" in favor of an alternative, albeit equally meritless argument. *Cumbie*, 596 F.3d at 581. Now, after losing in *Cumbie*, the DOL has decided to go through the backdoor by promulgating a new rule codifying its argument in *Cumbie* and its preferred interpretation of section 203(m).

Chevron deference does not work that way. The DOL is not a legislative body unto itself, but instead must carry out Congress's intent. *Chevron*, 467 U.S. at

[5] The DOL supported the waitress's appeal in *Cumbie* by filing an amicus brief.

842-43. To the extent Congress's intent is unclear with regard to a particular statute, the DOL may engage in statutory interpretation and issue rules. *Id.* But that circumstance is not presented here. Instead, we explicitly and unequivocally found section 203(m) clear and unambiguous. Congress's intent was clear on this matter. Regardless of how much the DOL dislikes the interpretation, it must follow it. *See Brand X*, 545 U.S. at 982. The DOL is not free to manufacture an ambiguity, which circuit precedent mandates is not there.

CONCLUSION

There are two cases before us. In the first case, the Oregon Restaurant and Lodging Association sued the DOL, challenging the validity of its newly promulgated rule and seeking to enjoin its enforcement. In the second case, a group of casino dealers sued their employer, Wynn Las Vegas, LLC, challenging its tip pooling practice as a violation of the DOL's new rule. In both of these cases, the employer paid its employees above minimum wage and did not take a tip credit. In both cases, the district court ruled in favor of the employer, relying in large measure on our decision in *Cumbie*.

Our course is clear in both cases. *Williams* is still good law; the Supreme Court has done nothing to overturn or alter it. *See Williams*, 315 U.S. at 397. Thus, the rule remains that tips belong to the tipped employee unless otherwise agreed between the employee and the employer. Here, such agreements existed between the employers and their respective employees. These tip redistribution agreements are presumptively valid and

compliant with our circuit's law. Thus, in each case, we ought to be affirming the district court. To do otherwise is to ignore circuit precedent and disregard stare decisis, as the majority does here.

I respectfully dissent.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, PORTLAND DIVISION, FILED JUNE 7, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

No. 3:12-cv-01261-MO

OREGON RESTAURANT AND LODGING, *et al.*,

Plaintiffs,

v.

HILDA L. SOLIS, *et al.*,

Defendants.

June 7, 2013, Decided
June 7, 2013, Filed

Judges: MICHAEL W. MOSMAN, United States District Judge.

OPINION AND ORDER

MOSMAN, J.,

Tip pooling is the practice of collecting all tips from tipped employees so that they can be redistributed among a group. Until recently, employers could contract with

their tipped employees to include non-tipped employees in the tip pool. This allowed employers to set up employment arrangements that incentivized and rewarded the whole line of service, including employees, like cooks and dishwashers, who were not customarily or regularly tipped.

In 2011, the Department of Labor ("DOL") issued regulations that target the use of tips by the employers of tipped employees. The new regulations prohibit employers from contracting with their tipped employees to include non-tipped employees in the tip pool. The central question before the Court is whether these regulations are valid under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), and its progeny. Because I find that Congress has directly spoken to the precise question at issue, defendants' motion for summary judgment [25] is DENIED and plaintiffs' cross-motion for summary judgment [26] is GRANTED.

BACKGROUND

I. The Fair Labor Standards Act

The Fair Labor Standards Act ("FLSA") was enacted "to protect all covered workers form substandard wages and oppressive working hours." *Barrentine v. Ark.-Best Freight Sys. Inc.*, 450 U.S. 728, 739, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981). Under the FLSA, employers must pay their employees a minimum wage. *See* 29 U.S.C. § 206(a) ("Section 6(a)"). The FLSA's definition of the term "wage,"

in turn, recognizes that under certain circumstances, an employer of tipped employees may credit a portion of its employees' tips against its minimum wage obligation, a practice commonly referred to as taking a "tip credit." *See id.* § 203(m) ("Section 3(m)"). Section 3(m) provides in relevant part:

> 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—
>
> > (1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and
> >
> > (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.
>
> 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.

