No. 16-41606

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF NEVADA; STATE OF TEXAS; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF NEBRASKA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF UTAH; STATE OF WISCONSIN; COMMONWEALTH OF KENTUCKY, by and through Governor Matthew G. Bevin; TERRY E. BRANSTAD, Governor of the State of Iowa; PAUL LEPAGE, Governor of the State of Maine; SUSANA MARTINEZ, Governor of the State of New Mexico; PHIL BRYANT, Governor of the State of Mississippi; ATTORNEY GENERAL BILL SCHUETTE, on behalf of the people of Michigan,

Plaintiffs - Appellees,

v.

UNITED STATES DEPARTMENT OF LABOR; THOMAS E. PEREZ, SECRETARY, DEPARTMENT OF LABOR, In his official capacity as United States Secretary of Labor; WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR; MARY ZIEGLER, in her official capacity as Assistant Administrator for Policy of the Wage and Hour Division; DOCTOR DAVID WEIL, in his official capacity as Administrator of the Wage and Hour Division,

Defendants - Appellants.

On Appeal from the United States District Court
for the Eastern District of Texas, Sherman

APPELLEES' RESPONSE BRIEF

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CERTIFICATE OF INTERESTED PARTIES

State of Nevada et al. v. United States Department of Labor et al., No. 16-41606

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-appellees:

State of Nevada
State of Texas
State of Alabama
State of Arizona
State of Arkansas
State of Georgia
State of Indiana
State of Kansas
State of Louisiana
State of Nebraska
State of Ohio
State of Oklahoma
State of South Carolina
State of Utah
State of Wisconsin
Commonwealth of Kentucky, by and through Governor Matthew G. Bevin
Terry E. Branstad, Governor of the State of Iowa
Paul LePage, Governor of the State of Maine
Susana Martinez, Governor of the State of New Mexico
Governor Phil Bryant of the State of Mississippi
Attorney General Bill Schuette on behalf of the People of Michigan

Defendants-appellants:

United States Department of Labor
Thomas E. Perez, as Secretary of Labor
The Wage and Hour Division of the Department of Labor
Dr. David Weil, as Administrator of the Wage and Hour Division
Mary Ziegler, as Assistant Administrator for Policy of the Wage and Hour Division

Amici:

Plano Chamber of Commerce
Texas Association of Business
Allen-Fairview Chamber of Commerce
Frisco Chamber of Commerce
McKinney Chamber of Commerce
Paris-Lamar County Chamber of Commerce
Gilmer Area Chamber of Commerce
Greater Port Arthur Chamber of Commerce
Kilgore Chamber of Commerce
Longview Chamber of Commerce
Lufkin-Angelina County Chamber of Commerce
Tyler Area Chamber of Commerce
Chamber of Commerce of the United States of America
National Automobile Dealers Association
The National Association of Manufacturers
National Association of Wholesaler-Distributors
National Federation of Independent Business
National Retail Federation
American Bakers Association
American Hotel & Lodging Association
American Society of Association Executives
Associated Builders and Contractors
Independent Insurance Agents and Brokers of America
International Franchise Association
International Warehouse and Logistics Association
National Association of Homebuilders
Angleton Chamber of Commerce
Bay City Chamber of Commerce & Agriculture
Baytown Chamber of Commerce
Cedar Park Chamber of Commerce
Clear Lake Area Chamber of Commerce
Coppell Chamber of Commerce

Corsicana and Navarro County Chamber of Commerce
East Parker County Chamber of Commerce
Galveston Regional Chamber of Commerce
Grand Prairie Chamber of Commerce
Greater El Paso Chamber of Commerce
Greater Irving-Las Colinas Chamber of Commerce
Greater New Braunfels Chamber of Commerce
Greater Tomball Chamber of Commerce
Houston Northwest Chamber of Commerce
Humble Area Chamber of Commerce
Lubbock Chamber of Commerce
McAllen Chamber of Commerce
Mineral Wells Area Chamber of Commerce
North San Antonio Chamber of Commerce
Pearland Chamber of Commerce
Port Arkansas Chamber of Commerce
Portland Chamber of Commerce
Richardson Chamber of Commerce
Rockport-Fulton Chamber of Commerce
Round Rock Chamber of Commerce
San Angelo Chamber of Commerce
Texas Hotel and Lodging Association
Texas Retailer Association
Texas Travel Industry Association

Counsel:

For Plaintiffs-Appellees:
Lawrence VanDyke and Jordan T. Smith of the State of Nevada and Prerak Shah of the State of Texas serve as lead counsel for the States.

For Defendants-Appellants:
Various officials from the Department of Justice and Department of Labor.

For amici Chamber of Commerce et al.:
Littler Mendelson, PC
U.S. Chamber Litigation Center
Manufacturers' Center for Legal Action
NFIB Small Business Legal Center

STATEMENT REGARDING ORAL ARGUMENT

If the District Court is reversed, the new overtime rule will have devastating and nationwide consequences for State budgets, core services, workplaces, employment, and sovereignty. In light of these stakes, the States agree with Appellants' request for oral argument. But this case warrants additional time per side. After extensive briefing, the District Court hearing required almost 3 ½ hours to explore the complex issues involved in this challenge. It is likely that the parties and the Court will similarly need more than the customary amount of time to discuss and address all facets of the case. Moreover, this case brought by the States was consolidated in the District Court with a companion suit brought by private Business Plaintiffs (the Plano Chamber of Commerce et al.). The Business Plaintiffs, although parties in the consolidated proceedings below, are participating in this appeal as amici. Given the Business Plaintiffs' distinct but overlapping perspectives and arguments, the States intend to share argument time with them. For all these reasons, Appellees respectfully submit that an allotment of 30 minutes per side would be appropriate in this case.

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STATEMENT OF THE ISSUE

In 29 U.S.C. § 213(a)(1), Congress exempted from the Fair Labor Standards Act's minimum wage and overtime requirements "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 ….)." The Department of Labor's new overtime rule excludes from this exemption, based on the amount of salary alone, thousands of State employees and millions of private employees that, today, unquestionably perform executive, administrative, or professional duties. Does the new overtime rule go beyond the scope of Congress's statutory authorization?

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The District Court correctly enjoined the Department of Labor's new rule that more than doubles the salary-level cutoff associated with the so-called "EAP" overtime exemption. 29 U.S.C. § 213(a)(1) exempts from the Fair Labor Standards Act's minimum wage and overtime requirements "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 ….)." These words unambiguously demonstrate Congress's intent to exempt "any" EAP employee. As the District Court held, and United States Supreme Court precedent confirms, the terms in Section 213(a)(1) are defined functionally and cannot be swept aside by a rule that imposes a cutoff based on salary alone. Nothing in the statutory text, expressly or implicitly, implicates compensation; nor does the text delegate to the DOL the authority to set a minimum-salary level for EAP workers. Only Congress has the power to set a national minimum wage for American workers, including for EAP employees. The DOL itself has long acknowledged this, conceding that it "is not authorized to set wages or salaries for executive, administrative, and professional employees." ROA.1655.

Yet by grafting the salary-level test onto Section 213(a)(1), and now raising it to an unprecedented level that categorically denies an overtime exemption based on salary-alone to millions of EAP employees, the Federal Executive attempts to wield its rule as a battering-ram to force a species of minimum wage through the backdoor, without Congressional approval. During his tenure, President Obama tried to pass a minimum

wage increase as part of his legislative agenda, but his efforts were stymied.[1] Frustrated by Congressional inaction, the President ordered the DOL to "update" the EAP exemption because, in his view, "millions of Americans lack the protections of overtime *and even the right to the minimum wage*." 79 Fed. Reg. 18737 (emphasis added). President Obama proclaimed the new overtime rule "the single biggest step [he] can take through executive action *to raise wages* for the American people."[2] Indeed, the law professors' amici brief unabashedly supports the new DOL rule precisely because it imposes a minimum wage for EAP employees—or, in academic-speak, to help those "who lack the bargaining power to secure … their own wages and hours …." Law Professors Amici Br. at 13. But neither the Constitution nor Congress granted authority to the Executive Branch to unilaterally raise the minimum wage for a class of workers; certainly, no such authority resides in Section 213(a)(1).

While the salary-level test has existed for decades, it has always been an unauthorized DOL invention and, contrary to the revisionist history of the DOL and certain members of Congress,[3] it has always been controversial—tempered only by the

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[1] Wesley Lowery, *Senate Republicans Block Minimum Wage Increase Bill*, WASH POST. (Apr. 30, 2014) *available at* https://www.washingtonpost.com/news/post-politics/wp/2014/04/30/senate-republicans-block-minimum-wage-increase-bill/?utm_term =.df324940e688.

[2] Remarks of President Barack Obama as Delivered in his Weekly Address at the White House: Expanding Overtime Pay (May 21, 2016), *available at* https://www.whitehouse.gov/the-press-office/2016/05/21/weekly-address-expanding-overtime-pay (emphasis added).

