WHO OWNS THE TIPS? *CHEVRON* AND TIP OWNERSHIP UNDER THE FLSA

I. INTRODUCTION

At first blush, the answer to "who owns the tips" may seem obvious. In some tipping situations, money is directly exchanging hands. But in the restaurant industry, it is customary for a customer to leave a tip at the table.[1] Can management just keep the tips? Using property law principles, the answer to "who owns the tips" may depend on whether the customer intends to tip the service or the server.[2] One scholar has argued that even if the customer intends to tip the service, such a tip creates a trust relationship between the employer and server where the server is an intended beneficiary.[3]

Of course, it would be preferable to avoid a foray into property law. Enter the Department of Labor. In 2011, the DOL issued a regulation declaring once and for all that "[t]ips are the property of the employee."[4] This regulation, § 531.52, supplements existing statutory provisions governing the payment of tipped employees. Section 531.52 regulates more than mere tip ownership. It has been construed as prohibiting employment agreements whereby an employee agrees to divest control of her tips to the employer.[5] This interpretation makes sense. Otherwise, an employee who initially owns the tips could simply enter into a contract of adhesion with his or her employer and—as a condition of employment—agree to turn over tips that formerly belonged to the employee.

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[1] Matthew I. Knepper, *The Nexus of the Tip: The Proper Analysis of Property and Contract Rights to the Tip*, 3 UNLV GAMING L.J. 129, 133 (2012).
[2] *See* Knepper, *supra* note 1, at 140 (undertaking two analyses: one where the customer intends to tip the server and the other where the customer intends to tip for the service).
[3] *Id.* at 164.
[4] 29 C.F.R. § 531.52 (emphasis added).
[5] Oregon Rest. & Lodging v. Solis, 948 F. Supp. 2d 1217, 1219 (D. Or. 2013) (stating that "[t]he new regulations prohibit employers from contracting with their tipped employees to include non-tipped employees in the tip pool").

However, courts have held that § 531.52 is invalid under *Chevron*,[6] which provides that an agency regulation controls if (1) the statute is silent or ambiguous on the issue, and (2) the regulation is reasonable.[7] Specifically, these courts have held that the statute in question, 29 U.S.C. § 203(m), speaks directly to the issue of tip ownership.[8] Accordingly, the issue discussed in this paper is not simply who *owns* the tips; it is more precise. First, is the FLSA silent or ambiguous on the issue of whether employers can require employees to divest control of his or her tips? Second, is the DOL's regulation reasonable? Answering these questions requires interpreting the FLSA using the typical tools of statutory construction.

The Ninth Circuit is currently reviewing the *Chevron* issue in a case where the Secretary of Labor is a defendant.[9] The Ninth Circuit is the first appellate court to address this issue. Although the *Chevron* issue comes down to matters of statutory interpretation, the litigants are ultimately battling over competing values: freedom of contract versus employee rights.[10]

This paper argues that § 531.52 is a valid regulation under the *Chevron* doctrine. Section II provides some context regarding the regulation of tipping under the present and past versions of the Fair Labor Standards Act (FLSA). Section III examines the circumstances leading to the DOL's issuance of § 531.52, as well as the judiciary's reaction to the regulation. Section III also discusses the *Chevron* doctrine and the relevant case law that precipitated from the *Chevron*

[6] Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).
[7] *See, e.g.*, Cesarz v. Wynn Las Vegas, LLC, 2:13-CV-00109-RCJ, 2014 WL 117579, *3 (D. Nev. 2014) (holding that Section 531.52 is not entitled to deference under Chevron); *Oregon Rest. & Lodging Assoc.*, 948 F. Supp. 2d at 1226 (D. Or. 2013) (same); Trinidad v. Pret A Manger (USA) Ltd., No. 12 Civ. 6094, 2013 WL 3490815, at *13 (S.D.N.Y. July 11, 2013) (same); Stephenson v. All Resort Coach, Inc., No. 2:12-CV-1097, 2013 WL 4519781, *8 (D. Utah 2013) (same).
[8] *Id.*
[9] *Oregon Rest. & Lodging Assoc. v. Solis*, No. 13-35765 (9th Cir. 2014).
[10] *See* Brief for Defendant-Appellants at 13, Oregon Rest. & Lodging Assoc. v. Solis, (No. 13-35765) (9th Cir. 2013) ("The issue before the Court on this appeal concerns the livelihood of tens of thousands of tipped employees throughout the Ninth Circuit."); Complaint for Declaratory and Injunctive Relief at ¶ 127 Oregon Rest. & Lodging Assoc. v. Solis, 948 F. Supp. 2d 1217 (2013) (No. 3:12-cv-01261), 2012 WL 4932011 (stating that "the very essence of the Regulations is to impose limits on private property use").

decision. Section IV argues that the DOL's regulation of tips is valid under *Chevron* because § 203(m) is silent as to the issue of tip ownership and the regulation is reasonable.

