



OREGON RESTAURANT AND LODGING ASSOCIATION ET AL.,

Plaintiffs-Appellees,

v.

THOMAS PEREZ, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPT. OF LABOR; ET AL.,

Defendants-Appellants.

No. 13-35765

U.S. Court of Appeals for the Ninth Circuit

Introduction:

On September 6, 2016, Judge Diarmuid O’Scannlain and nine of his colleagues took issue with the Ninth Circuit’s refusing to rehear *en banc* a panel decision that contradicted a previous panel’s decision on the practice of tip pooling under the Fair Labor Standards Act. Judge O’Scannlain, who authored the prior panel opinion, argues that the second panel’s reliance on new Department of Labor regulations does not permit the court to change its interpretation of the underlying statute. His disquisition on the meaning of “statutory silence” deserves a wide audience for its judicial craftsmanship alone. The opinion would be well worth reading even if the case in question (and a companion) did not still have certiorari petitions pending at the US Supreme Court.

Opinion Digest:

O’SANNLAIN, Circuit Judge, with whom KOZINSKI, GOULD, TALLMAN, BYBEE, CALLAHAN, BEA, M. SMITH, IKUTA, N.R. SMITH, Circuit Judges, join, dissenting from the denial of rehearing en banc:

Our court today rejects 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. Flouting that first principle, the panel majority equates a statute’s “silence” with an agency’s invitation to regulate, thereby reaching the startling conclusion that the Department of Labor can prohibit any workplace practice Congress has not “unambiguously and categorically protected” through positive law. ***

I

A *** In *Cumbie v. Woodie Woo, Inc.*, 596 F.3d 577, 578 (9th Cir. 2010), we addressed “whether a restaurant violates the Fair Labor Standards Act, when, despite paying a cash wage greater than the minimum wage, it requires its wait staff to participate in a ‘tip pool’ that redistributes some of their tips to the kitchen staff.” We held it does not; instead, the statute’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.

Judge Diarmuid F. O’Scannlain was appointed to the US Court of Appeals for the Ninth Circuit on September 26, 1986. He recently took senior status. Judge O’Scannlain had no role in WLF’s selecting or editing this opinion for our CIRCULATING OPINION feature. The full opinion is at: <http://cdn.ca9.uscourts.gov/datastore/opinions/2016/09/06/13-35765.pdf>

Id. at 580–83. So, if a restaurant guarantees its employees the federal minimum wage, the restaurant *can* (so far as federal labor law is concerned) force its servers to share their tips with the bussers, cooks, and dishwashers. ***

Two background principles informed *Cumby*'s construction of the statute. First, *** "*Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 397 (1942)] establishes the default rule that an arrangement to turn over or to redistribute tips is presumptively valid." *Id.* at 583. Second, the "Supreme Court has made it clear that an employment practice does not violate the FLSA unless the FLSA *prohibits* it." *Id.* (citing *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) ***).

B We decided *Cumby* in 2010. Unhappy with our decision, in 2011 the Department of Labor issued new regulations addressing the very same issue. See Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832 (Apr. 5, 2011). The preamble to those regulations confessed that *Cumby* advanced a "plain meaning' construction," *id.* at 18,842, but nevertheless voiced the Department's opinion that *Cumby* was wrongly decided, *id.* at 18,841–42. *** The Department replaced this language:

In the absence of an agreement to the contrary between the recipient and a third party, a tip becomes the property of the person in recognition of whose service it is presented by the customer.

with the following:

Tips are the property of the employee whether or not the employer has taken a tip credit under section [203(m)] of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section [203(m)]: As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

[*** cites omitted]. This new regulation thus flips *Williams* and *Christensen* on their heads. It takes the longstanding rule that federal law permits employers to institute any tip-pooling arrangement the FLSA does not prohibit, and turns it into a rule that employers may only institute a tip pool if the FLSA expressly authorizes it.

II

The facts of these consolidated cases are straightforward and undisputed. The Appellees are employers who pay all of their employees at or above the minimum wage. *Or. Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1082 (9th Cir. 2016). That is, none of them takes a tip credit. In addition, the employers have opted to institute tip pools comprised of both customarily tipped employees and non-customarily tipped employees. *** The question for us is whether such tip pools are prohibited by § 203(m).

