Melissa Smith
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue N.W., Room S-3502
Washington, DC 20210

Re: RIN 1235-AA21, Comments in Response to Proposed Rulemaking: Tip Regulations Under the Fair Labor Standards Act (FLSA)

Dear Ms. Smith:

The National Center for Law and Economic Justice writes in response to the Department of Labor's (the Department) Notice of Proposed Rulemaking (NPRM), whereby the Department seeks to rescind portions of tip regulations it issued in 2011 (the 2011 Final Rule) pursuant to the Fair Labor Standards Act (FLSA).[1] We oppose this NPRM in the strongest possible terms and urge the Department to withdraw it.

As an organization dedicated to economic justice, we are committed to promoting fairness in the workplace and supporting the economic security of low-income families, individuals, and communities. By rescinding portions of the 2011 Final Rule that clarify employers' obligations to their tipped employees under section 3(m) of the FLSA and, in particular, abolishing the regulation affirming that tips are the property of the employee who earned them, the Department departs from longstanding practice and precedent and threatens the economic security of millions of working people and their families. Tipped workers in the United States stand to lose an estimated $5.8 billion dollars in tips each year if the Department's rule goes into effect—and women would bear the overwhelming share of this loss: $4.6 billion.[2]

The Department of Labor's 2011 Final Rule updating the tip credit regulations was a long-overdue change that harmonized those regulations with intervening statutory changes and legislative history; clarified that tips are the property of the employee and may not be confiscated by employers to bolster their profits or subsidize their operating costs; and strengthened critical wage protections for working people.[3] While the Department cites legal challenges to the Department's 2011 Final Rule as a primary rationale for its proposed reversal,[4] pending litigation challenging a rule is not a reasoned basis for reversing an agency's prior considered position—especially where one of the two courts of appeals to consider direct challenges to the 2011 Final Rule has *agreed* with the Department's prior view that the 2011 Final Rule is a valid exercise of

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[1] U.S. Dep't of Labor, Notice of Proposed Rulemaking, *Tip Regulations Under the Fair Labor Standards Act (FLSA)*, 82 Fed. Reg. 57,395 (proposed Dec. 5, 2017) [hereinafter "Tipped Workers NPRM"]; U.S. Dep't of Labor, Final Rule, *Updating Regulations Issued Under the Fair Labor Standards Act*, 76 Fed. Reg. 18,832 (Apr. 5, 2011) [hereinafter "2011 Final Rule"].

[2] HEIDI SHIERHOLZ ET AL., ECON. POLICY INST. (EPI), WOMEN WOULD LOSE $4.6 BILLION IN EARNED TIPS IF THE ADMINISTRATION'S "TIP STEALING" RULE IS FINALIZED 1 (2018), http://www.epi.org/files/pdf/140380.pdf.

[3] *See generally* 2011 Final Rule, 76 Fed. Reg. 18,832.

[4] Tipped Workers NPRM, 82 Fed. Reg. at 57,396, 57,399, 57,402, 57,399.

agency discretion.[5] Nor does the Department's argument that state minimum wage changes since 2011 have reduced the number of employers who may claim a tip credit under the FLSA provide a credible basis for revisiting the 2011 Final Rule;[6] relying on the enactment of stronger state-law protections to weaken federal standards is a perverse argument that would undermine the fundamental goals of the FLSA, the purpose of which "is to establish a national *floor* under which wage protections cannot drop."[7] It would turn congressional intent on its head for the Department to *lower* federal standards under the FLSA in response to state-law developments that aim to provide *greater* protections for working people.

The Department should let the judicial challenges run their course before deciding whether to revisit the rule, withdraw its current proposal, and instead focus its energies on advancing policies that strengthen—rather than undermine—the ability of people working in low-wage jobs, including tipped workers, to support themselves and their families.

I. The Proposed Rule Will Increase Economic Insecurity For Women and People of Color, Who Are Overrepresented Among People Who Work For Tips.

