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' REPLY 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 so that the judges of this Court may evaluate possible disqualification or recusal.

/s/ Luke A. Wake_____
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INTRODUCTION

The Department of Labor does not dispute that Section 213(a)(1) ("EAP Exemption") was modeled on the National Industrial Recovery Act (NIRA). And as with the NIRA, the EAP Exemption delegates a "wide field of legislative possibilities" for the Executive Branch to do as it likes without any direction in the operative text. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538 (1935) (finding a nondelegation violation). But not only does the Department fail to distance the EAP Exemption from the unconstitutional NIRA, it doubles down by arguing that Congress allowed it to assign meaning to the operative text—so long as its regulations are not "arbitrary and capricious" or "manifestly contrary to the statute." Opp'n Br. at 19. If accepted, this interpretation would confirm that the "define and delimit" power suffers the same constitutional defects as the NIRA.

The Department nevertheless claims that its "define and delimit" power falls within "the range of delegations the Supreme Court has approved." Opp'n Br. at 32. But the Court has never upheld a delegation in the absence of a textually grounded governing standard. AOB at 44–

47, 61–66. And the Department fails to identify anything controlling the Secretary of Labor's discretion.

Even so, the Department maintains that the terms "employed in a bona fide executive, administrative or professional capacity" are not an "empty vessel" to be filled with whatever meaning the Secretary likes. Opp'n Br. at 32. Yet in contradiction, the Department asserts the Secretary may assign meaning to the operative text as she thinks fit—so long as her regulations align with the FLSA's broad purposes. *Id.* at 31–32. This interpretation violates the intelligible principle test because it leaves unfettered discretion to the Secretary to adopt whatever salary rules she might like—or to withdrawal salary rules altogether.

The only way to avoid this constitutional problem is to construe the EAP Exemption under its ordinary meaning, which denies the Secretary discretion to impose salary level rules. But the Department disavows that interpretation without engaging in the serious textual analysis that *Chevron* requires. Indeed, it refuses to even cite *Chevron*.[1] Instead, it now

[1] In recent years the Department of Justice has backed away from *Chevron* at the appellate stage. Molly Weisner, *How would ending 'Chevron deference' impact federal agencies?*, Federal Times (May 9, 2023), https://www.federaltimes.com/federal-oversight/congress/2023/05/09/how-would-ending-chevron-deference-impact-federal-

runs from *Chevron* and claims this Court need not engage with the EAP Exemption's terms as a whole, because Congress has delegated it the authority to "define and delimit" those terms. Full stop. Thus, in the Department's view, courts can skip straight to reviewing its regulations under an "arbitrary and capricious" standard. Opp'n Br. at 19. But, under *Chevron*, courts must first engage with a statute's text to ensure the Executive Branch has the authority it is claiming before deciding whether a rule is "arbitrary and capricious."

And the Department's view suffers from the same legal infirmity as *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603, 608 (5th Cir. 1966). The Department argues this Court is bound by *Wirtz*, but that decision is not binding because it did not engage in the rigorous textual analysis that *Chevron* now requires. Nor did *Wirtz* consider the major questions doctrine or constitutional avoidance arguments presented here.

In any event, the parties agree on one thing: this case is important and should be resolved on the merits now. The Department is finalizing a proposed rule that will dramatically raise salary level requirements for

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agencies/. ("Recently, [*Chevron* has] not been cited as often . . . That's why [some have] compared it to the Lord Voldemort of administrative law—the decision that shall not be named.").

EAP employees from $35,568 to $55,068 annually. *See* Opp'n Br. at 10. That rule, if finalized, would raise salary requirements by ***60 percent***, which would only exacerbate the Appellants' constitutional injuries. Thus, the parties agree that "[b]ecause plaintiffs contest the Department's authority to issue any salary-level test, issuance of the final rule will not moot this case." *Id*. It is important that this Court resolve the issues presented now because there is no limiting principle on how much higher the Department can raise the salary level in the future. This Court should reverse the District Court and ensure that the Department abides by its statutory mandate and the Constitution.