II. TIPPED EMPLOYEES AND THE FLSA

In order to provide some context for the statutory interpretation issue, this Section first outlines the present statutory scheme regarding the payment of tipped employees under the FLSA. It also includes an explanation of § 531.52. Next, this Section examines the regulation of tipping under the FLSA historically, beginning with a case interpreting the FLSA following its initial enactment. At first, the FLSA permitted employers to enter into employment agreements whereby they could retain the tips of their tipped employees. Amendments to the FLSA both expanded coverage to tipped employees and provided employers the option of using a "tip credit" when paying tipped employees. This Section also observes the relevant legislative history, which initially suggests a congressional intent to permit employers to use employee tips. Later amendments to the FLSA evince an intent to grant more rights to tipped employees.

A. The Payment of Tipped Employees Under the Present Version of the FLSA

The FLSA, which generally requires a minimum wage currently set at $7.25 per hour,[11] has a different compensation scheme for tipped employees.[12] This compensation scheme is laid out in 29 U.S.C. § 203(m). Under § 203(m), employers can pay tipped employees less than the minimum wage and use a tip credit to meet their minimum wage obligations. Section 203(m) provides that "the amount paid [a tipped] employee . . . shall be an amount equal to" (1) a cash wage of $2.13 per hour and (2) "an additional amount on account of the tips received by such employee" equal to the difference between the $2.13 cash wage and the $7.25 minimum wage.[13]

[11] 29 U.S.C. § 206(a)(1)(C).
[12] 29 U.S.C. § 203(m).
[13] *Id.*

The "additional amount on account of tips" is known as the tip credit.[14] It does not operate like a tax credit. Instead, it operates to decrease the amount that an employer must pay a tipped employee. The maximum amount of tips that an employer can credit towards its minimum wage obligations is $5.12—the difference between the current minimum hourly wage of $7.25 and the required hourly wage of $2.13 for tipped employees. If the $2.13 wage and the employee's tips combined do not reach the minimum wage threshold of $7.25, the employer must pay difference.[15]

An employer cannot take a credit unless two conditions are satisfied: (1) the employer has informed the employee "of the provisions of this subsection," and (2) "all tips received by such employee have been retained by the employee."[16] There is one exception to satisfying these conditions. Section 203(m) provides that "this subsection shall not be construed to prohibit the pooling of tips among employees who *customarily and regularly* receive tips."[17] In other words, even when the employer takes the credit, it can lawfully require its tipped employees to share its tips with other customarily tipped employees, notwithstanding the requirement that "all tips received by such employee have been retained by the employee."[18]

Section 203(m) does not expressly address whether employees are prohibited from contracting away their tips when the employer uses the credit. It merely provides that employees must *retain* their tips. Additionally, for an employer who does not take the credit and instead pays the full minimum wage, § 203(m) does not expressly explain whether the employer can keep or use the tips. For the purpose of this article, employers who do not use the credit will be

[14] Fast v. Applebee's Int'l, Inc., 638 F.3d 872, 876 (8th Cir. 2011).
[15] 29 U.S.C. § 203(m).
[16] *Id.*
[17] *Id.* (emphasis added).
[18] *Id.*

referred to as noncredit employers. Employers who avail themselves of the credit will be referred to as credit employers.

In 2011, the DOL promulgated § 531.52 in an attempt to clarify the obligations of noncredit employers. Section 531.52 provides that tips are the property of the tipped employee regardless of whether the employer takes a credit. It also provides that an "employer is prohibited from using an employee's tips, whether or not it has taken a tip credit." [19]

Section 531.52 throws a wrench into existing payment practices for tipped employees that were arguably valid under § 203(m). For instance, some employers have elected *not* to take the credit. Instead, they paid tipped employees the full $7.25 minimum wage.[20] Believing that they were no longer bound to the credit condition that "all tips received by such employee have been retained by the employee," some employers have pocketed the tips for themselves. Additionally, noncredit employers have required that their tipped employees pool their tips and share them with other employees who do not "customarily and regularly" received tips.[21]

This situation—where tip pools involve employees who do not customarily and regularly receive tips—poses problems in the restaurant industry. Courts have interpreted § 203(m)'s tip pooling provision as prohibiting tip pools involving kitchen staff because such employees do not customarily and regularly receive tips.[22] Under the new DOL regulation, however, employers who do not take the credit but require employees to share tips with kitchen staff would violate § 531.52 because such tips are the property of the tipped employee.[23]

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[19] 29 C.F.R. § 531.52.
[20] *See, e.g.*, Trinidad v. Pret A Manger (USA) Ltd., 12 CIV. 6094, 2013 WL 3490815, at *11 (S.D.N.Y. July 11, 2013) (plaintiff-employee alleged that employer did not take the tip credit, but instead paid employees the full minimum wage).
[21] *See, e.g.*, *Trinidad*, 2013 WL 3490815, at *11–12.
[22] *See, e.g.*, Myers v. Copper Cellar Corp., 192 F.3d 546, 551 (6th Cir. 1999).
[23] *See Oregon Rest. & Lodging Assoc.*, 948 F. Supp. 2d at 1219.

