No. 23-50724

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROBERT MAYFIELD, AND
R.U.M. ENTERPRISES, INCORPORATED,

Plaintiffs – Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR, AND
MARTIN WALSH, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants – Appellees.

On Appeal from the United States District Court
for the Western District of Texas, Austin
Robert L. Pitman, U.S. District Judge

PLAINTIFFS – APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

No. 23-50724, *Mayfield, et al. v. U.S. Department of Labor, et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case:

1. Dixon, Courtney, Attorney for Defendants-Appellees
2. Garrison, Frank D., Attorney for Plaintiffs-Appellants
3. Kerkhoff, John F., Attorney for Plaintiffs-Appellants
4. Klien, Alisa Beth., Attorney for Defendants-Appellees
5. Mayfield, Robert, Plaintiff-Appellant
6. Pitman, Robert, U.S. District Court Judge
7. R.U.M. Enterprises, Inc., Plaintiff-Appellant
8. Rosen-Shaud, Brian C., Attorney for Defendants-Appellees
9. Su, Julie, Acting U.S. Secretary of Labor
10. U.S. Department of Labor, Defendant-Appellee
11. Wake, Luke A., Attorney for Plaintiffs-Appellants
12. Walsh, Martin, former U.S. Secretary of Labor, named Defendant-Appellee

In accordance with Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that none of the named Appellants have any parent corporation and that no publicly held corporation owns 10% or more of their stock.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

s/ Luke A. Wake
LUKE A. WAKE

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Robert Mayfield and
R.U.M. Enterprises, Inc.

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument. Oral argument would be helpful because it would allow the Court to clarify issues of statutory construction, background principles of administrative law, and the Supreme Court's nondelegation doctrine in resolving the difficult and profoundly important issues presented.

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INTRODUCTION

The Fair Labor Standards Act (FLSA) generally requires that employers pay employees an hourly wage and overtime after they work 40 hours in a week. But Congress understood that some jobs are not conducive to an hourly pay structure. For this reason, Congress provided 19 exemptions to the general rule—all of which are defined by the nature or function of the work performed.

At issue here is the exemption for "executive, administrative, [and] professional" employees ("EAP"). 29 U.S.C. § 213(a)(1). The operative text makes clear that "any" employee performing executive, administrative, or professional duties is exempt from hourly pay and overtime requirements. Yet the Secretary of Labor claims authority to exclude employees from the exemption—regardless of their work duties—unless they are paid a minimum salary. And the Secretary asserts (unguided) discretion to raise minimum salary requirements using any methodology she pleases—such that there are no limits on how high the Secretary might raise salary requirements.

The Secretary presumes minimum salary rulemaking authority for this exemption, even though Congress expressly imposed salary

requirements on other exemptions and was clear when it wanted to impose compensation requirements elsewhere in the FLSA. By contrast, nothing in the operative text suggests Congress intended salary rules here. But because the exemption for executive, administrative, and professional employees parenthetically authorizes the Secretary to "define and delimit" the operative text, the Secretary insists that Congress delegated broad rulemaking authority to impose any condition on the exemption.

Of course, the "define and delimit" language delegates some rulemaking authority. But that authority is bounded by the ordinary meaning of the operative text—which implies authority only to promulgate rules related to the duties that an employee must perform to qualify for this exemption. That is so because the operative text has a finite meaning. And that objective meaning does not entail a requirement for employers to pay minimum salaries.

Contrary to the District Court's opinion below, the "define and delimit" power cannot be understood as an open-ended delegation for the Secretary to impose any condition on the exemption that Congress has not expressly prohibited. It is not a meaningless vessel under which the

Secretary may fill in whatever policies she believes reflects the statutory purpose. But if so construed, the "define and delimit" authority unconstitutionally delegates Congress' power to make law. Indeed, if the operative text is merely an "empty vessel" that the Secretary can fill with any meaning, then nothing controls the Secretary's rulemaking discretion. At that point there is no limiting principle.

Yet under the District Court's interpretation, the Secretary can impose any restriction she likes on this exemption. So construed, the "define and delimit" delegation suffers the same constitutional infirmity as the National Industrial Recovery Act ("NIRA") on which the provision was modeled. The only way to avoid this nondelegation problem is to reject the Secretary's claim of authority to impose minimum salary rules.

JURISDICTIONAL STATEMENT

This Court has subject matter jurisdiction under 28 U.S.C. § 1331 because this case raises questions of federal law. This appeal is from a final judgment disposing of all claims. Plaintiffs filed a timely notice of appeal. ROA.968.

STATEMENT OF THE ISSUES PRESENTED

1. Whether Congress delegated authority under 29 U.S.C. § 213(a)(1), for the Secretary of Labor to impose minimum salary requirements as a condition of classifying an executive employee as exempt from the FLSA's default hourly pay and overtime requirements?

2. Whether 29 U.S.C. § 213(a)(1) violates the nondelegation doctrine if construed as authorizing the Secretary to impose minimum salary requirements as a condition of classifying an executive employee as exempt?

STATEMENT OF THE CASE

Robert Mayfield believes he has a winning formula for success in the Austin, Texas, fast food market.[1] He seeks to attract motivated employees with superior customer service by offering a competitive starting wage of $15.00 per hour. Mayfield Decl. ¶ 7. But he ultimately attributes his company's success to "an entrepreneurial philosophy that rewards [his] management team for their success." *Id.* ¶ 5. Besides

[1] Mayfield is the owner of R.U.M. Enterprises, Inc., which operates 13 successful Dairy Queen locations and a Wally's Burger Express. 1:22-cv-00792-RP, Doc. No. 19-A, Decl. of Robert Mayfield, ¶ 4 ("Mayfield Decl."). Mayfield and R.U.M. Enterprises are referred to collectively as "Mayfield."

paying a base salary, Mayfield offers his management team bonuses tied directly to store profits because they are more motivated to produce profits when they share in the company's success. *Id.* ¶¶ 8, 11, 27.

But the U.S. Department of Labor prevents Mayfield from employing his optimal incentive pay structure. Ideally, he would start managers at lower base salaries, which would enable his company to pay higher bonuses to his most successful managers. *Id.* ¶¶ 27, 29-30. Yet the Department mandates that "executives" (*i.e.*, managers) must be paid a salary of at least $684 per week ($35,568 annually) to be deemed "exempt" from the FLSA's default hourly wage and overtime requirements. 29 C.F.R. § 541.600.

The Department claims that the Secretary of Labor has authority to dictate minimum salary rules for executive employees under section 213(a)(1) of the FLSA. That provision provides—without qualification—that "any employee employed in a bona fide executive, administrative, or professional capacity" shall be exempt. 29 U.S.C. § 213(a)(1). But the FLSA does not define these terms. Instead, Congress delegated authority to the Secretary to "define and delimit" the EAP Exemption. *Id.* The Department has therefore asserted broad

discretionary powers to "draw[] the line beyond which the exemption is not applicable."[2]

While the Secretary has long presumed authority to condition the EAP Exemption on payment of minimum salary levels, section 213(a)(1) provides no direction as to where to draw the line. The Department assumed it was free to borrow from minimum salary rules that had predominated in Industry Codes approved previously under the NIRA. Stein Report, *infra* at 20 (stating that codes adopted under the NIRA provided "precedent" for minimum salary rules). Thus, even after the NIRA was declared unconstitutional—because it violated the nondelegation doctrine in *ALA Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)—the Roosevelt Administration carried forward its preferred policies governing salaries for EAP employees through its "define and delimit" authority.

Operating without textual direction, the Department has oscillated dramatically in its methodology for setting salary rules. For example, in

[2] Executive, Administrative, Professional . . . Outside Salesman" Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer [Harold Stein] at 2 (Oct. 10, 1940) ("Stein Report"), http://tinyurl.com/2fv4er7b.

1958 the Department set the lowest permissible salary for EAP employees so that only "**10 percent** of workers performing EAP duties in the lowest-wage regions and industries" would be excluded from the Exemption.[3] By contrast, the Department set the minimum salary at the **20th percentile** in 2004 (looking to salary data from the South and the retail industry),[4] and later attempted to set the minimum salary at the **40th percentile** in 2016 (looking only at salaries in the South).[5]

The current applicable Rule used the Department's 2004 methodology to raise the minimum salary for EAP employees by 50 percent from $455 per week ($23,660 annually) to $684 per week ($35,568 annually). *See* Rule, 84 Fed. Reg. 51,230, 51231. Mayfield challenges this Rule because it compelled his company to change its compensation structure, resulting in less opportunity for incentive pay to his managers.

[3] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 84 Fed. Reg. 51230, 51236 (Sept. 27, 2019) ("Rule").
[4] *Id*.
[5] *Id*. at 51237.

