No. 16-920

In the Supreme Court of the United States

NATIONAL RESTAURANT ASSOCIATION, ET AL.,
PETITIONERS

v.

DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

The Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, requires that an employer pay its non-exempt employees the federal minimum-wage rate, currently $7.25 per hour. 29 U.S.C. 206(a). Section 203(m) of Title 29 permits an employer to reduce its cash-wage obligation to a "tipped employee," provided that the employer informs the employee of Section 203(m)'s provisions and the employee either retains her tips or participates in a tip pool comprised only of "employees who customarily and regularly receive tips." 29 U.S.C. 203(m). Section 203(m) thus places conditions on an employer's taking of a "tip credit" against its cash-wage obligation to a tipped employee. 29 C.F.R. 531.59(a). The question presented is whether, as the Department of Labor amended its regulations to say in 2011, Section 203(m) places those same conditions on employers that pay a direct cash wage of at least the federal minimum wage and thus do *not* take a tip credit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26a-57a) is reported at 816 F.3d 1080. The order of the court of appeals denying rehearing (Pet. App. 1a-3a) and an opinion dissenting from the denial of rehearing en banc (Pet. App. 3a-25a) is reported at 843 F.3d 355. The opinion of the district court (Pet. App. 58a-78a) is reported at 948 F. Supp. 2d 1217.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2016. A petition for rehearing was denied on September 6, 2016 (Pet. App. 1a-3a). 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, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, requires, *inter alia*, that an employer pay non-exempt employees "wages" at a rate not less the federal minimum-wage rate, currently $7.25 per hour. 29 U.S.C. 206(a). Cf. 29 U.S.C. 213 (2012 & Supp. IV 2016) (exemptions). In 1966, Congress amended the FLSA's definition of "wages" in 29 U.S.C. 203(m) to provide what is known as a "tip credit," 29 C.F.R. 531.59(a), that allows an employer to reduce the amount that it directly pays to certain tipped employees. See Fair Labor Standards Amendments of 1966 (1966 Amendments), Pub. L. No. 89-601, § 101(a), 80 Stat. 830.[1]

Under Section 203(m), as amended, an employer is deemed to pay to a tipped employee an amount equal to (1) "the cash wage paid such employee" (which must be at least $2.13 per hour) plus (2) "an additional amount on account of the tips received by such employee" equal to the difference between the cash wage paid by the employer and the federal minimum wage. 29 U.S.C. 203(m); see 29 C.F.R. 531.50(a), 531.59(a). That "additional amount"—the tip credit—"may not exceed the value of the tips actually received by an employee." 29 U.S.C. 203(m).

In 1974, Congress amended Section 203(m) to specify conditions that must be satisfied before an employer may take a tip credit. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 13(e),

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[1] All citations to Section 203(m) in this brief are to the 2012 edition of the United States Code unless otherwise indicated. This brief separately addresses Congress's March 2018 amendments to Section 203(m), see p. 12, *infra*, which are too recent to be reflected in a volume of the United States Code.

88 Stat. 64-65. Under that amendment, Section 203(m)'s tip-credit provisions "shall not apply with respect to any tipped employee" unless "such employee has been informed by the employer of the provisions of [Section 203(m)]" and "all tips received by such employee have been retained by the employee." 29 U.S.C. 203(m). The amendment, however, further provided that Section 203(m)'s tip provisions "shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips." *Ibid.* An employer may therefore take a tip credit if it informs tipped employees of Section 203(m)'s provisions and each employee either (a) retains all the tips she receives from customers or (b) participates in a tip "pool[]" comprised only of "employees who customarily and regularly receive tips." See *ibid.*; 29 C.F.R. 531.54.

This case presents the question whether an employer that pays its employees a direct cash wage at or above the federal minimum wage—and therefore does *not* take a tip credit under Section 203(m)—may require its tipped employees to participate in a nontraditional tip pool, *i.e.*, a tip pool that includes some employees (such as cooks or dishwashers) who do *not* customarily and regularly receive tips. The earnings all such employees receive from the tip pool would thus be in addition to the $7.25 or more per hour that the employer directly pays each employee. Regulations amended by the Department of Labor (Department) in 2011—the validity of which are at issue in this case—prohibit an employer from requiring that employees contribute to a nontraditional tip pool, even if the employer pays all of its employees a direct cash wage at or above the federal minimum wage and does

not take a tip credit under Section 203(m). See 29 C.F.R. 531.52; see also 29 C.F.R. 531.54, 531.59(b).

b. The Department's original tip regulations did not prohibit an employer from requiring employees to participate in such nontraditional tip pools. See 32 Fed. Reg. 13,575 (Sept. 28, 1967) (revising 29 C.F.R. Part 531). The regulations stated that "a tip becomes the property of the person" who receives it from a customer unless an "agreement" exists that provides otherwise. 29 C.F.R. 531.52 (2010); cf. 29 C.F.R. 531.59. The regulations also provided that "[o]nly tips actually received by an employee as money belonging to him * * * may be counted * * * in applying the provisions of [S]ection [20]3(m)." 29 C.F.R. 531.52 (2010).