ARGUMENT

I. *Chevron* (for now) Is the Proper Mode of Analysis for Reviewing Whether Congress Authorized the Department's Claimed Salary Level Rulemaking Authority

The Department urges this Court to withhold meaningful judicial review over its salary level rule based on *Wirtz v. Mississippi Publishers Corp*. Opp'n Br. at 13–17. But that is wrong. Supreme Court and Fifth Circuit precedent require courts to apply *Chevron*'s two-step framework when reviewing whether an agency's rulemaking is lawful. That framework's first step requires courts to apply the traditional tools—and

other background principles—of statutory construction *before* deferring to an agency's view of its statutory authority. Only then will courts uphold an agency's "reasonable" statutory construction. *Wirtz* does not control here because it did not apply *Chevron*'s two-step framework.

A. Post-*Wirtz* Supreme Court and Fifth Circuit Precedents Require Courts to Apply the Traditional Tools and Background Principles of Statutory Construction

This Circuit "abides by the rule of orderliness, under which a panel of the court cannot overturn a prior panel decision 'absent an intervening change in the law[.]'" *Stokes v. Sw. Airlines*, 887 F.3d 199, 204 (5th Cir. 2018). But the "rule of orderliness" does not bind the Court here.

First, *Wirtz* was not based on "reasoned consideration" because it did not engage in a rigorous textual analysis before ruling that the Department's 1963 minimum salary rule was not "arbitrary and capricious." AOB at 41–42 (citing *Ochoa-Salgado v. Garland*, 5 F.4th 615, 619 (5th Cir. 2021)). *Second*, *Wirtz* is not binding because there was an intervening change in the law since it was decided. AOB at 41. The Supreme Court's decision in *Chevron* ruled that courts must assess an agency's claim to rulemaking authority under a two-step analytical

framework. *Chamber of Com. of United States of Am. v. United States Dep't of Lab.*, 885 F.3d 360, 369 (5th Cir. 2018) (citing *Chevron*, 467 U.S. at 842–43 (1984)). This panel must therefore review the statutory question presented under the *Chevron* framework—or whatever new analytical framework the Supreme Court might require while this case is ongoing. *See* AOB at 42.

Stokes affirms that when there is a change in the law—either express or implied—from a higher authority, a panel of this Court has an "*obligation* to declare and implement this change in the law." 887 F.3d at 204 (cleaned up). A "change in the law" includes when the "Supreme Court disavows the mode of analysis on which [this Court's] precedent relied." *Id.* And a "mode of analysis" includes the Supreme Court's instructions "'on how to' perform the relevant analysis . . . ." *Id. See also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989) (observing that "lower courts" are bound not only by the "outcome" of Supreme Court decisions but also by their "mode of analysis.").

Chevron now holds that the first step in a statutory analysis is to apply the traditional tools of statutory construction. "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.'" *Chamber of Com.*, 885 F.3d at 369 (citing *Chevron*, 467 U.S. at 842–43); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2153 n.175 (2016) ("*Chevron* told us explicitly that we should employ all the 'traditional tools of statutory construction' to resolve any statutory ambiguity *before* we defer to an agency. . . [I]n those cases, we would not have to defer to the agency at all."). Then if—but only if—there is ambiguity (two equally plausible interpretations), the next step is to determine whether the agency's interpretation is reasonable. *Chamber of Com.*, 885 F.3d at 379–380.

More still, the rule of orderliness does not bind this panel because intervening Supreme Court precedent now requires this Court to construe agency action against "background principles" of statutory interpretation—including the emergent major questions doctrine, AOB at 41; *see also West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (requiring that executive branch agencies must point to "clear congressional

authorization" when they claim highly consequential rulemaking authority). Following the Supreme Court's lead, the Fifth Circuit now also applies the major questions doctrine—where more deferential modes of analysis would have applied previously. *E.g., Texas v. Nuclear Regul. Comm'n*, 78 F.4th 827, 844 (5th Cir. 2023) (requiring a "clear delegation" of authority). *Wirtz* had no occasion to consider the major questions doctrine. There was thus no reasoned analysis of this issue.

B. The Department Cannot Rehabilitate *Wirtz*'s Outdated Mode of Analysis

The Department seeks to rehabilitate *Wirtz* by arguing that this Court can leapfrog *Chevron* step one and simply review the salary level rule under a an "arbitrary and capricious standard." Opp'n Br. at 15–17. In the Department's view, this is so because Congress has explicitly delegated it the power to "define and delimit" the EAP Exemption. Opp'n Br. at 15–16. In essence, the Department argues that this Court should, based on *Wirtz*, skip straight to *Chevron* step two.[2] This argument fails for several reasons.