Women—disproportionately women of color—represent nearly two-thirds of tipped workers nationwide.[8] In 32 states, at least 7 in 10 tipped workers are women.[9] Median hourly earnings for people working in tipped jobs hover around $10, including tips,[10] and poverty rates for tipped workers are more than twice as high as rates for working people overall—with tipped workers who are women, and especially women of color, at a particular disadvantage.[11] As recognized in the NPRM, working people in tipped occupations rely on tips as a major source of income;[12] the

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[5] *Compare Oregon Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1086-90, *reh'g and reh'g en banc denied*, 843 F.3d. 355, 356 (9th Cir. 2016) (Ninth Circuit upheld the Department's 2011 Final Rule, concluding that the rule permissibly regulated the tip pooling practices of employers who do not take a tip credit) *with Marlow v. The New Food Guy, Inc.*, 861 F.3d 1157, 1162-64 (10th Cir. 2017) (holding that the Department lacked authority to promulgate its tip regulation to the extent it applies to employers who do not take a tip credit). *See also Pennsylvania v. Trump*, Civ. No. 17-4540, 2017 WL 6398465, at *11-12 (E.D. Pa. Dec. 15, 2017) (holding that uncertainty caused by ongoing litigation does not create the kind of good cause needed to avoid notice and comment under the APA). The plaintiffs in the *Oregon Rest. & Lodging Ass'n* case have filed a petition for certiorari with the Supreme Court, and that petition is pending. Petition for Writ of Certiorari, *Nat'l Rest. Ass'n v. Dep't of Labor*, No. 16-920.

[6] *See* Tipped Workers NPRM, 82 Fed. Reg. at 57,396, 57,401.

[7] *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990).

[8] Nat'l Women's Law Ctr. (NWLC) calculations based on U.S. Census Bureau, American Community Survey 2016 one-year estimates (ACS 2016) using IPUMS-USA. Women make up 65.5 percent of tipped workers. Figures include employed workers only and use the same definition of tipped workers set forth in SYLVIA A. ALLEGRETTO & DAVID COOPER, EPI & CTR. ON WAGE & EMPLOYMENT DYNAMICS, UNIV. OF CA., BERKELEY, TWENTY-THREE YEARS AND STILL WAITING FOR CHANGE 20, 23 (2014), http://s2.epi.org/files/2014/EPI-CWED-BP379.pdf. Women of color are 25.2 percent of tipped workers, compared to 17.5 percent of all workers. NWLC calculations based on ACS 2016 using IPUMS-USA.

[9] *See* NWLC & REST. OPP. CTR. UNITED (ROC UNITED), WOMEN AND THE TIPPED MINIMUM WAGE, STATE BY STATE, https://nwlc.org/resources/tipped-workers/ (last visited Jan. 18, 2018).

[10] *See* ALLEGRETTO & COOPER, *supra* note 8, at 12 (finding median hourly wages of $10.22 for all tipped workers and $10.11 for waiters/bartenders, compared to $16.48 for all workers).

[11] *See generally* NWLC & ROC UNITED, RAISE THE WAGE: WOMEN FARE BETTER IN STATES WITH EQUAL TREATMENT FOR TIPPED WORKERS (2016), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2016/10/Tipped-Wage-10.17.pdf.

[12] Tipped Workers NPRM, 83 Fed. Reg. at 57,409 fn 40,41.

National Employment Law Project and Restaurant Opportunities Centers United estimate that tips typically represent close to 60 percent of hourly earnings for servers and 54 percent for bartenders.[13] Reducing the amount of tips that working people can take home to their families will undoubtedly harm this already low-paid workforce, especially the women and people of color who disproportionately hold these roles.[14]

Yet this is precisely what the proposed rule would do, by allowing employers to retain employee tips for their own purposes—whatever those purposes may be, including increasing profits. While the NPRM suggests that the Department's rule change is motivated by a desire to allow employers to decrease wage disparities between front- and back-of-house workers through tip pooling arrangements, such arrangements are already permissible under existing regulations when employees voluntarily share their tips. Allowing employers to require redistribution of tips to back-of-house workers merely provides an incentive for employers to keep base wages low for cooks, dishwashers, and others, subsidized by the earnings from bartenders and wait staff. And the proposed rule itself—which would apply to all tipped workers, not just those in restaurants or other settings where tip pooling is relevant—simply removes all limits on employer control of employee tips, so long as the employer pays the employee the federal minimum wage.[15]