Id.

Each sentence of Section 3(m) contributes an essential piece to its overall meaning. The first sentence requires an employer to pay a tipped employee an amount equal to (1) a cash wage of at least $2.13,[1] plus (2) an additional amount in tips equal to the federal minimum wage minus such cash wage.[2] The second sentence clarifies that the difference between the federal minimum wage and the cash wage may not be greater than the value of tips actually received. Therefore, if the cash wage plus the value of tips actually received does not meet the federal minimum wage, the employer must supplement the cash wage. The third sentence states that the preceding two sentences shall not apply—i.e., the employer may not take a tip credit—unless two conditions are satisfied: (1) the employer must inform the employee of the tip-credit provisions of Section 3(m), and (2) the employee must be allowed to retain all tips, except where the employee participates in a tip pool with other customarily and regularly tipped employees. *See Cumbie v. Woody Woo, Inc.*, 596 F.3d 577, 579-80 (9th Cir. 2010)

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[1] *See* 29 U.S.C. §§ 203(m), 206(a)(1) (1996).

[2] *See* 29 U.S.C. § 206(a)(1).

II. *Woody Woo*

In *Cumbie v. Woody Woo, Inc.*, the Ninth Circuit carefully analyzed Section 3(m) and found that it was plain and clear. The question presented in *Woody Woo* was whether a restaurant violated the FLSA when, despite paying a cash wage above the minimum wage, it required its wait staff to participate in a tip pool that redistributed a portion of their tips to the kitchen staff. *Id.* at 578. The district court dismissed the plaintiff's suit based on the plain meaning of Section 3(m), and the Ninth Circuit affirmed the district court on appeal.

The Court began its analysis by underscoring an important background principle: "In business where tipping is customary, the tips, in the absence of an explicit contrary understanding, belong to the recipient. Where, however, [such] an arrangement is made . . . , in the absence of statutory interference, no reason is perceived for its invalidity." *Id.* at 579 (quoting *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 397, 62 S. Ct. 659, 86 L. Ed. 914 (1942) (internal citations omitted)).

The Court then rejected the plaintiff's argument that "an employee must be allowed to retain all of her tips—except in the case of a 'valid' tip pool involving only customarily tipped employees—regardless of whether her employer claims a tip credit." *Id.* at 580. "[W]e 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." *Id.* 581 (emphasis in original).

As the Court observed, "[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" *Id.* (emphasis in original).

The Court found support for its holding in the text of Section 3(m) for two additional reasons. First, "[i]f Congress wanted to articulate a general principle that tips are the property of the employee absent a 'valid' tip pool, it could have done so without reference to the tip credit." *Id.* Second, noting the obligation to give effect, if possible, to every clause and word of a statute, the Court "decline[d] to read the third sentence in such a way as to render its reference to the tip credit, as well as its conditional language and structure, superfluous." *Id.* For these reasons, the Court refused to "resort to legislative history to cloud [the] statutory text." *Id.* at 581 n.11 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 147-48, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994)).

III. The Challenged Regulations

In 1974, Congress passed amendments to the FLSA, including a substantive amendment to Section 3(m). At that time, Congress also granted the Secretary of Labor the authority "to prescribe necessary rules, regulations, and orders" to implement the 1974 amendments. Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76 (1974).