And now the Department has proposed another rule—based on another (newly devised) methodology.[6]

If finalized, the Department's Proposed Rule would raise minimum salary requirements to $1,059 per week ($55,068 annually). Proposed Rule, 88 Fed. Reg. at 62,152. This increase would greatly exacerbate Mayfield's present injury. It would likely force him to demote his entire management team to clock-punching hourly employees, which would mean those employees would lose opportunities for bonuses. Mayfield Decl. ¶¶ 18-19, 31-32. But regardless of the consequences to Mayfield's company (or his managers), the Department maintains that the power to "define and delimit" the EAP Exemption entails unbounded authority to impose salary rules with any methodology that—in the Secretary's sole judgment—advances the FLSA's remedial goals.

Only days after the Department issued its new Proposed Rule, the District Court denied Mayfield's motion for summary judgment and granted the Department's cross-motion. ROA.949. The court held that

[6] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. 62,152 (Sept. 8, 2023) ("Proposed Rule") (drawing the line at the **35th percentile** of salaried workers in the South).

the Secretary was entitled to deference under *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). ROA.955. Applying *Chevron*, Judge Pitman concluded that the Secretary's authority to "define and delimit" entails authority to impose minimum salary rules. ROA.955-960. And he rejected Mayfield's nondelegation claim on the view that the FLSA's broad goal of improving American labor conditions provides an "intelligible principle." ROA.967.

STANDARD OF REVIEW

This Court reviews appeals from an entry of summary judgment *de novo*. *See King v. Provident Life & Acc. Ins.*, 23 F.3d 926, 928 (5th Cir. 1994).

SUMMARY OF THE ARGUMENT

The delegation of authority to "define and delimit" the EAP Exemption's operative terms does not entail power to alter the statute and impose minimum salary rules. The Secretary's rulemaking authority is limited to clarifying the duties that an employee must perform to be properly classified as exempt. That is so because Congress said that "any employee employed in a bona fide executive … capacity" is deemed exempt, and those terms have objective meaning that does not entail

minimum salary requirements. *See Helix Energy Sols. Grp. Inc. v. Hewitt*, 598 U.S. 39, 67 (2023) (Kavanaugh, J., dissenting) (emphasizing that the text "focuses on whether the employee performs executive duties, not how much an employee is paid.").

Under the ordinary meaning, an employee is exempt if genuinely working as an executive employee—no matter what specific salary he or she is paid. And the structure of the Act confirms that when Congress wanted to impose specific compensation requirements, it did so in clear terms. Therefore, there is no basis for inferring minimum salary rulemaking authority.

Even if the terms "bona fide executive … capacity" were ambiguous, the major questions doctrine precludes this Court from inferring authority to impose extra-textual compensation rules. For something as economically and politically significant as a power to impose compensation requirements, one would expect Congress to have provided specific direction to the agency—as it explicitly has in other parts of the statute—and to impose express guardrails to prevent extreme rules. Given the FLSA's conspicuous lack of direction for setting minimum

salary rules, this Court must reject the Department's elastic interpretation of its delegated powers.

But if the statute is understood as authorizing minimum salary rules, Congress's delegation of power to "define and delimit" the EAP Exemption violates separation of powers because there is no standard, grounded in the FLSA's text, to govern the Secretary's discretion. The District Court errantly concluded that there was an intelligible principle because Congress established a "manifest policy of having specific criteria laid down" for saying who counts as an exempt employee. ROA .965. But the nondelegation doctrine prohibits Congress from delegating the quintessentially legislative task of assigning meaning to critical statutory language without objective direction.

The District Court alternatively held that the FLSA's remedial goals furnish an intelligible principle. *Id.* But both *Panama Refining Co. v. Ryan*, 293 U.S. 388, 416–19 (1935), and *Schechter*, 295 U.S. at 537–543, reject the notion that a court may infer an intelligible principle from the hortatory goals of a statute without something grounded in the text guiding the exercise of discretion on the subject at hand. And there is *nothing*. The Secretary is simply free to rewrite the statute and impose

any minimum salary rule. She can do so without making any finding, considering any factors, using any methodology, or satisfying any standard. The District Court's judgment should be reversed.

ARGUMENT

I. The District Court Erred in Inferring Authority for the Secretary to Impose Minimum Salary Rules

At least for now, this Court reviews claims challenging an agency's assertion of rulemaking power under the framework set forth in *Chevron,* 467 U.S. 837.[7] But *Chevron* applies only when Congress has left a gap for the agency to fill and there is ambiguity in the statute. *Id*. at 842. But nothing in section 213(a)(1) implies gap-filling authority to impose minimum salary rules. Nor is there any ambiguity in the EAP Exemption's terms.

First, the ordinary meaning of this text and the structure of the FLSA confirm that the Secretary is limited to promulgating rules concerning the duties that an employee must perform to be deemed exempt under section 213(a)(1). For this reason, the District Court erred

[7] The Supreme Court is reconsidering the *Chevron* standard in *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (2023) (No. 22-451). The decision will directly affect this Court's interpretation of the EAP Exemption.

in giving *Chevron* deference. Further, the text must be construed as delegating only limited rulemaking authority to clarify the sort of duties that an employee must perform to be deemed exempt to avoid constitutional problems.

Second, even if the text were ambiguous, the major questions doctrine requires a clear statement authorizing minimum salary rules because of the inherently politicized nature of federally imposed compensation rules.

Finally, *Wirtz v. Miss. Publishers Corp.*, 364 F.2d 603 (5th Cir. 1966) is not controlling. *Wirtz* did not address section 213's text and structure. Nor did it grapple with the major questions doctrine.

A. The District Court Erred in Giving *Chevron* Deference

When Congress has explicitly left a gap for an agency to fill, *Chevron* requires a reviewing court to determine whether the text authorizes the rule. 467 U.S. at 842. If there is ambiguity as to whether the rule is authorized, the next step is to determine whether the agency's interpretation is reasonable. *See Brackeen v. Haaland*, 994 F.3d 249, 425

(5th Cir. 2001) (stressing *Chevron* requires a "holistic reading of the statute" to determine whether the agency's construction is "permissible").

Here there is no ambiguity. The text denies minimum salary rulemaking authority. And if there is ambiguity, the Department's interpretation unreasonably raises serious constitutional concerns.

1. *Chevron* Asks Whether Congress Authorized a Minimum Salary Rule

The District Court found that section 213(a)(1) was ambiguous—but not because the operative text was unclear about whether Congress had authorized minimum salary rules. On the contrary, the opinion concluded that the text was silent on this highly consequential issue. ROA.956. So where was the supposed ambiguity?

The Court apparently found ambiguity in the fact that Congress had failed to "unambiguously prohibit[]" minimum salary rules. ROA.957-958. But that turns the *Chevron* doctrine on its head. The inquiry is not whether Congress unambiguously intended ***to prohibit*** minimum salary rules, it is whether the text ***authorized*** such rules. *See Clean Water Action v. EPA*, 936 F.3d 308, 313 n.10 (5th Cir. 2019) ("[A]gencies, as mere creatures of statute, must point to explicit

Congressional authority justifying their decisions.") (emphasis added); *Cf. Louisiana Pub. Serv. Commission v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act ... unless and until Congress confers power upon it").

And the fact that Congress delegated authority to "define and delimit" the terms "bona fide executive … capacity" tells us nothing as to whether those operative terms—objectively construed—entail authorization to impose minimum salary rules. As the Court recognized, the text does not address salaries at all. And statutory silence is no basis for giving *Chevron* deference. S*ee Contender Farms, LLP v. U.S. Dep't of Agric.*, 779 F.3d 258, 272 (5th Cir. 2015) ("[A]n [] agency does not receive deference … merely by demonstrating that 'a statute does not expressly negate the existence of a claimed [] power...'").

2. The Text Only Allows the Secretary to Consider an Employees Duties

Both the ordinary meaning and the structure of the Act confirm that the Secretary is authorized only to promulgate regulation concerning the duties an employee must perform to be deemed exempt. As such, the Department's statutory argument fails at *Chevron* Step One.

See Chamber of Comm. v. U.S. Dep't of Lab., 885 F.3d 360, 369 (5th Cir. 2018) ("Where the text and structure of a statute unambiguously foreclose an agency's statutory interpretation, the intent of Congress is clear, and 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'") (citing *Chevron*, 467 U.S. at 842–43).

a. Dictionary Definitions Confirm the Secretary Is Limited to Regulating Duties

It is "axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *VanDerStok v. Garland*, 86 F.4th 179, 187 (5th Cir. 2023) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). "[A]gencies, as mere creatures of statute, must point to explicit Congressional authority justifying its decisions." *Id.* (quoting *Clean Water Action*, 936 F.3d at 313 n.10. And whether an agency has exceeded its statutory mandate is derived by looking first to the ordinary meaning of the statute's text at the time of enactment. *Id.* at 188; *see also id.* at 189 ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only

the words on the page constitute the law adopted by Congress and approved by the President.") (quoting *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020)). When that meaning is clear, "the inquiry should end." *Puerto Rico v. Franklin California Tax-Free Tr.*, 579 U.S. 115, 125 (2016) (cleaned up).