Evidence already demonstrates that even under current law, employers are illegally pocketing worker tips. One study surveying workers in Chicago, Los Angeles, and New York found that 12 percent of tipped workers had wages stolen by their employer or supervisor.[16] The Economic Policy Institute now estimates (conservatively) that under the proposed rule, employers would claim $5.8 billion dollars taken *legally* from their employees, representing 16 percent of tips earned by workers annually.[17] And an astounding $4.6 billion of this $5.8 billion—nearly 80 percent—would be tips earned by women.[18]

Even the slight protection offered by the rule's requirement that employers forego the federal tip credit before taking control of employee tips may prove illusory. As the Department acknowledges in the NPRM, its proposal could allow employers to "circumvent[] the protections of section 3(m) [of the FLSA] . . . [by] utilizing its employees' tips towards its minimum wage obligations to a greater extent than permitted under the statute for employers that take the tip credit."[19] The risk here is clear: money is fungible, and so long as an employer pays its tipped employees the full minimum wage in week one, there is nothing in the proposed rule that would

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[13] IRENE TUNG & TEOFILO REYES, NAT'L EMPLOYMENT LAW PROJECT (NELP) & ROC UNITED, WAIT STAFF AND BARTENDERS DEPEND ON TIPS FOR MORE THAN HALF OF THEIR EARNINGS (2018), http://www.nelp.org/publication/wait-staff-and-bartenders-depend-on-tips-for-more-than-half-of-their-earnings/.

[14] People of color represent 44.1 percent of the tipped workforce, compared to 36.5 percent of the overall workforce. ROC United calculations based on ACS 2016 using IPUMS-USA.

[15] NELP & ROC UNITED, DOL'S PROPOSED RULE ON TIPPED WORKERS: LEGALIZING WAGE THEFT IN TIPPED INDUSTRIES (2017), http://www.nelp.org/publication/dols-proposed-rule-on-tipped-workers-legalizing-wage-theft-in-tipped-industries/.

[16] ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 23 (2009), http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf.

[17] HEIDI SHIERHOLZ ET AL., EPI, EMPLOYERS WOULD POCKET $5.8 BILLION OF WORKERS' TIPS UNDER TRUMP ADMINISTRATION'S PROPOSED 'TIP STEALING' RULE 1 (2017). http://www.epi.org/files/pdf/139138.pdf [hereinafter SHIERHOLZ ET AL. 2017].

[18] SHIERHOLZ ET AL., *supra* note 2.

[19] Tipped Workers NPRM, 82 Fed. Reg. at 57,402 n.14.

prevent the employer from taking all of the tips earned in week one to subsidize payment of all or some of the minimum wage in week two, and so on. In this scenario, except for the first week of work, an employee's tips are the source of the minimum wage payments and the employer is in effect taking a tip credit without abiding by the protections of section 3(m) of the FLSA. Moreover, the assurance of receiving $7.25 an hour before tips does little to change the employee's dependence on those tips, as the inadequate federal minimum wage leaves a mother supporting one or more children thousands of dollars below the poverty line, even if she works full time.[20]

In sum, the Department's adoption of the changes proposed in this NPRM will likely result in lower earnings for the already vulnerable tipped workforce, an increased number of women living in poverty, and reduced incentives for employers to raise base wages across the board now or in the future.