Section 3(m) has remained essentially unchanged since 1974, and for several decades, the Secretary of Labor did not initiate any rulemakings with regard to the tip credit. That period of inactivity ended in 2008, when the

Appendix C

DOL issued a Notice of Proposed Rulemaking, proposing changes to several DOL regulations that interpret the FLSA. *See* 73 Fed. Reg. 43,654 (July 28, 2008) (the "2008 NPR"). The purpose of the proposed rule was to update the regulations to incorporate amendments to the FLSA, the legislative history, subsequent court decisions, and the DOL's interpretations. *Id.* at 43,654, 43,659. In discussing the changes to Section 3(m), the DOL explained that:

> Section 3(m) provides the only method by which an employer may use tips received by an employee to satisfy the employer's minimum wage obligation. An employer's only options under section 3(m) are to take a credit against the employee's tips of up to the statutory differential, or to pay the entire minimum wage directly. . . .
>
> . . .
>
> The proposed rule updates the regulations to incorporate the 1974 amendments, the legislative history, subsequent court decisions, and the Department's interpretations. Sections 531.52, 531.55(a), 531.55(b), and 531.59 eliminate references to employment agreements providing either that tips are the property of the employer or that employees will turn tips over to their employers, and clarify that the availability of the tip credit provided by section 3(m) requires that all tips received must be paid out to tipped employees in accordance with the 1974 amendments.

Id. at 43,659-60. To that end, the proposed rule stated in relevant part that

> Where an employee is being paid wages no more than the minimum wage, the employer is prohibited from using an employee's tips for any reason other than to make up the difference between the required cash wage paid and the minimum wage or in furtherance of a valid tip pool.

Id. at 43,667.

On April 5, 2011, the DOL issued new regulations based on the 2008 NPR. *See* 76 Fed. Reg. 18,832 (Apr. 5, 2011). The preamble to these regulations addresses the Ninth Circuit's opinion in *Woody Woo*, which was decided after the publication of the 2008 NPR but before the publication of the final regulations. The DOL stated that it "respectfully believe[d] that *Woody Woo* was incorrectly decided" and that "[t]he Ninth Circuit's 'plain meaning' construction [was] unsupportable." *Id*. at 18,841-42. The DOL also staked out its current position: "The fact that section 3(m) does not expressly address the use of an employee's tips when a tip credit is not taken leaves a 'gap' in the statutory scheme, which the Department has reasonably filled through its longstanding interpretation of section 3(m)." *Id*. at 18,841.

Accordingly, the new regulations purport to "make clear that tips are the property of the employee, and that section 3(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." *Id.* at 18,842. Specifically, the new regulations made three relevant changes. First, the DOL replaced this language:

> In the absence of an agreement to the contrary between the recipient and a third party, a tip becomes the property of the person in recognition of whose service it is presented by the customer.

with the following language:

> 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.

Compare 32 Fed. Reg. 13,575, 13,580 (1967) *with* 29 C.F.R. § 531.52. Second, the DOL added the following language to § 531.54:

> [V]alid mandatory tip pools . . . can only include those employees who customarily and regularly receive tips. However, an employer . . . may not retain any of the employees' tips for any other purpose.

Compare 32 Fed. Reg. 13,575, 13,580 (1967) *with* 29 C.F.R. § 531.54. Third, the DOL replaced this language:

> Under employment agreements requiring tips to be turned over or credited to the employer to be treated by him as part of his gross receipts, it is clear from the legislative history that the employer must pay the employee the full minimum hourly wage, since for all practical purposes the employee is not receiving tip income.

with the following language:

> With the exception of tips contributed to a valid tip pool as described in § 531.54, the tip credit provisions of section 3(m) also require employers to permit employees to retain all tips received by the employee.

Compare 32 Fed. Reg. 13,575, 13,581 (1967) *with* 29 C.F.R. § 531.59. These changes are the subject of plaintiffs' challenge in this lawsuit.

LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In challenges to final agency action, however, the court does not employ the usual summary judgment standard for determining whether a

genuine issue of material fact exists. The reason for this variance is that the court does not generally resolve facts in reviewing final agency action. *See Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769-70 (9th Cir. 1985). Instead, "the function of the district court [at summary judgment] is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Id.* at 769.

