No. 16-163

IN THE
Supreme Court of the United States

WYNN LAS VEGAS, LLC,

Petitioner,

v.

JOSEPH CESARZ AND QUY NGOC TANG, ET AL.,

Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

GREGORY J. KAMER
R. TODD CREER
KAMER ZUCKER ABBOTT
3000 W. Charleston Boulevard
Suite 3
Las Vegas, NV 89102
(702) 259-8640

EUGENE SCALIA
Counsel of Record
MIGUEL A. ESTRADA
JOSHUA S. LIPSHUTZ
AMANDA C. MACHIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
escalia@gibsondunn.com

Counsel for Petitioner

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8, petitioner Wynn Las Vegas, LLC (Wynn) respectfully submits this supplemental brief to address the government's brief in the companion case of *Nat'l Rest. Ass'n v. Dep't of Labor* (*NRA*), No. 13-35765, petition for cert. pending, No. 16-920 (filed Jan. 19, 2017).

The government's brief correctly acknowledges that the Department of Labor rule at issue in this case was *ultra vires* and is irreconcilable with the plain language of the statute; that the decision of the court below was mistaken and in conflict with the decision of every other court to address the issue; and that the lower court's decision should be vacated. However, the government's suggestion that this case be remanded for the Ninth Circuit to reconsider its decision stops short of the relief warranted here.

Merely vacating and remanding will leave the private parties in this and other cases to continue to litigate under the specter of a rule that arose from admittedly unauthorized governmental action, and that was approved through an indefensible treatment of *Chevron* and *Brand X* in the decision below. The sole basis for that decision was deference to a government "interpretation" that the government confesses was wrong and due no deference. In such circumstances, there is nothing left for the lower court to decide, and this Court should therefore summarily reverse the decision below.

A. Relevant Background

The 2011 Labor Department rule at issue prohibits certain tip-pooling practices by employers, even where those employers do not take a tip credit against

their minimum wage obligations under Section 203(m) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq*. That rule was a purposeful rejection of a 2010 Ninth Circuit decision, which held that under the "plain text" of the statute, "[t]he FLSA does not restrict tip pooling when no tip credit is taken." *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577, 582 (9th Cir. 2010); *see* Dep't of Labor, *Final Rule*, 76 Fed. Reg. 18,832, 18,841-42 (Apr. 5, 2011) (Pet. App. 96a, 115a-116a).

In the decision below, a divided panel of the Ninth Circuit approved that rule's repudiation of the Ninth Circuit's own decision in *Cumbie*. Since Wynn filed its petition for review of that decision, and as described in Wynn's supplemental brief of September 2016, ten judges of the court below have joined in a powerful dissent from the denial of rehearing en banc in the companion case to this one, *Nat'l Rest. Ass'n v. Dep't of Labor*. Order Denying Rehearing En Banc, and Dissenting Opinion, *Or. Rest. & Lodging Ass'n v. Perez* (*ORLA*), No. 13-35765 (9th Cir. Sept. 6, 2016).

Then, as described in Wynn's August 2017 supplemental brief, the Tenth Circuit Court of Appeals—in a 2-0 decision by a panel on which then-Judge Gorsuch sat for oral argument—expressly disagreed with the Ninth Circuit's ruling and held that the Labor Department rule rests on a mistaken interpretation of the FLSA, and exceeds the Department's authority. *Marlow v. The New Food Guy, Inc.*, 861 F.3d 1157, 1161, 1164 (10th Cir. 2017). And the Eleventh Circuit concurred that private plaintiffs lack a cause of action under the FLSA where, as here, they do "not assert that [they] received less than the minimum wage before tips." *Malivuk v. Ameripark, LLC*, 694 F. App'x 705, 710 (11th Cir. 2017) (per curiam). Those decisions, in

turn, are in accord with an earlier decision of the Fourth Circuit holding that the FLSA did not create a private right of action for the recovery of tips, as plaintiffs attempt here. *See Trejo v. Ryman Hospitality Properties, Inc.*, 795 F.3d 442 (4th Cir. 2015).

Now, the Executive Branch and Congress have joined these courts in rejecting the Department's 2011 rule.