[3] Rep. Scott et al. Amici Br. at 2 ("The regulation was an uncontroversial exercise of the Department's broad authority under the statute.").

fact that for most of its history it was set so low as to be inconsequential. Since the test's adoption in 1940, the DOL's authority to impose a salary qualification has been continuously questioned. The Minimum Wage Study Commission—on which the DOL relies heavily—admitted in 1981 that the salary-level test impermissibly acts as a minimum wage contrary to Congressional intent. "It is clear," the Commission said, "that the Congress intended *all* bona-fide executives, administrators, and professionals to be exempt from both the minimum wage and the [overtime] provisions of the Act. The current salary test as a basic criterion used to identify exempt workers *implicitly introduces a minimum wage type concept … counter to the original intent of the exemption.*" ROA.1291 (emphasis added). *See also* ROA.1553-54, ROA.1651, ROA.1750 (DOL reports acknowledging complaints that salary level test is illegal).

Underscoring its illegality from inception, a number of district courts across the country, decades before *Chevron*, instinctively applied a *Chevron*-step-one-type review and rejected the salary-level test as contravening the text and Congress's clear intent to exempt "all" EAP employees.[4] But the Tenth Circuit led other courts astray in *Yeakley*, where it upheld the salary-level test by applying only a *Chevron* step-two-type "unreasonable and arbitrary" analysis. The court expressly "admit[ted]," but then disregarded, that a rule

[4] *See Buckner v. Armour & Co.*, 53 F. Supp. 1022, 1024 (N.D. Tex. 1942); *Devoe v. Atlanta Paper Co.*, 40 F. Supp. 284, 286-87 (N.D. Ga. 1941); *Krill v. Arma Corp.*, 76 F. Supp. 14, 17 (E.D.N.Y. 1948); *Walling v. Yeakley*, 140 F.2d 830, 831 (10th Cir. 1944) (noting district court rejected rule's salary requirements); *Wirtz v. Miss. Publishers Corp.*, 364 F.2d 603, 606 (5th Cir. 1966) (similar).

considering "the amount of salary" was at odds with "the general acceptation of the phrase … bona fide executive …." Other courts, like the Fifth Circuit in *Wirtz*, followed the Tenth Circuit's lead with very little explanation, also relying exclusively on a *Chevron* step-two-type "arbitrary or capricious" analysis and never addressing the disconnect between the FLSA's text and a salary requirement that many district courts—and the *Yeakley* court itself—had acknowledged.

The absence of more recent cases challenging the salary-level test is likely due to the very low level at which the test has always been deliberately set. In the past, the DOL intentionally set the salary threshold as "such a low requirement" because it recognized that "some foremen and supervisors are paid exceedingly low wages," ROA.1569-70, and the DOL wanted to ensure that in "an overwhelming majority of cases, … personnel who did not meet the salary requirements would also not qualify under" a reasonable duties test. ROA.1652. Because of this, by the time *Chevron* was decided, there was no reason to challenge the salary-level test—the juice just wasn't worth the squeeze. But the absence of more recent challenges does not ratify what the DOL has now done: openly transforming the salary threshold so that it deliberately excludes many bona fide EAP employees from an overtime exemption.

Even worse, the DOL has conjured an automatic indexing regulation that mechanically increases that salary-only test every three years without regard for future changes in EAP duties and without being subject to the APA's notice-and-comment

requirements. The DOL itself has conceded on multiple occasions that it has no statutory authority to impose either a "salary only" test or an indexing mechanism. The Final Rule admits that "[w]hile it is true that section 13(a)(1) does not reference automatic updating, it also does not reference a salary level or salary basis test …. *These changes were all made without specific Congressional authorization*." 81 Fed. Reg. 32431 (emphasis added). The DOL agrees that all employees earning less than the new level "will not qualify for the EAP exemption … *irrespective of their job duties and responsibilities*." *Id.* at 32405 (emphasis added). Thus, contrary to the DOL's claim, the salary-level test does not "work together" with any duties test; below $47,476, duties are simply irrelevant. Despite Section 213(a)(1)'s clear command that "any" EAP employee be exempt, the DOL has manufactured a salary-level cutoff to categorically exclude millions of workers from EAP status based on "salary only," regardless of their duties.

If the new overtime rule is allowed to proceed, the States and our constitutional structure will suffer irreparable harm on a massive scale. As a consequence of the level's steep increase, tens of thousands of State employees (and millions of private employees) "employed in a bona fide [EAP] capacity" will have their overtime exempt status eliminated, with no change in their actual duties, based solely upon a salary amount that the Federal Government forces State officials to pay them. Coercing States to pay their employees more (either by overtime or by raising their salaries) will significantly disrupt, in some cases disastrously, State economic policy and essential governmental services.

Overnight, *millions* of dollars in unfunded employment costs will be inflicted on States (and *billions* on the private economy). To avoid a fiscal disaster, States will have no choice but to involuntarily reorganize sovereign priorities, scramble to cut or reduce crucial government programs, shift administrative workloads, and re-categorize or even terminate employees. A number of States that have balanced budget amendments or supermajority hurdles to raising taxes are especially endangered. They cannot suddenly find additional funds to cover the costs hefted upon them by the new rule. All of these compelled changes will fundamentally alter the relationship between the States and their employees, the States and their citizens, and the States and Federal Government.

Under our system of government, the Federal *Executive* does not possess authority—inherent or statutory—to legislate a minimum salary level for State EAP employees, especially in the absence of a "clear statement" from Congress. There is no such clear statement supporting the DOL's salary-level test in Section 213(a)(1); compensation is not remotely referenced or implicated. Indeed, in the District Court below, the DOL defended its authority to promulgate the salary-level test based on purported *ambiguity* in the FLSA's text—precisely the opposite of the "clear statement" that would be required to impose the salary-level test on the sovereign States under binding Supreme Court precedent. Without an unequivocal statement that Congress approved the use of the salary-level test against the States, the Federal Executive does not have authority to dictate the terms of State employment relationships.

STATEMENT OF THE CASE

A. Grafting a Salary Requirement onto the EAP Exemption Has Always Been Controversial, but In the Past was Generally Inconsequential.

The DOL's account of the EAP exemption's regulatory history and the procedural posture of this case are generally accurate with a few significant exceptions and amplifications:

As enacted, the plain language of Section 13(a)(1) of the FLSA did not reference a mandatory compensation or salary level to qualify as an EAP employee. Neither did all three categories of employees in the first regulations promulgated in 1938. 3 Fed. Reg. 2518. "Professional" employees were described solely in terms of the type of work performed. *Id.*; 81 Fed. Reg. 32401. As the statutory language suggests, a "professional" employee was considered one who engaged in work: predominantly intellectual and not physical; requiring the unsupervised exercise of discretion and judgment; that cannot be produced or accomplished in a given period; and based on a specialized body of academic knowledge. 3 Fed. Reg. 2518. Likewise "executive" and "administrative" employees were jointly defined primarily based upon the duties that they performed, but also with a marginal $30 per week compensation element.

Contrary to the DOL's mischaracterization, the addition of the salary-level test was controversial when first implemented and remained so. The very year the salary-level test was promulgated, the DOL noted in its Stein Report that "some parties claimed that the Administrator did not have authority and should not establish a general national

minimum requirement for exemption." ROA.1553-54. "It was asserted by some that the Administrator has no authority to include a salary qualification." ROA.1567. To defend its salary-level test, the DOL, in the Report, noted that many state wage-and-hour laws contained a salary qualification, but it never explained how the text of the FLSA authorized a *federal* one. ROA.1567-68. The Report defended a salary-level test as an "easily applied …. best single test of the employers' good faith" in categorizing an employee as EAP, ROA.1567, but the same Report undercut that rationale when, in defending "such a low [salary] requirement," it acknowledged that some EAP employees "are paid exceedingly low wages." ROA.1569-70. These inherently conflicting positions were reiterated in future Reports, where the DOL continued to defend its salary-level test against claims that the test is illegal, mostly by emphasizing that its low salary cutoff was merely used as "a ready method of screening out the obviously nonexempt employees," and that the DOL believed that "a good deal of the opposition to maintaining a salary level test … resulted from th[e] *misunderstanding*" that the DOL might "rais[e] the figure so high as to disqualify for exemption individuals" that Congress intended to be exempt. ROA.1651-52 (emphasis added).

Even so, the lack of statutory support manifested in federal courts. In each of the next two years after the rule was announced, a court struck down the salary-level test as beyond the statute's plain language. *Devoe v. Atlanta Paper Co.*, 40 F. Supp. 284, 286 (N.D. Ga. 1941); *Buckner v. Armour & Co.*, 53 F. Supp. 1022, 1024 (N.D. Tex. 1942).

The DOL's 1949 Weiss Report admitted to receiving multiple comments arguing "that the salary tests were illegal," but avoided the issue, stating that "this is not the place to settle the question of their validity." ROA.1651. Decades later, the Minimum Wage Study Commission in 1981 observed precisely what the District Court concluded in this case: "It is clear that the Congress intended *all* bona-fide executives, administrators, and professionals to be exempt from both the minimum wage and the [overtime] provisions of the Act. The current salary test as a basic criterion used to identify exempt workers implicitly introduces a minimum wage type concept … counter to the original intent of the exemption." ROA.1291.

