From: Scalia, Eugene
To: Geale, Nicholas C. - SOL
Subject: FW: Nat"l Restaurant Ass"n and Wynn "tip-pooling" cases
Date: Friday, March 17, 2017 4:18:24 PM
Attachments: Gibson Dunn memo to Acting Solicitor General.pdf

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As promised, Nick. Look forward to seeing you Tues.

From: Scalia, Eugene
Sent: Friday, March 17, 2017 3:53 PM
To: Yang, Anthony (OSG) <(b) (6) [redacted]>
Cc: Estrada, Miguel A. <(b) (6) [redacted]>; Lipshutz, Joshua S. <(b) (6) [redacted]>; Huston, Michael R. <(b) (6) [redacted]>
Subject: Nat'l Restaurant Ass'n and Wynn "tip-pooling" cases

Mr. Yang, in anticipation of our meeting Tuesday, attached is a memorandum regarding these two cases. Please share with your colleagues as appropriate. (I will forward to NRA's counsel.)

We look forward to seeing you Tuesday.

GIBSON DUNN

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Memorandum

To: Jeffrey B. Wall, Acting Solicitor General

From: Eugene Scalia ES
Miguel A. Estrada MAE
Joshua S. Lipshutz JSL

Date: March 17, 2017

Re: *National Restaurant Association v. Dep't of Labor*, No. 16-920
Wynn Las Vegas, LLC v. Cesarz, No. 16-163

In *Oregon Restaurant and Lodging Association* v. *Perez*, 816 F.3d 1080 (9th Cir. 2016), the Ninth Circuit upheld the Department of Labor's 2011 rule providing that, under the Fair Labor Standards Act ("FLSA"), a tip-pooling arrangement is valid only if the employees participating in the pool are customarily and regularly tipped, regardless whether the employer takes a "tip credit"—that is, regardless whether the employer uses the tips to fulfill its obligation to pay its employees a statutory hourly minimum wage. *See* 76 Fed. Reg. 18,832, 18,841–42 (Apr. 5, 2011) ("the 2011 rule"). The Ninth Circuit upheld the 2011 rule notwithstanding its own earlier decision in *Cumbie* v. *Woody Woo, Inc.*, 596 F.3d 577, 583 (9th Cir. 2010), which held that as a matter of "plain" statutory language, the FLSA, 29 U.S.C. § 203(m), addresses the tip-pooling practices *only* of employers who take a tip credit, and so does not regulate employers who establish a tip pool *on top of* paying the requisite minimum wage. Despite the intra-circuit conflict created with this earlier decision, the Ninth Circuit denied rehearing en banc, but nine judges joined a sharply worded dissent authored by Judge O'Scannlain.

The Ninth Circuit's decision addressed two separate cases that had been consolidated for oral argument; petitions for a writ of certiorari have been filed in both cases. In *Wynn Las Vegas, LLC* v. *Cesarz*, No. 16-163, the petitioners are employers who were sued by their employees in an FLSA collective action to enforce the 2011 rule. In *National Restaurant Association* v. *Department of Labor*, No. 16-920, the petitioners are trade associations and others who filed suit against the Department to challenge the 2011 rule.

As counsel for petitioners in *Wynn*, we urge the United States to support certiorari in both cases. With respect to the *Wynn* case in particular, the United States should support certiorari in order to reaffirm its previously expressed position that the FLSA does not provide a private right of action to challenge tip-pooling arrangements for employees who are paid the statutory minimum wage. Indeed, we understand that the United States expressed this view as recently as February 28, 2017, in an Eleventh Circuit oral argument raising the same issue of the validity of the 2011 rule. *Aguila* v. *Corp. Caterers II*, CA11 No. 16-15838; *see id.*, U.S. Amicus Br. at 10 (Nov. 1, 2016). By permitting a new private right of action for tip-pooling claims, the Ninth Circuit has taken a significant element of FLSA oversight away from the Department and put it in the hands of private plaintiffs. In many cases, these suits will be filed against small-business defendants that lack the resources to litigate.