In 2010, the Ninth Circuit held that Section 203(m) does not prohibit an employer that pays a direct cash wage at or above the federal minimum wage from requiring employees to participate in a nontraditional tip pool. *Cumbie* v. *Woody Woo, Inc.*, 596 F.3d 577. Section 203(m), the court concluded, did "not alter the default rule" established by *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386 (1942), that "an arrangement to turn over or to distribute tips is presumptively valid" under the FLSA. *Cumbie*, 596 F.3d at 579, 582. The court reasoned that Section 203(m)'s "plain text" merely "imposes *conditions* on taking a tip credit and does not state freestanding *requirements* pertaining to all tipped employees." *Id.* at 580-581. The contrary position, the court concluded, would render Section 203(m)'s "reference to the tip credit, as well as its conditional language and structure, superfluous." *Id.* at 581.

c. In April 2011, the Department issued a final rule amending its tip regulations to prohibit employers who pay a direct cash wage at or above the federal minimum wage—without taking a tip credit—from requiring that tipped employees participate in a non-traditional tip pool. 76 Fed. Reg. 18,832 (Apr. 5, 2011). In its regulatory preamble, the Department stated that "Congress deliberately amended the FLSA's tip credit provisions in 1974 to clarify that [S]ection [20]3(m) provides the only permitted uses of an employee's tips—through a tip credit or a valid tip pool among only those employees who customarily and regularly receive tips"—"regardless of whether a tip credit is taken." *Id.* at 18,841. The Department stated that *Cumbie*'s contrary "'plain meaning' construction [of Section 203(m)] is unsupportable." *Id.* at 18,841-18,842. "The fact that [S]ection [20]3(m) does not expressly address the use of an employee's tips when a tip credit is *not* taken," the Department reasoned, "le[ft] a 'gap' in the statutory scheme, which the Department" concluded that it could clarify through rulemaking. *Id.* at 18,841.

The 2011 tip regulations interpret Section 203(m) by providing that, "[w]ith the exception of tips contributed to a valid tip pool" (composed only of employees who customarily and regularly receive tips), "the tip credit provisions of [S]ection [20]3(m) * * * require employers to permit employees to retain all tips received by the employee." 29 C.F.R. 531.59(b); see 29 C.F.R. 531.54 (describing "valid" tip pool). More fundamentally, the regulations declare that "[t]ips are the property of the employee whether or not the employer has taken a tip credit under [S]ection [20]3(m)," and that an employer is therefore "prohib-

ited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than * * * [a]s a credit against its minimum wage obligations * * * or in furtherance of a valid tip pool" specified by Section 203(m). 29 C.F.R. 531.52.

2. Petitioners are four restaurant associations that filed this action against the Department under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.*, on behalf of themselves and member restaurants that "pay their employees at least full minimum wage and do not take a tip credit." Compl. ¶¶ 1, 12, 34. Petitioners challenged the portions of the 2011 final rule that amended the tip provisions in 29 C.F.R. 531.52, 531.54 and 531.59, arguing that the amended regulations are unlawful and inconsistent with Section 203(m). Compl. ¶¶ 1, 115; see *id.* ¶¶ 59-61, 106-130.

The district court granted summary judgment to petitioners. Pet. App. 58a-78a. The court held that the 2011 regulations are invalid because "Congress has directly spoken to the precise question at issue." *Id.* at 59a; see *id.* at 70a-77a. The court explained that *Cumbie* determined, "based on [Section 203(m)'s] clear and unambiguous text," that "Congress intended only to limit the use of tips by employers when a tip credit is taken." *Id.* at 72a; see *id.* at 72a-73a, 77a.

3. a. The Ninth Circuit consolidated this case for disposition with *Cesarz* v. *Wynn Las Vegas, LLC*, No. 14-15243, petition for cert. pending, No. 16-163 (filed Aug. 1, 2016). See Pet. App. 27a n.*. A divided panel of the court of appeals then reversed and remanded in both cases. *Id.* at 26a-57a. The majority concluded that the 2011 regulations are valid because they re-

flect an interpretation of the FLSA that is entitled to *Chevron* deference. *Id.* at 37a-46a.

At step one of its *Chevron* analysis, the majority concluded that *Cumbie* does not answer the "precise question" here, *i.e.*, whether the Department "may regulate the tip pooling practices of employers who do not take a tip credit." Pet. App. 37a; see *id.* at 37a-42a. The majority stated that *Cumbie* had held that "[S]ection 203(m) does not restrict the tip pooling practices of employers who do not take tip credits," *id.* at 33a, because "'nothing in the text purports to restrict'" such practices, but that *Cumbie* "did not hold that the FLSA unambiguously and categorically protects the practice in question." *Id.* at 37a (citation omitted). The majority determined that "a distinction [exists] between court decisions that interpret statutory commands and court decisions [like *Cumbie*] that interpret statutory silence." *Id.* at 40a-41a. *Cumbie*, the majority stated, "le[ft] room for agency discretion" by determining that the "statute does not prohibit conduct because it is silent" on the matter. *Id.* at 41a; see *id.* at 42a.