ANALYSIS

Under the canonical formulation of *Chevron*, a court must adopt an agency's interpretation of a statute it administers if Congress has not directly spoken "to the precise question at issue" and if the "agency's answer is based on a permissible construction of the statute." 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694. Here, the parties raise the three classic *Chevron* questions: First, whether the DOL was authorized to issue the challenged regulations; second, whether Congress has directly spoken to the precise question at issue; and third, whether the DOL's answer is based on a permissible construction of the FLSA.

I. Authority to Regulate

Not every agency interpretation is entitled to *Chevron* deference. At *Chevron* Step Zero, the court applies *Chevron* deference only when (1) "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," and (2) "the agency interpretation claiming deference was promulgated in the

exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001).

Despite the frequency with which courts cite *Mead*, it was unclear until recently whether a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority. The Supreme Court has now answered that question in the affirmative. *See City of Arlington v. FCC*, 569 U.S. , 133 S. Ct. 1863, 185 L. Ed. 2d 941, 950, 2013 WL 2149789 (2013). As the Court held in *City of Arlington*, "[n]o matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority." Id.* (emphasis in original).

In the briefing and at oral argument, the parties presented thoughtful arguments as to whether Congress delegated authority to the DOL to regulate the particular question before the Court. In light of *City of Arlington*, that inquiry now appears to be much more direct. In 1974, Congress granted the Secretary of Labor the authority "to prescribe necessary rules, regulations, and orders with regard to the [1974] amendments," which included an amendment to Section 3(m). Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76. This is a general conferral of rulemaking authority, and as the Supreme Court has cautioned, there has not yet been «a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." *City of Arlington*, 185 L. Ed. 2d 941, 2013 WL 2149789,

at *10. This will not be the first case to so find. Here, the DOL exercised a general conferral of rulemaking authority within its substantive field. I therefore proceed to *Chevron* Step One.

II. *Chevron* Step One: The Precise Question at Issue

At *Chevron* Step One, the court asks "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." *Chevron*, 467 U.S. at 842-43.

A. *The* Brand X *Standard*

Fortuitously, the Ninth Circuit has already pored over the text of Section 3(m) to discern Congressional intent on the very question presented here. In *Woody Woo*, the plaintiff argued that under Section 3(m), "an employee must be allowed to retain all of her tips—except in the case of a 'valid' tip pool involving only customarily tipped employees—regardless of whether her employer claims a tip credit."[3] 596 F.3d at 580. The Ninth Circuit disagreed.

In rejecting the plaintiff's argument, the Court emphasized Section 3(m)'s "clear" and "plain" language at least four times. First, the Court held that "the plain text of the third sentence . . . imposes *conditions* on taking a tip credit and does not state freestanding *requirements* pertaining to all tipped employees. A statute

[3] This was also the DOL's argument as an amicus curiae at that time, and it remains the DOL's argument today.

that provides that a person must do *X in order to achieve Y* does not mandate that a person must do *X*, period." *Id.* at 581 (emphasis in original). Second, responding to plaintiff's legislative history arguments, the Court noted that it "do[es] not resort to legislative history to cloud a statutory text that is clear." *Id.* at 581 n.11. Third, the Court "conclude[d] that the meaning of the FLSA's tip credit provision is clear." *Id.* at 579 n.6. Fourth, detecting no "ambiguity or . . . irreconcilable conflict with another statutory provision," the Court refused to "'alter the text [of Section 3(m)] in order to satisfy the policy preferences' of Cumbie and [the DOL]." *Id.* at 583 (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002)).

The fact that the Ninth Circuit has previously interpreted Section 3(m) does not end my inquiry, however. "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." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

Here, the DOL argues that *Woody Woo* does not satisfy the *Brand X* standard for two reasons. First, the DOL argues that *Woody Woo* cannot satisfy *Brand X* because the new regulations were promulgated two years after the Ninth Circuit's decision. (Defs.' Mem. [25] at 13.) Apparently, the DOL believes that this sequence of constructions is atypical for a *Brand X* case. It is not.