B. A Brief History of the Regulation of Tipping Inder the FLSA

The original FLSA, passed in 1938, did not contain any provision specifically regulating the wages of tipped employees.[24] Instead, the Act imposed minimum wage obligations across all industries, with some exceptions.[25] The minimum wage requirement did not apply to restaurant workers.[26] But the minimum wage requirement covered railroad employees, and these employees regularly received compensation in the form of tips.[27] Unsurprisingly, disputes arose almost immediately in the railroad industry regarding the effect that tips would have on an employer's minimum wage requirements.[28]

In *Williams v. Jacksonville Terminal Co.*, the Supreme Court addressed this issue head on.[29] The case involved two civil actions, both between railroad workers and the railroads that employed them.[30] The facts underlying both disputes were virtually identical.[31] The employee railroad workers had been working for the railroads as "at will" employees.[32] The railroads were paying them a cash wage that was less than the soon-to-be required minimum wage, but the employees had also been receiving tips.[33] If calculated together, the cash wage and tips satisfied the railroads' minimum wage obligations.

Two days before the effective date of the FLSA, the railroads sent notices to employees stating that the tips would be regarded as wages for the purpose of satisfying the minimum wage

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[24] *See* S. REP. NO. 89-1487 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3014 (stating that the amendment contains provisions for employees who receive tips).
[25] Pamela N. Williams, *Historical Overview of the Fair Labor Standards Act*, 10 FLA. COASTAL L. REV. 657, 677 (2009) (noting that the minimum wage requirement did not apply to apprentices, housekeepers, chauffeurs, babysitters, message deliverers, seasonal workers, and movie employees).
[26] *See id.* (explaining that the 1966 amendment to the FLSA expanded coverage to restaurant workers).
[27] Williams v. Jacksonville Terminal Co., 315 U.S. 386, 398 (1942).
[28] *See, e.g.*, Pickett v. Union Terminal Co., 33 F. Supp. 244, 247 (N.D. Tex. 1940) (describing correspondence between an employer and employee on the eve of the FLSA's effective date concerning a dispute between the effect of the employee's tips on the employer's minimum wage obligations).
[29] 315 U.S. 386, 388 (1942).
[30] *Id.* at 389.
[31] *See id.* at 389 (describing the two actions as following the "same general pattern").
[32] *See id.* at 397.
[33] *Id.* at 388.

requirement.[34] The notice also stated that the railroad would pay the difference if the cash wage and tips together did not equal the minimum wage. Employee representatives objected to this arrangement, but the employees continued to work, receiving cash wages and keeping their tips as they had in the past.[35] The issue in both actions was whether the employees' tips constituted wages for the purpose of satisfying the railroads' minimum wage requirements under the FLSA.[36] The Court ultimately concluded that they did, but the reasoning underlying that decision provides an enlightening take on the interrelationship between the FLSA and permissible employment practices under the common law.

The Court began with the premise that the FLSA was "not intended to do away with tipping."[37] The Court explained that "[i]n businesses where tipping is customary, the tips, in the absence of an explicit contrary understanding, belong to the recipient."[38] Employers and employees, however, may enter into a contract whereby the employee agrees to receive compensation in the form of tips. This, the Court concluded, is what happened here.[39]

Here, the tip "recipient" was the railroad, not the employee.[40] The travelers provided these tips as compensation for the entire railroad service, which the railroads created and supervised.[41] Moreover, the railroad workers were at will employees, and their employment relationships could therefore be modified by the employer at any time.[42] When the railroads issued the notices to the employees providing that their tips would constitute wages, the railroads

[34] *Id.* at 392.
[35] *Id.* at 396.
[36] *Id.* at 389.
[37] *Id.* at 388.
[38] *Id.* at 397.
[39] *Id.* at 398.
[40] *Id.* at 397.
[41] *Id.* at 397–98. Such tips were customary in the railroad business, so the railroads could rightly take them. *Id.*
[42] *Id.* at 397.

changed the terms of employment.[43] By continuing to work and receive compensation under these new terms, the parties created a new contract in which tips would constitute wages.[44] In the Court's view it was irrelevant that the employers, instead of acquiring the tips and redistributing directly to the employees as wages, let the employees pocket the tips they received as wages.[45]

Against this backdrop, Congress amended the FLSA in 1966 to grant minimum wage protections to restaurant employees.[46] The amendment also created a tip credit that employers could credit towards the wages of tipped employees.[47] It defined tipped employees in § 203(t) as "any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips."[48] With regard to the tip credit, the amendment redefined the term "wages" in § 203(m) to permit an employer to credit an employee's tips towards meeting its minimum wage obligations.[49] Specifically, an employer was permitted to credit half of its minimum wage obligations on account of the tips received by the employee:

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of [fifty] per centum of the applicable minimum wage rate.[50]

The Senate Report to the 1966 amendment indicates an intent to permit employers and employees to agree to a wide range of tipping compensation practices. Specifically, the report provides, "The committee believes that the tip provisions are sufficiently flexible to permit the continuance of existing practices with respect to tips."[51] For instance, the parties "may agree that