At step two of its *Chevron* analysis, the panel majority concluded that the Department's "interpretation is reasonable." Pet. App. 46a; see *id.* at 43a-46a. The majority based that determination largely on its view that "[t]he legislative history of the FLSA supports the [Department's] interpretation of [S]ection 203(m)." *Id.* at 44a-45a. The majority ultimately upheld the 2011 regulations based on its conclusion that "Congress has not addressed the question at issue because [S]ection 203(m) is silent as to the tip pooling practices of employers who do not take a tip credit" and the 2011 regulations are "consistent with

the FLSA's language, legislative history, and purpose." *Id.* at 46a.

b. Judge N.R. Smith dissented. Pet. App. 47a-57a. He concluded that the "majority ignore[d]" the court of appeals' *Cumbie* precedent, adding that "[t]his case is nothing more than *Cumbie II*." *Id.* at 47a.

4. The Ninth Circuit denied rehearing en banc over the dissent of ten judges. Pet. App. 1a-3a; see *id.* at 3a-25a (O'Scannlain, J., dissenting). In the dissent's view, the panel in this case disregarded "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." *Id.* at 3a. The panel majority's view that the statutory "silence" here is tantamount to an "invitation to regulate," the dissent stated, disregarded the separation of powers and warranted en banc review. *Ibid.*

The dissent found "[t]wo background principles" significant in this context. Pet. App. 5a. First, this Court's 1942 decision in *Jacksonville Terminal* found no basis to invalidate agreements with respect to the allocation or redistribution of tips, thus setting the default rule that such agreements are presumptively valid under the FLSA. *Id.* at 5a-6a. Second, "an employment practice does not violate the FLSA unless the FLSA *prohibits* it." *Id.* at 6a (citation omitted). Reflecting those principles, the dissent explained, *Cumbie*'s analysis showed that Section 203(m)'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 5a. The Department's contrary 2011 regulations, the dissent conclud-

ed, had incorrectly transformed "the longstanding rule that federal law permits employers to institute any tip-pooling arrangement the FLSA does not prohibit" into "a rule that employers may only institute a tip pool if the FLSA expressly authorizes it." *Id.* at 8a.

The panel majority opinion, the dissent continued, had applied a "caricature of *Chevron*" based on asserted statutory "silen[ce]." Pet. App. 10a-12a. Section 203(m), the dissent observed, is also "'silent' about whether [a judge] can require [his] law clerks to wear business attire in chambers," but the FLSA could not "serve as a source of authority to prohibit [such] activities it does not cover." *Id.* at 12a. The dissent explained that "'sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion'" and, it concluded, that is the case here, where the "statute's deliberate non-interference with a class of activity is not a 'gap' in the statute at all" and "simply marks the point where Congress decided to stop authorization to regulate." *Id.* at 13a-14a (quoting *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009)).

5. Since petitioners filed their certiorari petition, a series of administrative and legislative developments have altered the relevant legal landscape.

a. First, in July 2017, the Department of Labor adopted a nationwide "nonenforcement policy" under which the Department will "not enforce" the regulations at issue in this case in any context in which the employer pays its employees a direct cash wage of at least the minimum wage. See 82 Fed. Reg. 57,395, 57,399 (Dec. 5, 2017) (discussing policy). That policy will remain in effect at least for 18 months from July

2017 or until the completion of relevant rulemaking, whichever is earlier. *Ibid.*

b. Second, in December 2017, the Department published a notice of proposed rulemaking (NPRM) in which it proposed "rescind[ing] 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 portion of tips as a credit toward their minimum wage obligations." 82 Fed. Reg. at 57,395. The proposed revisions would eliminate the portions of 29 C.F.R. 531.52, 531.54, and 531.59 that petitioners have challenged in this case. See 82 Fed. Reg. at 57,413; cf. Compl. ¶¶ 58-61. The revisions would therefore allow "employers that pay direct cash wages of at least the Federal minimum wage and do not take a tip credit" under Section 203(m) to arrange for "tip sharing among a larger tip pool of employees," including those "who are not customarily and regularly tipped, such as back-of-the-house employees in restaurants." 82 Fed. Reg. at 57,396 & n.2; see 82 Fed. Reg. 59,562 (Dec. 15, 2017) (extending comment period to Feb. 5, 2018).