So far, so *Cumby*. The facts are the same. The statute is the same. But this time the panel holds that the tip-pooling arrangements just described are illegal. The only difference is that here we have a Department of Labor regulation declaring that it simply will not follow what *Cumby* said was permitted. The problem for the Department is that the Supreme Court has prohibited an agency in its position from doing exactly that. That is, "a court's interpretation of a statute trumps an agency's ... if the prior court holding 'determined a statute's clear meaning.'" *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984 (2005) [*** quote and emphasis omitted].

That is precisely what we did in *Cumby*: we held that § 203(m) is clear and unambiguous—and that it clearly and unambiguously permits employers who forgo a tip credit to arrange their tip-pooling affairs however they see fit. We said this explicitly no fewer than six times. *** Remarkably, we even declined to consider then-existing Department of Labor regulations—as well as an amicus brief filed by the Secretary of Labor on *Cumby*'s behalf—precisely because "we conclude[d] that the meaning of the FLSA's tip credit provision is clear," and hence

“we need not decide ... what level of deference [the Department’s interpretations] merit.” *Id.* at 579 n.6. And, as if the substance of our holding were not already obvious beyond doubt, we cited a *Chevron* Step One decision to illustrate our reasoning. *Id.* (citing *Metro Leasing & Dev. Corp. v. Comm’r*, 376 F.3d 1015, 1027 n.10 (9th Cir. 2004) (“Because we conclude that [the] meaning of the statute is clear, we need not decide whether this regulation should be upheld.”)). ***

III

It would take some mighty fancy footwork to get around *Cumby*; if *Brand X* does not foreclose a contrary agency construction here, the doctrine is a dead letter. Indeed, in the panel majority’s attempt to dance around *Cumby* and its manifestly correct reading of § 203(m), it has stumbled off a constitutional precipice.

A The problems begin at the beginning. The majority acknowledges that “section 203(m) does not restrict the tip pooling practices of employers who do not take tip credits.” *Or. Rest.*, 816 F.3d at 1084. That was the holding of *Cumby*. *** But then where does the panel majority think the Department of Labor gets authority to ban the very thing Congress has decided not to interfere with?

Here is where the panel majority’s analysis goes wrong, and dangerously so. The majority claims to perceive a “crucial distinction between statutory language that affirmatively protects or prohibits a practice and statutory language that is silent about that practice.” *Or. Rest.*, 816 F.3d at 1087. From that premise, it concludes that the Department of Labor can ban these employers’ tip pooling because § 203(m) does not “unambiguously and categorically *protect*” it; instead, the statute is simply “silent about that practice.” *Id.* at 1086–87 (emphasis added). For that reason alone, the panel majority holds, the Department has a free hand to prohibit it. *Id.* As the majority says, any time a statute does not “unambiguously protect[] or prohibit[] certain conduct,” the statute necessarily “leaves room for agency discretion” to regulate such conduct as it sees fit. *Id.* at 1088.

This is a caricature of *Chevron*. Indeed, the notion is entirely alien to our system of laws. *** [O]bviously, the FLSA cannot serve as a source of authority to prohibit activities it does not cover, just as a statute reading “No dogs in the park” cannot be said to authorize a Parks Department to ban birds as well. The reason is basic but fundamental, and it has nothing to do with any sort of free-floating nondelegation presumption. Rather, the point is that a statute’s deliberate non-interference 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. *** The Department is in reality legislating, yet that is a power the Constitution does not permit executive agencies to exercise.³

The problem here is that the majority has confused two very different types of statutory silence. Sometimes “[statutory] silence is meant to convey nothing more than a refusal to tie the agency’s hands,” meaning that Congress has given the agency discretion to choose between policy options Congress itself has placed on the table. *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. In other words, not all statutory silences are created equal. But you would never know that from the majority’s opinion. The majority seems to think executive agencies have plenary power to regulate whatever they want, unless and until Congress affirmatively preempts them. With all due respect, that is a profoundly misguided understanding of administrative law.