[43] *Id.* at 398.
[44] *Id.* ("By continuing to work, a new contract was created.").
[45] *Id.* at 408.
[46] Williams, *supra* note 26, at 677.
[47] Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, sec. 101(a), § 3(m), 80 Stat. 830 (1966).
[48] Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, sec. 101(b), § 3(t), 80 Stat. 830 (1966).
[49] *Id.* at § 3(m).
[50] *Id.*
[51] S. REP. NO. 89-1487 (1966), *reprinted* 1966 U.S.C.C.A.N. 3002, 3014.

all tips are to be turned over or accounted for to the employer to be treated by him as part of his gross receipts."[52] If the employee is turning over his or her tips, he or she must receive the full minimum wage "since for all practical purposes the employee is not receiving tip income."[53]

In 1974, Congress amended the tip credit portion of § 203(m).[54] The amendment created conditions that an employer must satisfy in order to avail itself of the credit,[55] the pertinent condition being that the employee must retain all of his or her tips, except that the employer can require that the tips be shared with other employees who "customarily and regularly receive tips" pursuant to a tip pooling arrangement. [56] The legislative history to the 1974 amendments indicates that Congress intended to strengthen protection for tipped employees. Senator Harrison Williams, Jr., the ranking member of the Senate minority,[57] prepared a report on behalf of the Committee on Labor and Public Welfare.[58] The report stated that the credit "could not be reduced at this time, but that the tipped employee should have stronger protection to ensure the fair operation of this provision."[59]

Finally, in 1996, Congress amended the tip credit language of § 203(m), replacing the prior language with the elemental list reflected in the current version.[60] The legislative history indicates an intention to ensure that employers pay for the difference between the sum of the tips and cash wage that employers are required to pay tipped employees and the minimum wage.[61]

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[52] *Id.*
[53] *Id.*
[54] Barcellona v. Tiffany English Pub, Inc., 597 F.2d 464, 467 (5th Cir. 1979).
[55] H.R. REP. NO. 93-913 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2855.
[56] 29 U.S.C. § 203(m).
[57] SUBCOMM. ON LABOR OF COMM. ON LABOR AND PUB. WELFARE, 94TH CONG., 2ND SESS., LEGISLATIVE HISTORY OF THE FAIR LABOR STANDARDS AMENDMENTS OF 1974 2417 (Comm. Print 1976).
[58] S. REP. NO. 93-690, at 1 (1974), *reprinted in* SUBCOMM. ON LABOR OF COMM. ON LABOR AND PUB. WELFARE, 94TH CONG., 2ND SESS., *supra* note 58, at 1505.
[59] *Id.* at 42, *reprinted in* SUBCOMM. ON LABOR OF COMM. ON LABOR AND PUB. WELFARE, 94TH CONG., 2ND SESS., *supra* note 58, at 1546.
[60] *See* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, sec. 2105(b), § 3(m), 110 Stat. 1755 (1996) (amending Section 203(m)).
[61] CONF. REP. NO. 104-737, at 360 (1996).

This amendment did not make any substantive changes to the credit conditions.[62] The present version of the tip credit condition language provides that "*[t]he preceding 2 sentences shall not apply with respect to any tipped employee unless*," inter alia, "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."[63] Although Congress has amended the FLSA many times since 1974, it has not made any additional pertinent changes to § 203(m).[64]

To summarize, the original FLSA did not expressly prohibit employment agreements allowing employers to pocket or use the tips. In fact, employers could enter into compensation agreements whereby employees' wages could be paid for solely by the tips they received. The legislative history to the 1966 Amendments suggested an intent to continue permitting such compensation practices. The 1974 amendments, however, cabined such practices by prohibiting employers from using the credit unless the tipped employees retained all of their tips.

III. THE 2011 AMENDMENT TO § 531.52 AND *CHEVRON* DEFERENCE.

This Section discusses the subject DOL regulation, which expressly designates tips as the property of the tipped employee. This Section also examines the courts' universal response to the regulation—that it is invalid under *Chevron*. This Section also discusses *Chevron*'s analytical framework. Finally, this Section ends with an outline of the DOL's arguments that the subject DOL regulation is valid under *Chevron*.

[62] Small Business Job Protection Act of 1996, Pub. L. No. 104-188, sec. 2105(b), § 3(m), 110 Stat. 1755 (1996).
[63] 29 U.S.C. § 203(m) (emphasis added).
[64] *See* Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198 (2006) (not amending Section 203(m)); Fair Labor Standards Act—Amendment, Pub. L. No. 106-151, 113 Stat. 1731 (1999) (not amending Section 203(m)); Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (1995) (not amending Section 203(m)); Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787 (1985) (not amending Section 203(m)).