In addition, with respect to both cases, the United States should support certiorari because the Ninth Circuit's decision conflicts with a Fourth Circuit decision, *Trejo* v. *Ryman Hosp. Props., Inc.*, 795 F.3d 442, 448 (4th Cir. 2015), and with a series of district court opinions in multiple circuits. Employers need to know how to pay their employees, and employees need to know what they are entitled to be paid. Employers, employees, and the Department would thus all benefit from final resolution of the 2011 rule's legality *now*. By granting certiorari, the Supreme Court can provide much-needed clarity.

Background

A. The FLSA is "focus[ed] on minimum wage rates and maximum working hours." *Trejo*, 795 F.3d at 446 (internal quotation marks omitted). To clarify the scope of employers' minimum-wage obligations, Section 3(m) of the FLSA provides a definition of "wage." 29 U.S.C. § 203(m). Section 3(m) in its original form did not address tips, but Congress later amended the FLSA to give employers the option to credit employees' tips toward those employees' minimum wages. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 13(e), 88 Stat. 55, 76 (1974). At present, this "tip credit" provision permits an employer of "tipped employee[s]" to pay a portion of the minimum wage ($2.13 per hour) in cash, and then to count "tips actually received by [the] employee" toward the remainder of the minimum wage ($5.12), so long as two conditions are met: (i) the employee must "ha[ve] been informed by the employer of the provisions of" Section 3(m); and (ii) the employer must allow the employee to "retai[n]" "all tips received," unless tips are "pool[ed]" only "among employees who customarily and regularly receive tips." 29 U.S.C. § 203(m).

Petitioners in both of these cases use a tip pool but do not take a tip credit. Instead, Petitioners pay every employee at least the minimum wage, and then employees receive tips in addition to that guaranteed wage. The employees who receive the tips then share those tips with coworkers. This practice is common in service industries, particularly in restaurants, as it allows non-customer-facing employees who contribute to the overall customer experience that produces the tips (e.g., kitchen workers, busboys, etc.) to share in the customers' gratuities.

The Supreme Court has held that "an employment practice does not violate the FLSA unless the FLSA prohibits it." *Christensen* v. *Harris Cty.*, 529 U.S. 576, 581 (2000). And as described above, Section 3(m) says nothing about tip pooling unless the employer takes a tip credit—it discusses tip-pooling requirements only as a *condition* for employers who take a tip credit. For that reason, the Ninth Circuit held in *Cumbie* that the "plain text" of the statute is "clear" and does not restrict tip-pooling practices for employers (like Petitioners) who do not take a tip credit. 596 F.3d at 579 n.6, 581. The Fourth Circuit later reached the same conclusion about the meaning of Section 3(m): that provision, "whatever its import[,] could give rise to a cause of action only if the employer is using tips to satisfy its minimum wage requirements." *Trejo*, 795 F.3d at 448. The Fourth Circuit also noted—as explained by the United States in an amicus brief—that plaintiffs who are paid the statutory minimum wage do not have a private cause of action under the FLSA to challenge their employers' tip-pooling arrangements. *See id.* at 446 ("the Plaintiffs concede that they are paid a full minimum wage absent tips," and so "essentially concede that they do not have a private right of action under [29 U.S.C.] § 216(b) because they are not seeking damages for unpaid minimum wages"); *id.* at 448 n.8 (noting the Government's agreement that plaintiffs do not have a private right of action where the plaintiffs are paid the minimum wage).

In adopting the 2011 rule, the Department of Labor acknowledged *Cumbie*'s "'plain meaning' construction" of Section 3(m). 76 Fed. Reg. at 18,841–42. But the Department asserted that *Cumbie* "was incorrectly decided," *id.* at 18,841, and so it adopted regulations governing all tip-pooling arrangements, purportedly "pursuant to" the FLSA. *Id.* at 18,841–45. The 2011 rule provides that "[t]ips are the property of the employee *whether or not* the employer has taken a tip credit under section 3(m) of the FLSA," and that "valid mandatory tip pools . . . can only include those employees who customarily and regularly receive tips." 29 C.F.R. §§ 531.52, .54 (emphasis added).