An agency may not issue a given regulation unless it has a “textual commitment of authority” to do so. *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001). Indeed, it is axiomatic that “an agency literally

³ As every novice learns, the official theory of the administrative state begins from the premise that “the lawmaking function belongs to Congress ... and may not be conveyed to another branch or entity.” *Loving v. United States*, 517 U.S. 748, 758 (1996). Agency rulemaking respects that constraint so long as it remains guided by an “intelligible principle” supplied by Congress. *E.g.*, *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 n.4 (2013). But the panel majority would effectively vaporize even that flimsy constraint by holding that an agency need not justify a given rule by tracing it to a valid statutory grant of authority; instead, it need only demonstrate that Congress has not affirmatively voiced opposition to the rule in question. The majority’s vision makes a fear of “delegation running riot” look quaint by comparison, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring), for it would dispense with even the pretense of delegation altogether.

has no power to act ... unless and until Congress confers power upon it.” *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986). Thus, it should go without saying that an agency “may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.” *Am. Trucking*, 531 U.S. at 485. And “Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.” *City of Arlington*, 133 S. Ct. at 1868. *** The Department has no power to put words in Congress’s mouth when Congress has deliberately chosen to stay quiet in the face of activity it knows is taking place.

Simply put, Congress intended to control, not to delegate, when employers may require tip pooling. And there can be no question that the Department of Labor has no power to extend the statute beyond its stopping point. *** Because “the statutory text forecloses the agency’s assertion of authority,” its attempt to prohibit tip pooling by employers like the ones before us “is ultra vires.” *City of Arlington*, 133 S. Ct. at 1871, 1869.

The majority’s reasoning flies in the face of the above principles. *** *Christensen v. Harris County*, 529 U.S. 576 (2000), *** and Justice Souter’s concurrence give absolutely no support to the majority’s radical idea that an agency can regulate whatever it wants until Congress says out loud that it must stop. *Christensen* says only what everybody already knows: if a statute can reasonably be read either to permit or to prohibit a given practice, then the agency has discretion to choose which reading to enforce. 529 U.S. at 587–88; *id.* at 589 (Souter, J., concurring). ***

B It should come as no surprise that our sister circuits have roundly and forcefully repudiated the specious theory of agency power our court now adopts. Those circuits have echoed again and again the basic reality that silence does not always constitute a gap an agency may fill, but often reflects Congress’s decision not to regulate in a particular area at all, a decision that is binding on the agency.

*** Notice what the panel majority has not produced: a citation to a single case endorsing the extravagant theory of executive lawmaking our court adopts today. Meaningful silence? ****⁴

IV

*** Notwithstanding their conviction that the Department of Labor can regulate any private activity Congress has not “unambiguously and categorically protect[ed]” through positive law, [my panel-majority colleagues] still undertake to reassure themselves that the Department’s interpretation of § 203(m) is “reasonable.” *Or. Rest.*, 816 F.3d at 1089. Yet their analysis on this score is so perfunctory that it only confirms they must really believe what they have repeatedly said, namely, that an agency does not need a discernible grant of regulatory power over a given subject matter before it can insert itself into the affairs of ordinary citizens. ***

V

Never let a statute get in the way of a tempting regulation. That, at any rate, seems to be the prevailing mood on our court. I cannot go along with such a breezy approach to the separation of powers ***. The majority ignores binding Supreme Court and circuit precedent [and] allows the Department of Labor to defy the clear and unambiguous limits on its discretion written into the Fair Labor Standards Act ***.

More reckless is the unsupported and indefensible idea that federal agencies can regulate any class of activity that Congress has not “unambiguously and categorically protected” through positive law. Such notion is completely out of step with the most basic principles of administrative law, if not the rule of law itself. I respectfully dissent.

⁴ “Circuit split” perhaps does not fully describe the resulting state of affairs. It is more like we have spun out of the known legal universe and are now orbiting alone in some cold, dark corner of a far-off galaxy, where no one can hear the scream “separation of powers.”