The FLSA does not expressly state whether noncredit employers must also permit employees to keep their tips. In 2010, the Ninth Circuit held that § 203(m) does not create a freestanding requirement that employees retain all of their tips, regardless of whether the employer takes the credit.[65] In 2011, the DOL reacted to this decision by amending § 531.52. [66] The amended regulation explicitly states that tips are the property of the employee, regardless of whether the employer takes the credit.[67]Many courts have held that the DOL's regulation of tip ownership in § 531.52 is invalid under *Chevron* because it is inconsistent with § 203(m).[68]

In *Chevron*, the Court provided a framework for determining the validity of an agency regulation. First, courts must look at whether Congress intended to regulate the issue in question.[69] "[I]f the statute is silent or ambiguous with respect to the specific issue," the court must then determine "whether the agency's answer is based on a permissible construction of the statute."[70] In the latter situation, the Court must defer to the agency regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute."[71]

Under the first step, courts must use traditional tools of statutory construction to determine legislative intent, [72] such as principles of grammatical usage.[73] Courts must avoid an

[65] *Cumbie v. Woody*, 596 F.3d 577, 581 (9th Cir. 2010).
[66] Trinidad v. Pret A Manger (USA) Ltd., No. 12 Civ. 6094, 2013 WL 3490815, at *13 (S.D.N.Y. 2013).
[67] 29 C.F.R. § 531.52 (emphasis added).
[68] *See, e.g.*, Cesarz v. Wynn Las Vegas, LLC, 2:13-CV-00109-RCJ, 2014 WL 117579, *3 (D. Nev. 2014) (holding that Section 531.52 is not entitled to deference under Chevron); *Oregon Rest. & Lodging Assoc.*, 948 F. Supp. 2d at 1226 (D. Or. 2013) (same); Trinidad v. Pret A Manger (USA) Ltd., No. 12 Civ. 6094, 2013 WL 3490815, at *13 (S.D.N.Y. July 11, 2013) (same); Stephenson v. All Resort Coach, Inc., No. 2:12-CV-1097, 2013 WL 4519781, *8 (D. Utah 2013) (same).
[69] *Chevron*, 467 U.S. at 842.
[70] *Id.* at 843. Congress may explicitly or implicitly leave gaps in a statute for an administrative agency to fill. *Chevron*, 467 U.S. at 843. If the gap is implicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844.
[71] Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 86 (2002) (quoting United States v. O'Hagan, 521 U.S. 642, 673 (1997)).
[72] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).
[73] *See* Barnhart v. Thomas, 540 U.S. 20, 26, 29 (2003) (applying the "rule of the last antecedent").

interpretation that produces an absurd result.[74] Courts should construe a statute so as to give meaning to every clause, sentence, or word.[75]

Another canon of construction is *expressio unius est exclusio alterius*. Black's Law Dictionary defines this phrase as "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative."[76] The *expressio unius* canon permits courts to draw a negative implication—or negative inference—if supported by the context of the statutory scheme.[77] "For example, the rule that "each citizen is entitled to vote" implies that noncitizens are not entitled to vote."[78]

The Supreme Court has not addressed directly the utility of the *expressio unius* canon under *Chevron* step one. However, in other cases, the Court has cautioned against automatically drawing an inference from congressional silence.[79] This canon "does not apply 'unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.'"[80] Additionally, "[i]n some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective."[81] Simply put, "[n]ot every

[74] United States v. Wilson, 503 U.S. 329, 334 (1992).
[75] Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1094 (2011).
[76] BLACK'S LAW DICTIONARY (9th ed. 2009). The Court has expressed the *expressio unius* canon in several ways. *See, e.g.*, Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1175 (2013) (merely referring to it as creating a "negative implication"). One such expression is that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." Christensen v. Harris Cnty., 529 U.S. 576, 583 (2000) (quoting Raleigh & Gaston R. Co. v. Reid, 13 Wall. 269, 270, 20 L.Ed. 570 (1872)).
[77] Burns v. United States, 501 U.S. 129, 136 (1991).
[78] BLACK'S LAW DICTIONARY, *supra* note 77.
[79] *Burns*, 501 U.S. at 136.
[80] Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1175 (2013) (quoting *Barnhart*, 537 U.S. at 168).
[81] *Burns*, 501 U.S. at 136.

silence is pregnant."[82] In a case involving de novo statutory interpretation, congressional silence does not warrant a negative inference unless the inference is supported by the context.[83]

Federal appellate cases analyzing regulations under *Chevron* step one have refused to apply the *expressio unius* canon.[84] In *Cheney R. Co., Inc. v. I.C.C.*,[85] the D.C. Circuit explained that the canon is "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved."[86] The court reasoned that "the contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion."[87]

At least one scholar, Harvard professor Cass Sunstein, has questioned the utility of the *expressio unius* canon when assessing the validity of a regulation under *Chevron* step one.[88] Sunstein contends that the *expressio unius* canon should not apply in *Chevron* cases because of the "dubious reliability of inferring specific intent from silence."[89] In *Pauley v. BethEnergy Mines, Inc.*,[90] a *Chevron* step two case, the Supreme Court refused to apply the *expressio unius* canon.[91] In *Pauley*, Congress authorized the Department of Labor to enact interim regulations pursuant to a black lung benefits program.[92] In so doing, Congress provided that the DOL interim regulations "shall not be more restrictive than" the regulations promulgated by the