Second, the DOL argues that under *Woody Woo*, Section 3(m) applies only to employers who take a tip credit. According to the DOL, both *Woody Woo* and Section 3(m) are silent with regard to employers who do not take a tip credit. Therefore, *Woody Woo* does not control my analysis, Section 3(m) is ambiguous regarding employers who do not take a tip credit, and the new regulations are entitled to *Chevron* deference. (Defs.' Reply [29] at 5-9.)

I cannot agree. *Woody Woo* squarely addressed the question of whether Congress intended to limit the use of tips by the employers of tipped employees when no tip credit is taken. The Court was presented with the very argument made by the DOL in this action, "that under section 203(m), an employee must be allowed to retain all of her tips—except in the case of a 'valid' tip pool involving only customarily tipped employees—regardless of whether her employer claims a tip credit." *Woody Woo*, 596 F.3d at 580. And the Court didn't buy it. Rather, based on the clear and unambiguous text of the statute, the Court found that Congress intended *only* to limit the use of tips by employers when a tip credit is taken. *Id.* at 580-83. This is not silence. This is repudiation. Therefore, I find that *Woody Woo* leaves no room for agency discretion here.

B. *The Text of Section 3(m)*

Even were I free to disregard *Woody Woo*, which I am not, I would reach the same conclusion regarding Congressional intent on the precise question at issue. The text of Section 3(m) is clear and unambiguous: It imposes conditions on employers that take a tip credit but does not impose a freestanding requirement 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." *Id.* at 581 (emphasis in original).

Moreover, "[i]f Congress wanted to articulate a general principle that tips are the property of the employee absent a 'valid' tip pool, it could have done so without reference to the tip credit." *Id.* This assumption is reinforced by the fact that when Congress enacted the 1974 amendments, it understood that the Supreme Court had already held that private agreements between employers and employees with regard to the allocation of tips were lawful. *See Jacksonville Terminal*, 315 U.S. at 397.

Finally, I decline to read Section 3(m) "in such a way as to render its reference to the tip credit, as well as its conditional language and structure, superfluous." *Woody Woo*, 596 F.3d at 581. The third sentence of Section 3(m) states that if an employer takes a tip credit, the employee must be allowed to retain all her tips, except where she participates in a "valid" tip pool. There would be no need to make such a statement if Congress intended that an employee always retain her tips.

C. *The Purpose and General Structure of the FLSA*

In addition to the text of Section 3(m), the purpose and general structure of the FLSA suggest that Congress did not intend to limit an employer's use of tips when no tip credit is taken. As previously noted, the FLSA was enacted "to protect all covered workers from substandard wages and oppressive working hours." *Barrentine*, 450

U.S. at 739. To that end, the FLSA includes specific statutory protections. *See* 29 U.S.C. §§ 206, 207, 211, 212. What is more, the Supreme Court has made clear that an employment practice does not violate the FLSA unless the FLSA *prohibits* it. *See Christensen v. Harris Cnty*, 529 U.S. 576, 588, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000). The FLSA is thus an Act of defined scope.

The most relevant statutory protection here is Section 6(a), which requires employers to pay their employees at least the federal minimum wage. *See* 29 U.S.C. § 206. Section 3(m) defines the term "wage" under the FLSA and allows for certain credits to meet the minimum wage rate specified in Section 6(a)(1). *See id.* § 203(m). The relationship between these provisions implies that Congress has given employers a choice: 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). Under either scenario, the employee's right to the federal minimum wage is protected and the purposes of the FLSA are fulfilled.

The new regulations prohibit the use of tips by an employer even when the employer does not take a tip credit—i.e., even when the employer pays at least the full minimum wage. In so doing, the new regulations do not protect covered workers from substandard wages or oppressive working hours, nor do they vindicate any of the FLSA's specific statutory protections. In light of the Supreme Court's holding that an employment practice does not violate the FLSA unless the FLSA actually prohibits it, *Christensen*, 529 U.S. at 588, I presume that

Congress intended not to add a new statutory protection guaranteeing a tipped employee who receives the full minimum wage the additional right to retain all tips, except where she participates in a "valid" tip pool.