B. Repudiation of the 2011 Rule by the Department of Labor and Labor Secretary

In December 2017, the Department of Labor issued a notice of proposed rulemaking explaining that, "[a]fter considering the *ORLA* rehearing dissent and the Tenth Circuit's decision in *Marlow*, both of which state that the Department's 2011 Final Rule exceeded the agency's authority under section 3(m)," it was "seriously concerned that it incorrectly construed the [FLSA] in promulgating the tip credit regulations" in 2011. Dep't of Labor, *Notice of Proposed Rulemaking*, 82 Fed. Reg. 57,395-96 (Dec. 5, 2017). Moreover, "[t]he Department [had] independent and serious concerns about those regulations as a policy matter," in that they prevented tip sharing among "restaurant cooks, dishwashers, and other traditionally lower-wage job classifications." *Id.* at 57,399. The Department announced that it would rescind "portions of its tip regulations . . . that impose restrictions on employers that pay a direct cash wage of at least the full federal minimum wage and do not seek to use" a tip credit. *Id.* at 57,395.

Three months later, on March 6, 2018, the Secretary of Labor testified before the House Appropriations Committee's Subcommittee on Labor, Health

and Human Services, and Education. *See* U.S. Br. in Opp., *NRA*, Case No. 16-920, at 11. The Secretary testified that he "found persuasive" what "the Tenth Circuit had made clear in *Marlow*," "that the Department lacked statutory authority for its 2011 regulations at issue here." *Id.* Any regulation of the tip-pooling practices of employers who do not take a tip credit, the Secretary said, would require legislation. *Id.*

These actions of the Department and Secretary of Labor illustrate the appropriateness of summary reversal in this case. The panel decision below rested exclusively on deference (purportedly animated by *Chevron*) to the Department of Labor's interpretation of the FLSA. *See ORLA*, 816 F.3d 1080, 1088 (9th Cir. 2016). But the Department has abandoned that interpretation, acknowledging that the 2011 regulations exceeded its statutory authority. "[I]t would be quite inappropriate to defer to an interpretation which has been abandoned by the policymaking agency itself." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 480 (1992); *see Epic Sys. Corp. v. Lewis*, 584 U.S. __, 2018 WL 2292444, at *14 (U.S. May 21, 2018) ("whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth"); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 n.14 (2012) ("Neither petitioners nor the DOL asks us to accord controlling deference to the . . . interpretation the Department advanced in its briefs [below], nor could we given that the Department has now abandoned that interpretation."). In fact, for a court to "defer" to a statutory interpretation that the agency insists is wrong would be the *opposite* of *Chevron* deference, which purportedly rests on the "expertise of the Agency." *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

More fundamentally, if the Ninth Circuit in this case were to continue to defer to the 2011 rule, it would produce an essentially lawless regime in which rights are determined not by statute or a court's interpretation thereof (in *Cumbie*), but instead by an agency's admittedly unlawful defiance of a court ruling. The Framers never envisioned such a state of affairs, and this Court should not countenance it.

C. The 2018 FLSA Amendments

With the 2018 Appropriations Act, Congress—for the first time—gave the Department limited authority to regulate the tip-pooling practices of employers who do not take a tip credit. The Act amended Section 203(m) of the FLSA to prohibit certain kinds of tip pools, even if an employer pays tipped employees the full minimum wage. The added language states that "[a]n employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit." 2018 Appropriations Act, Div. S, § 1201(a) (29 U.S.C. § 203(m)(2)(B)).

That Congress created this new "express prohibition," U.S. Br. in Opp., *NRA*, Case No. 16-920, at 25, demonstrates that the FLSA did not previously prohibit such tip pools in the absence of a tip credit. *See id.* at 26 ("until the 2018 amendments, Section 203(m) placed limits only on employers that took a tip credit"). Indeed, Congress invalidated the 2011 regulations on which respondents rely by *permitting* tip pools that the regulations would not (*e.g.*, pools with non-supervisors), and expressly barred *any* further reliance on the regulations by providing that "[t]he portions of the [2011] final rule" that are at issue in this case "shall have no further force or effect until any further action

by the Administrator of the [Department's] Wage and Hour Division." 2018 Appropriations Act, Div. S, § 1201(c).