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[82] *Id.*
[83] *See id.* (negative inference not warranted in the context of interpreting a particular statute); Wachovia Bank, N.A. v. Burke, 319 F. Supp. 2d 275, 285 n.5 (D. Conn. 2004) *aff'd in part, rev'd in part and remanded*, 414 F.3d 305 (2d Cir. 2005) (explaining that silence might be important when interpreting a statute *de novo*, but it is not helpful when answering the first step of Chevron—whether Congress has unambiguously expressed its intent).
[84] *See, e.g.*, Nat'l City Bank of IN v. Turnbaugh, 463 F.3d 325, 331 (4th Cir. 2006) (refusing to infer congressional intent from silence when undertaking step one of the Chevron analysis).
[85] *Cheney R. Co., Inc.* v. I.C.C., 902 F.2d 66, 69 (D.C. Cir. 1990).
[86] *Id.*
[87] *Id.* (emphasis in original).
[88] Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2120 n.182 (1990).
[89] *Id.*
[90] 501 U.S. 680 (1991).
[91] *Pauley*, 501 U.S. at 703.
[92] *Id.* at 688.

Department of Health, Education, and Welfare ("HEW").[93] The HEW regulations created two rebuttable presumptions in favor of eligibility for benefits, as well as two methods for rebutting the presumptions.[94] The DOL, however, created two additional rebuttal provisions.[95]

The claimants argued that the delineation of the two rebuttal methods in the HEW regulations created a "conclusive" presumption that these were the exclusive methods of rebuttal.[96] The Court disagreed, explaining that "[a]lthough the delineation of two methods of rebuttal [in the HEW regulations] may support an inference that the drafter intended to exclude rebuttal methods not so specified, such an inference provides no guidance where its application would render a regulation inconsistent with the purpose and language of the authorizing statute."[97] In refusing to use the *expressio unius* canon, the Court cited to the Sunstein article and included the following explanatory parenthetical: "recognizing that the principle *expressio unius est exclusio alterius* 'is a questionable one in light of the dubious reliability of inferring specific intent from silence.'"[98]

Courts universally have held that § 531.52 fails to survive the first step of the *Chevron* analysis because Congress did not intend to regulate the employer's use of tips when the employer does not use the credit.[99] In *Stephenson v. All Resort Coach, Inc.*,[100] the district court reasoned that § 203(m) restricts the ability of an employer to retain an employee's tips only when

[93] *Id.*
[94] *Id.* at 686–87.
[95] *Id.* at 689.
[96] *Id.* at 703.
[97] *Id.*
[98] *Id.* (quoting Sunstein, *supra* note 89, at 2120 n.182).
[99] *See, e.g.*, Cesarz v. Wynn Las Vegas, LLC, 2:13-CV-00109-RCJ, 2014 WL 117579, *3 (D. Nev. 2014) (holding that Section 531.52 is not entitled to deference under Chevron); Oregon Rest. & Lodging Assoc. v. Solis, 948 F. Supp. 2d 1217, 1226 (D. Or. 2013) (same); Trinidad v. Pret A Manger (USA) Ltd., No. 12 Civ. 6094, 2013 WL 3490815, at *13 (S.D.N.Y. 2013) (same).
[100] No. 2:12-CV-1097, 2013 WL 4519781, *8 (D. Utah 2013) (footnotes omitted).

it take the credit.[101] Section 203(m), however, "does not create a freestanding requirement" that all tipped employees must retain their tips.[102] Congress easily could have required that all tips be retained by the employee regardless of the employer's use of the credit, but it chose not to.[103] Instead, Congress gave employers a choice: either pay the full minimum wage, or take a credit and allow the employee to retain all of her tips.[104] Section 531.52 eliminates this choice, and thus cannot be supported by § 203(m).[105] Accordingly, § 531.52 is invalid under *Chevron*.[106]

The issue is currently pending before the Ninth Circuit in *Oregon Rest. & Lodging Assoc. v. Solis*.[107] This case involves a lawsuit filed by various restaurant associations ("associations") and a restaurant server, (collectively, "plaintiffs") against the Secretary of Labor.[108] The associations allege that many of its member employers do not take the credit, but instead pay employees the full minimum wage.[109] Additionally, many of these noncredit employers have established mandatory tip pools that include kitchen staff such as dishwashers and cooks.[110] This is problematic for these employers because § 531.52 would effectively preclude the member employers from requiring employees to enter into tip pools that involve that kitchen staff.[111] Accordingly, the associations sought declaratory and injunctive relief preventing the enforcement of § 531.52.[112] The plaintiffs filed a motion for summary judgment, which the

[101] *Id.* at *8.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] No. 13-35765 (9th Cir. 2014).
[108] Complaint for Declaratory and Injunctive Relief at 2, 9, Oregon Rest. & Lodging Assoc. v. Solis, 948 F. Supp. 2d 1217 (2013) (No. 3:12-cv-01261), 2012 WL 4932011.
[109] *Id.* at 6.
[110] *Id.* at 5–6.
[111] *See id.* at 6.
[112] *See id.* at 29, 34 (asserting that Section 531.52 is not entitled to deference).

district court granted.[113] As of the writing of this article, the parties have submitted their briefs to the Ninth Circuit.