Despite continuously asserted doubts about the validity of the salary-level test, as time went on there were few legal challenges to its use because the salary thresholds were always purposefully set at a low level. There was rarely any reason for employers to contest the salary-level test. For example, by 2004, the long-test cutoff used by the DOL was below the minimum wage. 69 Fed. Reg. 22164.

In fact, when pressed to defend the legality of a salary-level test, the DOL emphasized that it was purposefully set low to *avoid* any genuine debate about the EAP status of affected employees. In 1940, the DOL first justified its use of a salary-level test as "such a low requirement" because "some foremen and supervisors are paid exceedingly low wages." ROA.1569-70. Again, in 1949, the DOL expressly disclaimed any intent to set "the required salary … [at] a figure so high as to disqualify for exemption

individuals who … were intended by Congress to be exempt." ROA.1651. Instead, "the level selected must serve as a guide to the classification of bona fide executive employees and not as a barrier to their exemption." ROA.1659. The DOL considered the minimum salary test as merely "a ready method of screening out the obviously nonexempt employees" and emphasized that "[i]n an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations"—i.e., the duties test. ROA.1652. Accordingly, the DOL continued to defend its salary-level test as "a relatively low figure" deliberately set "near the lower end of the range of prevailing salaries." ROA.1652.

A decade later, the DOL reiterated in the Kantor Report that "the primary objective of the salary test is the drawing of a line separating bona fide [EAP] employees" from non-EAP employees. ROA.1751. Thus, "it is clear that the objectives of the salary tests will be accomplished if the levels selected are set at points near the lower end of the current range of salaries for each of the categories." ROA.1752. Into the next century, the DOL again explained that it deliberately set the new salary cutoff to be "consistent with the Department's historical practice of looking to 'points near the lower end of the current range of salaries'" so as to avoid "'disqualifying any substantial number of [EAP] employees.'" 69 Fed. Reg. 22171 (quoting Kantor Report). As the DOL explained, the

"Department followed this same methodology when determining the appropriate salary level" in 1963, 1970, and 1975. *Id.* at 22166.

This history demonstrates that, from the 1940s until now, the DOL has consistently set the minimum salary cutoff very low in a deliberate effort to ensure that the "overwhelming majority" of bona fide EAP employees could be eligible for an overtime exemption under the rule, based on their duties. The low level of the salary test also insulated the DOL from litigation, but the *legality* of the test was hardly as well-accepted for 75 years as the DOL claims. The new rule, instead of setting the salary-level cutoff "at points near the lower end of the current range of salaries," sets the cutoff at the 40th percentile, deliberately and categorically denying *over a third* of salaried employees an EAP exemption, regardless of their duties. This is a radical departure from the DOL's historical practice.

B. The District Court Correctly Observed that the New Overtime Rule Departs from Historical Practice.

The new salary-level test, besides lacking statutory authorization, departs dramatically from past practice. The new rule does not simply update to today's dollars the "relatively low" salary threshold, or modernize analytical percentages to accomplish the same purpose the test has ostensibly served since the 1940s. Instead, the DOL is openly transforming the salary threshold into a de facto minimum wage mechanism that deliberately excludes many bona fide EAP employees from an overtime

exemption—employees that the DOL acknowledges would be exempt under a more accurate and rigorous duties test.

Rather than continuing to set the minimum salary level very low in order to ensure that the "overwhelming majority" of bona fide EAP employees were eligible for the exemption, the DOL has now deliberately set the salary threshold much higher than historical thresholds, *doubling* the 20th percentile used in the 2004 rule to establish the salary level. 81 Fed. Reg. 32412. The DOL explains that it intentionally picked this much higher, ahistorical threshold because it believes it created a "mismatch" in 2004 by eliminating the "more rigorous long duties test," while pairing the lower salary threshold historically associated with that test with the less rigorous short duties test (now called the standard duties test). *Id.* at 32403-04. According to the DOL, this allowed some employees who can meet the less rigorous short duties test, but who would not have been able to meet the more rigorous long duties test, "to inappropriately classify as exempt." *Id.* at 32404. To "correct th[is] mismatch," rather than implement a more rigorous duties test that would more effectively distinguish between bona fide EAP employees and non-EAP employees, the DOL simply flipped the "mismatch," moving its salary cutoff, which for over *65 years* has been set at the lower long-duties test level, up to the short-duties test level—doubling the historical percentile of salaried employees denied EAP status based on salary alone. *Id.*

The DOL believed that "a standard salary threshold significantly below the 40th percentile would require a more rigorous duties test than the current standard duties test in order to effectively distinguish between white collar employees who are overtime protected and those who may be bona fide EAP employees." *Id.* In other words, the DOL fully recognized that by doubling the salary threshold from the 20th percentile to the 40th, it would trap many more bona fide EAP employees under the threshold than had ever historically been denied an overtime exemption—indeed, it now categorically denies an exemption to effectively *all* employees who would have qualified under the old long duties test.

The new rule expressly acknowledges that "[w]hite collar employees subject to the salary level test earning less than $913 per week will not qualify for the EAP exemption, and therefore will be eligible for overtime, *irrespective of their job duties and responsibilities*." *Id.* at 32405 (emphasis added). Hence, the new rule creates a de facto "salary-*only* test" for any employee earning less than $913 per week—a species of litmus test that the DOL has repeatedly acknowledged it "does not have authority under the FLSA to adopt …." 69 Fed. Reg. 22173; 81 Fed. Reg. 32429; 32446 n.84; ROA.1667.

The DOL cannot disguise the new rule as simply business as usual. By imposing a salary only test for those EAP employees below the increased threshold, the DOL estimates that "*4.2 million* employees who meet the standard duties test will no longer fall within the EAP exemption …." 81 Fed. Reg. 32405, 32393. The sheer number of

employees that will no longer be exempt demonstrates that the DOL has flipped the very purpose for which the salary test was adopted. It started as a measure to screen out only "obviously nonexempt employees," without disqualifying "any substantial number of individuals who could reasonably be" considered bona fide EAP employees. ROA.1651-53. The new rule does exactly the reverse: it purposefully denies an exemption to many "bona fide EAP employees" that the DOL knows should be exempt based on any reasonable duties test, just to avoid improperly giving an exemption to any non-EAP employees. And it does so because the DOL believes the "current standard duties test" is too lenient and it would be "difficult" to make that test "more rigorous." 81 Fed. Reg. 32404, 32444.

The District Court analyzed the DOL's historical use of the salary-level test and correctly observed, at the preliminary-injunction hearing, that it is a "drastic change" from past practice—"a radical change, from a floor to a ceiling." ROA.3985, ROA.3988, ROA.4014. The Court concluded that "for 75 years [the salary-level test has] been a floor … but it's no longer a floor. It's [now] a ceiling, and so I view that as a drastic change." ROA.3999. As a floor, "typically you [were] never going to find an employee that does EAP duties that would be below the figure …." ROA.3985. "[T]his isn't a floor." ROA.3994, ROA.4005-6.

The new rule deviates even further from the past by adopting an indexing mechanism that will automatically raise the salary level triennially, without notice and

comment. Unlike prior salary levels, the "ceiling" described by the District Court will automatically get higher every three years. In earlier rulemakings, the DOL disclaimed the authority to use indexing when setting the salary level. In 2004, the DOL flatly stated that adopting a method of automatic increases "is both contrary to congressional intent and inappropriate." 69 Fed. Reg. 22171-72. "Further, the Department [found] nothing in the legislative or regulatory history that would support indexing or automatic increases." *Id.* at 22171.

By indexing, the DOL abandons any pretext of staying within statutory or historical bounds and has made a great leap forward in usurping Congress's authority to set wages. The District Court identified it firsthand. At the hearing, the DOL argued that the test is outdated because "there are people who for a family of four have a salary that puts them below the poverty line … are being classified as white collar under the current test in place." ROA.4002. The Court responded "[w]ell, that sounds like what you're saying is that it's not defining and [de]limiting the words, but [the DOL's] decision [is] to say we want to give everyone a raise and raise the salaries up." *Id.* As the District Court correctly recognized—and as the DOL has itself recognized in the past, *see*, *e.g.*, ROA.1655—that was never Congress's intent under the FLSA's EAP overtime exemption.

ARGUMENT

A. The Standard of Review

This Court reviews the District Court's determination of each of the preliminary injunction "elements for clear error, its conclusions of law de novo, and the ultimate decision whether to grant relief for abuse of discretion." *Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016).

B. The District Court Correctly Recognized the States' Likelihood of Success Under *Chevron*.

Pursuant to *Chevron*'s two-step framework, the Court must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, 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." 467 U.S. 837, 842-43 (1984). If, however, Congress has not unambiguously addressed the precise question at issue, the Court proceeds to step-two and assesses whether the agency's regulation is based on a permissible construction of the statute. *Id.* at 843. Here, the District Court held that the new rule flunks both steps of *Chevron* because, at step-one, the salary-level test is contrary to Congress's intent as expressed in the plain language of the statute and, at step-two, it is not a permissible construction of the statute. ROA.3814-20.