The NPRM explained that the Department was "concerned about the scope of its current tip regulations as applied to employers that pay the full Federal minimum wage to their tipped employees," and that, after reviewing the matter in light of litigation on the subject, the Department was "seriously concerned that it [had] incorrectly construed the statute in promulgating the tip credit regulations that apply to such employers." 82 Fed. Reg. at 57,396; see *id.* at 57,399. The NPRM recounted the history of Section 203(m) and the Department's regulations in light of

this Court's FLSA decision in *Jacksonville Terminal*, the Ninth Circuit's decision in this case, and the dissent from the Ninth Circuit's denial of en banc rehearing. *Id.* at 57,396-57,398, see *id.* at 57,399-57,401. The NPRM also explained that the Tenth Circuit in *Marlow* v. *New Food Guy, Inc.*, 861 F.3d 1157 (2017), had subsequently held that "the Department's 2011 tip regulations are invalid to the extent that they bar an employer from using or sharing tips with employees who do not customarily and regularly receive tips when the employer pays a direct cash wage of at least the Federal minimum wage and does not claim a [S]ection [20]3(m) tip credit." 82 Fed. Reg. at 57,398.

c. Third, on March 6, 2018, after the comment period on the NPRM had closed, the Secretary of Labor testified before the Subcommittee on Labor, Health and Human Services, and Education of the House Committee on Appropriations concerning the Department's FY2019 budget request. In that hearing, the Secretary explained that the Tenth Circuit had made clear in *Marlow*, in reasoning the Secretary found persuasive, that the Department lacked statutory authority for its 2011 regulations at issue here, and that the Secretary had concluded that Congress has not authorized the Department to fully regulate in this space. The Secretary, however, explained that Congress had the authority to implement a solution, and he suggested that Congress enact legislation providing that establishments, whether or not they take a tip credit, may not keep any portion of employees' tips.[2]

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[2] Although an official transcript of the Secretary's March 6 testimony has not yet been published, a video recording of his testimony is available. See Committee on Appropriations, U.S. House of Representatives, *FY19 Budget Hearing—Department of Labor*,

d. Finally, on March 23, 2018, Congress enacted the Consolidated Appropriations Act, 2018 (2018 Appropriations Act), Pub. L. No. 115-141, 132 Stat. 348. A provision of that Act revises Section 203(m) by adding a new sentence addressing tips: "An 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." *Id.* Div. S, § 1201(a)(5) (29 U.S.C. 203(m)(2)(B)).

The 2018 Appropriations Act also addresses the portions of the 2011 final rule revising the three tip regulations (29 C.F.R. 531.52, 531.54, and 531.59) that petitioners have challenged in this case. The Ninth Circuit had determined that Section 203(m) does "not address[] the question" resolved in those regulations, because Section 203(m) "is silent as to the tip pooling practices of employers who do not take a tip credit." Pet. App. 46a. The 2018 Act addresses that decision and the Department's subsequent regulatory actions in a provision entitled "EFFECT ON REGULATIONS." 2018 Appropriations Act, Div. S, § 1201(c). The provision states that "[t]he portions of the [2011] final rule * * * that revised [the three regulations in question] and that are not addressed by [S]ection [20]3(m) * * * (as such section was in effect on April 5, 2011), shall have no further force or effect until any future action taken by the Administrator of the [Department's] Wage and Hour Division." *Ibid.*

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https://appropriations.house.gov/calendararchive/eventsingle.aspx?EventID=395112 (relevant excerpts at 44:50-45:44, 1:12:40-1:13:23, 1:14:10-1:15:02).

ARGUMENT

Section 203(m) of Title 29 provides that an employer may pay less than the federal minimum wage to an employee who receives tips, and thus take what is known as a "tip credit" against its cash-wage obligation. To do so, the employer must pay a direct cash wage of at least $2.13 per hour and inform the employee of Section 203(m)'s provisions, and the employee must retain her tips or participate in a tip pool composed only of "employees who customarily and regularly receive tips." 29 U.S.C. 203(m). Section 203(m) thus places certain conditions on an employer's taking of a tip credit against its direct cash-wage obligation to a tipped employee. The question presented here is whether Section 203(m) places those same conditions on an employer that pays the full federal minimum wage to its tipped employees and does *not* take a tip credit. The question is recurring and practically important because some employers that pay the full minimum wage want to require their tipped employees to participate in a nontraditional tip pool—*i.e.*, a tip pool that includes some employees (such as cooks or dishwashers) who do not customarily and regularly receive tips.

In 2011, the Department of Labor amended its regulations to prohibit that practice. The Department concluded that Section 203(m)'s conditions apply "whether or not" an employer "has taken a tip credit." 29 C.F.R. 531.52. That conclusion is incorrect, and the amended regulations exceed the Department's statutory authority. Section 203(m) does not address whether an employer that pays a direct cash wage equal to or greater than the federal minimum wage may require tipped employees to share their tips with

nontipped employees. The FLSA neither limits employers in that circumstance nor grants regulatory authority to the Department to do so. The court of appeals' contrary decision conflicts with the Tenth Circuit's decision in *Marlow* v. *New Food Guy, Inc.*, 861 F.3d 1157, 1164 (2017), and would normally warrant this Court's review.

Here, however, while the Department was reconsidering its 2011 regulations, Congress suspended the operation of those regulations in relevant part and made clear that employers may have nontraditional tip pools, provided that they do not retain any portion of employees' tips. In light of the government's change of position in this case, as well as the intervening statutory and regulatory changes, the Court should grant certiorari, vacate the judgment of the court of appeals, and remand for further proceedings in light of those developments.