The DOL asserts that § 203(m) is silent on the issue of "whether employers who do not take a tip credit may utilize their employees' tips."[114] Because Congress did not address "the precise question at issue," the DOL could fill the gap in the statute.[115] It argues that a contrary interpretation would be absurd because it would permit noncredit employers "to use tips to subsidize their payment of the minimum wage."[116]

The DOL also asserts that § 531.52 is reasonable. It reasoned that Congress enacted the 1974 amendments to ensure that employers could not use tips to satisfy more than 50% of the minimum wage.[117] According to the Secretary, the 1974 amendments "left a loophole that [could] permit employers to circumvent their minimum wage obligations by paying their employees 'a [cash] wage slightly in excess of the minimum wage,' and then requiring their employees to turn over some or all of their tips, thereby effectively subsidizing the employers' minimum wage obligation."[118] Thus, noncredit employers could "mandate that employees turn over all of their tips and use those tips to pay the minimum wage or for any other purpose."[119] Such a reading of the law creates an absurd result that gives noncredit employers more leeway to use tips than employers that take the credit. It contravenes the purpose of the 1974 amendments, which sought to grant stronger protections to tipped employees. Accordingly, the regulation is a reasonable response to this issue.

IV. DISCUSSION

[113] *Oregon Rest. & Lodging Assoc.*, 948 F. Supp. 2d at 1217.
[114] Brief for Defendant-Appellants, *supra* note 10, at 17.
[115] *Id.* at 19.
[116] *Id.* at 22–23.
[117] *Id.* at 32–33.
[118] *Id.* at 33 (quoting Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. at 18,839, 18,840-41 (Apr. 5, 2011) (to be codified at 29 C.F.R. pt. 4)).
[119] *Id.* (quoting Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. at 18,839, 18,842).

Section 531.52 is valid under *Chevron*. Section 203(m) is ambiguous with respect to whether employees can contract away their tips to noncredit employers. The tip credit condition—that employees retain their tips—does *not* create the unambiguous negative inference that noncredit employers must be allowed to require employees to contract away their tips. If such an inference were to stand, it would result in noncredit employers being able to use *more* tip money to satisfy their minimum wage obligations than they otherwise would have been able if they had used the credit. Section 531.52 is reasonable because it prevents this absurd result.

Section 203(m) sets out a mandatory payment scheme for tipped employees. This is evident in the use of the word "shall" at the beginning.[120] Thus, under § 203(m), employers must pay tipped employees (1) a cash wage of at least $2.13 per hour, and (2) an amount constituting the difference between the tips received and the minimum wage.[121]

The plain language of § 203(m) imposes conditions on an employer's ability to use the credit. These conditions are (1) notice of the credit scheme, and (2) the employee must retain all tips. Section 203(m) does not take a position on whether tips must be retained by the employee when the employer does not use a credit. Nor does § 203(m) unambiguously forbid the agency's interpretation of the statute—that a noncredit employer cannot require the employee to hand over his or her tips as a condition of employment. Rather, the statute is silent, and therefore ambiguous as to this issue.

A contrary interpretation of § 203(m) produces an absurd result, which Congress would not have intended. Under the contrary interpretation, a noncredit employer may pay its employee

[120] *See* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 661 (2007) (indicating that use of the word shall generally connotes a mandatory obligation).
[121] 29 U.S.C. § 203(m).

the minimum wage and keep all of the employees' tips. This would render the credit provision obsolete because the employer could subsidize its minimum wage obligations with the tips.[122]

An example illustrates the absurd result. Assume there are two scenarios, one where the employer uses the credit, and another where it does not. Under scenario one, an employer could pay the required minimum hourly wage under § 203(m)(1), which is $2.13.[123] The employee may earn $20 in tips during an hour of work, and the employee must keep those tips. The employee would earn a total of $22.13 per hour. Under scenario two, the noncredit employer can pay the minimum wage of $7.25 and keep the $20 in tips. The employee would have earned $7.25, or $15.88 per hour less than he or she would have earned under the first scenario. The noncredit employer would have effectively received a substantial net profit of $12.75—the difference between the $20 in tips and the $7.25 wage paid to the employee. The noncredit employer could use the tip earnings to pay the employee's entire minimum wage. This renders the credit option obsolete because it removes the incentive for employers to use the credit. Such an interpretation produces an absurd result.[124]

In this case, *Chevron* does not permit drawing a negative inference when determining whether § 203(m) is silent or ambiguous. Pursuant to the *expressio unius* canon, a court may draw a negative inference from a statute if it is supported by the surrounding context.[125] A number of appellate courts, however, have refused to draw negative inferences when analyzing statutes under *Chevron* step one,[126] and in *Pauley v. BethEnergy Mines*, the Supreme Court