II. The Proposed Rule Exacerbates the Vulnerability to Sexual Harassment Faced By Women in Tipped Jobs.

Sexual harassment is a pervasive problem in the restaurant industry and in other industries where women rely on tips to survive.[21] Women who rely on tips for much of their income often feel forced to tolerate inappropriate behavior from customers so as not to jeopardize that income; women working for tips know, just as the NPRM observes, that tips often "may be more a function of server looks and friendliness [and] the customer mood . . . than they are of aspects of service quality."[22] A study by the Restaurant Opportunities Centers United and Forward Together found that the overwhelming majority of tipped restaurant workers have experienced some type of sexual harassment or assault in the workplace,[23] and Equal Employment Opportunity Commission (EEOC) data reveals that workers in the accommodation and food service industry—mostly women—filed more sexual harassment charges than in any other between the years 2005 and 2015.[24]

The proposed rule further entrenches the most problematic aspects of tipped work. Reliance on tips already creates strong financial incentives to accept harassment from customers, which

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[20] A woman working full time at minimum wage earns just $14,500 annually (assuming 40 hours of work per week, 50 weeks per year). The poverty line for a parent and one child, for example, is $16,543; for a parent and two children, it is $19,337. U.S. Census Bureau, Poverty Thresholds for 2016, https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html (last visited Jan. 8, 2018).

[21] *See generally* ROC UNITED & FORWARD TOGETHER, THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY (2014), http://rocunited.org/wp-content/uploads/2014/10/REPORT_TheGlassFloor_Sexual-Harassment-in-the-Restaurant-Industry.pdf.

[22] Tipped Workers NPRM, 82 Fed. Reg. at 57,409.

[23] *See* ROC UNITED & FORWARD TOGETHER, *supra* note 21, at 2 (restaurant workers surveyed report high levels of harassing behaviors from restaurant management (66 percent), co-workers (80 percent), and customers (78 percent)).

[24] JOCELYN FRYE, CTR. FOR AM. PROGRESS, NOT JUST THE RICH AND FAMOUS: THE PERVASIVENESS OF SEXUAL HARASSMENT ACROSS INDUSTRIES AFFECTS ALL WORKERS (Nov. 20, 2017), https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/. In addition, in every year between 2002 and 2016, women working in the accommodation and food services sector filed more sexual harassment charges than women in any other sector. NWLC calculations based on unpublished U.S. Equal Employment Opportunity Commission data on sexual harassment charges by industry for 1996-2016.

affects the broader culture of restaurants as workplaces. When employers have a direct stake in those tips, as this rule would permit, we can expect even greater employer pressure on tipped front-of- house workers to accept customer harassment without complaint so as not to risk lower tips, which in turn feeds into a workplace culture of objectification of tipped workers. The proposed rule would make women who depend on tips doubly vulnerable to harassment and exploitation as they try to please the customer in order to earn tips, then the employer in order to keep them.

III. The Department Has Failed To Engage in Necessary Quantitative Analysis of Its Proposed Rule.

In a highly unusual move, the Department has failed to even attempt to quantitatively analyze the costs and benefits of the proposed rule, counter to standard practice and multiple rulemaking authorities.[25] Yet the impact of this rule is eminently quantifiable, as shown by the Economic Policy Institute (EPI) which, in less than two weeks, engaged in the analysis that the Department would not.[26] It would be arbitrary and capricious for the Department to proceed with this rulemaking without understanding the likely effect of the proposed rule on working people[27]—and should the Department conduct the requisite analysis, we have every confidence that its estimates, like EPI's, will show that the Department should not move forward with this rulemaking because of the harm it would cause to the working people the Department is charged with protecting.

The National Center for Law and Economic Justice strongly urges the Department to withdraw the proposed rule, and instead focus its energies on promoting policies that will improve economic security for people working in low-wage jobs and empower all working people with the resources they need to combat sexual harassment in their workplaces.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact us to provide further information.

Leah Lotto
Staff Attorney

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[25] *See* Exec. Order 13,563, at § 1, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (Jan. 21, 2011) ("[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."); *see also* Exec. Order 12,866, at §§ 1(a), 1(b)(6), 6(a)(3)(C), *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993); White House Office of Mgmt. and Budget, Circular A-4, at 18-27 (Sept. 17, 2003).

[26] *See generally* SHIERHOLZ ET AL. 2017, *supra* note 17.

[27] *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (explaining that "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy'") (quoting *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009)); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).