B. Petitioner the National Restaurant Association and other plaintiffs filed suit in federal district court in Oregon, arguing that the 2011 rule exceeds the Department's statutory authority. The Oregon district court agreed with Petitioners, holding that because *Cumbie* "leaves no room for agency discretion and . . . the intent of Congress is clear, . . . the new regulations are invalid at *Chevron* Step One." *Or. Restaurant & Lodging Ass'n* v. *Solis*, 948 F. Supp. 2d 1217, 1226 (D. Or. 2013).

Meanwhile, a group of casino dealers at the Wynn Las Vegas ("Wynn") filed a private collective action against Petitioner Wynn in district court in Nevada, alleging that Wynn had violated the Department's 2011 rule by requiring dealers to participate in a tip pool with other employees who allegedly do not customarily receive tips. The Nevada district court dismissed the dealers' suit because it held, like the Oregon court, that "there was no room for agency discretion under *Chevron* to read [Section] 203(m) of the FLSA to permit the [regulations], because the Court of Appeals in *Cumbie* had clearly held that Congress only intended . . . to limit the use of tip pools by employers who had to take a tip credit to satisfy the minimum wage requirements," and the plaintiffs conceded that Wynn did not take a tip credit. *Cesarz* v. *Wynn Las Vegas, LLC*, No. 13-109, 2014 WL 117579, at *3 (D. Nev. Jan. 10, 2014).

The Ninth Circuit consolidated the appeals in both cases and, in a single opinion by Judge Pregerson, reversed both district courts over the vigorous dissent of Judge N.R. Smith. 816 F.3d 1080. The majority acknowledged *Christensen*, as well as the long-standing "default rule" that the FLSA does not prohibit tip pooling "in the absence of statutory interference." *Id.* at 1084 (internal quotation marks omitted) (citing *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386, 397 (1942)). The majority also conceded that it had "no quarrel" with the ruling in *Cumbie* that "there *is* no statutory interference" with tip pooling under Section 3(m) unless an employer takes a tip credit. *Id.* at 1085, 1090 (emphasis added). Nevertheless, the majority held that the Department of Labor was authorized to create for employees a new substantive right to their tips out of the FLSA's "clear silence." *Id.* at 1085. The majority based this conclusion on the legislative history and certain comments in the 2011 rulemaking, without discussion of Section 3(m)'s text.

The Ninth Circuit then denied rehearing en banc, but Judge O'Scannlain (joined by nine other judges) filed an opinion dissenting from that denial. The panel's decision, Judge O'Scannlain and his colleagues explained, "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." *Or. Restaurant & Lodging Ass'n* v. *Perez*, 843 F.3d 355, 365 (9th Cir. 2016) (O'Scannlain, J., dissenting).

Reasons for Supporting Certiorari

The United States should support certiorari in *Wynn* in order to reaffirm that, when employees are paid the statutory minimum wage (and required overtime), it is the role of the Department—not private plaintiffs—to enforce the other requirements of the FLSA. The United States should also support certiorari in both cases so the legality of the 2011 rule can be finally determined and employers and employees can structure their affairs accordingly.

A. The United States should support certiorari in *Wynn* in order to reiterate its previously expressed position that the FLSA does not create a privately enforceable cause of action for employees who are paid the statutory minimum wage. (Because *National Restaurant Association* involves a pre-enforcement challenge to the rule itself, the petition in that case does not present this question.) Section 16(b) of the statute authorizes a limited private right of action by workers *only* when seeking either "unpaid minimum wages" or "unpaid overtime compensation" (or for retaliation for reporting FLSA violations). 29 U.S.C. § 216(b); *see also Trejo*, 795 F.3d at 446. Neither unpaid minimum wages nor unpaid overtime compensation is at issue in *Wynn*; the Respondents were paid the minimum wage and do not allege they were required to work underpaid overtime.