[2] Whether an agency's rule is "arbitrary, capricious, or manifestly contrary to the statute" is only a permissible consideration under *Chevron* step two.

First, the Department asserts that "when Congress has explicitly left a gap for the agency to fill, the agency implementing regulations must be upheld unless they are arbitrary, capricious, or manifestly contrary to the statute." Opp'n Br. at 15 (quoting *Easom v. US Well Servs., Inc.*, 37 F.4th 238, 245 (5th Cir. 2022). But this argument begs the question. Indeed, the very preliminary question here is "what gap" Congress has left for the agency to "fill." And that gap must be derived by applying traditional tools and background principles of statutory construction at *Chevron* step one.[3]

When the traditional canons are applied, the analysis reveals that the Department's delegation to "define and delimit" the EAP Exemption is confined; the Department is limited to enacting rules over the many various duties that could show an employee is working in a "bona fide executive, administrative, or professional capacity." AOB at 26–41. But the Department cannot chisel new gaps into the statute to enact

[3] This might be labeled as a "Step Zero" for delegated authority. *See* Jonathan H., Adler, West Virginia v. EPA: *Some Answers About Major Questions*, 2022 Cato Sup. Ct. Rev. 37, 60–61 (2022). But the point remains the same: "[t]he delegation of authority must be explicit in the plain language of the authorizing statute, *as it would have been understood at the time of enactment*." *Id.* (emphasis added).

extratextual minimum salary requirements. *Wirtz* failed to engage in this now required analysis.

Second, the cases the Department relies on (Opp'n Br. at 15–16) confirm that *Wirtz*'s mode of analysis is not binding on this Court because they granted deference *only after* engaging in the *Chevron* mode of analysis. And none of the cases addressed the major questions doctrine, or the canon of constitutional avoidance raised here. For example, *Easom* held that the Department was owed deference over whether the phrase "due to" in the Worker Adjustment and Retraining Notification Act triggered either but-for or proximate causation. 37 F.4th at 244–245. The panel reasoned that deference was owed because Congress left "a gap for the agency to fill"—what level of causation is required—and that its view that the Act required proximate cause was not "arbitrary, capricious, or manifestly contrary to the statute." *Id*. But, unlike *Wirtz*, the court only found there was an ambiguity (and thus a gap to fill) after going through *Chevron* step-one. *See id.* at n.2.

Nor does *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), save *Wirtz*. *Coke* addressed the FLSA's exemption for "any employee employed in domestic service employment to provide

companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary) . . . " 29 U.S.C. § 213(a)(15). The question presented was whether the Department had violated the FLSA in promulgating a regulation to clarify that the exemption applies to someone performing domestic service work regardless of whether they are employed by a third party. And contrary to the Department's preferred analytical approach, *Coke* answered that question by applying *Chevron's* two-step framework. The Court deferred to the agency's interpretation only after tethering the scope of the agency's authority to the statute's operative text. 551 U.S. at 167. By contrast, the Department now seeks to skip *Chevron* step one in claiming authority to "define and delimit" the EAP Exemption in any way not expressly foreclosed by the text.

Put differently, *Coke* (unlike *Wirtz*) addressed the text to determine the scope of the Department's statutory authority *before* giving any deference to the Department's statutory construction. In that case, the question of who had to be the employer was properly viewed as an "interstitial matter" because the term "employed" had to be construed one

way or the other—either as including or excluding employment by third parties. *Coke*, 551 U.S. at 165. By contrast, the Department points to nothing in the operative text of the EAP Exemption that implies authority to impose minimum salary requirements. The Department can only rely on its conclusory assertion that it can assign meaning as it likes under its "define and delimit" power.