Under the ordinary meaning, the Department's minimum salary rule is unlawful. *First*, the FLSA's text confers exempt status on "***any*** employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1) (emphasis added). The operative terms "executive, administrative, [and] professional" all "relate to a person's performance, conduct, or function without suggesting salary." *Nevada v. DOL*, 218 F.Supp.3d 520, 529 (E.D. Tex. 2016) ("*Nevada I*").

This commonsense reading of the statute is confirmed by the ordinary meaning of the terms at the time the FLSA was enacted. *First*, "Executive," as defined by "[t]he Oxford English Dictionary" means "someone '[c]apable of performance; operative … [a]ctive in execution, energetic … [a]pt or skillful in execution.'" *Id.* (quoting *The Oxford Dictionary*, 1933 Edition). That definition does not speak to an

employee's salary-level. Similarly, "'Administrative' is defined as '[p]ertaining to, or dealing with, the conduct or management of affairs; executive.'" *Id.* "[A]nd the dictionary defines 'professional' as "[p]ertaining to, proper to, or connected with a or one's profession or calling … [e]ngaged in one of the learned or skilled professions … that follows an occupation as his (or her) profession, life- work, or means of livelihood." *Id.* Like the term executive, both "administrative" and "professional" have no connection to how much an employee is paid.

Second, the statute's use of the term "capacity" after "executive," administrative," and "professional" confirms that the EAP Exemption focuses on an employee's duties or functions. "Capacity" refers to being placed in a specific "position, condition, character, or relation," and underscores that Congress focused on the employees' role in the enterprise. *Id.*; *see also Capacity*, *Webster's New International Dictionary* (W. T. Harris & F. Sturges Allen eds., 1930) ("Ability; capability; possibility of being or of doing.") Thus, to be employed in the "capacity" of an "executive," for example, means to work in the role of an executive—*i.e.*, to perform executive duties in one's position.

Third, the term "bona fide" simply emphasizes the focus on the employee's functional duties. "The Oxford English Dictionary defines 'bona fide' as '[i]n good faith, with sincerity; genuinely." *Id.; see also Bona Fide*, *Webster's New International Dictionary* ("[i]n or with good faith; without fraud or deceit; real or really; actual or actually; genuine or genuinely; as, he acted bona fide; a bona fide transaction.") By using "bona fide," Congress intended the EAP Exemption to apply to employees who were genuinely performing EAP "tasks" in their employment, but to deny it to those who were merely given a job title without commensurate duties.[8]

What is more, the text provides examples of qualifying EAP employees by referring only to *the nature of their work*: "any employee

[8] Fifth Circuit cases similarly observe this straightforward construction under the seaman exemption, which applies to "any employee *employed as* a seaman." 29 U.S.C. § 213(b)(6) (italics added). *See, e.g.*, *Dole v. Petroleum Treaters, Inc.*, 876 F.2d 518, 523 (5th Cir. 1989) (recognizing that the "italicized words mean something" and are not "mere tautology"; instead they "warn us to look to what the employees do" rather than "rest on a matter of a name, or the place of their work" (quoting *Walling v. W.D. Haden Co.*, 153 F.2d 196, 199 (5th Cir. 1946)). This Circuit's cases also frequently characterize the EAP exemption as applying to those "working in" a bona fide executive, administrative, or professional capacity when describing the statute. *See, e.g.*, *Lott v. Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326, 331–33 (5th Cir. 2000) (recognizing the exemption applies to employees "*working in* a bona fide executive, administrative or professional capacity" (emphasis added)); *Cowart v. Ingalls Shipbuilding, Inc.*, 213 F.3d 261, 266 (5th Cir. 2000) (same); *Faludi v. U.S. Shale Sols., L.L.C.*, 950 F.3d 269, 273 (5th Cir. 2020) (same).

employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools" qualifies for the EAP Exemption. 29 U.S.C. § 213(a)(1). Congress opted against creating a special exemption for teaching professionals but chose to clarify that these professionals are *performing duties* qualifying them as working in a "bona fide executive, administrative, or professional capacity." And, at least in this respect, the Department has adhered to the statutory text and not sought to impose minimum salary level rules for teachers.[9]

To be sure, the statute delegates authority for the Secretary to "define and delimit" the operative terms of the EAP Exemption. *Id.* But that authority is cabined by the statute's text when read as a whole. The "define and delimit" authority is simply authorization for the Secretary to explain the objective meaning of the operative terms Congress chose *within the confines of their ordinary meaning*—rather than a power to assign meaning.

At bottom, the ordinary meaning of the EAP Exemption's text focuses on "duties not dollars." *Hewitt v. Helix Energy Sols. Grp., Inc.*,

[9] The Department also does not set a minimum salary for employees employed as "outside salesman"—even though the FLSA allows her to "define and delimit" that statutory term. *See* 29 U.S.C. § 213(a)(1).

15 F.4th 289, 314 (5th Cir. 2021) (J. Jones, dissenting) (footnote omitted).[10] Therefore, the Department's Rule is unlawful.

b. The FLSA's Structure Confirms that the Secretary is Limited to Regulating Duties

Section 213's structure confirms what the ordinary meaning of the text conveys: Congress did not contemplate minimum salary rules for EAP employees. "In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *VanDerStok*, 86 F.4th at 188 (citation omitted).

First, Congress consistently defines the Act's exemptions by referring to employees who are employed in specific trades, occupations, or in certain types of employment. E.g., 29 U.S.C. § 213(a)(5) (fisherman exemption); 29 U.S.C. § 213(a)(19) (baseball exemption). *See Addison*,

[10] Even assuming the Department could permissibly adopt a salary-level test as a prophylactic screening mechanism to guard against misclassification of employees who are not performing the right duties, the statutory text plainly prohibits any rule that would exclude more than a de minimis number of employees performing EAP duties. *See Nevada v. U.S. Dep't of Labor*, 275 F.Supp.3d 795 (E.D. Tex. 2017) ("*Nevada II*") (concluding that the Department lacked authority to impose a salary level rule excluding 40 percent of otherwise qualifying EAP employees). *See also Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 614 (1944) (stressing that the Court could not infer authority for the Secretary to expand labor exemptions in the absence of "appropriate language").

322 U.S. at 617 (emphasizing that Congress "dealt with exemptions in detail and with particularity, enumerating [them] … based on different industries, on different occupations … on size and on areas [of production]."). This pattern confirms that Congress's focus was on the nature of an employee's work—not on how much an employee is paid.

Second, Congress knows how to include a salary level when it wants—and it omits salary language from the EAP Exemption. Unlike the EAP Exemption, section 213(a)(19) says baseball players must be paid a salary level equal or greater than what they would be earning if working "40 hours" a week at "minimum wage." That Congress imposed a minimum salary requirement for the baseball player exemption but not in the EAP Exemption shows that Congress did not intend to impose minimum salary requirements on EAP employees. *See Addison*, 322 U.S. at 614 (holding that DOL abused its discretion in "defin[ing] and delimit[ing]" the scope of an exemption: "Where Congress wanted to make [an] exemption depend on size [of the business], as it did in two or three instances not here relevant, it did so by appropriate language.").[11]

[11] The Department maintains that the baseball player exemption is inapposite because it was included in a later amendment to the FLSA. But this Court must construe the statutory text in its current form.

See also Small v. United States, 544 U.S. 385, 398 (2005) (Thomas, J., dissenting) ("Congress' explicit use of [language] in other provisions shows that is specifies such restrictions when it wants to do so.").[12]

Third, Congress is explicit in imposing other compensation requirements throughout the rest of the FLSA. Unlike here, Congress determined the major policy question and explicitly authorized those requirements. The Secretary thus cannot 'discover' the same authority for himself in the "define and delimit" authority under the EAP Exemption. For example, when Congress wanted a minimum wage, it said so in express terms. *See* 29 U.S.C. § 206(a) (requiring that nonexempt employees must be paid at least "$7.25 an hour"). And elsewhere, when Congress wanted to regulate compensation, the statute imposed clear requirements to pay employees based on formulas that left nothing to the discretion of either the employer or the Department.[13]

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[12] For this reason, the Department's construction also conflicts with the canon *expressio unius est exclusio alterius*. *See Texas v. United States*, 809 F.3d 134, 182 (5th Cir. 2015), as revised (Nov. 25, 2015) ("to express or include one thing implies the exclusion of the other, or of the alternative.") (citing *Black's Law Dictionary* 701 (10th ed. 2014)).

[13] E.g., 29 U.S.C. § 207(a)(1) (setting overtime rates for nonexempt employees); 29 U.S.C. § 203(m)(2)(A) (establishing a lower hourly wage for tipped employees); 29 U.S.C. § 207(i)(1) (setting formula compensating retail employees); 29 U.S.C.