A. The Decision Below Is Incorrect

1. By its terms, the FLSA regulates tip pooling only by employers that take a tip credit. Section 203(m) states that, "[i]n determining the wage an employer is required to pay a tipped employee," the total wage is deemed to be (1) a required "cash wage" of at least $2.13 per hour plus (2) "an additional amount on account of the tips received by such employee" that is "the difference between" the cash wage and the current federal minimum wage of $7.25 per hour. 29 U.S.C. 203(m); see 29 C.F.R. 531.50(a), 531.59(a). That "additional amount"—which is the employer's tip credit—"may not exceed the value of the tips actually received by an employee." 29 U.S.C. 203(m). Section 203(m) thus provides that, so long as a tipped employee retains at least $5.12 per hour in tips, an employer

may satisfy its minimum-wage obligation by paying the employee a direct cash wage of only $2.13 per hour.

Since its amendment in 1974, Section 203(m) has placed certain conditions on an employer that wishes to take such a tip credit. The employer may do so only if "[the tipped] employee has been informed by the employer of the provisions of [Section 203(m)], 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). Crucially, however, the statute imposes those conditions only when an employer wants to pay less than a full cash wage and claim "an additional amount on account of the tips received by such employee." *Ibid.* Thus, at all times relevant to this case, Section 203(m) did not address tip-pooling practices by employers that paid a direct cash wage equal to or greater than the federal minimum wage, but that wanted tipped employees to share their additional tip income with nontipped employees for reasons of fairness or morale. Such employers satisfied the FLSA's minimum-wage requirements, and did not run afoul of Section 203(m).

2. The history of Section 203(m) confirms that conclusion. In 1942, shortly after Congress enacted the FLSA, this Court addressed the statute's relationship to the compensation of tipped employees in *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386. There, the Court held that railroad terminals had complied with the FLSA by permitting porters to keep their tips, and then paying a supplemental cash wage when necessary to make up the difference between a por-

ter's tips and the required minimum wage. *Id.* at 388-389, 392, 397-398, 403-408. "In businesses where tipping is customary," the Court acknowledged, "tips, in the absence of an explicit contrary understanding, belong to the recipient." *Id.* at 397. But the Court concluded that the terminals had given written notice of their intention to take a tip credit, *id.* at 392, 394; employees had agreed to that arrangement, *id.* at 398; and there was "no reason" to invalidate such "an arrangement" absent a contrary statutory directive, *id.* at 397, which the FLSA did not provide, *id.* at 403-408. Congress required that employees "receive a compensation at least as great as that fixed by the Act," the Court explained, but otherwise "left [the employer] free, in so far as the Act [is] concerned, to work out the compensation problem in his own way." *Id.* at 408.

In 1966 and 1974, when Congress added and then amended the tip-credit provisions at issue here, it did so against the backdrop of *Jacksonville Terminal*. As explained above, by its terms, the 1974 amendment imposes conditions before an employer may take a tip credit to reduce its cash-wage obligation to a tipped employee. See pp. 2-3, 15, *supra*. Congress did not extend those conditions to tip-pooling practices by an employer that does *not* take a tip credit. The court of appeals acknowledged as much: "[S]ection 203(m) does not restrict the tip pooling practices of employers who do not take tip credits." Pet. App. 33a; see *id.* at 46a. Under the reasoning of *Jacksonville Terminal*, by amending the Act to place limits on tip pooling only when employers seek to take a tip credit, Congress "left [other employers] free, in so far as the Act [is] concerned," to require tipped employees to participate in nontraditional tip pools. 315 U.S. at 408.

The Department of Labor reached the contrary conclusion in amending its tip regulations in 2011. It concluded that "Congress deliberately amended the FLSA's tip credit provisions in 1974 to clarify that [S]ection [20]3(m) provides the only permitted uses of any employee's tips—through a tip credit or a valid tip pool among only those employees who customarily and regularly receive tips"—"regardless of whether a tip credit is taken." 76 Fed. Reg. at 18,841. That interpretation cannot be squared with the statutory text or historical background. As previously discussed, Congress specified in 1974 that Section 203(m)'s tip credit (which it had added in 1966) would not apply unless the tipped employee is informed of Section 203(m)'s provisions and either retains her tips or participates in a traditional tip pool. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 13(e), 88 Stat. 64-65. In adding that final sentence to Section 203(m) (now Section 203(m)(2)(A)), Congress qualified only the existing tip credit. It did not go further and regulate tip pooling outside of the tip credit, as it would have needed to do under *Jacksonville Terminal*'s background rule that employers and employees may arrange compensation unless the FLSA provides otherwise.