Auer v. Robbins, 519 U.S. 452 (1997), is also inapt. For one, the respondents in *Auer* were not challenging the Department's authority to condition the EAP Exemption on the payment of specific salaries; instead, they pressed an "as applied" challenge to the Department's "unreasonable" interpretation of the Exemption as to "public-sector employees." *Id. Auer* thus focused its analysis on *Chevron* step two—which considers whether an agency's interpretation is reasonable. *Id.* at 454. But unlike *Auer*, this case challenges the Department's very authority to impose salary level rules—and that question necessarily requires beginning at *Chevron* step one. *Id.* at 457. (emphasizing the

respondents "do not raise any general challenge to the Secretary's reliance on the salary-basis test").[4]

Finally, the Department emphasizes that *Wirtz* aligned with other cases that have upheld the Department's salary regulations. But those out-of-circuit cases suffer from the same failure as *Wirtz*—because they did not engage in the two-step analysis required by *Chevron* and did not engage with background principles of statutory construction. *See* Opp'n Br. at 14 (citing *Prakash v. American Univ.*, 727 F.2d 1174, 1177–78 (D.C. Cir. 1984); *Fanelli v. U.S. Gypsum Co.*, 141 F.2d 216, 218 (2d Cir. 1944); *Walling v. Morris*, 155 F.2d 832, 836 (6th Cir. 1946); *Walling v. Yeakley*, 140 F.2d 830, 832–33(10th Cir. 1944)).

[4] To be sure, the District Court in *Nevada v. DOL* ("*Nevada II*") found "*Wirtz* is controlling." 275 F. Supp. 3d 795, 805 n.5 (E.D. Tex. 2017). But the District Court had it right the first time: "*Wirtz* is distinguishable from this case and thus is not binding. *Wirtz* did not evaluate the lawfulness of a salary-level test under *Chevron* step one, as *Wirtz* predated *Chevron*." *Nevada v. DOL*, 218 F. Supp. 3d 520, 530 n.3 (E.D. Tex. 2016) ("*Nevada I*").

II. The FLSA Does Not Authorize the Department to Adopt a Minimum Salary Level Test for the EAP Exemption

A. The FLSA Does Not Delegate the Department the Free-Floating Authority to Adopt a Salary Level Rule

The Department asserts this Court need not "search for ambiguity" before blessing the agency's view of its delegated authority. Opp'n Br. at 18–19. (citing *Children's Hosp. Ass'n of Tex. v. Azar*, 933 F.3d 764, 770 (D.C. Cir. 2019)). But this argument misconstrues the nature of the inquiry, ignores all notions of modern administrative (and constitutional) law, and conflicts with Supreme Court and Fifth Circuit precedent.

It is "axiomatic" that "an administrative agency's power to promulgate legislative regulations is limited to the authority delegated [to it] 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)). And to derive what authority Congress has delegated—what gap, if any, an agency may fill—requires courts to construe a statute's text, in context, and as part of the statutory scheme. *See Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 289–90 (2010) (stating that "[s]tatutory language has meaning only in

context" and that a court has a "duty to construe statutes, not isolated provisions.") (alteration in original) (quotations omitted).

Everyone agrees that the FLSA delegates the Department some power to fill in the details of the EAP Exemption's terms. But the question is whether Congress delegated an open-ended authority for the Department to assign meaning to the operative text in any way that is not expressly precluded by the text—or whether the scope of the "define and delimit" power is confined by the objective meaning of the operative text. And *Chevron* provides the answer: An agency has no rulemaking authority unless it can show that the text authorizes the rule, considering all the canons of construction and background principles of law at *Chevron* step one. *See Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015) (as revised Nov. 25, 2015) (Courts cannot "presume a delegation of power.").

Under the Department's view, all this Court need consider is that Congress gave it the broad power to "define and delimit" the EAP Exemption. But the canons of construction require that the Department's authority must be construed by looking to the EAP Exemption as a whole—including the objective meaning of the operative terms Congress

chose—not by merely looking to the "define and delimit" language in isolation. And when viewed in this way, the EAP Exemption does not delegate the open-ended power that the Department claims.

The EAP Exemption's text covers "any" employee "employed in a bona fide executive, administrative or professional capacity . . . (*as such terms* are defined and delimited from time to time by regulations of the Secretary) . . . ." 29 U.S.C. § 213(a)(1) (emphasis added). When viewed in context—when the EAP Exemption's text is viewed as a whole—the Department's authority to "define and delimit" is tethered to the (unambiguous) ordinary meaning of the operative text's undefined terms.