As the District Court's decision reflects, sometimes the step-one and step-two analyses can reach the same conclusion for similar reasons. *Texas v. U.S.*, 809 F.3d 134, 183 n.191 (5th Cir. 2015) ("Now, even assuming the government had survived Chevron

Step One, we would strike down DAPA as manifestly contrary to the INA under Step Two."); *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1175 (D.C. Cir. 2003) ("Our judgment in this case is the same whether we analyze the agency's statutory interpretation under Chevron Step One or Step Two. In either situation, the agency's interpretation of the statute is not entitled to deference absent *a delegation of authority* from Congress to regulate in the areas at issue.").

Both steps closely scrutinize the statutory text. Step-one uses "the traditional tools of statutory construction to determine whether Congress has spoken to the precise point at issue [because] there is no better or more authoritative expression of congressional intent than the statutory text." *City of Arlington, Tex. v. F.C.C.*, 668 F.3d 229, 249 (5th Cir. 2012). This step requires the invalidation of an agency's interpretation "if it does not conform to the plain meaning of the statute." *Tex. Office of Pub. Util. Counsel v. F.C.C.*, 183 F.3d 393, 409 (5th Cir. 1999).

At step-two, courts examine the text to assess whether Congress has "explicitly left a gap for the agency to fill," and if so, whether the means of filling that gap are "arbitrary, capricious, or manifestly contrary to the statute.'" *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004).[5] A regulation is not a permissible construction or

[5] In the court below, the DOL's defense centered on a theory that Section 213(a)(1) is ambiguous under *Chevron* step-two. ROA.1010-11. Here, the DOL abandons all claims of ambiguity and, instead, asserts authority to promulgate the salary-level test under the "*explicit* grant of substantive rulemaking authority that allows [the DOL] to define and delimit the scope of the exemption." Br. 24. This strategic shift on appeal does not impugn the District Court's reasoning or change the outcome. The new tactic is likely designed to avoid the consequences of the "clear statement rule" discussed *infra*.

is "manifestly contrary to statute" when it is inconsistent with, or sets a higher and more restrictive standard than, the words chosen by Congress. *See Sullivan v. Zebley*, 493 U.S. 521 (1990); *see also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). Step-two still requires an evaluation of the meaning of the actual words, phrases, and context of the statute. *Pfennig*, 541 U.S. at 238-45. "Even under Chevron's deferential framework, agencies must operate within the bounds of reasonable interpretation." *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2442 (2014).

Step-two requires the Court "to evaluate the same data that [it] evaluate[s] under *Chevron* step one, but using different criteria." *Bell Atl. Tel. Cos. v. F.C.C.*, 131 F.3d 1044, 1049 (D.C. Cir. 1997). "Under step one [the court] consider[s] text, history, and purpose to determine whether these convey a plain meaning that *requires* a certain interpretation; under step two [the court] consider[s] text, history, and purpose to determine whether these *permit* the interpretation chosen by the agency." *Id.*

In this case, Congress has directly and unambiguously spoken about the types of employees that *must* be exempt from the overtime requirements. The plain language demonstrates that Section 213(a)(1) *requires* the exemption be available to "any" employee performing EAP duties and does not *permit* the use of a salary only test to exclude otherwise eligible employees. Nor does the statute authorize the indexing mechanism.

1. Salary-Level Test

a. Plain meaning and context

Congress did not define what it means to be "any employee employed in a bona fide executive, administrative, or professional capacity," 81 Fed. Reg. 32394, but left it to the DOL to "define[] and delimit[]" these terms "from time to time by regulations." Because the operative phrase is not defined, this Court must look to the commonly understood meaning of those words around the time that the FLSA was enacted in 1938 to determine if their meanings can bear the weight that the DOL places on them. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012).

The Supreme Court has previously interpreted Section 213(a)(1) by relying upon the 1933 edition of THE OXFORD ENGLISH DICTIONARY ("O.E.D.")—the same dictionary relied upon by the States and the District Court. In *Christopher v. SmithKline Beecham Corp.*, the Court utilized contemporary definitions and held "[t]he statute's emphasis on the 'capacity' of the employee counsels in favor of a *functional*, rather than a formal, inquiry, one that views an employee's *responsibilities* in the context of the particular industry in which the employee works." 132 S. Ct. at 2170 (emphases added).[6]

[6] "Capacity" is defined as "position, condition, character, relation," "to be in, put into … a position which enables, or renders capable," or "legal competency or qualification." 2 O.E.D. 89.

The contemporary dictionary definitions of Section 213(a)(1)'s other operative words are similarly described in functional terms—and not by how much each category earns in salary.[7] For example, the 1933 O.E.D. defines "executive" as one "[c]apable of performance; operative … Active in execution, energetic … Apt or skillful in execution … Pertaining to execution; having the *function* of executing or carrying to practical effect." 3 O.E.D. 395 (emphasis added). "Administrative" is defined as "[p]ertaining to, dealing with, the *conduct* or management of affairs; executive … Of the nature of stewardship, or delegated authority … An administrative body; company of men entrusted with management." 1 O.E.D. 118 (emphasis added). "Professional" is defined as a person "[e]ngaged in one of the *learned* or *skilled* professions, or in a calling considered socially superior to a trade or handicraft … That follows an occupation as his (or her) professional, life-work, or means of livelihood … That is *trained* and *skilled* in the theoretic or scientific parts of a trade or occupation … that raises his trade to the dignity of a learned profession." 8 O.E.D. 1428 (emphases added).

The version of A DICTIONARY OF AMERICAN ENGLISH ON HISTORICAL PRINCIPLES ("D.A.E."), published between 1938 and 1944, contains similar definitions. It defines "executive" as "[a]n employee or official of an organization having directive

[7] The DOL does not dispute that, in the context of Section 213(a)(1), the word "any" was meant to have a broad construction. Shortly after promulgation, courts held that it was Congress's intent to exempt "all" EAP employees. *Buckner*, 53 F. Supp. at 1024 (Congress declared "*all* serving in executive and administrative capacities were exempt."). The Minimum Wage Study Commission said the same. ROA.1291 ("It is clear that Congress intended all bona-fide [EAPs] to be exempt").

duties" and as someone that is "[e]nergetic, competent; qualified to direct and control." 2 D.A.E. 907-08 (1940). "Professional" is defined as one "[e]ngaged in an occupation or activity as a profession or means of livelihood." 3 D.A.E. 1838 (1942).

All of these terms are defined by the nature of a person's "performance," "function," "conduct," "learning," "skills," "duties," "control," or "activities." The definitions never identify or even hint at a minimum amount of compensation as a defining or delimiting characteristic. By omitting any reference to salary or compensation, Congress demonstrated its clear intention that the EAP exemption apply to all employees engaged in an EAP *capacity* based upon the *duties* they *perform* without regard for the amount of their compensation. As the Weiss Report confirms, the DOL itself has long recognized that "the definition of bona fide [EAP] in terms of a high salary alone is not consistent with the intent of Congress … and would be of doubtful legality …." ROA.1667.

Grasping for some plausible textual purchase for its interpretation, the DOL shifts, on appeal, from trying to read ambiguity into the statute through the word "capacity," to now focusing exclusively on the phrase "bona fide." *Compare* ROA.3817 *with* Br. 22, 27. Near the time of enactment, "bona fide" meant "[i]n good faith, with sincerity; genuinely." 1 O.E.D. 980. The DOL's belated attempt to stress the adjective "bona fide" is therefore especially puzzling. "Bona fide" doesn't expand the meaning of a word that it modifies; if anything, it *limits* it. If the word "professional" must by its

plain meaning be defined with respect to duties, not pay, then adding the modifier "genuine" or "sincere" in front of "professional" only reinforces the word's already-existing meaning. The DOL's attempt to use "bona fide" to add additional meaning to the words "executive, administrative, and professional" makes no more sense than it would for any other word. For example, while the phrase "bona fide athlete" might encompass a subset of a broader category of "athletes" (excluding, perhaps, Monday-morning quarterbacks) one would never say or understand that the difference between "bona fide" athletes, and all other athletes, lay in their differing pay. Just as the DOL has recognized with respect to EAP employees, many "genuine" or "sincere" athletes are "paid exceedingly low wages," while others are compensated handsomely. ROA.1570, ROA.1656. Under the plain language of Section 213, *any* "genuine" or "sincere" EAP employee *must* be allowed an overtime exemption, irrespective of compensation. ROA.3817.

This textual result is confirmed by viewing this operative phrase in the context of the rest of Section 213. The remaining portions of Subsection (a)(1) speak solely in terms of the duties performed. There are specific references to the "activities" and "the *performance* of executive or administrative *activities*." Many other subsections of Section 213 with a parallel structure similarly focus on duties and activities, with no allusion to a minimum level of pay. *See, e.g.,* § 213(a)(5) ("any employee employed in the catching, taking, propagating, harvesting cultivating, or farming of any kind of fish"); § 213(a)(8)

("any employee employed in connection with the publication of any weekly … newspaper"); § 213(a)(12) ("any employee employed as a seaman on a vessel other than an American vessel"); § 213(a)(15) ("any employee employed on a casual basis in domestic service employment to provide babysitting services").

