No. 16-163

In The Supreme Court of the United States

WYNN LAS VEGAS, LLC and STEVE WYNN,

Petitioners,

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 RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Pursuant to Rule 15.8, respondents Joseph Cesarz, et al., respectfully submit this supplemental brief to address the supplemental brief for petitioner ("Pet. Supp. Br.") and the government's brief in the companion case of *National Restaurant Association v. Department of Labor* ("*NRA*"), No. 16-920 ("U.S. Br.").

ARGUMENT

I. CERTIORARI SHOULD BE DENIED IN *WYNN LAS VEGAS V. CESARZ*

A. The Limited Conflict Between the Ninth and Tenth Circuits Is No Longer Important

Any conflict between the Ninth Circuit and the Tenth Circuit regarding the validity of the 2011 regulation is no longer important. Post-Act claims, those arising after March 26, 2018, such as claims regarding tip pools that include back-of-the-house employees, may no longer be brought under the 2011 regulation. Post-Act claims regarding employers who pocket employee tips, or who use them to pay supervisors or managers, will henceforth be brought under the new section 203(m)(2)(B). A group of Wynn employees, including the named plaintiffs in this case, filed just such an action under section 203(m)(2)(B) on May 16, 2018.[1]

Aside from the instant case, petitioner can identify only two pending cases which involve pre-Act claims.

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[1] *Tang v. Wynn Las Vegas*, No. 2:18-cv-00891-PAG-GWF (D.Nev.).

The litigation in *Paraky v. The Brigantine, Inc.*, No. 3:17-cv-00352-GPC-AGS (S.D.Cal.), was effectively settled in November 2017; an unopposed motion for approval of that settlement is now pending in the district court in that case.[2] In *Alison v. Dolich*, No. 3:14-cv-2005-AC, 2017 WL 7052909 (D.Or. June 21, 2017), the complaint asserts that some of the employee tips were given to the general manager of the firm; that claim is now actionable under the new section 203(m)(2)(B).[3] The plaintiffs are also litigating in state court a separate state law conversion claim regarding the seizure of their tips. *Allison v. Dolich*, Case No. 14CV07294 (Circuit Ct. Multnomah County). A decision in favor of the plaintiffs on that state law claim would moot their federal claim under the 2011 regulation. The complaint in *NRA* does not assert that any of the plaintiffs or their members were the subject of pending litigation.

B. Summary Reversal Is Not Warranted

Petitioner now insists that this Court should summarily reverse the decision of the Ninth Circuit. That would be a wholly inappropriate way of addressing the complex statutory and administrative law issues in this case.

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[2] See Docs. 73 (agreement by parties to mediator's proposal), 78 (plaintiff's motion for approval of settlement), 80 (defendant's non-opposition to motion).

[3] Doc. 1, p. 4.

Quoting *Maryland v. Dyson*, 527 U.S. 465, 467 n.* (1999), petitioner argues that summary disposition is warranted where, as (supposedly) here, a decision by this Court would "not decide any new or unanswered question of law, but simply correct[ ] a lower court's demonstrably erroneous application of federal law." Pet. Supp. Br. 8. But the legal issue in *Dyson* was one which this Court had expressly resolved on two prior occasions. The Court in *Dyson* required only two sentences to explain that it had already "[ ]answered" the question decided by the court below. "The holding of the [court below] ... is squarely contrary to our holdings in [*United States v.*] *Ross* [, 456 U.S. 798 (1982),] and [*Pennsylvania v.*] *Labron* [, 518 U.S. 938 (1996) (*per curiam*)]." 527 U.S. at 467. Neither petitioner, the Solicitor General, nor the dissenters in the court of appeals suggest that this Court has previously resolved the issues in this case in some earlier decision.

Noting that the decision of the Ninth Circuit was based on deference to the 2011 regulation, petitioner asserts that the entire foundation of that court of appeals' decision has been eliminated because "the Department has abandoned that interpretation." Pet. Supp. Br. 4. That contention ignores the distinction, critical under the Administrative Procedure Act, between a regulation adopted after notice and comment and an interpretation articulated in some other way. When an agency has announced an interpretation of a statute (or regulation) other than by formal notice and comment rulemaking, the agency is free to modify or

rescind that interpretation without those formalities. *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015). In such a case, a mere more recent brief or other action short of notice and comment rulemaking could be sufficient to eliminate any weight the earlier position might have had. The cases relied on by petitioner did not involve notice and comment rulemaking. In *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992), the federal agency at issue had filed a brief taking one position in the court of appeals, and then took the contrary position in a brief in this Court. It was in that context that the Court declined to defer to the earlier position "which had been abandoned by the policymaking agency itself." 505 U.S. at 480. Similarly, the abandonment of the agency's prior position in *Christopher v. Smithkline Beecham Corp.*, 567 U.S. 142, 155 n.14 (2012), involved the repudiation by a brief in this Court of the position that the agency had taken in an earlier brief in the court below.