Put differently, the Department can determine the scope of those terms through regulation to determine *which* duties an employee is engaged in that make him or her employed in a "bona fide executive, administrative, or professional capacity"—but it may not add extratextual substantive requirements to the statute. AOB at 17 (citing *Nevada I*, 218 F. Supp. 3d at 529) (The operative terms "executive,

administrative, [and] professional" all "relate to a person's performance, conduct, or function without suggesting salary.").[5]

At bottom, an analysis of the EAP Exemption's text, as required by *Chevron*'s first step, does not "explicitly" delegate the Department's claimed authority to issue minimum salary rules for the EAP Exemption.[6]

B. The Department's Other Arguments Are Wrong

Aside from its extraordinary assertion that this Court should skip *Chevron* step one, the Department makes three unpersuasive arguments.

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[5] This construction of the FLSA's delegation reflects the common distinction in law between statutory rules—which do not change—and applications of those rules to new circumstances. *See Wisconsin Central Ltd. v. United States*, 585 U.S. 274, 284 (2018) ("Written laws are meant to be understood and lived by . . . if their meaning could shift . . .the point of reducing them to writing would be lost. That is why it's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning ... at the time Congress enacted the statute.'"); *see also id.* ("While every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world.") Thus, the Department may "define and delimit" the Exemption's terms to apply to the new applications—duties that arise in new and different employment contexts—but it cannot alter the meaning of the statutory terms to include extra-textual requirements.

[6] The Department also uses its "explicit delegation" argument to suggest that the Supreme Court's decisions in *Loper Bright Enterprises v. Raimondo*, No. 22-451, and *Relentless, Inc. v. Department of Commerce*, No. 22-1219, will not affect this case. Opp'n Br. at 19 n.2. But even the case the Department cites to support its "skip *Chevron* step one" theory grounds the distinction between "explicit and implicit delegations" in *Chevron*. *See, e.g.*, *Children's Hosp. Ass'n of Tex.,* 933 F.3d at 770 ("The familiar *Chevron* framework guides our review.").

First, when the Department finally gets around to the FLSA's operative text, it briefly addresses the EAP Exemption's terms and makes illogical leaps from their dictionary definitions to the ordinary meaning they convey. Opp'n Br. at 18–20. The Department first notes that it "has long understood the statutory phrase bona fide executive, administrative, or professional capacity to connote a status not attained by low-wage workers." Opp'n Br. at 19. But this does not speak to the objective meaning of those terms. *See Texas*, 809 F.3d at 184 ("[H]istorical practice . . . does not, by itself, create power."). The agency's "long understanding" is also no justification for adhering to an errant interpretation. *Cf. Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality) (rejecting the Army Corps' 30-year "entrenched executive error").

The Department's inference from the definition of "capacity" also makes little sense. Opp'n Br. at 20 ("[C]apacity includes "position, condition, character, relation."). According to the Department, "position" can include an employee's "pay." *Id.* But in ordinary usage, these terms speak to the outward appearance of one's official position or authority within a hierarchy. *E.g.*, *Place*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/place (last visited Apr. 17,

2024) (defining "place" as "prestige accorded to one of high rank"); *Status*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/status (last visited Apr. 17, 2024) (defining "status" as one's "position or rank in relation to others").

The Department similarly misconstrues the implication of the meaning of the term "bona fide." Opp'n Br. at 20. Everyone agrees that the term "bona fide" means an employee must genuinely be employed in an "executive, administrative or professional capacity." But it is a giant leap to conclude a worker is "genuinely" employed as an EAP employee based on his or her salary. Indeed, the natural reading of bona fide—when conjoined with EAP's other operative terms—simply means an employee must be performing duties that make him or her an "executive, administrative or professional" employee. Thus, an employer cannot assign the gardener the title of "head groundskeeper" to avoid the FLSA's requirements. But conversely, the "Vice President" of a nonprofit could make a low salary and still be exempt because she genuinely engages in executive duties.

The Department's interpretive gloss is also contradictory: the Secretary has long justified its salary level rules as a proxy for the duties

test on the assumption that most (but not all) employees who appropriately perform EAP duties are already compensated at the level required by Department's regulations. *But see* AOB at 28 (the salary level rule will affect "1.2 million workers.") It is also no legal justification for the Department to say that a salary-level test is "helpful." Opp'n Br. at 17. And the Department is simply wrong in suggesting that a salary-level test is needed to ensure that employers are classifying employees in "good faith" because the Department has an independent obligation to ensure that employees are performing the proper duties—no matter how high of a salary they may receive.