3. Section 203(m)'s legislative history confirms that Congress intended Section 203(m)'s tip provisions to apply only to employers that take a tip credit, not those that pay a direct cash wage at or above the federal minimum wage.

a. When Congress enacted Section 203(m)'s original tip-credit provisions in 1966, the relevant Senate Report made clear that the provision was "sufficiently flexible to permit the continuance of existing practices

with respect to tips." S. Rep. No. 1487, 89th Cong., 2d Sess. 12 (1966). The Report thus stated that "an employer and his tipped employees may agree that all tips are to be turned over or accounted for to the employer to be treated by him as part of his gross receipts," but that, "[w]here this occurs, the employer must pay the employee the full minimum hourly wage" without a tip credit, "since for all practical purposes the employee is not receiving tip income." *Ibid.* The Department's contemporaneous regulations—which remained in force until 2011—likewise reflected the established rule under *Jacksonville Terminal* that the FLSA left employers free to decide how tips should be distributed to compensate employees. See p. 4, *supra* (discussing regulations).

In 1974, Congress added the conditions on taking a tip credit. The relevant Senate Report explained that the amendment "require[d] the employer to inform each of such employer's tipped employees of this provision *before the credit * * * is applied*. In addition, [the amendment] further require[d] that all tips received by a tipped employee must be retained by such tipped employee." S. Rep. No. 690, 93d Cong., 2d Sess. 64 (1974) (*1974 Senate Report*) (emphasis added); *id.* at 42 (similar); cf. *id.* at 72 (text). Significantly for this case, the Senate Report further explained that "if" an employer required its "tipped employees * * * to share their tips with employees who do not customarily and regularly receive tips" (through a nontraditional tip pool), "the *employer will lose the benefit of this exception*." *Id.* at 43 (emphasis added). That explanation, like Section 203(m)'s plain text, confirms that Congress did not intend employers to be prohibited from establishing nontraditional tip pools. Sec-

tion 203(m) merely prevents an employer that does so from taking Section 203(m)'s tip-credit exception from the FLSA's normal minimum-wage requirements.

The court of appeals relied on "surrounding text" in the Senate Report stating that "'all tips received be paid out to tipped employees.'" Pet. App. 44a-45a (quoting *1974 Senate Report* 42). That passage does not support the court of appeals' decision when read within the context of the full sentence in which it appears. The sentence states that "[the 1974 amendments] modif[y] [S]ection [20]3(m) * * * by requiring employer explanation to employees of the tip credit provisions, and by requiring that all tips received be paid out to tipped employees." *1974 Senate Report* 42. That statement accurately summarizes the conditions in the 1974 amendment *for taking a tip credit*. See *id.* at 64 (describing requirements as conditions to be met "before the credit * * * is applied"). The statement does not address whether an employer may require the sharing of tips among both tipped and nontipped employees when it does *not* take a tip credit.[3]

b. In 2017, the Department issued an NPRM that proposed rescinding the 2011 tip regulations at issue here. That NPRM identified the source of the Department's 2011 interpretive error. In 1989, the Department had issued an opinion letter stating that

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[3] The court of appeals relied on another passage from the Report stating that tipped employees should have "'stronger protection'" and reproducing the then-existing regulatory distinction between a "tip" and a service "charge." Pet. App. 45a (quoting *1974 Senate Report* 42). But the 1974 amendment to Section 203(m)(2) provided stronger protection by specifying that an employer may take a tip credit only if it informs the employee of Section 203(m)'s provisions and the tipped employee retains "all tips received" or his share of tips from a traditional tip pool. 29 U.S.C. 203(m).

"courts ha[d] made clear that tips are the property of the employee to whom they are given." Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter WH-536, 1989 WL 610348, at *2 (Oct. 26, 1989). Based on that premise, the 1989 opinion letter determined for the first time that Section 203(m) prohibited an employer who paid a direct cash wage of at least the minimum-wage—even if "the employer d[id] not claim a tip credit under [S]ection [20]3(m)"—from requiring that a tipped employee participate in a nontraditional tip pool. Doing so, the opinion letter concluded, "would, in effect, [force the employee to] contribute part of his or her property" to that pool "for the benefit of the employer" and thereby reduce the employee's net wages by the amount of that contribution. *Ibid.*

The Department has now acknowledged that the 1989 opinion letter was based on "erroneous reasoning," because lower courts, following this Court's decision in *Jacksonville Terminal*, had determined that tips belong to the employee who receives them only "'[i]f there was no agreement as to ownership.'" 82 Fed. Reg. at 57,400 & n.9 (citation omitted). The 1989 opinion letter was a central basis for the Department's 2008 NPRM for the relevant 2011 tip regulations and the 2011 final rule. See 76 Fed. Reg. at 18,839 (2011 final rule citing Opinion Letter WH-536 to support view that "Section [20]3(m) provides the only method by which an employer may use tips received by the employee"); 73 Fed. Reg. 43,654, 43,659 (July 28, 2008) (NPRM repeatedly citing Opinion Letter WH-536). The Department has thus recognized, contrary to the decision below, that Section 203(m) does not require all tips to be retained by

tipped employees when the employer does not take a tip credit.