In sum, under the FLSA's structure, it makes no sense to infer a roving power for the Secretary to dictate minimum salary rules for EAP employees—especially when Congress has explicitly enumerated compensation requirements in other parts of the statute. *See Jama v. Immigration and Customs Enf't*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."). *See also Air Transp. Ass'n of Am., Inc. v. U.S. Dep't. of Agric.*, 37 F.4th 667, 673 (D.C. Cir. 2022) (emphasizing that courts "read meaning into statutory silence when Congress has demonstrated that it is perfectly capable of delegating this authority to [the agency] when it so chooses.")

3. The Department's Interpretation Unreasonably Creates a Constitutional Problem

Even assuming that there is ambiguity in the operative text, this Court must reject the Department's interpretation as unreasonable

§ 213(a)(17) (exempting software engineers who earn at least $27.63 per hour); 29 U.S.C. § 213(b)(24) (exempting employees at certain nonprofits who "are together compensated, on a cash basis, at an annual rate of not less than $10,000").

under *Chevron*'s second step. The constitutional avoidance canon holds that courts must prefer a plausible reading of a statute that avoids "serious doubt of constitutionality." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). For example, in *Solid Waste of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001), the Supreme Court rejected the Environmental Protection Agency's interpretation of its jurisdictional powers under the Clean Water Act ("CWA") because there was no "clear statement from Congress" that it intended to confer such expansive jurisdiction as to test the bounds of federalism. Likewise, this Court should reject the Department's elastic interpretation of its power to "define and delimit" the EAP Exemption because it would test the bounds of Congress' power to lawfully delegate rulemaking authority. *See Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) ("*UARG*") (directing courts to approach nebulous claims of broad rulemaking—especially on significant issues—with skepticism).

The District Court blithely rejected the avoidance doctrine on the view that it is "implausible" to construe the text as limiting the Secretary's "define and delimit" power. ROA.961. But this conflicts with Judge Pitman's conclusion that the text is silent about whether minimum

salary rules are authorized. ROA.956-57. Again, the District Court concluded the text was ambiguous and susceptible to different interpretations. ROA.958. Yet if that were true, it would be unreasonable to favor an interpretation that creates a serious constitutional problem. *Cf. Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 672 (6th Cir. 2021) (stressing that nondelegation concerns underscored the Court's textual interpretation).

B. The Major Questions Doctrine Forecloses the Department's Interpretation

The District Court reasoned that the Secretary may impose any condition on the EAP Exemption that Congress has not expressly prohibited. ROA.959-60. But this conflicts with the major questions doctrine—which requires that an agency must point to "clear congressional authorization" when it claims highly consequential rulemaking authority. *See West Virginia v. EPA*, 142 S.Ct. 2587, 2609 (2022).[14] And the major questions doctrine supersedes *Chevron* when in

[14] The major questions doctrine is based on "two overlapping and reinforcing presumptions"—that Congress "intends to make major policy decisions itself" and that Congress should make those choices under a "separation of powers-based" default that forbids it from delegating "major lawmaking authority." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

play. *Id.* at 2614 (requiring a clear statement in lieu of the *Chevron* framework).

But the District Court held that the major questions doctrine does not apply because it adopted arbitrary limitations on the doctrine. ROA.961-963. These limitations do not reflect the Supreme Court's major questions jurisprudence. Indeed, the District Court overlooked the Supreme Court's seminal major questions cases—which confirm the presumption that Congress would have spoken in clear terms (as it did with the baseball player exemption, 29 U.S.C. § 213(a)(19)) if it had intended to authorize minimum salary rules under section 213(a)(1). *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("*Williamson Tobacco*") (emphasizing that Courts must consider the "manner in which Congress is likely to delegate" on important regulatory subjects); *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 114 S. Ct. 2223 (1994) (concluding it was "highly unlikely that Congress would leave" to "agency discretion" the authority claimed).

The District Court's approach to the major questions analysis was also flawed because it considered only the economic and political impact of the Department's 2019 Rule—rather than the political and economic

implications of the Department's assertion of an open-ended power to raise minimum salary requirements as high as the Secretary may deem fit. ROA.961-962. *See West Virginia*, 142 S. Ct. at 2612 (applying the major questions doctrine in rejecting the Agency's "view" of its authority under the Clean Air Act). And finally, the District Court was wrong to conclude that the delegation of an open-ended power to "define and delimit" constitutes a clear statement authorizing minimum salary rules—as is required by the major questions doctrine. ROA.963. *See West Virginia*, 142 S. Ct. at 2614 (rejecting EPA's assertion that Congress spoke with requisite clarity because the word Congress used was an "empty vessel," which might be filled with any meaning).

1. The Major Questions Doctrine Looks to the Full Implications of the Agency's Claimed Powers

The District Court held that this was not a major questions case because the Department estimated its 2019 Rule would *only* have hundreds of millions of dollars in economic impact. ROA.960 (contemplating an impact of $472.1 million in the first ten years). Likewise, the Court found that it could not apply the doctrine because the 2019 Rule would *only* affect "1.2 million workers." ROA.960. But the

focus of the major questions doctrine is on the *breadth of the agency's asserted rulemaking authority*—not just the effect of the agency's choice to exercise its claimed discretion with a specific rule. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2379 (2023) (Barret, J., concurring) (explaining that the major questions doctrine requires a context driven analysis "interpreting the scope of a delegation"). Therefore, the proper analysis must consider the consequences that would follow if the Department should exercise its authority to impose more extreme rules to govern the 47.6 million employees (ten million more than the combined population of Texas, Louisiana, and Mississippi) who may perform EAP duties nationally.[15] *See Gonzales v. Oregon*, 546 U.S. 243, 268 (2006) ("Under the Government's theory ... the medical judgments the Attorney General could make are not limited to physician-assisted suicide ... [H]e could decide whether any particular drug may be used for any particular purpose ...")

The District Court should have considered the full economic and political implications of the assertion that the Secretary has authority to

[15] *See* Rule, 84 Fed. Reg. at 51258 (estimating "workers for whom employers might claim" the EAP Exemption). *See also* State by State List, U.S. Census Bureau, https://www.census.gov/library/ stories/promote-content/state-by-state-list.html.

adopt *any* minimum salary rule—or impose any other condition not expressly prohibited by the statutory text. *See Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) ("*Alabama Realtors*") (emphasizing that "[i]t is hard to see what measures this interpretation would place outside the CDC's reach.") After all, if the Department is correct, the Secretary is free to raise minimum salary rules ***much higher***. For example, the Department's Proposed Rule would more than double the minimum required before the 2019 Rule went into effect. Proposed Rule, 88 Fed. Reg. at 62,152. *See also* Letter to Secretary Walsh from Rep. Mark Takano et al., (June 15, 2022) (urging the Department to raise the minimum salary to over $80,000).[16] But the opinion ignores the economic implications or the political firestorm that would arise if the Secretary should test the bounds of her claimed authority.

Without any express limitation on the "define and delimit" power, the Secretary claims unfettered discretion to "exclude" any employee from the EAP Exemption for any reason not expressly prohibited by the

[16] https://progressives.house.gov/_cache/files/3/2/32bbd3fe-fc9b-47b6-a4b8-7ba1666aadd1/77B103B7E04203F6BE51CA7FBD2A94DB.6.15.2022-ot-letter-takano-adams-jayapal.pdf.

text. ROA.957-958. She could effectively "define and delimit" the EAP Exemption out of existence if she should choose to impose too high of a minimum salary. And conversely, this claimed authority entails power to decide what employees to "exclude" from the protections of the FLSA. *See* 1:22-cv-00792-RP, No. 19-B, 28th Annual Report of Secretary of Labor (acknowledging that "the power to define is the power to exclude").

But the major questions doctrine requires Court to approach such a significant claim to power with "skepticism." *UARG*, 573 U.S. at 324. And the doctrine is implicated here because the Department claims "virtually unlimited power" to "unilaterally define" its regulatory powers. *Nebraska*, 143 S.Ct. at 2373. *Cf. United States v. United Verde Co.*, 196 U.S. 207, 215 (1905) (rejecting a claim that Congress had delegated authority to "define" critical statutory language because this would amount to a "power to abridge or enlarge the statute at will.").

2. The Doctrine Applies Because of the Economic and Political Implications of the Department's Claimed Powers

The District Court also erred in its conclusion that a regulation imposing hundreds of millions of dollars in economic impact is *per se* too insignificant. ROA.962. No precedent requires that a rule must have

economic implications on the scale of billions of dollars.[17] On the contrary, the precedent confirms that the doctrine may apply to politically significant assertions of regulatory authority *without regard to economic impacts*.