D. *Silence*

In large part, the DOL's argument hinges on silence. According to the DOL, Section 3(m) is silent regarding an employer's use of tips when no tip credit is taken. That is, the FLSA does not authorize the unfettered use of tips when no tip credit is taken, nor does it expressly prohibit the DOL from regulating tips under such circumstances. (Defs.' Reply [29] at 5-6.) Therefore, Congress has not directly spoken to the precise question at issue, and I need only ask whether the DOL's construction is reasonable. *See Chevron*, 467 U.S. at 843 ("[I]f 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.") (emphasis added).

Chevron and its progeny make clear that discerning Congressional intent is more nuanced than the DOL suggests. To express its intention that certain activities be left free from regulation, Congress need not lace the United States Code with the phrase, "You shall not pass!" Instead, "[i]f a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9 (emphasis added). The interpretive problem, then, is "that of deciding

whether, or when, a particular statute in effect delegates to an agency the power to fill a gap, thereby implicitly taking from a court the power to void a reasonable gap-filling interpretation." *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843, 182 L. Ed. 2d 746 (2012) (plurality opinion).

Gaps can be explicit or implicit. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843-44. For example, the Supreme Court found an explicit gap in a section of the FLSA that included the phrase "as such terms are defined and delimited by regulations of the Secretary [of Labor]." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 162, 127 S. Ct. 2339, 168 L. Ed. 2d 54 (2007) (quoting 29 U.S.C. § 213(a)(15)).

Similarly, if Congress has implicitly left a gap for the agency to fill, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844. In *Chevron*, for example, the Supreme Court found that Congress had left an implicit gap with the ambiguous term "stationary source." *Id.* at 866. Significantly, the Court reached this conclusion only after employing the tools of statutory construction.

Here, the DOL concedes that Section 3(m) contains no explicit gap. The $64,000 question, then, is whether the absence of language regarding an employer's use of tips when no tip credit is taken amounts to an implicit gap left

for the agency to fill or an area where Congress intended free economic choice. 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. In its view, the text of Section 3(m) is an afterthought. It does not matter that "section 3(m) applies only to those employers who take a tip credit toward their minimum wage obligation." (Defs.' Reply [29] at 5.) If Congress did not come out and say that the DOL cannot regulate an employer's use of tips when no tip credit is taken, that should be the end of my inquiry.

The Court's ability to discern Congressional intent is not so limited. Congressional silence often signifies unclear intent. But not here. Employing traditional tools of statutory construction, as I have done above, the intent of Congress in Section 3(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.

* * *

Based on my alternative findings that *Woody Woo* leaves no room for agency discretion and that the intent of Congress is clear, I conclude that the new regulations are invalid at *Chevron* Step One. As a result, I decline to reach plaintiffs' challenges under *Chevron* Step Two and 5 U.S.C. § 553(b).

Appendix C

CONCLUSION

The DOL is concerned that "if there are no restrictions on an employer's use of its employees' tips when it does not utilize a tip credit, the employer can . . . mandate that employees turn over all of their tips and use those tips to pay the minimum wage or for any other purpose." 76 Fed. Reg. 18,832, 18,842; (Defs.' Mem. [25] at 15.) Although this is technically true, one suspects that most employers would find such business practices unwise. In an industry where tipping is the norm, employers who forced tipped employees to surrender all of their tips would remove a major incentive for good service. Tipped employees' performance would deteriorate, customer satisfaction would decline, and the employers' profits would decrease. In any event, the court "will not alter the text [of a statute] in order to satisfy the policy preferences of the [Secretary of Labor]." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002).

For the foregoing reasons, defendants' motion for summary judgment [25] is DENIED and plaintiffs' cross-motion for summary judgment [26] is GRANTED.

IT IS SO ORDERED.

DATED this 7th day of June, 2013.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
United States District Judge