4. The panel majority agreed that Section 203(m) is "silen[t] as to employers who do not take a tip credit," but incorrectly reasoned that the silence "leaves room for agency discretion" and the Department's 2011 interpretation is "reasonable." Pet. App. 41a, 42a, 46a. As the dissenting judges explained below, 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. See, *e.g.*, *id.* at 3a ("[T]he panel majority equates a statute's 'silence' with an agency's invitation to regulate."); *id.* at 12a ("[A] statute's deliberate noninterference 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."). Just as the "meaning of statutory language, plain or not, depends on context," *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) (citation omitted), so too does the meaning of statutory "silence." Sometimes "silence is meant to convey nothing more than a refusal to tie the agency's hands" on a matter. *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009). But "sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion." *Id.* at 223. Silence alone does not necessarily reflect a congressional delegation of authority to an agency to fill a gap for which deference can be warranted.

This case illustrates that principle. The terms of Section 203(m)—particularly when read against the backdrop of *Jacksonville Terminal*—evince Congress's intent *not* to regulate the tip pooling practices of em-

ployers that do not take a tip credit. Section 203(m)'s "silence" with respect to employers that do not take a tip credit thus is not the type of silence reflecting ambiguity that the Department could clarify through regulations. Because the interpretation of Section 203(m) reflected in the 2011 regulations misconstrues the statutory text and history, there is ultimately no relevant "gap" for the agency to fill. Indeed, had Congress intended such a significant departure from *Jacksonville Terminal*'s determination that Congress "left [the employer] free, in so far as the Act [is] concerned, to work out the compensation problem in his own way," 315 U.S. at 408, it would have made such a change clear in statutory text and not relied upon "statutory silence." See *Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017) (noting that "Congress . . . does not, one might say, hide elephants in mouseholes") (citation omitted).

The panel majority invoked this Court's brief discussion of *Chevron* deference in *Christensen* v. *Harris County*, 529 U.S. 576 (2000), to support its rationale. The panel majority viewed that discussion as "strongly suggest[ing]" that when "a statute does not prohibit conduct because it is silent," the statute's silence "leaves room for agency discretion" to engage in rulemaking. Pet. App. 39a-42a. To the contrary, the Court in *Christensen* determined that the relevant sections of the FLSA said "nothing about" the issue in that case, 529 U.S. at 585, and declined to grant *Skidmore* deference to the Department's opinion letter on the subject because the letter's reasoning was "unpersuasive," *id.* at 587. *Christensen* then acknowledged that "the framework set forth in *Chevron* [would] apply to an agency interpretation con-

tained in a regulation," but the Court made clear that, in the case before it, the only relevant "regulation d[id] *not* address the [disputed] issue." *Ibid.* (emphasis added). The Court thus had no occasion to address whether a regulation addressing the issue would have been within the Department's authority. As such, *Christensen* lends no support to the notion that statutory silence necessarily leaves room for agency regulation.

B. This Court Should Grant The Petition, Vacate The Judgment Of The Court Of Appeals, And Remand For Further Proceedings

Although the decision below is incorrect, important, and the subject of a circuit conflict, the Court should grant certiorari, vacate the Ninth Circuit's judgment, and remand for further proceedings rather than grant plenary review, in light of the government's change in position and intervening statutory and regulatory changes.

1. Vacating the judgment of the court of appeals would eliminate the division of authority on the question presented and would deprive the decision below of ongoing effect. That is appropriate here for two reasons.

a. First, although the government has previously defended the Department of Labor's 2011 tip regulations, the Department of Labor has reconsidered the validity of those regulations in light of the Tenth Circuit's recent decision in *Marlow*, *supra*, and the dissent from the denial of rehearing en banc below. In July 2017, the Department suspended its enforcement of the relevant portions of the 2011 regulations pursuant to a "nonenforcement policy." See pp. 9-10, *supra*. In December 2017, the Department issued an NPRM

proposing to rescind the relevant regulations, expressing "serious concern" that it had misconstrued the governing statutory framework. See pp. 10-11, *supra*. And in March 2018, after the notice-and-comment period had closed, the Secretary of Labor testified before a congressional subcommittee that he found persuasive the Tenth Circuit's decision in *Marlow* and had concluded that the Department lacked statutory authority for its 2011 regulations. See p. 11, *supra*. On remand, the court of appeals may address in the first instance the Department's changed position.

b. Second, in March 2018, Congress addressed the decision below and the Department's subsequent regulatory actions. It revised Section 203(m) by adding a new sentence: "An 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)). Congress separately provided that "[t]he portions of the [2011] final rule" that are at issue in this case "and that are not addressed by [S]ection [20]3(m) * * * (as such section was in effect on April 5, 2011), shall have no further force or effect until any further action by the Administrator of the [Department's] Wage and Hour Division." *Id.* § 1201(c).

Those actions by Congress adopt the Secretary of Labor's position during his recent testimony: employers that pay the full minimum wage should be permitted to have nontraditional tip pools, so long as they do not themselves keep any portion of their employees' tips. That conclusion flows from Congress's decision

to add to Section 203(m) an express prohibition on employers' keeping tips received by employees and Congress's related decision to deprive the relevant portions of the 2011 tip regulations of any "further force or effect" pending action by the agency. The Department of Labor has advised this Office that, in light of the statutory amendments, it intends to conduct a future rulemaking to clarify how those amendments affect nontraditional tip pools (for instance, the Department intends to consider how to define the category of managerial and supervisory employees who may not participate in tip pools). The court of appeals potentially could consider any new final rule on remand.

2. The Court also should grant, vacate, and remand the companion case of *Cesarz* v. *Wynn Las Vegas, LLC*, No. 14-15243 (9th Cir.), petition for cert. pending, No. 16-163 (filed Aug. 1, 2016), which the court of appeals consolidated for disposition with this case. Pet. App. 27a n.*. There, casino employees sued their employer, Wynn Las Vegas, LLC, alleging that, although Wynn pays its employees a direct cash wage equal to or greater than the federal minimum wage, Wynn purportedly violated the FLSA's minimum-wage or overtime requirements by pooling tips among both tipped and nontipped employees. See *id.* at 28a. Unlike in this case, where petitioners rely on the APA's cause of action, see 5 U.S.C. 702, the plaintiffs in *Cesarz* asserted their tip-pool claims under the FLSA's cause of action for minimum-wage or overtime claims in 29 U.S.C. 216(b). 13-cv-109 Am. Compl. ¶¶ 1, 11-13.

Before the 2018 Appropriations Act, Section 216(b) established a private right of "action * * * against any

employer" only for "violat[ing] the [minimum-wage and overtime] provisions of [S]ection 206 or [S]ection 207" or retaliating against an employee for protected activity in violation of Section 215(a)(3). 29 U.S.C. 216(b) (2012). The government has therefore argued, and courts have agreed, that an employee could maintain an action under Section 216(b) for alleged tip-credit violations only when the employee alleges that those violations resulted in a minimum-wage or overtime violation.[4] In an effort to fit within Section 216(b), the *Cesarz* plaintiffs have relied on the 2011 regulations to claim that, although Wynn paid a direct cash wage of at least $7.25 an hour, they were entitled to keep all of their tips, and Wynn's pooling of their tips with nontipped employees should be treated as a deduction from their cash wage (thereby creating a minimum-wage violation). Their claim fails 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. Neither Section 203(m) nor any other provision of the FLSA prevents an employer that pays at least the

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[4] See, *e.g.*, *Trejo* v. *Ryman Hospitality Props., Inc.*, 795 F.3d 442, 448 (4th Cir. 2015) (affirming dismissal, consistent with Department's cause-of-action arguments, because plaintiffs "concede[d] that their wages d[id] not fall below the statutory minimum"); *id.* at 448-450 (Harris, J., concurring in the judgment); see also *Malivuk* v. *Ameripark, LLC*, 694 Fed. Appx. 705, 708-710 & n.5 (11th Cir. 2017) (per curiam) (agreeing with Department and dismissing action because plaintiffs failed to allege minimum-wage or overtime violation); cf. *Marlow*, 861 F.3d at 1161 n.4 (noting government's position and stating that "the FLSA's limited private right of action suggests that the statute's focus is on ensuring employees receive a minimum wage, not that they keep their tips").

minimum wage from instituting a nontraditional tip pool for employees' tips.

As explained above, the 2018 Appropriations Act amended Section 203(m) to prohibit all employers—whether or not they take a tip credit—from keeping any portion of their employees' tips. To enforce that requirement, Congress added to Section 216(b) an express cause of action for private parties to bring suit whenever an employer keeps the employee's tips, even if the employee does not allege a resulting minimum-wage or overtime violation. 2018 Appropriations Act, Div. S, § 1201(b)(1) (amending Section 216(b)'s private right of action to enforce Section 203(m)(2)(B)). The fact that Congress added that limited private right of action only underscores that Section 216(b) does not otherwise permit a private individual to bring tip-pool or tip-credit claims, unless he alleges that an employer's treatment of his tipped income brought his net wages below the minimum wage or overtime pay required by the FLSA.

On 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*. If the court of appeals concludes that private plaintiffs may continue to rely on the 2011 tip regulations, despite the express language of the 2018 amendment, the court of appeals may reconsider the validity of the 2011 tip regulations in light of the Department's change in position, as well as Congress's further decision to prevent employers from keeping tips while not otherwise limiting employers' ability to establish nontraditional tip pools.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further proceedings.

Respectfully submitted.

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MAY 2018

APPENDIX

1. 29 U.S.C. 203 (2012) provides in pertinent part:

Definitions

As used in this chapter—

* * * * *

(m) "Wage" paid to any employee includes * * * . 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.

* * * * *

2. 29 U.S.C. 203, as amended by Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. S, § 1201(a), 132 Stat. 348, provides in pertinent part:

Definitions

As used in this chapter—

* * * * *

(m)(1) "Wage" paid to any employee includes * * * .

(2)(A) 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—

(i) 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

(ii) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in clause (i) 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.

(B) An 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.

* * * * *