For example, the Supreme Court applied the major questions doctrine in *Gonzales*, to reject the Attorney General's claim of authority to regulate physician-assisted suicide—with no suggestion that the doctrine hinged on the economic impact of the asserted power. 546 U.S. at 267–68. The opinion stressed only that the Attorney General's claim to regulatory authority was "not sustainable" because authority to regulate such a politically sensitive matter could not be inferred from oblique language. *Id.* at 246. Likewise, this Court has applied the major questions doctrine without any discussion of economic impacts. *See Nuclear Regul. Comm'n*, 78 F.4th 827, 844 (stressing only that the

[17] There is no principled reason to draw a line in the sand at the billion-dollar mark. For that matter, a regulation imposing hundreds of millions of dollars in impacts is no less economically significant than a regulation concerning the disposal of nuclear waste—which implicates the doctrine under this Court's precedent. *See Texas v. Nuclear Regul. Comm'n*, 78 F.4th 827, 844 (5th Cir. 2023).

question of how to dispose of nuclear waste was a "hotly politically contested" issue).

The Supreme Court has identified several disjunctive factors that may trigger the major questions doctrine—with the ultimate touchstone being the political or economic significance of the power asserted. *See West Virginia*, 142 S.Ct. at 2620 (Gorsuch, J., concurring) (discussing prior cases). For example, in *Williamson Tobacco*, the Supreme Court rejected the Food and Drug Administration's claim that it had authority to prohibit sale of tobacco products under its authority to regulate "drugs" and "devices." 529 U.S. at 133. While one could interpret these terms to cover products that contain nicotine, the Court held that these terms had to be interpreted to exclude tobacco products because the Court was skeptical that Congress meant to authorize regulation of a product that had long been subject to political controversy. *Id*.

Here the Department asserts a highly politicized authority to decide an important issue of labor law. The extent to which the federal government will impose compensation requirements for employees has always been—and remains—a politically fraught subject. For example, proposals to raise the minimum wage invariably spark heated political

debate.[18] And proposals to raise minimum salary requirements are also highly politicized. For that matter, the Department's 2016 Rule (and its newly Proposed Rule) have generated significant controversy and debate among different political "factions"—including in the halls of Congress. *See, e.g., Julie Su Reworks Overtime*, Editorial Board, Wall Street Journal (Sept. 8, 2023), https://www.wsj.com/articles/julie-su-labor-department-overtime-pay-biden-administration-b314387c (chiding that "[t]he Administration is again evading Congress by imposing through regulation what it can't pass through legislation"); Protecting Workplace Advancement and Opportunity Act, H.R. 4773 (proposed bill to "nullify" the Department's 2016 Rule) (introduced March 17, 2016).

The FLSA's history gives additional reason to assume that Congress would have provided clear authority to impose minimum salary rules if it had meant to do so. For one, the original enactment expressly authorized the Department to impose industry specific wage orders. *See Opp Cotton Mills v. 312 U.S. Adm'r of Wage & Hour Div. of Dep't of Lab.*,

[18] *See* Smith, Kelly Anne, *What You Need to Know About the Minimum Wage Debate*, Forbes (Feb. 26, 2021), https://www.forbes.com/advisor/personal-finance/minimum-wage-debate/ (discussing a proposal to raise the federal minimum wage, and observing "few political arguments [are] more polarizing than raising the federal minimum wage.").

312 U.S. 126, 136–37 (1941). But because compensation regulation is so contentious, Congress was careful to provide guardrails and explicit direction. The original enactment, therefore, required that the Department had to consider specific factors, abide by specific procedures, and stay within a floor and ceiling. *Id.*

As such, one would expect Congress to have provided similar parameters and direction if it intended to authorize minimum salary rules in section 213(a)(1). Yet the EAP Exemption conspicuously omits anything providing direction for how the Secretary should go about this line-drawing exercise. This matters because "courts 'must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political significance to an administrative agency.'" *Texas v. United States*, 497 F.3d 491, 501 n.6 (5th Cir. 2007) (quoting *Williamson Tobacco*, 529 U.S. at 133).

What is more, history demonstrates that some of the FLSA's biggest legislative fights were over the issue of who would be deemed exempt from default hourly pay and overtime rules.[19] This, likewise,

[19] Grossman, Jonathan, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, Monthly Labor Review, June 1978, https://www.dol.gov/general/

demonstrates the political salience of the question presented. Given the political wrangling that went into deciding who would be deemed exempt from the FLSA's protections, one would have expected Congress to be explicit if it had intended to condition the EAP Exemption on minimum salary rules—just as several enacted state laws explicitly required minimum salaries for "executive" employees at the time. *See Infra* Stein Report at 20 (observing that "10 state wage-and-hour laws requir[e] … a salary qualification for exemption of executive … employees").

Additionally, modern legislative debates speak to the politically charged nature of this issue. Congress is now contemplating legislation to address salary requirements for EAP employees. *See* Restoring Overtime Pay Act of 2023, S.1041, 118th Cong. (2023); Restoring Overtime Pay Act of 2023, H.R. 2395, 118th Cong. (2023) (both of which would establish a $45,000 minimum salary, with annual adjustments). These proposals will become law only if there is broad enough support for our elected lawmakers to agree on a standard. And separation of powers

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aboutdol/history/flsa1938 (explaining that "[d]uring the legislative battles ... members of Congress had proposed 72 amendments," and that many of these concerned proposed exemptions). *See* Forsythe, John, *Legislative History of the Fair Labor Standards Act*, 6 Law. & Contemp. Probs. 464, 484–86 (1939) (discussing proposed exemptions).

prevents the Department from adopting minimum salary rules as a "legislative work-around." *NFIB v. OSHA*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J. concurring).

Additionally, precedent requires a clear statement for rulemaking authority that "intrude[s] into an area that is the particular domain of state law." *West Virginia*, 142 S. Ct at 2621 (Gorsuch, J. concurring) (citing *Alabama Realtors*, 141 S. Ct. at 2486–87). That is precisely what the Department's minimum salary level rules do here. They intrude into the employer-employee relationship, which is traditionally governed by state law.

Of course, with enactment of the FLSA, Congress chose to displace state law that would otherwise allow employers to pay nonexempt employees less than the federally prescribed minimum wage and overtime requirements. But while Congress spoke clearly when it intended to displace state standards for nonexempt employees, Congress made no clear decision to displace state law as to compensation requirements for EAP employees. *Cf. Infra* Stein Report at 30 (noting

that the 75th Congress proposed—but failed to enact—express minimum salary requirements).

For all these reasons, this Court should construe the EAP Exemption as denying the Department the controversial power to impose minimum salary rules—consistent with our structural separation of powers. *See Devoe v. Atlanta Paper Co.*, 40 F. Supp. 284 (N.D. Ga. 1941) (holding that the Department lacked authority to impose salary requirements); *Buckner v. Armour & Co.*, 53 F. Supp. 1022, 1024 (N.D. Tex. 1942) (narrowly construing the "define and delimit" language and signaling that the Department was engaged in "an attempted law-making function").

3. Neither Precedent nor Reason Limits the Doctrine to Review of New Interpretations of Old Statutes

The District Court also held that the major questions doctrine cannot apply here because the Department has long interpreted the "define and delimit" language as authorizing salary level rules. ROA.963. But the vintage of the Department's interpretation does not bear on the question of whether the agency's claimed authority has major economic or political implications. And the fact that an agency has long arrogated

Congress' legislative role is no basis for affirming a continued breakdown of the constitutional order.

Of course, there is special reason for skepticism when an agency seeks to "pour new wine out of old bottles." Adler, Jonathan H., West Virginia v. EPA: *Some Answers About Major Questions*, Cato Sup. Ct. Rev., 2021–22, at 37, 66. But there is no precedent for the District Court's rule that longstanding interpretations are categorically exempt from major questions review. Nor would any such rule make sense.

The Supreme Court's decision in *Nebraska* makes clear that the major questions doctrine can apply in review of audacious interpretations of relatively young enactments. There, the Court applied the doctrine in reviewing an agency's claim of rulemaking authority under a statute enacted only twenty years prior. 143 S. Ct. at 2372. And there is simply no reason to say that the doctrine would not apply if the agency had claimed the same power—from supposedly ambiguous language—within a shorter timeframe.

By the same token, there is no reasoned basis for saying that an audacious interpretation that would be subject to major questions doctrine analysis when first announced should become immune as time

passes. For example, the Supreme Court recently applied major questions related canons in rejecting the EPA's longstanding interpretation of its jurisdictional powers under the CWA. *Sackett v. EPA,* 143 S. Ct. 1322, 1364–66 (2023) (rejecting the "significant nexus" theory under both the federalism canon and the canon of avoidance—which requires a clear statement); *cf. Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality) (rejecting that the Army Corps' 30-year "entrenched executive error" construing the Clean Water Act could support an "adverse possession" theory insulating "statutory text from judicial review"). Similarly, the major questions doctrine should apply—depending on the nature of the regulatory subject—without regard to the vintage of the agency's (errant) interpretation. *See Nuclear Regul. Comm'n*, 78 F.4th 827, 844 (affirming that the "inquiry" is "shaped … by the nature of the question presented").