At bottom, the most natural reading of the statute's operative terms is that any employee qualifies for the exemption if they are genuinely employed in a position that performs EAP duties, regardless of "how much" they are "paid[.]" *Helix Energy Sols. Grp., Inc.*, *v. Hewitt*, 598 U.S. 39, 67 (2023) (Kavanaugh J., dissenting). *See also Nevada I*, 218 F. Supp. 3d at 529 ("Congress defined the EAP exemption with regard to duties, which does not include a minimum salary level."). And the Department's insinuation that the sky will fall if this Court limits it to enforcing the EAP Exemption's text is an exaggeration. Indeed, the Department would

remain free to adopt its own enforcement priorities—which might entail greater scrutiny for lower-salaried employees. Congress can also act to expressly authorize salary level rules if it so wishes, as it has done before. AOB at 21–22.

Second, the Department brushes aside the FLSA's structure—which includes dozens of exemptions—some of which explicitly require minimum salaries. Opp'n Br. at 24–27. The Department argues that Congress used different language with the EAP Exemption. *Id.* at 25. But that misses the point: Congress knows how to include a minimum salary requirement when it wants. As the Supreme Court emphasized in *Addison v. Holly Hill Fruit Products, Inc.*, "where Congress" wants to restrict an FLSA exemption, it does so with "appropriate language." 322 U.S. 607, 614 (1944).

The Department rests only on an assertion that Congress used magic words in delegating an authority to "define and delimit" the EAP Exemption. Opp'n Br. at 25–26. Yet in *Addison*, the Supreme Court confronted a similar question under another FLSA exemption that delegated authority for the Secretary to "define and delimit" the operative text. 322 U.S. at 617. Despite that language, the Supreme

Court rejected the Department's authority to impose limitations on that exemption because Congress had explicitly imposed similar restrictions elsewhere—just as Congress later imposed salary restrictions on the baseball exemption. *See id.*[7] Thus notwithstanding the "define and delimit" language, *Addison* rejected the Department's proffered approach. *Id.* And, of course, the Department has no answer for *Addison*.

Finally, the Department asserts that Congress has "ratified" its extratextual interpretation of the Act. Opp'n Br. at 21–27. Not so. To begin, while Congress can ratify administrative orders and similar actions on technical matters with explicit statutory language, it cannot retroactively bless substantive regulations like the salary-level rule. *See Forbes Pioneer Boat Line v. Bd. of Comm'rs of Everglades Drainage Dist.*, 258 U.S. 338, 339 (1922) (stating that ratification deals with "slight technical defect[s,]" but refusing to recognize a ratification that would alter legal relations between parties). Nor can Congress ratify the

[7] The Department also argues that this Court should not infer anything here because the baseball exemption was not included in the original enactment of the FLSA; however, Appellants have already explained that statutes are construed as a whole with the text as it is exists today. AOB at 22 n.11. Even so, the Department cites no authority for its view that the EAP Exemption should be construed as if the baseball exemption had never existed.

Secretary's preferred interpretative lens for the EAP Exemption. *Cf. Graham v. Goodcell*, 282 U.S. 409, 430 (1931) (ratifying a tax collected after a limitations period because this merely remedied "mistakes and defects in the administration of government . . . .").

This leaves only the Department's claim that Congress has never repudiated its interpretation. But legislative acquiescence—if it is relevant at all—cannot trump text-based canons of construction. *See Jones v. Liberty Glass Co.*, 332 U.S. 524, 533, (1947) ("The doctrine of legislative acquiescence is as best only an auxiliary tool for . . . interpreting ambiguous statutory provisions"); *Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1196 (11th Cir. 2019) ("'[L]egislative silence is a poor beacon to follow' in construing a statute. And [the Supreme Court] has repeatedly warned that congressional silence alone is ordinarily not enough to infer acquiescence."). Nor can evidence of legislative acquiescence trump background principles of statutory construction. *See Tiger Lily, LLC v. U.S. Dep't of Hous. and Urb. Dev.*, 992 F.3d 518, 524 (6th Cir. 2021) (concluding that "mere congressional acquiescence in the [agency's] assertion that [a national eviction moratorium] was supported by [law] . . . does not make it so, especially

given that the plain text . . . indicates otherwise."). *Cf. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (applying the major questions doctrine to invalidate the eviction moratorium).