But in this case, unlike *Perez, Cowart*, and *Christopher*, the Department of Labor position on which the Ninth Circuit relied was embodied in a regulation adopted after formal notice and comment rulemaking. Such a regulation retains the force of law, and is the agency position that would normally warrant deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), until it has actually been rescinded through that same notice and comment rulemaking process. It often occurs that a new administration disagrees with regulations issued

under a previous administration. But the Administrative Procedure Act prescribes the steps that must be taken to undo any such regulations, the necessarily inconvenient and deliberately cumbersome task of formal notice and comment rulemaking. An agency head cannot rescind a regulation, or deprive it of the force of law, simply by filing a brief, or through congressional testimony, any more than he or she could do so by criticizing that regulation in a speech to a trade group or by denouncing the regulation in an early morning tweet.

The Administrative Procedure Act clearly does not contemplate that the mere issuance of an NPRM, rather than the actual adoption of a final rule, would have any practical effect on an existing regulation. The NPRM in this case did not even announce that the agency had concluded that the 2011 regulation was "wrong." Pet. Supp. Br. 4. It was a Notice of *Proposed* Rulemaking, calling the attention of the public to the fact that the agency was considering changing the regulation. The NPRM did not assert that the Department had already concluded the 2011 regulation was unlawful or even unwise; it merely expressed "serious[] concern" about those issues. The Secretary's March 2018 testimony, on which petitioner also relies, is no more significant. See Pet. Supp. Br. 3-4. The Secretary's testimony, perhaps because of the pending notice and comment rulemaking, was deliberately framed to avoid setting out the position of the Department itself. The Secretary consistently made clear that it was only his "personal" view that the Tenth Circuit decision

in *Marlow* (rather than the Ninth Circuit decision in the instant case) was persuasive.

Petitioner insists that the Court must attach controlling significance to the brief recently filed by the government in *NRA*. "[T]he government's brief admits that the 2011 regulations were wrong...." *Id.* 7. "In such circumstances, *there is nothing left ... to decide*, and this Court should therefore summarily reverse the decision below." *Id.* 1. On this view, if the Executive Branch files a brief asserting that a regulation is "wrong," an Article III court would have "nothing left ... to decide," but would be limited to the purely ministerial task of reversing the lower court decision (or dismissing the complaint) which had relied on the particular regulation to which the Executive now thinks is "wrong."

"All Members of the Court are agreed that we 'should [not] mechanically accept any suggestion from the Solicitor General that a decision rendered in favor of the Government by a United States Court of Appeals was in error.'" *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 170-71 (1996). This Court, with caution and not without controversy, has on occasion directed reconsideration of the merits of a case in which the United States is the sole respondent and has confessed error. But this Court has never held that the government can "confess error" in a case between two private parties, or that such a government "confession" would be conclusive of that private dispute and would preclude the party with which the

government disagrees from obtaining a judicial determination of its contentions.

Independent of the dispute about the 2011 regulation, petitioner urges this Court to summarily reverse the court of appeals because "it allowed respondents to persist in their private litigation, 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." Pet. Sup. Br. 9. But in the litigation below, although petitioner did raise this issue, neither the district court nor the court of appeals addressed it. Br. Opp. 23-24. It would be inappropriate for this Court to rule nisi prius on an issue which neither court below ever considered. The complaint, moreover, expressly asserted that petitioner's practices resulted in a minimum wage violation. Br. Opp. 17, 24-25. That contention raises fact-bound issues regarding which there is as yet no record in this case, and petitioner does not suggest that this Court should decide the evidentiary and legal questions which it poses.

II. *NATIONAL RESTAURANT ASSOCIATION V. DEPARTMENT OF LABOR* IS MOOT

The litigation in *National Restaurant Association v. Department of Labor* is moot. The complaint in that action sought a declaration that the 2011 regulation was invalid. 2012 WL 4932011 ("Prayer for relief"). The avowed purpose of that action was to establish

that restaurants may lawfully include back-of-the-house workers in tip pools. The recently enacted amendment to the FLSA definitively establishes that they may do so. The 2018 amendments preclude either the Department of Labor or a private party from bringing any post-Act claim under the 2011 regulation. Although the new section 203(m)(2)(B) forbids employers from keeping employee tips for themselves, or from using such tips to pay managers or supervisors, the complaint in *NRA* did not suggest that any of the plaintiffs were engaging, or wished to engage, in these forbidden practices.

The complaint in *NRA* does not assert that any of the plaintiffs, or their members, is a defendant in an action raising a pre-Act claim. That complaint sought to enjoin the Department of Labor from enforcing the 2011 regulation. *Id.* But the Department has never brought any such enforcement action, and in July 2017 it announced that it would not do so.

Under these circumstances, there is no live case or controversy in *NRA*. A decision as to whether the 2011 regulation was lawful would not have any effect on the prospective conduct of the plaintiffs or their members, and the plaintiffs do not claim that they or their members are affected by any pending pre-Act claim.