When pay is a relevant consideration to be exempt from the minimum wage or overtime requirements, Congress has said so. For example, Section 213(a)(6)(D)(i) exempts "any employee employed in agriculture … if such employee … is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment …." Likewise, a criminal investigator is exempt if he "is paid availability pay under section 5545a of Title 5." § 213(a)(16). Section 213(b)(11) exempts from overtime "any employee employed as a driver … who is compensated for such employment on the basis of trip rates, or other delivery payment plan …."

Significantly, when Congress decided that there should be a specific compensation threshold for an overtime exemption, it explicitly said that too. For example, Section 213(b)(24) provides that the FLSA overtime requirements do not apply to certain types of employees at nonprofit educational institutions "if such employee and his spouse … are together compensated, on a cash basis, at an annual rate of not less than $10,000 …." The plain language of Subsection (b)(24), unlike in

the EAP exemption, establishes a strict annual compensation level before the exemption applies.

The omission of a similar compensation threshold in Section 213(a)(1) further demonstrates that Congress did not mean to hinge an employee's EAP status on a particular pay or salary level. This is especially true since Congress enacted Subsection (b)(24) in the same 1974 legislation that purported to extend the entirety of the FLSA to the States. 88 Stat. 55. Had Congress wanted to limit the EAP exemption to employees making a certain amount, it would have expressed that intention in the statute, as it did in Subsection (b)(24). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 23 (1983) (quotations omitted).

As if the plain language and context of the statute weren't enough, the DOL concedes that the statute "does not reference … a salary level or salary basis test …. These changes were all made *without specific Congressional authorization*." 81 Fed. Reg. 32431 (emphasis added). The DOL has consistently recognized that its authority "to define and delimit who is employed in a bona fide [EAP] capacity" does not authorize it to adopt a "salary only" test. *Id.* at 32429, 32446 (stating that a salary only approach is "precluded by the FLSA"); 69 Fed. Reg. 22173 ("Secretary does not have authority under the FLSA to adopt a 'salary only' test …. The Department has always maintained

that the use of the phrase 'bona fide [EAP]' in the statute requires the performance of specific duties.").

The DOL has done precisely what it has acknowledged it cannot do by promulgating the equivalent of a salary-only test for all employees earning less than $913 per week. Under the new rule, "[w]hite collar employees subject to the salary level test earning less than $913 per week will not qualify for the EAP exemption, and therefore will be eligible for overtime, *irrespective of their job duties and responsibilities*." 81 Fed. Reg. 32405 (emphasis added). In other words, an employee's duties, functions, tasks, and activities will not matter *at all* below the new salary threshold.

The DOL estimates that, as a result of the new salary level, "4.2 million employees who meet the standard duties test will no longer fall within the EAP exemption and therefore will be overtime-protected." *Id.* Put simply, the new rule's increased salary level will exclude from exemption, on the basis of pay, *millions of employees* that Congress authorized to be exempt based upon the EAP duties they perform—thousands of employees in State government alone. Section 213(a)(1) plainly states that "*any*" bona fide EAP employee "*shall not*" be eligible for overtime. The statute's language does not leave room for the DOL to adopt any standard or test—salary-based or otherwise—that would categorically bar from the exemption *any* employee performing EAP duties. *Compare Supreme Beef Processors, Inc. v. U.S.D.A.*, 275 F.3d 432 (5th Cir. 2001) (agency cannot develop a "proxy" test that conflicts with the

statutory text), *with* 81 Fed. Reg. 32404 (salary-level test "serves as an appropriate proxy for" an examination of duties). The statute only permits the DOL to define and delimit the duties of EAP employees.

b. Case law

Beyond its attempt to contort the phrase "bona fide," the DOL defends its actions by relying on pre-*Chevron* case law. The DOL's first line of defense is *Wirtz*. But, as the District Court pointed out, *Wirtz* predates *Chevron* and "did not evaluate the lawfulness of the salary-level test under *Chevron* step one …." ROA.3818 n.3. The Supreme Court has explained that pre-*Chevron* cases evaluating agency regulations constitute binding precedent only if they made a step-one-type determination. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

"The better rule," the Supreme Court held, "is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate." *Id.* Courts must closely examine the pre-*Chevron* decision to ascertain whether the earlier court made the equivalent of a step-one or step-two holding. *U.S. v. Home Concrete & Supply, LLC*, 132

S. Ct. 1836, 1842-44 (2012) ("There is no reason to believe that the linguistic ambiguity noted by *Colony* reflects a post-*Chevron* conclusion that Congress had delegated gap-filling power to the agency."). This "blank slate" reexamination is necessary because "whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur." *Brand X*, 545 U.S. at 983.

Wirtz is a classic example of a pre-*Chevron* decision that made no effort to examine the statutory text and, consequently, is not entitled to *stare decisis* effect. There, one of the "Appellees' final contentions" was "that the minimum salary requirement is not a justifiable regulation under … the Act because not rationally related to the determination of whether an employee is employed in a 'bona fide executive * * * capacity.'" 364 F.2d at 608. The Court reviewed appellees' contention under an "arbitrary and capricious" standard—the same standard now applicable at *Chevron* step-two. The Court never discussed whether or not the FLSA's text was consistent with the DOL's regulation. Indeed, the Court did not provide any analysis even as to its "arbitrary and capricious" ruling, opting instead to simply cite to the Tenth Circuit's decision decades earlier in *Walling v. Yeakley*, 140 F.2d 830 (10th Cir. 1944).[8]

[8] The *Wirtz* court also cited to *Craig v. Far West Engineering Co.*, 265 F.2d 251, 258-60 (9th Cir. 1959). But *Craig* addressed the salary-*basis* test, not the salary-*level* test at issue here. In any event, as is characteristic of all of the pre-*Chevron* cases upholding a salary requirement under the FLSA, *Craig* essentially conducted a *Chevron* step-two analysis without considering whether the salary requirement was consistent with the statutory text.

But *Yeakley*, upon which *Wirtz* directly relied, especially exemplifies how challenges to the salary-level test would have come out different under *Chevron*'s two-step approach. *Yeakley* acknowledged that the salary-level test was inconsistent with the FLSA's text. It said, "[a]dmittedly, a person might be a bona fide executive *in the general acceptation of the phrase*, regardless of the amount of salary which he receives." *Id.* at 832 (emphasis added). And the court agreed that "[o]bviously, the most pertinent test for determining whether one is a bona fide executive is the duties which he performs." *Id.* The court further recognized that, under the salary-level test, "some employees who might fall within the general meaning of the phrases employed by Congress will be excluded." *Id.* Despite the disconnect between the DOL's regulation and the statute's text, the court nonetheless upheld the salary-level test because it concluded that the regulation was not "unreasonable and arbitrary"—again, a step-two finding. *Id.* But under *Chevron*, the acknowledged conflict between the salary-level test and the clear text of the FLSA acknowledged by the court would have doomed the salary-level test at step-one.

Footnote 5 of *Yeakley* noted that its decision split from two earlier cases. In contrast to *Yeakley*, those two cases—*Devoe* and *Buckner*—actually conducted the equivalent of a *Chevron* step-one analysis and concluded that the salary-level test was *without* statutory authority. In *Devoe*, the court recognized that the DOL's ability to define and delimit the EAP exemption is restricted by Congress's words.

Foreshadowing a step-one evaluation, the court said "[t]hese limits are marked out by the fair and natural meaning of the words 'bona fide executive … capacity." 40 F. Supp. at 286. The DOL's definitional regulations are "within such limits if the Administrator restricts it within the bounds of such meaning and does not add an element which has no reasonable connection with its connotation. To add such element is to legislate, not to define." *Id.*

The court's textual analysis continued: "[a]lthough the Administrator may legally define the term administrative employee with wide discretion within the meaning of such term, he cannot go beyond that and add elements which form no part of such conception. In other words, he cannot add an element which is not a real incident to executive work." *Id.* The court held that the salary level of an executive is not "a natural and admissible attribute of the term 'bona fide executive and administrative … capacity.'" *Id.* "It might have been wiser for Congress to have classified employees to be covered by the Act upon the basis of their earnings … but it did not do so …. The fact that an executive may work for less than $30 per week or even $1 a year does not alter the fact that he is an executive." *Id.* at 286-87.

Buckner adopted *Devoe*'s textual analysis. 53 F. Supp. at 1024. It found the minimum salary requirement to be in excess of the DOL's statutory authority because "[o]nly Congress had the arbitrary power to make the exception that an executive who received a salary less than $30 per week should not be exempt. It declared that *all*

serving in executive and administrative capacities were exempt." *Id.* (emphasis added). The court ruled that imposing a salary threshold "was purely an attempted law making function, while the power delegated to [the DOL] was only to define those terms." *Id.*

Anachronistic decisions like *Wirtz* and *Yeakley* that upheld the salary-level test under a step-two-type analysis without examining the statutory text are not binding and do not answer the question at hand—whether the salary-level test is authorized in the first instance.[9] To the extent the Court credits any pre-*Chevron* cases, it should mirror the analysis of cases like *Devoe* and *Buckner* that gave due regard to the statutory text as *Chevron* step-one demands.