C. The Major Questions Doctrine and Canon of Constitutional Avoidance Foreclose the Department's Assertion of Authority

The Department argues that the major questions doctrine cannot apply here because its current salary level rule does not have an economic impact on the order of billions or trillions of dollars.[8] Opp'n Br. at 28. But the Department has no answer to Appellants' argument that the doctrine applies without regard to economic impact when an agency is making an audacious assertion of regulatory authority of politically charged subject matter. AOB at 31–36 (explaining that the major questions doctrine applies to politically significant issues no matter the economic consequences) (citing *Gonzales v. Oregon*, 546 U.S. 243, 268 (2006);

[8] The Department does not respond to the Appellants' argument that the doctrine requires consideration of the full implications of the Department's elastic interpretation—i.e., the economic and political implications at stake should the Department exercise its asserted discretion to impose far more burdensome rules like the Department's pending proposal to raise minimum salary requirements by 60 percent from $35,568 to $55,068. AOB at 28–31.

Nuclear Regul. Comm'n, 78 F.4th at 844). For that matter, the Department fails even to acknowledge the Fifth Circuit's decision in *Nuclear Regulatory Commission*, 78 F.4th at 844, which held that the doctrine applies to "hotly politically contested" issues without regard to economic impact.

Failing that argument, the Department falls back on the District Court's conclusion that the major questions doctrine should not apply in review of longstanding agency interpretations—no matter their political or economic significance. Opp'n Br. at 27–28. But the Department has no answer to the Appellants' argument that the doctrine applies regardless of the vintage of the agency's interpretation. AOB at 38–40. And the Department provides no reasoned explanation for why an audacious interpretation should be insulated from the major questions doctrine review merely because of the passage of time. To be sure, there is *sufficient* reason for "hesitating" before concluding Congress meant to confer authority when an agency asserts a novel view of its powers under an old statute. *Biden v. Nebraska*, 143 S. Ct. 2355, 2372 (2023). But it is not *necessary*. *See West Virginia*, 597 U.S. at 745 (Gorsuch J., concurring) (noting the "suggestive factors" that trigger the major questions

doctrine.). The major questions doctrine is also a clear statement rule. And where applicable, clear statement rules apply regardless of whether an agency's illegal rulemaking is "unprecedented." *See Sackett v. EPA*, 598 U.S. 651, 679–682 (2023) (applying clear statement principles to the EPA's long-held view of the Clean Water Act).

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

The Department's opposition largely parrots the District Court's opinion in responding to the Appellants' nondelegation arguments, Opp'n Br. at 29–33. And it fails to address many arguments raised in the opening brief—which thoroughly addressed the District Court's deeply flawed reasoning. *See* AOB at 42–66. What remains misses the mark.

The Department insists that it may "define and delimit" the EAP Exemption in any way it chooses so long as its regulations are not expressly foreclosed by the text because Congress "explicitly" delegated the authority to establish the EAP Exemption's meaning. Opp'n Br. at 18–21. This claim to open-ended discretion all but concedes that Congress has failed to provide an "intelligible principle." The Department also fails to point to anything in the text of the FLSA that remotely channels its

exercise of discretion in deciding whether to impose salary level rules—or how to go about setting such rules.

The Department first urges this Court to rubberstamp out-of-circuit decisions that upheld its "define and delimit" power. Opp'n Br. at 29–30. But those cases are all unpersuasive because they fail to identify a textual based "intelligible principle" that would prevent the Secretary from making raw legislative rules. Indeed, while both *Yeakley*, 140 F.2d 830, and *Fanelli*, 141 F.2d 216, upheld the Department's salary-level rules against nondelegation challenges, neither case applied an intelligible principle test, nor did they offer an analysis explaining how the FLSA's text provides a limiting principle to guide the Secretary's exercise of discretion. *Yeakley*, for example, concluded that it was acceptable for Congress to delegate an open-ended authority for "the Secretary to make "rational[] and reasonabl[e]" rules. 140 F.2d at 832. But that is an arbitrary and capricious standard—not an intelligible principle test. *See Panama Refin. Co. v. Ryan*, 293 U.S. 388, 420 (1935) (rejecting the suggestion that a delegation is permissible simply because the Executive is presumed to act "for what he believes to be the public

good.").[9] *See also Schechter*, 295 U.S. at 522–23, 538 (finding no intelligible principle—notwithstanding the fact that the NIRA imposed limitations on the President's delegated authority to impose industry codes in prohibiting codes that would tend to promote monopolies or unduly suppress small business).