III. THIS COURT SHOULD NOT GRANT, VACATE AND REMAND EITHER *WYNN LAS VEGAS V. CESARZ* OR *NATIONAL RESTAURANT ASSOCIATION V. DEPARTMENT OF LABOR*

In *Lawrence on Behalf of Lawrence v. Chater*, all members of this Court "agreed that our GVR power should be exercised sparingly." 516 U.S. at 173. None of the government's suggestions warrant the exercise of that power.

In *NRA*, the government suggests that the Court GVR the case to permit the court of appeals to consider a dispute that might someday arise about a regulation that does not yet exist. "The Department of Labor has advised this Office that ... it intends to conduct a future rulemaking to clarify how [the 2018] amendments affect nontraditional tip pools ... The court of appeals potentially could consider any new final rule on remand." U.S. Br. 25. This makes no sense. It would take a year or more for the Department to draft a proposed regulation and NPRM, conduct the required notice and comment, and then frame a final rule. The Solicitor General does not know when this process will even begin. If and when such a final rule has been issued, the court of appeals could not on its own initiative "consider" that rule; there would have to be a pending case or controversy. It is entirely possible that the business plaintiffs in *NRA* will have no objection to anything that the Department of Labor includes in such a new regulation. It is quite inconceivable that any court of appeals would simply sit on an appeal such as this for a few years, waiting to see if a dispute might at some

point arise about a regulation that today is little more than a glint in the Secretary's eye.

The government also suggests that the Court GVR *Wynn* so that "the court of appeals may reconsider the validity of the 2011 tip regulations in light of the Department's change in position...." U.S. Br. 27. In the past, the Court has concluded that a GVR was warranted in some cases in which the government confessed error, but this Court has done so only in cases in which the government itself was the sole respondent. That GVR practice does not apply here. The United States does not propose a GVR in the government's own case, *NRA*, because that case is moot, and the government is not a party in *Wynn*, the case in which it suggests a GVR.

Despite the fact that the validity of the 2011 regulation is irrelevant to the disposition of *NRA*, the Solicitor General devoted more than half of the argument section of his brief to a detailed contention that the regulation was invalid. This Court noted in *Lawrence* that "we ... view late changes of position by the Government with some skepticism." 516 U.S. at 175. That is the appropriate view to take of the government's change of position – more specifically, to take of the government's decision to take any position at all in its recent brief – in this instance. The only possible significance of that portion of the government's brief was its potential impact on the litigation in *Wynn*. This was not a confession of error in *NRA*; it was essentially an out-of-time amicus brief in *Wynn*. A GVR under these circumstances would create a precedent that this Court, and

the government, would come to regret. If a government amicus brief addressing the merits of a pending petition is sufficient to warrant a GVR, practitioners in this Court will quickly grasp the opportunity that affords. In any private litigation in which there is hope of persuading the Solicitor General to file such a brief, it would make sense for a litigant to file a petition and then endeavor to convince the government to do so.

This is not a case in which a GVR might be warranted because there is "a particular issue that [the court below] does not appear to have fully considered." *Lawrence v. Chater*, 516 U.S. at 167. The merits arguments set out in the Solicitor's brief are a condensed version of the contentions previously advanced at length in the court of appeals by Wynn, the *National Restaurant Association* plaintiffs, and the dissenters below. The only thing that is new is that the government is on the other side. The Solicitor General does not contend that a GVR is warranted to permit the court below to consider any novel argument advanced by the government, but suggests a GVR only to permit the court of appeals to consider whether to set aside its prior detailed analysis of the complex legal issues solely because the United States has "change[d] ... position.". Because the panel which hears this case on remand would be bound by the earlier 2016 decision of the court of appeals, it is difficult to see how the government's change of position, as such, should or could affect the outcome on remand.

Next, the government suggests that if *Wynn* were remanded "the court of appeals may reconsider the validity of the 2011 tip regulations in light of ... Congress's ... decision to prevent employers from keeping tips while not otherwise limiting employers' ability to establish non-traditional tip pools." U.S. Br. 27. That does not fully describe the decision that Congress made. The new statute also expressly forbids expropriating tips to pay managers or supervisors, the very practice at issue in this case. Although this is a new development, such developments only warrant a GVR where there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration" *Lawrence*, 516 U.S. at 607. The government does not explain why there is a "reasonable probability" that consideration of this 2018 legislation could affect at all, least of all in favor of defendant Wynn, the dispute about the validity of the 2011 regulation.

Finally, the government suggests that "[o]n remand, the court of appeals may consider whether Congress's decision to deprive the 2011 tip regulations at issue of any 'further force or effect' means that those regulations may no longer be invoked in pending private suits like *Cesarz*." U.S. Br. 27. A GVR, however, is not necessary to afford Wynn an opportunity to raise this issue. The decision of the court of appeals did not award final judgment to the plaintiffs, but merely remanded the case for further proceedings. If Wynn wishes to argue that the "[no] further force or effect"

language operates retroactively to bar pre-Act claims, it may do so in the district court on remand.

CONCLUSION

For the above reasons, certiorari should be denied in *Wynn* and *NRA*.

Respectfully submitted,

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