The DOL's resort to *Auer v. Robbins,* 519 U.S. 452 (1997), fares no better. The District Court accurately distinguished *Auer* on grounds that it involved the *application* of the *salary-basis* test—not the *legality* of the *salary-level* test. ROA.3816. Writing for the Court, Justice Scalia, while recognizing that the FLSA grants the DOL broad authority to define and delimit the EAP exemption, highlighted at the outset that "Respondents concede[d] that the FLSA may validly be applied to the public sector, and they also d[id] not raise any general challenge to the Secretary's reliance on the salary-basis test." *Auer*, 519 U.S. at 456-57. Because of these concessions, the Court never engaged in a step-

[9] *Walling v. Morris*, 155 F.2d 832 (6th Cir. 1946), and *Fanelli v. U.S. Gypsum Co.*, 141 F.2d 216 (2d Cir. 1944), are also cited in passing by the DOL. Like *Wirtz*, *Morris* and *Fanelli* contain no analysis of their own but simply cite *Yeakley* and state that "[t]he validity and binding effect of these regulations are well established." *Morris*, 155 F.2d at 836; *Fanelli*, 141 F.2d at 218 (asserting only that the Administrator's "regulations are reasonable").

one analysis. The opinion proceeded by assuming—but not deciding—that the FLSA applies to the public sector and that the DOL can use a salary-basis test in the first place. Based on those assumptions, it decided that the DOL's "'no disciplinary deductions' *element* of the salary-basis test" was valid—the Court did not hold that the salary-basis test itself, much less the salary-level test, was valid. *Id.* at 457-58 (emphasis added). Indeed, some have read the Court's statement pointing out respondents' concessions as a subtle invitation to challenge these twin assumptions in the future, as the States do here.

The remainder of the *Auer* Court's analysis supports the States' methodology in this case. The Court emphasized that "the salary-basis test is a creature of the Secretary's own regulations …." *Id.* at 461. And the Court examined contemporary dictionary definitions to assess whether the DOL's interpretation of its own regulations comported with the regulation's text. *Id.* at 461. The Court affirmed that the DOL's regulatory discretion is "subject … to the limits imposed by the statute." *Id.* at 463.

The Court's decision in *Long Island Care at Home v. Coke*, 551 U.S. 158 (2007), also does not support the DOL's position. *Coke* involved Section 213(a)(15)—not Section 213(a)(1)—and the question of whether that statute's reference to "domestic service employment" and "companionship services" includes employees paid by third-parties. Unlike this case, the Court determined that "the text of the FLSA d[id] not expressly answer the third-party-employment question," and that the phrase "companionship

services" in Section 213(a)(15) was ambiguous enough that it could encompass third-party providers. *Id.* at 168. Of course, that says nothing about whether the words "bona fide executive, administrative, or professional" employee somehow includes a compensation element. *Coke* would have some bearing on this case only if the DOL had, as it has done here, imported a minimum compensation requirement into the phrase "domestic service employment" or "companionship services." Just as nothing in the plain meaning of the phrase "companionship services," for example, would give rise to the odd idea that the DOL could graft a minimum wage requirement onto Section 213(a)(15), so, too, nothing within the plain meaning of the words "bona fide executive, administrative, or professional" employee supports such a concept.

Nor does *Coke* support the DOL's astonishing assertion that it has the delegated authority to define the EAP terms in any manner it wishes subject only to whether the statute *expressly prohibits* the DOL's definition. Br. 26 ("The question is not whether that phrase explicitly requires, or even affirmatively suggests, a salary qualification, but whether it prohibits one."). As the D.C. Circuit pointed out in *Home Care Association of America. v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015), *Coke* "did not focus on the "define[ ] and delimit[ ]" language in § 213(a)(15)." *Id.* at 1091. "The "define[] and delimit[] language … was neither reproduced nor highlighted" by the Supreme Court. *Id.* at 1092. Rather, *Coke* rested upon a different "general grant of authority to establish rules implementing the 1974 Amendments." *Id.* at 1092.

Moreover, it is well established that courts "do not merely presume that a power is delegated if Congress does not expressly withhold it, as then agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Contender Farms, L.L.P. v. U.S.D.A.*, 779 F.3d 258, 269 (5th Cir. 2015). An agency cannot claim *Chevron* deference "merely by demonstrating that a statute does not expressly negate the existence of a claimed administrative power (i.e., when the statute is not written in 'thou shalt not' terms)." *Id.* "[F]or *Chevron* deference to apply, the agency must have received congressional authority to determine *the particular matter at issue in the particular manner adopted*." *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1874 (2013) (emphasis added).

c. Congressional acquiescence

The DOL contends that Congress has acquiesced in or ratified the salary-level test because it has not taken legislative action to stop it. Br. 23. The Supreme Court has repeatedly made clear that "congressional silence 'lacks persuasive significance.'" *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (collecting cases). This is "particularly [so] where administrative regulations are inconsistent with the controlling statute." *Id.* Legislative silence, the Court said elsewhere, "cannot be invoked to baptize a statutory gloss that is otherwise impermissible. Th[e] Court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional inaction frequently betokens unawareness, preoccupation, or paralysis. It is at best

treacherous to find in Congressional silence alone the adoption of a controlling rule of law." *Zuber v. Allen*, 396 U.S. 168, 185 n.25 (1969).

The longevity of an unlawful rule makes no difference. In *Brown v. Gardner*, the Supreme Court invalidated a 60-year-old Department of Veterans Affairs regulation that "fl[ew] against the plain language of the statutory text," holding "[a] regulation's age is no antidote to clear inconsistency with a statute …." 513 U.S. at 122. So it is here with the salary-level test. The test conflicts with the unambiguous language of Section § 213(a)(1) and should be enjoined. The fact that it has managed to survive for 75 years has less to do with Congressional acquiescence and more to do with the fact that, as explained, the salary-level test in the past was always deliberately set so low as to be hardly worth challenging.

Even if the Court was inclined to take account of Congress's inaction, that inaction cannot be construed to sanction what the DOL has done here. As explained, the DOL has upended over 75 years of setting the salary-level cutoff at a "relatively low figure" so that in "an overwhelming majority of cases" the cutoff would not disqualify employees who would qualify for EAP status based on a reasonable duties test. ROA.1652-56 (finding "no evidence" that the salary-level test "defeat[ed] the exemption for any substantial number of individuals who could reasonably be classified … as bona fide [EAP] employees"). If Congress acquiesced in anything, it was *that* practice, not the DOL's new approach of prioritizing salary-level over duties and

categorically denying the exemption to over one-third of all salaried employees based on salary-level alone.

2. Indexing Mechanism

The District Court enjoined the indexing mechanism because it is inextricably linked to the unlawful salary-level test. ROA.3821. The Court did not reach the States' other index-specific arguments. *Id.* Likewise, on appeal, the DOL ties its entire defense of the indexing mechanism to the legality of the salary-level test. Br. 35. So if the salary-level test sinks, the newly-created indexing mechanism goes down with the ship. Should the DOL improperly raise new arguments in its reply, the States respectfully direct the Court to the arguments they asserted in the lower court. ROA.138-41; ROA.1875-79.

C. The Court Can Affirm on Alternate Merits Grounds as to the States.[10]

1. The FLSA Cannot Be Applied to the States Consistent with the Tenth Amendment.

a. *Garcia* has been—or should be—overruled.

As originally enacted, States were exempt from the FLSA. 52 Stat. 1060. Congress extended FLSA coverage to certain State and public entities in the 1960s, 75 Stat. 65; 80 Stat. 831, and attempted to cover virtually all public sector employees in 1974. 88 Stat. 58-59. The 1974 amendments imposed upon almost all public employers

[10] This Court may affirm the judgment on any grounds supported by the record. *Rucker v. Bank of Am., N.A.*, 806 F.3d 828, 830 (5th Cir. 2015).

the minimum wage and overtime requirements previously limited to private employers. *Id.*

The first constitutional challenge to the FLSA's application to the States came in *Maryland v. Wirtz*, 392 U.S. 183 (1968). Maryland sued the DOL to enjoin the FLSA's application to State-run schools and hospitals, asserting that applying the FLSA to the States exceeded Congress's Commerce Clause power and interfered with their sovereign State functions. *Id.* at 187, 193. The Court ruled that the States were engaging in commerce and could therefore be regulated by the Federal Government to the same extent as private parties. *Id.* at 196-97.