The *Wynn* Respondents instead allege, in essence, that Wynn unlawfully confiscated a portion of their tips in violation of the FLSA. But as the United States has acknowledged, "[t]here is no cause of action" under 29 U.S.C. § 216(b) for claims for tips "divorced from a minimum wage claim or an overtime claim." U.S. Amicus Br., *Aguila* v. *Corp. Caterers II*, CA11 No. 16-15838, at 10 (Nov. 1, 2016); *see also* U.S. Amicus Br. 12, *Jahir* v. *Ryman Hosp. Indus., Inc.*, No. 14-1485, 2015 WL 191535 (4th Cir. Jan. 15, 2015) (same); *id.* at 11 (plaintiffs who "are not pursuing minimum wage claims or overtime claims"—including plaintiffs who "are seeking only to collect improperly withheld tips"—"do not have a cause of action under the FLSA"). The United States repeated that same position below in its brief urging denial of rehearing en banc. Br. of United States, CA9 Dkt. No. 46, at 15 (Apr. 28, 2016) ("in the absence of a minimum wage or overtime claim, an employee whose rights under the 2011 tip pooling regulations have been violated cannot bring a lawsuit, because he/she does not have a cause of action under the FLSA" (citing *Trejo*, 795 F.3d at 448 & n.8)). The Fourth Circuit in *Trejo* agreed with the United States that private plaintiffs may not bring suit solely to recover tips independent of any claim for unpaid minimum wages.

See 795 F.3d at 446–48. Multiple district courts have reached the same conclusion. *See* Pet. 27 (citing four cases).

Only the Department itself, not private plaintiffs, can enforce the provisions of the Act that do not concern unpaid minimum wages or unpaid overtime (irrelevant exceptions aside). *See* 29 U.S.C. §§ 211(a), 216–217. As Judge Harris noted in her separate opinion in *Trejo*, "[t]he FLSA establishes two separate means of enforcement: a private right of action for aggrieved employees, and a public enforcement power wielded by the Wage and Hour Division of the Department of Labor[.]" 795 F.3d at 448 (Harris, J., concurring in judgment). "Each of those mechanisms plays a distinct and critical role in the statute's enforcement regime." *Id.* (citing *Mitchell* v. *Lublin, McGaughy & Assocs.*, 358 U.S. 207, 214 (1959)). In particular, the Department has "broader" enforcement powers under the statute that are not available to private plaintiffs, *id.* at 449—powers that call for an exercise of the government's enforcement discretion.

The *Wynn* Respondents, facing this insurmountable hurdle to relief, have attempted to reimagine their claims as seeking unpaid minimum wages by contending that Wynn "*effectively* failed to pay *any* wages whatsoever." Br. in Opp. 16–17 n.15 (emphasis added). That makes no sense: The *Wynn* Respondents conceded below that they receive the statutory minimum wage and, with tips included, take home $75,000 per year on average. *See* Pet. Reply 7–8. Even if Respondents alleged that Wynn were unlawfully taking 100% of their tips, their claim could not be for unpaid *minimum wages*. The Department has previously argued that an employer might violate the FLSA by, for example, paying the minimum wage but requiring an employee to purchase her uniform, because that requirement leads the employee to end up with less than the minimum wage. But when it comes to tip pools (of whatever kind), employees who receive the minimum wage never take home less than the minimum wage. That is certainly true of Respondents here. Thus, those Respondents do not have a cause of action for unpaid minimum wages under the FLSA.

The absence of a cause of action is fatal to the *Wynn* Respondents' claim, and yet the Ninth Circuit refused to affirm dismissal on that basis even after the defect was pointed out to the panel and the en banc court in a petition for rehearing. It must be expected that district courts in the Ninth Circuit will read the court's opinion to validate the Respondents' legal theory for a private right of action, which will only invite more litigation that the Department would not control. In many cases, these suits would be filed against small businesses such as local restaurants that lack the resources to litigate. The United States should support certiorari in *Wynn* in order to ensure that the Department maintains its statutory role exercising enforcement discretion over the FLSA on all matters—including application of the 2011 rule—that do not involve minimum wages or overtime pay, rather than allow plaintiffs to subvert the government's enforcement role by creative pleading.