4. The "Define and Delimit" Authority Is Not a Clear Statement Authorizing Minimum Salary Rules

The District Court also wrongly concluded that the Congress provided a sufficiently clear statement authorizing minimum salary rules because the FLSA expressly delegated authority to "define and

delimit" the terms "bona fide executive … capacity." ROA.963. But the only thing clear is that this delegation authorizes the Secretary to promulgate regulation concerning the "duties" an employee must perform to be deemed exempt. *Helix*, 598 U.S. at 67 (Kavanaugh, J., dissenting). After all, Judge Pitman concluded that the text was silent on the question of minimum salary rulemaking authority. ROA.956-957.

C. The District Court's Reliance on *Wirtz* was Misplaced

This Court, in *Wirtz v. Miss. Publishers Corp.*, 364 F.2d 603 (5th Cir. 1966), brushed aside an Appellees' argument that the Department's salary-level regulation was not "justifiable" because it was "not rationally related to the determination of whether an employee is employed in a bona fide executive * * * capacity." *Id.* at 608. In a single paragraph *Wirtz* said the regulation was not "arbitrary or capricious" because the Secretary has "broad latitude to 'define and delimit' the meaning of the term 'bona fide executive * * * capacity." *Id.*

The District Court said that this "holding" foreclosed any ultra vires challenge to the Department's "general authority" to promulgate minimum salary rules because the result was "expressly based on fidelity to the statutory text." ROA.955. But *Wirtz*'s arbitrary and capricious

holding is not binding as to the arguments presented here. *See Ochoa-Salgado v. Garland*, 5 F.4th 615, 619 (5th Cir. 2021) ("[T]he rule of orderliness applies where (1) a party *raises* an issue and (2) a panel gives that issue *reasoned consideration*.")

First, *Wirtz* did not address whether a minimum salary rule is precluded by the ordinary meaning of the statutory text—which is, under the Supreme Court's modern jurisprudence, the first step in "reviewing an agency's construction of a statute." *See Nevada I*, 218 F.Supp.3d at 528. For that matter, *Wirtz* engaged in zero statutory construction before broadly deferring to the Secretary. Rather, *Wirtz* applied only an arbitrary and capricious standard.

Second, quite obviously, *Wirtz* did not address whether the Department's claimed minimum salary rulemaking authority violates the major questions doctrine. No party invoked the major questions doctrine. And therefore, this Court has never given the issue here reasoned consideration.

II. No Intelligible Principle Governs the Secretary's Minimum Salary Rulemaking Authority

The District Court held that Congress delegated an open-ended authority for the Secretary to "define and delimit" the operative text of the EAP Exemption. ROA.959-960. This Court should reject that construction based on statutory text. But if the District Court is correct, it means that the Secretary wields lawmaking powers because she may assign whatever meaning she likes to the terms "bona fide executive … capacity."

Indeed, under the District Court's interpretation, there is no limiting principle guiding the Secretary's exercise of rulemaking discretion in raising salary requirements or in imposing any conceivable restriction on the EAP Exemption. After all, if the Secretary's authority is not limited to clarifying the duties that an employee must perform to qualify for the EAP Exemption, then there is no text-based intelligible principle controlling her discretion.

The District Court was wrong to assume that the Secretary is guided by Congress' hortatory goal of improving working conditions for employees because that provides no more guidance than the NIRA's

broad goal of improving economic conditions in the United States—which the Supreme Court deemed insufficient in *Panama Refining* and *Schechter*. Those cases confirm that an intelligible principle must be grounded in the operative text. No precedent undermines that rule.

Therefore, because the terms "bona fide executive … capacity" provide no direction for imposing minimum salary rules, there is no intelligible principle here. And to boot, the history of the EAP Exemption confirms the nondelegation problem. Indeed, section 213(a)(1) was modeled on the NIRA—which gave unconstitutional authority to the President to impose minimum salary requirements when approving industry codes.

A. Congress Must Provide a Governing Standard to Limit and Channel the Exercise of Discretion

The Constitution vests Congress with the *exclusive* power to make law because only Congress is directly accountable to the American People. U.S. Const. art. I, § 1. Thus, the Constitution forbids Congress from delegating its lawmaking powers. *See Whitman v. Am. Trucking Assoc.*, 531 U.S. 457, 472 (2001) (affirming that the Vesting Clause prohibits any "delegation of [legislative] powers"). In this way, separation

of powers ensures democratic accountability. *See Jarkesy v. SEC*, 34 F. 4th 446, 460 (5th Cir. 2022) ("[A]ccountability evaporates if a person or entity other than Congress exercises legislative power.")

Separation of powers demands that regulation promulgated by the Executive Branch must be governed by an objective standard—*i.e.*, law established by Congress. *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (holding that the Executive Branch must "conform" to law). Otherwise "unaccountable 'ministers'" assume the role of lawmaker. *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, concurring). And that would frustrate our "constitutional design." *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (emphasizing that Congress cannot "announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.").

For this reason, the nondelegation doctrine requires that Congress must provide an "intelligible principle" to *cabin and guide* the exercise of administrative discretion. *See Panama Refining*, 293 U.S. at 430 (holding that "[a]s to the transportation [of hot oil] … Congress ha[d] declared no policy, [] established no standard, [] laid down no rule."). Of course, Congress can authorize executive officers and agencies to determine facts

and can delegate "the duty to carry out [a] declared legislative policy." *Panama Refining*, 293 U.S. at 426. But Congress cannot "[leave] the matter to the [executive] without standard or rule, to be dealt with as he please[s]." *Id*. at 418. *See also Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 43 (1825) (emphasizing that Congress must decide the "important subjects").

Applying this constitutional standard, the Supreme Court famously declared unconstitutional a provision of the NIRA, in *Panama Refining*, because it delegated authority to outlaw the transportation of hot oil without providing "definition of circumstances and conditions in which the transportation is to be allowed or prohibited."[20] 293 U.S. at 430. Section 9(c) violated the nondelegation doctrine because nothing in the text governed President Roosevelt's exercise of discretion. The President was left free to weigh competing policy considerations as he deemed "fit."[21] *Id*. at 415.

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[20] Historically, the judiciary narrowly construed delegations of rulemaking authority to avoid unlawful delegations of Congress' lawmaking powers. *See, e.g.*, *United Verde Co.*, 196 U.S. at 215 (rejecting an interpretation that would enable an officer to "define" critical text).

[21] The weighing "competing public values" is "the very essence of legislative choice …" *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987). *See also National Pork*

Later that same year, the Supreme Court declared the entire NIRA unlawful because the Act delegated "unfettered discretion" for the President to issue "industry codes" with whatever restrictions he thought "needed or advisable." *Schechter*, 295 U.S. at 537–38. The Court acknowledged that the President's delegated powers were not without limit. *Id*. For example, the NIRA prohibited the President from approving industry codes that would encourage monopolies or that would unduly suppress small business. *Id*. at 522–23. Even so, the NIRA violated separation of powers because nothing in the text channeled the President's exercise of discretion in deciding what specific rules should govern the conditions of lawful employment or anything else. *Id*. at 538 (concluding the NIRA's restrictions left "virtually untouched … the wide field of legislative possibilities …").

Critically, the Supreme Court rejected the Solicitor General's arguments that an intelligible principle could be inferred from the statute's general statement of policy in *Panama Refining* and *Schechter*. Instead, the Supreme Court affirmed that an intelligible principle must

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Producers Council v. Ross, 598 U.S. 356, 382 (2023) (emphasizing that it is the role of lawmakers to weigh "incommensurable" values).

be rooted firmly in statutory text—rather than self-serving claims about the general purpose of the statute. *Panama Refining*, 293 U.S. at 417–18; *Schechter*, 295 U.S. at 541–42. For this reason, the NIRA's hortatory goal of improving American economic conditions was insufficient.

B. No Intelligible Principle Governs Minimum Salary Rules

The District Court ruled that the FLSA entails an "intelligible principle" guiding the Secretary's exercise of discretion when imposing minimum salary rules under her authority to "define and delimit" the EAP Exemption. But the text says nothing as to the circumstances that should warrant establishing or modifying salary rules. Nor does the text speak to whether the Secretary should use any given methodology for this line-drawing exercise, whether there is any upper-limit for permissible salary level rules, or whether the Secretary should consider any given factors when deciding required salary levels.

In the District Court's view, Congress did not need to speak with any degree of specificity because the remedial goals of the FLSA and its history (supposedly) provide a pole star to guide the Secretary's discretion. *See* ROA.965-966 (concluding that "the express goal of

protecting the labor force and the history and purpose of section 213(a)" provide an intelligible principle). That is wrong. Neither the FLSA's remedial goals nor its history speak to the circumstances in which the Secretary should establish or modify salary level rules. Therefore, this Court cannot affirm the District Court's judgment consistent *Panama Refining* and *Schechter*.