Justices Douglas and Stewart dissented. *Id.* at 201. They thought the FLSA and the Court's decision "a serious invasion of state sovereignty protected by the Tenth Amendment [and] not consistent with our constitutional federalism." *Id.* They gave great weight to the FLSA's "overwhelm[ing]" effect on "state fiscal policy." *Id.* at 203. "It is one thing to force a State to purchase safety equipment for its railroad and another to force it either to spend several million more dollars on hospitals and schools or substantially reduce services in these areas." *Id.*

Less than a decade later, the Supreme Court overruled *Wirtz* in *National League of Cities v. Usery*, 426 U.S. 833 (1976). It held that the Tenth Amendment limited Congress's power under the Commerce Clause to apply the FLSA's minimum wage and overtime protections to the States. *Id.* at 842-55. The Court's "examination of the

effect of the 1974 amendments, as sought to be extended to the States and their political subdivisions, satisfie[d] [the Court] that both the minimum wage and the maximum hour provisions will impermissibly interfere with the integral governmental functions of these bodies." *Id.* at 851. The Court recognized that "[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime." *Id.* at 845. It reasoned that the Federal Government does not have authority to usurp the policy choices of the States as to how they structure the pay of State employees or how States allocate their budgets. *Id.* at 846-48. The Federal Government, likewise, cannot strong-arm States into cutting services and programs to pay for *federal* policy choices related to wages. *Id.* at 855. "If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest," the Court wrote, "we think there would be little left of the States' 'separate and independent existence.'" *Id.* at 851 (citations omitted).

Within the next decade the Court *again* reversed itself, the second time in less than twenty years. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court now decided that the "political process" would ensure that "laws that unduly burden the States will not be promulgated." *Id.* at 556. Once again, dissenters

advanced powerful arguments. Justice Powell, joined by three others, contended that the Court's reversal "substantially alter[ed] the federal system embodied in the Constitution …." *Id.* at 557. They characterized the decision as "effectively reduc[ing] the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause." *Id.* at 560. They pointed out that the role of the States in our divided government should not depend upon the grace of elected officials. *Id.* at 560-61. They concluded

> the harm to the States that results from federal overreaching under the Commerce Clause is not simply a matter of dollars and cents …. Rather, by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.

Id. at 572 (citations omitted).

As this tortured history shows, and as the Supreme Court itself has since admitted, its "jurisprudence in this area has traveled an unsteady path." *New York v. U.S.*, 505 U.S. 144, 160 (1992). "The Court has swung back and forth with regrettable disruption on the enforceability of the FLSA against the States …." *Alden v. Maine*, 527 U.S. 706, 814 (1999) (Souter, J., dissenting).

The District Court rightly observed that the tide has likely shifted once again, opining that "the State Plaintiffs have made a persuasive case that *Garcia* may have been implicitly overruled." ROA.3825. For example, majorities of the Supreme Court continue to rely upon Justice Powell's dissent in *Garcia*. *See, e.g., Gregory v. Ashcroft*, 501

U.S. 452, 458 (1991); *U.S. v. Morrison*, 529 U.S. 598, 616 n.7 (2000). Justices dissenting or writing separately occasionally accuse the majority of backing away from *Garcia*. *See, e.g., Gregory*, 501 U.S. at 477 (White, J., concurring in part, dissenting in part, and concurring in the judgment); *Morrison,* 529 U.S. at 650-52 (Souter, J., dissenting).

Printz v. U.S., 521 U.S. 898 (1997), also seems to overrule *Garcia*'s underpinnings. Scholars have debated whether *Printz*, and other opinions, render unconstitutional the FLSA's application to the States. *See, e.g.,* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2206-07 (1998); Andrew S. Gold, *Formalism and State Sovereignty in* Printz v. United States: *Cooperation by Consent*, 22 HARV. J.L. & PUB. POL'Y 247, 273 & n.169 (1998). In fact, the Supreme Court recognized that it has yet to answer whether *Printz* overruled *Garcia*, but it declined to do so on the basis of waiver, leaving *Garcia* in limbo. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998). Other lower courts question whether the Supreme Court has overruled *Garcia sub silentio.* In one Fourth Circuit case, Chief Judge Wilkinson requested supplemental briefing on the question: "'In light of the Supreme Court's decision in [*Printz*] whether [the FLSA] may be constitutionally applied to the salary determinations at issue in this case.'" *West v. Anne Arundel Cnty., Md.*, 137 F.3d 752, 756-57 (4th Cir. 1998) (citation omitted), *superseded on other grounds* 2016 WL 3409651 (4th Cir. June 21, 2016). The Fourth Circuit suspected that *Garcia* rested on reasons rejected in more recent cases, but ultimately felt constrained by its inability to

preemptively overrule Supreme Court precedent without direction from the Court. *Id.* at 760.

b. The "clear statement rule"

While overruling *Garcia* remains the exclusive province of the Supreme Court, this Court can, as the Supreme Court has done repeatedly since *Garcia*, give due regard to *Garcia*'s statement that the "political process" must ensure that "laws that unduly burden the States will not be promulgated." 469 U.S. at 556. Apart from whether *Congress* can generally apply the FLSA to the States, post-*Garcia* precedent makes clear that *the DOL* can apply its salary-level test and indexing mechanism to the States only if Congress has provided a "clear statement" expressly authorizing it to do so. Thus, even if the DOL is correct that "bona fide EAP" is ambiguous with regard to a salary-level test, that very ambiguity prevents the salary-level test from being applied to the States.

Garcia held that Tenth Amendment limits on Congress's ability to regulate the States are "structural, not substantive—*i.e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." *South Carolina v. Baker*, 485 U.S. 505, 512 (1988). Because *Garcia* left to the "political process" the States' protection from Congress's exercise of its Commerce Clause powers, courts "must be absolutely certain that Congress intended such an exercise" before they will uphold it as applied to the

States. *Gregory*, 501 U.S. at 464. "'[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'" *Id.* (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, p. 480 (2d ed. 1988)).

To ensure that Congress actually intended to interfere with areas that are traditionally within the States' sovereign domain, the Tenth Amendment and concerns of federalism require a "clear statement from Congress." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). The clear statement rule is a tool of statutory construction to "assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bond v. U.S.*, 134 S. Ct. 2077, 2088-89 (2014) (quotations omitted). Congress must make "unmistakably clear" its intent to alter the usual Federal-State balance in areas of "traditional and essential state function." *Yeskey*, 524 U.S. at 208-09. The intention "must be plain to anyone reading the [statute] …." *Gregory*, 501 U.S. at 467.

The very silence or statutory ambiguity that implicates *Chevron* step-two also triggers the application of the clear statement rule. *Shweika v. Dep't of Homeland Sec.*, 723 F.3d 710, 719 n.6 (6th Cir. 2013) (the lack of a clear statement from Congress "is not the kind of silence that aids an agency" to overcome *Chevron* step-one); *In re Supreme Beef Processors, Inc.,* 468 F.3d 248, 259-60 (5th Cir. 2006) (Higginbotham, J., concurring). Accordingly, "*Chevron* and the clear statement rule are, therefore, at loggerheads: If

[courts] must rely on the agency to divine the meaning of the statute, the meaning cannot be 'plain to anyone reading' it. And, where Congress has not spoken plainly, it cannot be deemed to have abrogated an important incident of a state's sovereignty." *John v. U.S.,* 247 F.3d 1032, 1046 (9th Cir. 2001) (Kozinski, J., dissenting with Judges O'Scannlain and Rymer).

Here, Congress has made no "unmistakably clear" statement that the DOL is authorized to apply the salary-level test against the States. Quite the opposite, the DOL's Final Rule admits that "[w]hile it is true that section 13(a)(1) does not reference automatic updating, it also does not reference a salary level or salary basis test …. *These changes were all made without specific Congressional authorization.*" 81 Fed. Reg. 32431 (emphasis added). The plain language of the FLSA requires that "*any* employee employed in a bona fide [EAP] capacity" be exempted from its overtime requirement. The statute does not mention salary or indexing. At most, assuming the FLSA can be applied to the States, Congress has expressed its intention that States pay overtime to all employees performing non-EAP *duties*. Congress has not indicated that salary should be considered, much less be the *only* consideration for any employee making less than the salary level picked by the DOL. *Id.* Since structuring employee wages is an integral aspect of State sovereignty, *Usery*, 426 U.S. at 845, a clear statement of Congress is necessary to impose any salary-level test on the States. *Gregory*, 501 U.S. at 460. The absence of a clear statement

approving the use of the salary-level test and indexing against the States prohibits their application under the Tenth Amendment and principles of federalism.[11]

2. Alternatively, the New Overtime Rule Constitutes an Unlawful Delegation.

The text of Article One, Section One of the Constitution does not permit delegation of Congress's legislative powers. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). If Congress has conferred "decisionmaking 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." *Id.* Should Section 213(a)(1) be read as broadly and extra-textually as the DOL argues, then nothing in Section 213(a)(1) sets forth any intelligible principle to guide the DOL's use of the salary-level test or the parameters of the indexing mechanism. If the statute's instruction to "define[] and delimit[]" the EAP terms "from time to time by regulations" is unconstrained by the

[11] The District Court found a "clear statement" in the provision applying the FLSA *generally* to the States. ROA.3814 (citing 29 U.S.C. § 203). The clear statement rule demands more. It requires a plain indication that Congress intended "the precise details of the statute's application" that is at issue. *Gregory*, 501 U.S. at 476 (White, J., concurring in part, dissenting in part, and concurring in the judgment) (describing the majority's application of the clear statement rule); *SWANCC,* 531 U.S. at 169-74 (holding that even though it was clear that the Clean Water Act could be applied by agencies against the States *generally*, the specific intrusive application in that case was not unmistakably authorized by Congress in a clear statement). Here, there is no indication that Congress intended the use of the salary-level test. Indeed, the DOL has never argued that Congress "clearly" requires the use of salary test; instead, it has only argued that textual ambiguity and Congressional authorization to "define and delimit" the EAP exemption empower it to create a salary-level test. ROA.1011. Even if that were true, that is far from a "clear statement" authorizing the DOL to apply a salary-level test to the States.

meaning of the words "bona fide executive, administrative, and professional," then there are no guideposts, factors, or considerations that might establish a ceiling over which the DOL could not set the salary-level test.