Importantly, the 2018 amendments also added a previously unavailable private right of action for recovery of tips. "Any employer who violates" the new provision of Section 203(m) "shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages." 2018 Appropriations Act Div. S, § 1201(b)(1). Until those amendments, the FLSA had authorized private suits *only* by workers seeking either "unpaid minimum wages" or "unpaid overtime compensation." 29 U.S.C. § 216(b). As the Department of Labor has repeatedly acknowledged, that language created "no cause of action" for tip claims "divorced from a minimum wage claim or an overtime claim." Dep't of Labor *Amicus* Br. 12, *Trejo*, No. 14-1485, 2015 WL 191535 (4th Cir. Jan. 15, 2015) (Dkt. 45-1) (Pet. App. 161a-62a). No such claim can be available for workers such as plaintiffs here, who on average take home more than $75,000 annually (including wages and tips) and who conceded below—and whom the Ninth Circuit concluded—"were paid the minimum wage." Pet. 13; Reply 8; Pet. App. 11a; C.A. Supp. E.R. 7; C.A. Oral Arg. 16:49-17:01,http://www.ca9.uscourts.gov/media/view_video.php? pk_vid=00000079-92.

D. The Government's Confession of Error in This Court

Most recently, the government conceded before this Court that the 2011 regulations were invalid and outside the Labor Department's authority, and that this case was wrongly decided below. U.S. Br. in Opp.,

NRA, Case No. 16-920, at 19. The government urged the Court to grant the petitions in this case and the *NRA* case, and to vacate the judgment of the court of appeals and remand for further proceedings.

The government's brief admits that the 2011 regulations were wrong to provide "that Section 203(m)'s conditions apply 'whether or not' an employer 'has taken a tip credit,'" *id*. at 13 (quoting 29 C.F.R. 531.52); that "conclusion is incorrect," the government concedes, "and the [2011] regulations exceed the Department's statutory authority." *Id*. The Department's prior interpretation of Section 203(m) "cannot be squared with the statutory text or historical background." *Id.* at 17.

With regard to the second question presented in Wynn's petition, the government admitted that the "panel majority" in the decision below misapplied *Chevron* when it "incorrectly reasoned that the silence" in the statute concerning employers who do not take a tip credit "leaves room for agency discretion." *Id.* at 21. The Solicitor General agreed instead with the dissenting judges below that "there is a critical difference between an interstitial gap in an ambiguous statute that an agency may fill by regulation, and a statute's failure to address certain subjects that therefore lie outside the agency's authority." *Ibid*. In the case of Section 203(m), that silence represented the limits of the Department's authority, not an invitation for rulemaking. *See id.* at 21-22 ("The terms of Section 203(m) . . . evince Congress's intent *not* to regulate the tip pooling practices of employers that do not take a tip credit").

The government expressly addressed the petition in this case, stating that the claims of respondents

here "fail[] for the same reasons that the 2011 tip regulations are invalid: until the 2018 amendments, Section 203(m) placed limits only on employers that took a tip credit." *Id.* at 26. The government further observed that the "limited private right of action" added by the 2018 amendments "only underscores that Section 216(b) does not otherwise permit" a cause of action such as respondents bring here. *Id.* at 27.

E. Wynn's Petition Should Be Granted and the Decision Below Summarily Reversed

Summary reversal is the appropriate disposition here. *Maryland v. Dyson*, 527 U.S. 465, 467 n* (1999) (summary reversal appropriate where the Court "does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law"). As the Solicitor General has conceded, the Ninth Circuit's decision was demonstrably erroneous in at least two respects—its application of *Chevron* to uphold the 2011 regulations despite unambiguous statutory language to the contrary, and its decision to allow a private right of action unsupported by the statute.

First, the Ninth Circuit's misapplication of *Chevron* merits summary reversal. *See* Pet. 19-23. As the Fourth and Tenth Circuits have held; as the Ninth Circuit itself held in *Cumbie*; and as the Solicitor General has now confirmed, Section 203(m)'s language is clear and unambiguous. Until recently amended, the statute did not restrict the use of tip-pools by employers that did not claim tip credits against their minimum wage obligations. The statute's clear language should have pretermitted any *Chevron* analysis. There is "no uncertainty that could warrant deference," and it therefore is the Court's "duty . . . to give

effect to the text that 535 actual legislators (plus one President) enacted into law." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358-59 (2018) (emphasis removed). *See Epic Sys. Corp.*, 2018 WL 2292444, at *14 ("Where, as here, the canons [of statutory construction] supply an answer, '*Chevron* leaves the stage.'" (quoting *NLRB v. Alternative Ent.*, 858 F.3d 393, 417 (6th Cir. 2017) (opinion of Sutton, J.))).