B. The United States should also support certiorari in these cases because the Department, employers, and employees would all be best served by resolving now the legality of the 2011 rule, rather than allowing that rule to linger in uncertainty as courts reach different conclusions about whether the rule comports with the statute. These cases present clean vehicles for deciding the rule's validity.

The rule affects tens of thousands of businesses nationwide, as tip pooling is a regular feature of the service industry. The rule has particular impact in states like Nevada, where state law prohibits employers from taking a tip credit against the minimum wage. *See* Nev. Rev. Stat. § 608.160(1)(b). Continued litigation over the rule is thus extremely likely until the Supreme Court weighs in. And even after the Ninth Circuit's opinion in this case, every district court to consider the 2011 rule has held it invalid. *See Malivuk* v. *Ameripark, LLC*, 2016 WL 3999878, at *4 (N.D. Ga. July 26, 2016) ("Even if the Court considered Plaintiff's argument regarding the [r]egulation, the Ninth Circuit's decision" in *Oregon Restaurant* "is not binding on this Court, and the Court also does not find the decision persuasive. The weight of authority holds the [r]egulation is invalid under *Chevron*."); *Aguila* v. *Corp. Caterers II, Inc.*, 199 F. Supp. 3d 1358, 1361 (S.D. Fla. 2016) ("The Court declines to follow the Ninth Circuit's reasoning in [*Oregon Restaurant*], as the holding of *Cumbie* is based on a plain language reading of § 203(m), not a gap in the statute" and the court agrees with *Cumbie*'s plain-text reading of the FLSA); *Brueningsen* v. *Resort Express Inc.*, 2015 WL 339671, at *5 (D. Utah Jan. 26, 2015), *reconsideration denied*, 2016 WL 1181683, at *2–5 (D. Utah Mar. 25, 2016) (declining to reconsider prior holding despite the Ninth Circuit's opinion below, which the district court found "unpersuasive"); *Azeez* v. *Ramaiah*, 2015 WL 1637871, at *7 (S.D.N.Y. Apr. 9, 2015) (The 2011 rule's "prohibition does not give rise to an independent right of action"; "to the extent this regulation purports to create such cause of action . . . it cannot overcome § 216 and § 203(m), which are not plausibly read to impose a nationwide freestanding code of conduct regarding the handling of tip money where the statute's minimum wage command is otherwise met") (internal quotation marks and citations omitted); *Mould* v. *NJG Food Service Inc.*, 2014 WL 2768635, at *5 (D. Md. June 17, 2014) ("[T]he text of section 203(m) is unambiguous. Where an employer wishes to use a tip pooling arrangement and use a tip credit to meet minimum wage requirements, the tip pooling arrangement must meet certain conditions. Where the tip pooling arrangement fails to meet those conditions, the only consequence under the FLSA and [state law] is that the employer may no longer claim a tip credit in calculating employees' wages.").

Not only is the rule legally unsound, it is bad policy that harms many of the low-income workers that the FLSA was designed to protect. When a service-industry employer pays the minimum wage and then uses a tip pool, it provides some of the benefit of the tips to employees who make important contributions to the customer-service experience that leads to tips but who do not directly receive the tips. The Department, by its rule prohibiting this common practice, will often protect a more highly compensated group of employees at the expense of these back-of-the-house, less-compensated employees, which is both contrary to the goals of the FLSA and bad for workplace morale.

Uncertainty is also bad for business. Employers need to know with confidence what to pay their employees, and employees too have an interest in clear rules regarding tip pools. No one is served by the current legal patchwork where the 2011 rule is effective for private plaintiffs in California, Nevada, and elsewhere in the Ninth Circuit, but cannot be enforced in districts in Georgia, Florida, Utah, New York, or Maryland that together comprise tens of millions of citizens. The United States should urge the Supreme Court to take these cases and resolve the 2011 rule's validity once and for all.

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We look forward to meeting with your office on March 21 to discuss these cases. Until then, please do not hesitate to contact us if we can answer any questions or provide additional information.