1. The Text Provides No Direction for Setting Minimum Salaries

a. The District Court Errantly Infers an Intelligible Principle with Circular Reasoning

The District Court held it was "sufficient that Congress guides the [Secretary's] discretion … by telling [her] that those employed in a 'bona fide executive, administrative, or professional capacity' are exempt from the protections designed for vulnerable low-level workers." ROA.966-967. But it is patently illogical to say that Congress has provided objective direction to channel the Secretary's discretion by using the terms "bona fide executive … capacity" when Congress opted against assigning meaning to the text. After all, under the District Court's rationale, Congress expressly delegated the power to assign meaning to the Secretary. This means the Secretary retains unfettered discretion to

decide who will be included or excluded from the exemption based on whatever considerations she might find fitting in her unilateral judgment.

And this Court must reject the District Court's circular reasoning that the text provides an intelligible principle simply because Congress made the choice to have the Secretary "define and delimit" the EAP Exemption. *See Panama Refining*, 293 U.S. at 430 (rejecting any approach that would allow Congress to transfer its lawmaking function "at will and as to such subjects as it chooses …"). The District Court concluded that this alone confirms a "manifest policy of having specific criteria laid down" so that everyone will know which employees fall "within or without" the Exemption. ROA.965 (quoting *Walling*, 140 F.2d at 830). But saying that the Secretary should decide who qualifies as working in a "bona fide executive … capacity" says nothing about whether, when, or how the Secretary should impose or modify minimum salary rules.

For that matter, *Schechter* made clear that it is insufficient for Congress simply to manifest a policy of having the Executive Branch decide the important matters. In response to a national economic

emergency, Congress had decided it was in the nation's interest to enable the President to decide the terms and conditions of lawful employment, and other applicable restrictions on industry. 295 U.S. at 531, n.9. But the Court affirmed that the nondelegation doctrine precludes Congress from giving a blank check of rulemaking power in this way. *Id*. at 551. And for that reason, the delegation of authority to "define and delimit" the EAP Exemption is unconstitutional—if it understood as an authority to impose a salary rule without objective direction in the text.

b. There is No Objective Direction in the Text

Panama Refining held that section 9(c) of the NIRA violated the nondelegation doctrine because the NIRA "declared no policy," "established no standard," and "laid down no rule" governing the President's exercise of discretion for deciding whether or when to prohibit transport of hot oil. ROA.966 (quoting *Panama Refining*). Even so, the District Court upheld section 213(a)(1) without identifying any textually grounded policy, standard, or rule guiding the Secretary's exercise of discretion for deciding whether, when or how to impose or modify minimum salary rules. For this reason, the District Court's opinion should be reversed.

Rather than pointing to anything in the text objectively guiding the Secretary's exercise of discretion in setting minimum salary rules, Judge Pitman presumed that there was an intelligible principle in the FLSA's supposed goal of protecting "vulnerable low-level workers." ROA.967. But the statutory text does not speak of "low-level workers." The text merely delineates between nonexempt employees who must be paid on an hourly basis and employees who are "employed in a bona fide executive … capacity" who are deemed exempt. 29 U.S.C. § 213(a)(1). And, under the District Court's interpretation, the text delegates exclusive authority to the Secretary to assign meaning to those terms—which means the Secretary has unfettered authority to decide which employees are entitled to the FLSA's wage and hour protections, and which merit exemption.

And while the District Court repeated this Court's admonition that Congress must establish "the boundaries of [] [an agency's] delegated authority," Judge Pitman failed to identify *anything* limiting the Secretary's discretion to raise salary level rules ever higher. ROA.964 (quoting *Big Time Vapes, Inc. v. Food & Drug Admin.*, 963 F.3d 436, 442 (5th Cir. 2020)). For that matter, the Department has now proposed to

raise the minimum salary requirement from $35,568 to $55,068 annually. Proposed Rule, 88 Fed. Reg. at 62,152. And ***nothing in the text*** prevents the Secretary from raising salary requirements to $80,000—or even $1,000,000.

Not only does the text fail to provide a ceiling on minimum salary rules, but the text provides no floor. Nothing in the FLSA requires minimum salary rules for EAP employees. Thus, just as the Secretary has always "defined and delimited" the exemption for those employed "in the capacity of outside salesman" to allow commission-only pay, the Secretary has discretion to redefine the text to eliminate minimum salary rules.

The text also leaves the Secretary with unfettered discretion to craft different salary rules for different industries. Or to impose different rules for different areas of the country. Or to impose different rules for "executives" than for "administrative" or "professional" employees. And, of course, the text says nothing about whether bonuses should be counted toward satisfying salary requirements.

Nor are there any "boundaries" limiting the Secretary's discretion to condition the EAP Exemption on any other requirement the Secretary

might deem fitting. If the authority to "define and delimit" allows the Secretary to impose minimum salary requirements, the Secretary might just as well require that employers provide specific paid sick leave policies, or provide any conceivable benefit that the Secretary might deem appropriate. Without any required findings, the Secretary could condition the EAP Exemption on employers providing robust healthcare and dental benefits. *See Panama Refining*, 293 U.S. at 415 (emphasizing that there was no requirement to "make any finding … as a condition of [the President's] action"). And without any textual limitations, the Secretary might just as well impose other rules governing exempt EAP employees—such as a requirement to provide greater compensation if EAP employees receive work emails or calls after working hours, or on weekends.[22]

The District Court said that "[t]he statutory language" entails "an intelligible principle that guides the [Secretary] … and limits [her] discretion" because the text prevents the Secretary from only using a

[22] *Cf.* Nelson, Soraya Sarhaddi, *German Government May Say 'Nein' To After Work Emails*, Nat. Pub. Radio (Dec. 1 2014), https://www.npr.org/sections/parallels/2014/12/01/366806938/german-government-may-say-nein-to-work-emails-after-six (discussing proposed regulation that would prohibit employers from contacting German employees after hours).

salary-level test. ROA.965. But even if the text forecloses the Secretary from enforcing a minimum salary test without a corresponding duties test, nothing channels the Secretary's discretion in deciding whether to establish, modify, or eliminate minimum salary requirements.

The Supreme Court confronted and rejected a similar argument in *Schechter*. The Solicitor General argued that the NIRA entailed an intelligible principle because the President was prohibited from approving industrial codes proposed by associations that were not representative of industry as a whole, and because the President was foreclosed from approving codes that would encourage monopolies or that would unduly suppress small business. 295 U.S. at 522–23. But the Court held that those limitations did not guide the President's exercise of discretion in deciding the substance of industry codes. *Id.* at 538 (concluding that "these restrictions leave virtually untouched … the wide field of legislative possibilities."). Likewise, the fact that Congress may have limited the EAP Exemption to employees who perform EAP duties tells us nothing about what sort of salary level rules the Secretary may promulgate under her delegated "define and delimit" power.

2. The FLSA's General Statement of Policy Provides No Direction

The District Court concluded that the FLSA's remedial goals provide an intelligible principle. ROA.965-967 (concluding that "Congress' intentions ... are clear."). But Congress must provide a governing policy or standard to control the exercise of discretion in the statutory text. *Panama Refining*, 293 U.S. at 417–18. And as established already, there is nothing in the text even loosely guiding the Secretary's discretion.

Rather than focusing on the FLSA's operative provisions, the District Court emphasized Congress' general statement of policy. ROA.965-967. But *Panama Refining* considered and rejected the idea that there might be an intelligible principle in the NIRA's general statement of policy. 239 U.S. at 417–18 (finding no "policy" speaking to "the circumstances or conditions in which the transportation of hot oil … should be prohibited."). Likewise, in *Schechter*, the Court found no intelligible principle channeling the President's exercise of discretion in creating industry codes—even though Congress had spelled out a general

goal of improving economic conditions and had directed the President to adopt codes that would "tend to effectuate th[at] policy." 295 U.S. at 523.

Just as in *Panama Refining* and *Schechter*, nothing in the FLSA's general statement of policy speaks to the "the circumstances or conditions in which" minimum salary rules should be imposed, modified, or withdrawn. True, the FLSA contemplates a general goal of "correcting and eliminating … labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general wellbeing of workers …" 29 U.S.C. § 202. But after establishing default worker protections in the FLSA's minimum wage and maximum hour provisions, the FLSA establishes a policy of exempting certain employees in section 213. Plainly then, the EAP Exemption resulted from legislative compromise. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (emphasizing that the "FLSA gives no 'textual indication' that its exemptions should be construed narrowly"). As such, it makes no sense to presume that the broad remedial goals contemplated in the FLSA's general statement of policy provide direction for "defining and delimiting" the operative text.

At bottom, Congress' remedial goal of improving and eliminating detrimental labor conditions provides no direction for the Secretary in deciding how high to raise minimum salary rules. Nor does Congress' hortatory goal of providing protections to maintain "minimum standards of living necessary for health, efficiency and general wellbeing of workers" provide any direction as to the substance of conditions the Secretary should impose on the EAP Exemption. If such general policy statements were enough, the Supreme Court would have had no problem upholding the NIRA because Congress had a goal of enabling the President to take action—as he deemed necessary—to improve economic conditions.