Moreover, and precisely because there is no room for *Chevron* deference here, the court below saved the Department's rule only by conjuring a hitherto unseen species of *Chevron*—a *Chevron* mutant so unprecedented that it created a split with no fewer than six courts of appeals, Pet. 25-28; Supp. App. 17a-19a, 22a-24a (Sept. 9, 2016), and so expansive of government power that even the government could not embrace it. U.S. Br. in Opp., *NRA*, Case No. 16-920, at 21-22.

Congress's enactment of the 2018 Appropriations Act, the Department's notice of intent to repeal the 2011 rule, the Secretary's congressional testimony, and the Solicitor General's confession of error all confirm what was obvious back in 2016 when the Ninth Circuit issued its erroneous opinion—that the 2011 rule is unauthorized and invalid. There is no "new or unanswered" question of law for the Ninth Circuit to consider on remand. *Dyson*, 527 U.S. at 467 n*.

Second, and independent of any dispute over the validity of the 2011 rule, the decision below calls for summary reversal because it allowed respondents to persist in their private litigation against Wynn, even though the Department has long conceded that there is no private right of action under the FLSA for unpaid tips when there is no minimum wage or overtime violation. *See supra* at 6; Pet. 23-25. Congress reaffirmed the government's position by adding a private right of

action in the 2018 amendments to the FLSA for employees whose employers keep their tips—proof there was not previously such a private right of action. 2018 Appropriations Act, Div. S, § 1201(b)(1).

Summary reversal in this case would also save defendants in pending cases around the country—including this case and numerous other class and collective actions—the needless expense and uncertainty of continued litigation while the Ninth Circuit reexamines the legality of the 2011 rule at issue. *See, e.g.*, *Pataky v. The Brigantine, Inc.*, 17-cv-00352 (S.D. Cal.) (class of approximately 800 servers conditionally certified); *Allison v. Dolich*, 3:14-CV-1005-AC, 2017 WL 7052909, at *1–2 (D. Or. June 21, 2017) (conditionally certified). As the Department of Labor observed, "the application of the Department's regulations to employers who do not take a tip credit has gained increasing importance in recent years." 82 Fed. Reg. at 57,398. Without a clear rejection now of the 2011 regulations and affirmation that Section 203(m) previously placed no restrictions on employers who do not take a tip credit, uncertainty will plague employers and the many employees who benefit from tip-pooling. And private plaintiffs will continue to seek to rely on the 2011 regulations in pending and future cases.

The Solicitor General concedes that "the decision below is incorrect, important, and the subject of a circuit conflict," but suggests the Court should grant, vacate, and remand the case so the Ninth Circuit may consider whether "private plaintiffs may continue to rely on the 2011 tip regulations, despite the express language of the 2018 amendment." U.S. Br. in Opp., *NRA*, Case No. 16-920, at 23, 27. But to ask that question is to answer it—*of course* the Ninth Circuit cannot defer to an agency rule that is patently unlawful.

Indeed, even if employees with a valid minimum wage claim—and thus a cause of action—could still argue that they can rely on the 2011 rule, *these respondents cannot*: they concededly made the minimum wage (*supra* 6) and would have no cause of action to enforce the 2011 rule, regardless of its validity.*

Vacating and remanding the decision below is appropriate only when there is "uncertainty" about the ultimate outcome. *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 172 (1996). Here, however, there is no uncertainty; respondents' claims, which are based exclusively on the invalid 2011 rules, cannot proceed.

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* Contrary to the Solicitor General's suggestion, this case can and therefore should be resolved on the basis of the unlawfulness of the 2011 rule and plaintiffs' lack of a private right of action, without the necessity of applying Congress's additional, sweeping prohibition on the 2011 rule being given any "further force and effect." 2018 Appropriations Act, Div. S, § 1201(c).

CONCLUSION

This Court should grant Wynn's petition for a writ of certiorari and summarily reverse the decision below.

Respectfully submitted.

GREGORY J. KAMER
R. TODD CREER
KAMER ZUCKER ABBOTT
3000 W. Charleston Boulevard
Suite 3
Las Vegas, NV 89102
(702) 259-8640

EUGENE SCALIA
Counsel of Record
MIGUEL A. ESTRADA
JOSHUA S. LIPSHUTZ
AMANDA C. MACHIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
escalia@gibsondunn.com

Counsel for Petitioner

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