The Department also only superficially engages the intelligible principle test. Opp'n Br. at 31. It argues that there is an intelligible principle on the view that Congress announced a broad purpose to "'eliminat[e]' substandard 'labor conditions' that are 'detrimental' to the 'health, efficiency, and general wellbeing of workers,'" *id.*, and expressly authorized the Department to fill in the statute in furtherance of that purpose. But this appeal to the FLSA's hortatory goals is insufficient because the Department cannot point to any textual guardrails to guide the exercise of administrative discretion. *See* AOB at 45–46.

If the Department's anemic approach to the intelligible principle test was correct, the Supreme Court would have had no trouble upholding

[9] *Fanelli*, for its part, was even more perfunctory in concluding that the "define and delimit" delegation was within Congress' power. *See* 141 F.2d at 216 (rejecting the nondelegation challenge in a single paragraph with no analysis of the supposed "intelligible principle" Congress has laid down in the FLSA.)

the NIRA in *Panama Refining* and *Schechter*. After all, in those cases Congress had decided the broad policy, and had decided that it was most efficient to have the President write the codes to govern various industries as he declared fit—and to decide, without direction, whether to prohibit transport of hot oil. Yet the Supreme Court squarely rejected those arguments—even as the government maintained that it was "necessary for Congress to delegate in sweeping terms during a national emergency." *See* Br. of U.S., *A.L.A Schechter Poultry Corp. v. United States*, Nos. 854 and 864, p. 134 (Oct. Term, 1934) (arguing that the delegation was justified by "unprecedented economic chaos").[10]

What is more, the Fifth Circuit has never endorsed an anemic "purpose" based vision of the intelligible principle test. On the contrary, *Jarkesy v. SEC* confirms that the intelligible principle test has real teeth. 34 F.4th 446, 460 (5th Cir. 2022). And it must be Congress that provides guidance to limit the agency's discretion. *Id*. at 462–63. But if the Department's view of its authority is correct, there is no judicially

[10] And as far as purposes go, "exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement." *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 89 (2018). The Department is thus mistaken to rely on one purpose of the statutory scheme to guide its discretion to narrow the EAP Exemption as it pleases.

identifiable text-based policy within the FLSA to govern the agency's exercise of discretion; the statute is utterly silent on how (or whether) salary-level rules should be developed.

Finally, the Department asserts there are extratextual limitations that cabin its discretion. Opp'n Br. at 32–33. But the nondelegation doctrine requires more. Indeed, the Constitution's separation of powers demands that regulation promulgated by the Executive Branch must be governed by an objective standard—*i.e.*, textual limitations within the law enacted by Congress. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (The Supreme Court has "repeatedly [] said that when Congress confers decision making authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'") (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). And the Supreme Court has "never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." *Id.* Thus, it is no answer to say, "the Department has long found" that the "salary level is relevant to whether a worker is employed in a bona fide executive, administrative or

professional capacity."[11] Opp'n Br. at 32. The Supreme Court rejected this basic argument in *Schechter*. 295 U.S. at 538.

In the end, the Department's view of its statutory power is nothing but raw delegation of legislative power. But our separation of powers gives the "responsibility" to weigh tough tradeoffs to "those chosen by the people through democratic processes." *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 666 (2022) (per curiam). Congress cannot delegate the Department the power to make those legislative choices.

* * * * *

[11] The Department simply fails to establish that anything in the FLSA limits the Secretary's discretion to raise salary level rules as high as the Secretary deems fit. After all, if the Secretary is guided only by the statutory purpose of "eliminat[ing] substandard labor conditions" she would seem to be free to raise salary level requirements as high as she thinks fitting.

CONCLUSION

For all these reasons, Appellants request that this Court reverse the District Court's judgment.

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Respectfully submitted,

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I hereby certify that on April 18, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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