Granted, this Court has said that "when evaluating whether Congress laid down a sufficiently intelligible principle, [courts are] meant … to consider the purpose of the [enactment], its factual background, and the statutory context." *Big Time Vapes*, 963 F.3d at 443. But as Justice Rehnquist observed, the Supreme Court has never relied on a general legislative purpose alone in upholding a statutory delegation. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 682–84 (1980) (Rehnquist J., concurring). Therefore, Congress' aspirational goal

of improving labor conditions—like Congress' goal of improving generally improving American economic conditions in the NIRA—is insufficient.

3. The "History" of the FLSA Provides No Intelligible Principle

The District Court obliquely suggests that "the history" of section 213(a)(1) provides guidance to the Secretary for setting minimum salary rules. ROA.965. But an intelligible principle must always rest on a firm textual foundation. *See Panama Refining*, 293 U.S. at 417–18. In this case, an appeal to history—divorced from the statutory text—is unavailing.

If anything, the regulatory history of the EAP Exemption demonstrates that there is a nondelegation problem. From the beginning, the Department claimed open-ended discretion to carry-on the Roosevelt Administration's preferred labor policies for "executive" employees from industry codes approved under the NIRA. The Department has repeatedly said that it drew from "experience gained under the NIRA." Proposed Rule, 88 Fed. Reg. at 62,161. For example, the Stein Report emphasized that most industry codes approved under the NIRA required that "executive" employees had to be paid a minimum salary. *Infra* at n.2

at 20. And the Department set a $30 per week minimum salary in 1940 because that was the predominant minimum salary established across various industries under the NIRA. *Id*.

The legislative history also suggests that the "define and delimit" power delegated in section 213(a)(1) represents a continuation of the NIRA's flawed legal theory that Congress may delegate blank checks or rulemaking power. The Department admits that this provision "was modeled after similar provisions in the earlier [NIRA]"—which infamously lacked any governing intelligible principle. Proposed Rule, 88 Fed. Reg. at 62,154. Title II of the NIRA concerned projects funded by federal loans and grants, and section 206 provided that "no individual directly employed on any such project shall be permitted to work more than thirty hours in one week"—but with exception for "executive … positions." Pub. L. 73-67, Ch. 90, title II, 206(2), 48 Stat. 195, 204-5 (June 16, 1933). And as noted already, the NIRA left the President with unfettered discretion to impose salary requirements for "executive" employees when approving industry codes.

There is otherwise a conspicuous dearth of legislative history on section 213(a)(1). The lack of legislative history over section 213(a)(1)

suggests that Congress gave no thought to the constitutional concerns presented in delegating power to "define and delimit" the EAP Exemption. By contrast, Congress gave serious thought to the nondelegation doctrine when drafting provisions authorizing industry-specific minimum wage orders. *See* Andrias, Kate, *An American Approach to Social Democracy: The Forgotten Promise to the Fair Labor Standards Act*, 128 Yale L.J. 616, 666 (2019) (explaining that during legislative debates, opponents "emphasized similarities between FLSA's industry committees" and the NIRA). The result was that Congress was careful to provide direction and safeguards when authorizing industry wage orders—but provided no such textual direction for minimum salary rules under the EAP Exemption.

4. The Cases Cited by the District Court Are Distinguishable

The District Court chiefly relied on *Big Time Vapes* in upholding section 213(a)(1). But that case is easily distinguishable. At issue was a provision of the Tobacco Control Act (TCA) that the Food and Drug Administration relied on to regulate electronic cigarettes. The provision delegated authority to FDA to extend the requirements of the TCA to

"tobacco products" that FDA "deem[ed] to be subject to" the Act. If read in isolation this language would seem to give the agency discretion to decide for itself the jurisdictional reach of the Act. But FDA's authority was circumscribed by context derived from the text.

The full text made clear that Congress had not given a blank check. For one, Congress had provided "a controlling definition of 'tobacco product.'" 963 F.3d at 438, 441, 444. And Congress had given four examples of the sort of tobacco products that it wanted FDA to regulate. As such, the agency was left only with the task of applying an objective standard that Congress had established in the text—i.e., with reference to the definition Congress had given and the specific examples Congress had provided. *See Alabama Realtors*, 141 S. Ct. at 2488 (concluding that an otherwise open-ended delegation to issue orders as deemed "necessary" was circumscribed because the text provided illustrative examples of "the kind of measures" that the agency could pursue).

By contrast, Congress declined to provide any definition for the critical terms in section 213(a)(1). Instead, Congress delegated the legislative task of assigning meaning to the terms "bona fide executive … capacity." And in the absence of any further textual direction, the

Secretary retains "the wide field of legislative possibilities …" *Schecter*, 295 U.S. at 538.

Nor does any Supreme Court opinion allow for a standardless delegation without any objective guidance derived from the statutory text. Without analysis the District Court points to a handful of Supreme Court decisions that upheld seemingly broad delegations. But in each case, there was something concrete in the text to channel administrative discretion.

The District Court's reliance on *Lichter v. United States*, 334 U.S. 742 (1948), and *Yakus v. United States*, 321 U.S. 414 (1944), is irrelevant because those cases concerned a delegation "of 'war' powers." *Int'l Union United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. OSHA*, 938 F.2d at 1318. As the Supreme Court observed in *Lichter*, the delegation of "constitutional war powers" may be exceptionally broad. 334 U.S. at 779–79. That is so because such delegations "implicate[] the president's inherent Article II authority." *Gundy*, 139 S.Ct. at 2137, 2140 (Gorsuch J., dissenting). *See United States v. Mazurie*, 419 U.S. 544, 556–57 (1975) (explaining that nondelegation standards are "less stringent in cases where the entity exercising the delegated authority itself possesses

independent authority over the subject matter"). But this Court must apply the intelligible principle test as articulated in *Panama Refining* and *Schechter* because Congress has delegated its authority to regulate interstate commerce.

In any event, there was an objective textually grounded standard governing administrative discretion in both *Lichter* and *Yakus*. The statute at issue in *Lichter* allowed the Secretary of War to recover "excess profits" from military contractors. But the text channeled the exercise of discretion by making clear the "factors appropriate for consideration." 334 U.S. 783–87. Likewise, in *Yakus*, the Executive Branch was charged with fixing "fair and equitable" prices for commodities during World War II. But this was not authority to impose any price control the Administrator might like. The statutory text provided that the Administrator had to look to "prevailing prices during the designated [pre-war] base period … with prescribed administrative adjustments to compensate for enumerated disturbing factors affecting prices." 321 U.S. at 421, 423.

The Supreme Court's decision in *National Broadcasting Co. v. United States*, is also distinguishable. *NBC* concerned the Federal

Communication Commission's licensing authority to regulate use of public air waves as "public interest, convenience, or necessity" requires. 319 U.S. 190, 255–26.[23] The Supreme Court upheld this delegation, but only because Congress gave meaningful direction in the Communications Act. The text enumerated a list of what the Commission could do, which provided narrowed context for an otherwise nebulous delegation. *Id.* at 214–15. By contrast, the FLSA's text provides no contextual clues for how the Secretary should go about drawing minimum salary rules.

Congress also provided objective direction in the statutory text when delegating authority to the Securities and Exchange Commission to compel dissolution of certain holding companies in *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946). Congress directed the Commission to exercise this authority on determining that a holding company's structure was "unduly or unnecessarily complicate[d]" or that it "unfairly or inequitably distribute[d] voting power among security holders." *Id.* at 104–05. But while this delegation might have been ambiguous, it was not standardless. And the statute provided adequate direction because it

[23] This case may also be distinguished because it concerned regulation of public air waves, as opposed to "generally applicable rules of conduct governing future actions by private persons." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting).

gave only limited discretion when read in context. Specifically, it was clear from both the legislative history *and* the text that Congress had established a policy aimed at pyramided holding companies. *Id.* at 103 (noting that that it was "found in § 1(b)(3) that the national public interest … may be adversely affected 'when control of such (subsidiary) companies is exerted through disproportionately small investment.'"). By contrast, nothing in the FLSA's text establishes a policy governing minimum salary requirements.

Finally, the delegation at issue in *American Trucking Association* was guided by an objective standard rooted in the text of the Clean Air Act. Here as well, Congress had delegated in nebulous terms. 531 U.S. at 457 (authorizing the EPA to set standards as required to "protect the public health"). But this was not a blank check of rulemaking authority because Congress mandated that air quality standards must be based on *findings* reflecting the latest science. 531 U.S. at 473–74. By contrast, nothing in the FLSA requires any findings for the Secretary to impose, modify or withdraw minimum salary rules under section 213(a)(1).

CONCLUSION

For all these reasons, Appellants respectfully request that this Court reverse the judgment of the District Court.

DATED: January 18, 2024.

Respectfully submitted,

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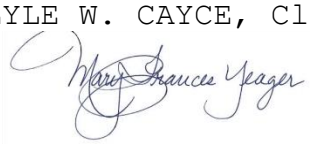

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