The DOL asserts that "Congress did not set forth *any criteria*, such as a salary-level test, *for defining the EAP exemptions, but instead delegated that task to the Secretary*." 81 Fed. Reg. 32432 (emphasis added). Without limiting principles, the DOL could continue to independently exercise the entirety of legislative power and executive power to completely exhaust State budgets and resources.

D. The States Demonstrated Irreparable Harm.

Most courts hold that the alleged inversion of federalism principles and the deprivation of a constitutional right alone constitutes irreparable harm. *See Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016); *Nat'l Solid Wastes Mgmt. Ass'n v. City of Dallas*, 903 F. Supp. 2d 446, 470 (N.D. Tex. 2012). States suffer irreparable injury if their sovereign interests and public policies may be injured before they have a full and fair opportunity to be heard on the merits. *Kansas v. U.S.*, 249 F.3d 1213, 1227 (10th Cir. 2001). That alone is sufficient irreparable harm to justify the preliminary injunction.

As described above, the new rule's greatest constitutional offense is its intrusion into the States' sovereign authority to structure employment relationships and provide integral governmental services. For example, in Indiana, the forced reclassification of employees and restricted workloads will compel management "to ensure that services

are not provided, for which [the State] cannot pay the time and a half rate ….” ROA.168. Consequently, Indiana resources will be “diverted to employment policies imposed on the State by USDOL, instead of those resources going to serve the citizenry as prescribed and prioritized per Indiana law.” ROA.170. The South Carolina officials in this case warn that “[i]n considering the costs involved in implementing the new … Rule, the potential impact based on a reduction of services or deferral of projects due to budget limitations should also be taken into account.” ROA.153. Arkansas avers that “[l]imiting and shifting workloads to avoid additional overtime liability is likely to result in the reduction of services or delays in the provision of services.” ROA.165. Maine asserts the same. ROA.51.[12]

But as the District Court recognized, the States will suffer financially as well as constitutionally. In the preliminary-injunction proceedings below, the District Court found, the “State Plaintiffs offer[ed] many examples of …. the significant cost of complying with the rule.” ROA.3821. Indiana and Iowa are just two examples. In Indiana the new rule “will cost the State a minimum of approximately $20,000,000 annually and create productivity and morale problems.” ROA.168. Iowa predicts that the new rule will add approximately $19.1 million of additional costs. ROA.49.

[12] In public documents, the Texas Commission on Jail Standards similarly explains how the DOL rule will “significantly impact the provision of services.” *See* http://www.tcjs.state.tx.us/docs/85thSessionLAR-FINALVersion.pdf, at 2.

Universities will be particularly hurt; Iowa's three public universities estimate that the new rule will increase personnel costs by some $9,975,000. ROA.162. Each additional dollar involuntarily spent on employee salaries or overtime is less money available to spend on education. The States could (and did in the District Court) detail many more similar examples from numerous affidavits filed below. *See*, *e.g.*, ROA.151-183.

Many States are simply unable to make budgetary adjustments to minimize the rule's damage. For example, Indiana's Legislature has not been in session since the rule was adopted and has not appropriated money, as required by its Constitution, to pay for the DOL's new mandate. ROA.169. "Therefore, this would amount to an unplanned, unbudgeted cost to State agency budgets, within the existing appropriation, which may affect other operational needs." *Id.* Nevada has a supermajority requirement to raise taxes. NEV. CONST. art. IV, § 18. Maine's biennial budget does not include funding to offset the resulting financial burden to the State in additional annual employment costs, overtime, or compensatory time accruals, if the State maintains its current level of overtime usage and payouts. ROA.51. These States illustrate what is true for many others—the new rule's effective date, December 1, 2016, would have been a budgetary doomsday.

Furthermore, this Court has held that irreparable harm is especially likely where States will be forced to expend significant sums of money to comply with a potentially unlawful federal mandate—money that the States will not be able to recoup even if they

win in court. *See Texas*, 809 F.3d at 186. A substantial portion of the States' monetary losses will go toward compliance with the unlawful rule. Kansas is illustrative. In order to mitigate the new rule's fiscal impact, agencies must engage in a "time intensive analysis" to "determine whether it would be more cost effective to increase the salary of these employees to the new minimum threshold or allow the employees to become non-exempt, and therefore eligible for overtime." ROA.156-57. Completing this task requires "significant additional work for … HR, fiscal, and management staff in affect agencies, which will keep them away from their regular duties." ROA.157. Due to the individualized nature of the analysis, "the cost of this effort in either lost productivity or actual additional expenses cannot be fully accounted for … but it is anticipated to be substantial." *Id.*; *see also* ROA.165-66; ROA.169; ROA.173-74. Like in many other States, the brunt of the compliance costs will fall on two vital cabinet-level agencies that have critical roles in protecting citizens, the Kansas Department for Children and Families and the Kansas Department of Corrections. ROA.157-58.

The DOL quibbles with the States' calculations but it does not suggest that the States will not suffer *any* economic harm, implementation costs, or injury to their sovereign interests. It cannot. *See*, *e.g.*, Br. 37 (stating only that "compliance costs should be relatively low"). Thus, any dispute is merely over the *degree* of the States' harm and whether it is enough to constitute irreparable injury. Yet the DOL *itself* predicts that the first year cost to State and local governments alone totals $115.1

million. 81 Fed. Reg. 32546. And it anticipates that State and local governments will suffer an additional $85.4 million after each automatic update. *Id.* For anyone but the Federal Government, these figures—likely grossly underestimated, too—constitute irreparable harm. *Texas*, 809 F.3d at 186 ("The states have alleged a concrete threatened injury in the form of millions of dollars of losses."); *Texas*, 829 F.3d at 433-34 ("tremendous costs" and threatened harm of unemployment, plant closures, and disruption of energy service "are great in magnitude" and can constitute irreparable injury).

Finally, the DOL criticizes the States for only providing illustrative declarations from seven of the 21 Plaintiff States. Notably, the DOL did not attempt this supposedly necessary State-by-State examination of the rule's impact when *promulgating* the regulation.[13] Nor does the DOL point to any authority requiring declarations from each State. That has never been the practice in this Circuit. *See*, *e.g.*, *Texas v. U.S.*, 787 F.3d 733, 769 (5th Cir. 2015) (refusing to limit nationwide injunction to Texas or the plaintiff States when the district court received affidavits from *three* of the 26 plaintiff States).

E. The Harm to the States Outweighs Any Harm from the Injunction and the Public Interest Necessitates a Preliminary Injunction.

These two factors overlap considerably "and most of the same analysis applies." *See Texas*, 809 F.3d at 187. On one side of the equation is the certainty that States will

[13] The DOL's website estimates that the new overtime rule will impact approximately 471,000 workers in the Fifth Circuit (370,000 in Texas alone). *See* https://www.dol.gov/featured/overtime.

be required to spend substantial sums of unrecoverable public funds if the rule goes into effect, together with interference with government services, administrative disruption, employee terminations or reclassifications, harm to the general public, and injury to fundamental notions of our Constitutional structure of government. On the other side, the DOL does not point to any injury remotely approaching the monumental harm to the States and their citizens. The current rule has been in place for more than a decade. The DOL and the public will not suffer any harm from maintaining its status quo level while the serious constitutional and legal issues in this litigation are addressed on the merits. The DOL's harms, if any "are less substantial[,]… vague, and … are more likely to be affected by the resolution of the case on the merits than by the injunction." *Texas*, 809 F.3d at 186. The public interest favors an injunction. *Id.* at 187.

F. Nationwide Injunction

The District Court appropriately issued a nationwide injunction. "[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). As this Court has held, "the Constitution vests the District Court with 'the judicial Power of the United States.' That power is not limited to the district wherein the court sits but extends across the country. It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction." *Texas*, 809 F.3d at 188. This Court

has affirmed nationwide injunctions against the Federal Government in similar proceedings where principles of federalism and the separation of powers were at stake, *id.*, and where a more constricted injunction would create an untenable "patchwork system" of regulatory enforcement. *Texas*, 787 F.3d at 769.

The irreparable harm caused by the new rule's unlawfulness is not limited to the Eastern District of Texas nor to the Plaintiff States. And the DOL has stated its desire that the salary-level test "apply nationwide." 81 Fed. Reg. 32409. It rejected a location-by-location approach to the salary level. *See id.* at 32410. Accordingly, the District Court's injunction properly matches the reach of the overtime rule and it did not abuse its discretion by issuing a "nationwide injunction [that] protects both employees and employers from being subject to different EAP exemptions based on location." ROA.3824.

CONCLUSION

The District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2017, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Sandra Geyer

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 12,940 words.

/s/ Lawrence VanDyke