[122] Brief for Defendant-Appellants, *supra* note 10, at 33.
[123] *See* Gray v. Powers, 673 F.3d 352, 354 (5th Cir. 2012).
[124] *See* United States v. Wilson, 503 U.S. 329, 334 (1992) (interpretation not adopted due to absurd result).
[125] *See* Burns v. United States, 501 U.S. 129, 136 (1991).
[126] *See, e.g.*, Nat'l City Bank of IN v. Turnbaugh, 463 F.3d 325, 331 (4th Cir. 2006).

cautioned against using this canon in the *Chevron* analysis where doing so would render a regulation inconsistent with the authorizing statute.[127]

Nevertheless, it is conceivable that this canon could play some role in interpreting statutes under *Chevron* step one where the negative inference is evident in the language of the statute. For instance, a statute may state, "no employer shall discriminate against an employee on account of race, sex, national origin, age, disability, or religion." This permits the negative inference that employers *are* permitted to discriminate on account of other factors, such as pet-ownership status. Even though the statute is technically silent on the issue of pet-ownership status, the phrasing of the statute essentially mandates a negative inference because the express listing removes ambiguity. Accordingly, the statute would not be "silent" on the issue of pet ownership under *Chevron* step one.

Here, however, drawing a negative inference is incorrect because the text of § 203(m) is ambiguous. The statute provides that employees *must* be paid a cash wage of $2.13 and "an additional amount on account of the tips received by such employee *which amount is equal to the difference* between" the cash wage and the minimum wage.[128] Based on this language, it is permissible to infer that Congress intended that all employers would avail themselves of the credit. If Congress contemplated that employers would not use the credit, then mentioning the "difference" between the cash wage and minimum wage would be unnecessary because the employers would already be paying employees the minimum wage. In other words, the "difference" between the cash wage and minimum wage would be zero.

Moreover, if the "difference" between the cash wage and minimum wage is zero, then the effect of a noncredit employer's failure to abide by the tip credit conditions is unclear. The

[127] Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 703 (1991) (noting the *expressio unius* canon provides no guidance where it renders a regulation inconsistent with the purpose and language of the authorizing statute).
[128] 29 U.S.C. § 203(m) (emphasis added).

conditional language in § 203(m) states that "[t]he preceding 2 sentences [regarding the cash wage and tip credit] shall not apply" if the employee does not retain the tips.[129] A permissible construction of this statute is that if this "condition" is not followed, the only consequence is that the employer may not lawfully avail itself of the credit. This consequence would follow whether the "difference" is $5.00, one cent, or *zero*. Thus, if the employee was prohibited from retaining his or her tips, the "preceding 2 sentences" would not apply, *even though the difference was zero*—i.e. even though the employer paid the employee the full minimum wage. Thus, an employer who took a credit of zero dollars would still be bound by the credit conditions. Accordingly, the statute is ambiguous with respect to whether employers can require employees to contract away their tips, and § 531.52 is valid under *Chevron* step one.

Section 531.52 is reasonable under *Chevron* step two. The 1974 amendments created the tip credit conditions.[130] These amendments, however, "left a loophole that [could] permit employers to circumvent their minimum wage obligations by paying their employees 'a [cash] wage slightly in excess of the minimum wage,' and then requiring their employees to turn over some or all of their tips, thereby effectively subsidizing the employers' minimum wage obligation."[131] Thus, noncredit employers could "mandate that employees turn over all of their tips and use those tips to pay the minimum wage or for any other purpose."[132] This creates an absurd result that gives noncredit employers more leeway to use tips than employers that take the

[129] *Id.*
[130] H.R. REP. NO. 93-913 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2855.
[131] Brief for Defendant-Appellants, *supra* note 10, at 33 (quoting Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. at 18,839, 18,840-41).
[132] *Id.* (quoting Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. at 18,839, 18,842).

credit. Section 531.52 responds to this issue by eliminating the ability of employers to require employees to contract away their tips. Accordingly, § 531.52 is reasonable.[133]

V. CONCLUSION

Section 531.52 is a reasonable regulation that attempts to fill a gap in the FLSA. The few courts that have construed § 531.52 invalid under *Chevron* were incorrect. These courts impermissibly drew a negative inference—implicitly using a canon of construction that already has questionable utility in the normal statutory interpretation context. As explained earlier, the DOL is currently defending the regulation in a case before the Ninth Circuit. Neither party, however, has tackled the *expressio unius* issue. The DOL would benefit from doing so in light of the canon's dubious utility in the *Chevron* context. As of now, the DOL simply claims that the statute is silent regarding the issue of tip ownership. This simple assertion may not be enough to persuade the Ninth Circuit.

[133] *See* Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 86 (2002) (quoting United States v. O'Hagan, 521 U.S. 642, 673 (1997)) (stating that the court must defer to the agency regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute").