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

BRIEF FOR APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

State of Nevada et al. v. U.S. Dep't 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
Phil Bryant, Governor of the State of Mississippi
Michigan Attorney General Bill Schuette

Defendants-appellants:

U.S. Department of Labor
Thomas E. Perez, as Secretary of Labor

Wage and Hour Division of the Department of Labor
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:

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For defendants-appellees:
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

The district court issued a nationwide preliminary injunction that blocks the Department of Labor from implementing and enforcing an important Final Rule with an effective date of December 1, 2016. The Final Rule, which was the product of notice-and-comment rulemaking in which nearly 300,000 comments were submitted, provides crucial minimum wage and overtime pay protections to millions of workers who were treated as exempt under the outdated regulations that the Final Rule amended. Given the importance of the issue, the federal government respectfully requests that the Court allot at least 20 minutes per side for oral argument.

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INTRODUCTION

Section 13(a)(1) of the Fair Labor Standards Act of 1938 ("FLSA" or "Act"), 29 U.S.C. § 213(a)(1), exempts from the Act's minimum wage and overtime pay protections "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 [of Labor])." For more than 75 years, the regulations implementing this "EAP" exemption generally have required that employees meet three criteria in order to be subject to the exemption and thus denied the protections of the FLSA. To be treated as exempt, the employee must: (1) be paid on a salary basis (the "salary-basis test"); (2) receive a specified salary (the "salary-level test"); and (3) have primarily executive, administrative, or professional duties (the "duties test"). *See* 29 C.F.R. pt. 541.

The Department of Labor has periodically updated the salary-level test over the past 75 years. In May 2016, after notice and comment, the Department issued a Final Rule again updating that test. *See* 81 Fed. Reg. 32391 (May 23, 2016); 29 C.F.R. §§ 541.600, 541.607. The Final Rule was promulgated with an effective date of December 1, 2016, but the district court issued a nationwide preliminary injunction that blocks the Department of Labor from implementing and enforcing it. ROA.3807-26.

The injunction rests on an error of law and should be reversed. The district court held that the applicability of the EAP exemption must be determined by analysis

of an employee's job duties alone, without regard to salary. The court declared that "Congress defined the EAP exemption with regard to duties, which does not include a minimum salary level," ROA.3817, and ruled that the statute "does not grant the Department the authority to utilize a salary-level test," ROA.3825.

That ruling is foreclosed by this Court's decision in *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603 (5th Cir. 1966), which rejected the contention that "the minimum salary requirement is not a justifiable regulation under Section 13(a)(1) of the Act because not rationally related to the determination of whether an employee is employed in a 'bona fide executive * * * capacity.'" *Id.* at 608. This Court reasoned that "[t]he statute gives the Secretary broad latitude to 'define and delimit' the meaning of the term 'bona fide executive * * * capacity,'" and it rejected the argument "that the minimum salary requirement is arbitrary or capricious." *Id.*

The district court's ruling is also in considerable tension with *Auer v. Robbins*, 519 U.S. 452 (1997), which rejected a challenge to an application of the Department's salary-basis test, under which "one requirement for exempt status under § 213(a)(1) is that the employee earn a specified minimum amount on a 'salary basis.'" *Id.* at 455. Echoing this Court's reasoning, the Supreme Court emphasized that "[t]he FLSA grants the Secretary broad authority to 'defin[e] and delimi[t]' the scope of the exemption for executive, administrative, and professional employees." *Id.* at 456 (citation omitted). The Supreme Court concluded that the Secretary's approach was

"'based on a permissible construction of the statute.'" *Id.* at 457 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

The district court deemed it significant that the Final Rule's update of the salary-level test will afford FLSA protection to many employees who would be exempt based on the current duties test alone. ROA.3820. But that result is not unique to the update; it flows from the longstanding requirement that an employee meet all three tests—salary basis, salary level, and duties—to be subject to the EAP exemption. Indeed, this Court's decision in *Wirtz* involved employees who met the duties test then in place, but whose salary was below the level that was in effect at the time. 364 F.2d at 607.

The updated salary level under the Final Rule is reasonable in light of the salary levels that the Department has used over the past 75 years, including in the early years of the FLSA's implementation. Although plaintiffs described the $30 per week compensation level adopted for executive and administrative employees in 1938 as "minimal," ROA.103, the ratio between the salary level and minimum wage is nearly the same under the Final Rule as it was under the 1938 regulations. In 1938, the federal minimum wage was 25 cents per hour. *See* Act of June 25, 1938, ch. 676, 52 Stat. 1060, 1062. Thus, the $30 weekly salary level set by the 1938 EAP regulations was three times the minimum wage for a 40-hour workweek ($10). The current federal minimum wage is $7.25 per hour. *See* 29 U.S.C. § 206(a)(1)(C). Thus, the

minimum $913 weekly salary level set by the Final Rule, *see* 29 C.F.R. § 541.600, is only 3.15 times the current minimum wage for a 40-hour workweek ($290).

Under the Final Rule, as under the Department's prior regulations, the salary-level test properly works together with the duties test and salary-basis test to identify bona fide EAP employees who do not receive the FLSA's protections. The district court did not offer any persuasive basis to overturn the approach that has been used for the past 75 years by the agency charged with implementing the FLSA. The preliminary injunction should be reversed.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. The district court issued a preliminary injunction on November 22, 2016. ROA.3807-26. Defendants filed a timely notice of appeal on December 1, 2016. ROA.3828. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the preliminary injunction rests on an error of law because the updated salary-level test, 29 C.F.R. § 541.600, is a reasonable exercise of the Secretary's authority to define and delimit the Fair Labor Standards Act exemption for employees who work in a bona fide executive, administrative, or professional capacity, 29 U.S.C. § 213(a)(1).

STATEMENT OF THE CASE

A. Statutory Background and Regulatory History

The Fair Labor Standards Act of 1938 generally requires covered employers to pay a minimum hourly wage and, for hours of work exceeding 40 in a work week, overtime compensation at a rate of one and one-half times the employee's regular rate of pay. 29 U.S.C. §§ 206(a), 207(a)(1). Section 13(a)(1) of the Act excludes from those protections "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 [of Labor])." *Id.* § 213(a)(1).

This provision, known as the EAP exemption, was premised on an understanding that the exempted workers typically earned salaries well above the minimum wage. *See* 81 Fed. Reg. 32391, 32394-95 (May 23, 2016) (citing Report of the Minimum Wage Study Commission, vol. IV, at 240 (June 1981) (ROA.1291). Since 1938, Department of Labor regulations implementing the EAP exemption have set a salary level that most workers must earn in order to be subject to the exemption and thus denied the protections of the FLSA.

The original 1938 regulations set the minimum compensation level at $30 per week for exempt executive and administrative employees, *see* 3 Fed. Reg. 2518 (Oct. 20, 1938), at a time when the minimum hourly wage was 25 cents, *see* 52 Stat. 1062. Since 1938, the Department has increased the minimum-salary levels seven times: in 1940, 1949, 1958, 1963, 1970, 1975, and 2004. *See* 81 Fed. Reg. 32400. The

Department has long recognized that the salary paid to an employee is the "best single test" of EAP status, *id.* (quoting 1940 Stein Report 19 (ROA.1567)), and that the salary-level test furnishes a "completely objective and precise measure which is not subject to differences of opinion or variations in judgment," *id.* (quoting 1949 Weiss Report 8-9) (ROA.1652-53).[1]

Since 1938, the salary-level test has been paired with a duties test that a worker also must meet to be subject to the EAP exemption. Under the duties test, the employee's job duties must primarily involve executive, administrative, or professional duties, as determined under standards set forth in the regulations, which the Department has periodically changed. 81 Fed. Reg. 32392. Since 1940, the regulations also have required that the employee be paid on a salary basis, defined as a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed. *Id.*

In 1949, the Department developed a two-tiered structure for assessing compliance with the salary-level and duties tests. 14 Fed. Reg. 7705 (Dec. 24, 1949);

[1] The preamble to the Final Rule discusses a number of historical reports by Labor officials. The "1940 Stein Report" is the Report and Recommendations of the Presiding Officer (Harold Stein), Wage & Hour Div., U.S. Dep't of Labor, at Hearings Preliminary to Redefinition (Oct. 10, 1940). The "1949 Weiss Report" is the Report and Recommendations on Proposed Revisions of Regulations, pt. 541, by Harry Weiss, Presiding Officer, Wage & Hour & Public Contracts Divs., U.S. Dep't of Labor (June 30, 1949). The "1958 Kantor Report" is the Report and Recommendations on Proposed Revisions of Regulations, pt. 541, under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage & Hour & Public Contracts Divs., U.S. Dep't of Labor (March 3, 1958).

see 81 Fed. Reg. 32401. Employers could satisfy either a "long" test, which combined a more protective duties test with a lower salary level, or a "short" test, which combined a less protective duties test and a higher salary level. 14 Fed. Reg. 7706; 81 Fed. Reg. 32401. The long duties test was more protective of workers because it contained a bright-line, twenty percent limit on the amount of time an employee could spend performing nonexempt work (such as manual labor or clerical tasks) and still qualify for the exemption. 14 Fed. Reg. 7706; 81 Fed. Reg. 32401. The short duties test, in contrast, did not limit the amount of time a higher-earning employee could spend on nonexempt duties and still be treated as exempt. *See* 14 Fed. Reg. 7706; 81 Fed. Reg. 32401; 1949 Weiss Report 22-23 (ROA.1666-67). For the next five decades, the Department retained the "long" and "short" test structure with its corresponding lower and higher salary levels. 81 Fed. Reg. 32402-03.

In 2004, the Department revised both the salary-level component and the duties component of the EAP regulations. 69 Fed. Reg. 22122 (Apr. 23, 2004). The preamble to the 2004 regulations emphasized that the minimum wage and overtime pay requirements of the FLSA are "among the nation's most important worker protections." *Id.* It explained that these protections had been "severely eroded," however, because the Department had not updated the salary levels since 1975. *Id.* By 2004, the passage of time had eroded the long-test salary levels below the amount a minimum wage employee earned for a 40-hour week, and even the short-test salary levels were not far above the minimum wage. *Id.* at 22164. Thus, as a practical

matter, employers used the more lenient short duties test, and the long duties test fell out of use. *Id.* at 22126. The Department determined that "[r]evisions to both the salary tests and the duties tests are necessary to restore the overtime protections intended by the FLSA which have eroded over the decades." *Id.*

Accordingly, in 2004 the Department eliminated the long and short test structure and created a new "standard" duties test. 69 Fed. Reg. 22164. Like the old short duties test, the new standard duties test did not place any cap on the percentage of nonexempt work that an employee could do and still remain exempt. *Id.* at 22127. In eliminating the percentage cap on nonexempt work, the Department noted that the cap had been complicated to apply and had required employers to time-test managers for the duties they perform, hour-by-hour in a typical workweek, even though employers are generally not required to maintain any records of daily or weekly hours worked by exempt employees. *Id.* at 22126. Groups representing employers, such as the U.S. Chamber of Commerce and the National Small Business Association, had opposed the percentage limit on nonexempt work, which they stated was difficult to apply and created needless recordkeeping burdens. *Id.* at 22127.

The 2004 regulations paired the new standard duties test with an increased minimum-salary level of $455 per week. 69 Fed. Reg. 22123. That increase nearly tripled the long-test salary level of $155 per week for executive and administrative employees that had been in place since 1975. *Id.* As a result of the salary-level

increase, 1.3 million white-collar workers who were exempt under the previous regulations gained FLSA protection. *Id.*

Notwithstanding the significant increase in the salary level, the 2004 regulations created a mismatch between the salary-level test and the duties test. 81 Fed. Reg. 32400. The 2004 salary level methodology resulted in a salary that was roughly equivalent to the salary level that would have resulted from the methodology that the Department previously had used to set the lower salary levels that had been paired with the long duties tests. This was true even though the new standard duties test (like the old short test) placed no cap on the percentage of time that an employee could spend on nonexempt work. 69 Fed. Reg. 22168; *see also* 81 Fed. Reg. 32412.[2] The result was the pairing of a less protective salary level with a less protective duties test, which was a departure from the Department's historical practice. *See* 81 Fed. Reg. 32400.

B. The 2016 Final Rule

By 2016, the annual value of the minimum-salary level set in 2004 ($23,660) was lower than the poverty threshold for a family of four. 81 Fed. Reg. 32400. In the

[2] The methodology used to determine the 2004 salary level was based on the lowest-paid 20% of full-time salaried employees in the South and in the retail industry. *See* 69 Fed. Reg. 22168. Previous long test salary level methodologies had been based on a lower percentage of *exempt* employees. For example, in 1958, the Department set the lower long test salary level to exclude approximately the lowest paid ten percent of salaried employees who passed the more rigorous long duties test in low wage regions, low wage industries, small establishments, and small towns. *See* 1958 Kantor Report 6-7 (ROA.1753-54); *see also* 81 Fed. Reg. 32402.

2016 Final Rule, the Department revised its EAP regulations to account for the declining real value of the 2004 level, and to correct for the mismatch between the salary-level test and the duties test that its 2004 regulations had introduced. *Id.* at 32406. The effect of that mismatch "was to exempt from overtime many lower-wage workers who performed little EAP work and whose work was otherwise indistinguishable from their overtime-eligible colleagues." *Id.* at 32400. For example, one comment noted the experience of a store manager who was classified as exempt even though she "regularly worked 70 hours per week, spending her time performing routine tasks such as 'unloading merchandise from trucks, stocking shelves and ringing up purchases.'" *Id.* at 32406 n.30.

The Final Rule sets a minimum-salary level equal to the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). 81 Fed. Reg. 32393; 29 C.F.R. § 541.600(a). The Final Rule also provides that, beginning January 1, 2020, the Secretary will update the minimum-salary level every three years using the same methodology. 81 Fed. Reg. 32393; 29 C.F.R. § 541.600(b).

The methodology used in the Final Rule results in a salary level of $913 per week based on data from the fourth quarter of 2015. 81 Fed. Reg. 32393; 29 C.F.R. § 541.600(a). That $913 salary level is a significant increase from the 2004 salary level, but it is at the low end of the historical range of short test salary levels, based on the historical ratios between the short and long test salary levels. 81 Fed. Reg. 32405. It

is below the real value of the short test salary level in all previous years when that test was updated, and only slightly above the real value of the long test salary level in several years when it was updated. *Id.* at 32450.

In adopting the 2016 Final Rule, the Department considered but rejected comments from employee representatives urging it to resurrect a cap on the percentage of time that an employee can spend on nonexempt work and still be treated as exempt. 81 Fed. Reg. 32446. Many employee representatives supported the adoption of a rule that would require at least 50% of an employee's time to be spent exclusively on exempt work that is the employee's primary duty. *Id.* at 32445.

Employer representatives, however, strongly opposed any kind of limit on the performance of nonexempt work, and argued that such a cap would fail to account for the realities of the modern workplace. 81 Fed. Reg. 32446. For example, many employer representatives argued that such a cap would prevent exempt employees from "pitching in" during staff shortages or busy periods, thus increasing labor costs or negatively affecting business efficiency and customer service. *Id.* Many explained that a cap on nonexempt work would impose significant recordkeeping burdens on employers, as the Department had acknowledged when it eliminated the cap in 2004. *Id.* Many commenters also predicted that resurrecting a quantitative cap on nonexempt work would increase FLSA litigation due to the administrative difficulties associated with tracking the hours of exempt employees. *Id.* They argued that a cap would "result in the upheaval of the past decade of case law and agency opinions." *Id.*

After considering these comments, the Department decided against adding a quantitative cap on the percentage of nonexempt work that an employee can perform and still be treated as exempt. 81 Fed. Reg. 32446. The Department recognized the concerns raised by employee representatives: that the qualitative nature of the standard duties test may allow the classification of employees as exempt and thus ineligible for overtime pay even though they are spending a significant amount of work time performing nonexempt work. *Id.* The Department concluded, however, that these concerns were better addressed by the Final Rule's update of the salary-level test. *Id.* It noted that "[t]hroughout the regulatory history of the FLSA, the Department has considered the salary level test the 'best single test' of exempt status." *Id.* at 32449 (quoting 1940 Stein Report 19 (ROA.1567)). The Department explained that "[t]his bright-line test is easily observed, objective, and clear." *Id.* (citing 1940 Stein Report 19 (ROA.1567)). The Department determined that the approach it adopted in the Final Rule strikes an appropriate balance between protecting overtime-eligible workers and reducing undue exclusions from exemption of bona fide EAP employees, and that it does so without necessitating a return to the two-test structure or a quantitative limit on nonexempt work—alternatives that employer representatives strenuously opposed. *Id.* at 32414.

The Final Rule was published on May 23, 2016, with an effective date of December 1, 2016 (more than 180 days after publication). 81 Fed. Reg. 32399.

C. Proceedings Below

Nearly four months after the Final Rule was published, Nevada and twenty other States, suing in their capacity as employers, filed this suit challenging the Final Rule. ROA.32. Several weeks later (and only a month and a half before the Final Rule was set to go into effect), they moved for a preliminary injunction. ROA.87.

The district court consolidated the States' suit with a suit filed by private employers challenging the Final Rule. ROA.3810. The court treated the private plaintiffs' summary judgment motion as an amicus brief in support of a preliminary injunction. *Id.* On November 22, 2016, the district court issued a nationwide preliminary injunction that bars the Department of Labor from implementing and enforcing the Final Rule's updated salary level and the mechanism for updating that salary level. ROA.3825-26.

The district court concluded that a salary-level test is contrary to the plain language of 29 U.S.C. § 213(a)(1) and thus fails at step 1 of the *Chevron* analysis. ROA.3816-19. The court ruled that the applicability of the EAP exemption must be determined by an examination of an employee's job duties alone. *Id.* Based on its understanding of various dictionary definitions, the court concluded that "Congress intended the EAP exemption to apply based upon the tasks an employee actually performs." ROA.3817. It declared that "Congress defined the EAP exemption with regard to duties, which does not include a minimum salary level," *id.*, and it ruled that the statute "does not grant the Department the authority to utilize a salary-level test."

ROA.3825. The district court acknowledged that this Court upheld the salary-level test in *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603 (5th Cir. 1966), but declined to follow this Court's decision because it predated *Chevron*. ROA.3818 n.3.

The district court further held that even if the language of Section 213(a)(1) is ambiguous, the Final Rule "does not deserve deference at *Chevron* step two" because it "is not 'based on a permissible construction of the statute.'" ROA.3819 (citation omitted). The court noted that the Final Rule will extend the FLSA's protections to about 4.2 million workers who pass the standard duties test. ROA.3820 (citing 81 Fed. Reg. 32405). Although the court acknowledged that the standard duties test does "not restrict the amount of nonexempt work an exempt employee [can] perform," ROA.3808, it stated that "Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption," ROA.3820. Because the court concluded that "the Final Rule is unlawful," the court declared that "the Department also lacks the authority to implement the automatic updating mechanism." ROA.3821.

In addressing the balance of harms and public interest, the district court recognized that the Final Rule extends the FLSA's protections to millions of workers, but concluded that the harm to employees from delaying the implementation of the Final Rule is outweighed by compliance costs that plaintiff States would face if an injunction was not issued. ROA.3820-22. The court declared that a "nationwide injunction is proper" because the Final Rule "is applicable to all states." ROA.3824.

SUMMARY OF ARGUMENT

The district court issued a nationwide preliminary injunction that blocks the Department of Labor from implementing and enforcing the updated salary-level test that is used to identify workers who are employed "in a bona fide executive, administrative, or professional capacity" as such terms are "defined and delimited" in the Department's regulations. 29 U.S.C. § 213(a)(1). The injunction rests on an error of law and should be reversed.

Since 1938, Department of Labor regulations have relied on both a duties test and a salary-level test, working together, to distinguish employees who are subject to the EAP exemption from those who are not. The Department has long recognized that "salary is the best single indicator of the degree of importance involved in a particular employee's job." 1949 Weiss Report 9 (ROA.1653).

The district court ruled, under step 1 of the *Chevron* analysis, that the FLSA "does not grant the Department the authority to utilize a salary-level test" in its regulations implementing the EAP exemption. ROA.3825; *see also* ROA.3818. That ruling is foreclosed by this Court's decision in *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603 (5th Cir. 1966), which expressly upheld the Department's authority to use a salary-level test. The district court had no authority to disregard this binding Circuit precedent. In any event, this Court's *Wirtz* decision is plainly correct, and every circuit to consider the question has upheld the Department's salary-level test.

Nor did the district court identify any plausible basis to overturn, under step 2 of the *Chevron* analysis, the particular salary level set by the 2016 Final Rule. The updated salary level is commensurate with salary levels that the Department has set over the past 75 years. And the approach adopted by the Department avoided the need to resurrect a cap on the percentage of nonexempt work that exempt employees can perform—an alternative that employer representatives strongly opposed. Judgments like these are well within the Department's "broad authority to 'defin[e] and delimi[t]' the scope of the exemption." *Auer v. Robbins*, 519 U.S. 452, 456 (1997).

The balance of harms and the public interest also preclude a preliminary injunction. Delaying the Department's implementation and enforcement of the Final Rule is particularly unwarranted here, because plaintiffs' own delay in seeking equitable relief consumed nearly five of the six months between the Final Rule's publication and its effective date. The harm caused by the nationwide injunction far exceeds the harm identified by plaintiffs: of the twenty States that joined this lawsuit, only seven submitted irreparable-harm declarations, and those declarations failed to meet plaintiffs' burden to demonstrate irreparable harm. And the Supreme Court has repeatedly admonished that an injunction should extend no further "than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

STANDARD OF REVIEW

A preliminary injunction is reviewed for abuse of discretion, but if a decision to grant injunctive relief is grounded in legal error, this Court's review is de novo. *Texas Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 206 (5th Cir. 2010).

ARGUMENT

I. The Preliminary Injunction Rests On An Error Of Law

A. The District Court's Ruling that EAP Status Must Be Determined by Analysis of Job Duties Alone Is Contrary to Controlling Precedent

"The FLSA grants the Secretary broad authority to 'defin[e] and delimi[t]' the scope of the exemption" for workers employed in a bona fide executive, administrative, or professional capacity. *Auer v. Robbins*, 519 U.S. 452, 456 (1997) (quoting 29 U.S.C. § 213(a)(1)). For more than 75 years, the regulations implementing this exemption generally have required that employees meet three criteria in order be subject to the EAP exemption and thus denied the protections of the FLSA. To be treated as exempt, the employee must: (1) be paid on a salary basis; (2) receive a specified salary; and (3) have primarily executive, administrative, or professional duties. *See* 29 C.F.R. pt. 541.

The district court concluded that under the plain text of Section 213(a)(1), the applicability of the EAP exemption must be determined by an analysis of an employee's job duties alone. The court declared that "Congress intended the EAP exemption to apply based upon the tasks an employee actually performs," ROA.3817,

and that the statute "does not grant the Department the authority to utilize a salary-level test." ROA.3825; *see also* ROA.3818 ("[N]othing in the EAP exemption indicates that Congress intended the Department to define and delimit with respect to a minimum salary level.").

That holding is foreclosed by this Court's decision in *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603 (5th Cir. 1966). There, this Court expressly rejected the contention that "the minimum salary requirement is not a justifiable regulation under Section 13(a)(1) of the Act because not rationally related to the determination of whether an employee is employed in a 'bona fide executive * * * capacity.'" *Id.* at 608. This Court reasoned that "[t]he statute gives the Secretary broad latitude to 'define and delimit' the meaning of the term 'bona fide executive * * * capacity,'" and it rejected the argument "that the minimum salary requirement is arbitrary or capricious." *Id.*

The district court did not identify any persuasive reason for declining to follow this Circuit precedent. The district court declared that *Wirtz* is "not binding" because it "predated *Chevron*." ROA.3818 n.3. But the interpretive principle on which the district court relied—that the Judiciary "must give effect to the unambiguously expressed intent of Congress," ROA.3814 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984))—was established long before *Chevron*. Indeed, *Chevron* cited a host of cases dating back to 1896 that recognized that principle. *See* 467 U.S. at 843 n.9. That principle would have been quite familiar to

the panel that decided *Wirtz*, which was authored by then-Judge Warren Burger (of the D.C. Circuit, sitting by designation) and joined by Circuit Judges Brown and Wisdom. If the *Wirtz* panel had believed that the plain text of Section 213(a)(1) precluded a minimum-salary requirement, it would have so held. Instead, it sustained the minimum-salary requirement.

The district court also declared that "*Wirtz* offers no guidance on the lawfulness of the Department's Final Rule salary level." ROA.3818 n.3. But although the district court stated that it was "not making a general statement on the lawfulness of the salary-level test for the EAP exemption" and was "evaluating only the salary-level test as amended under the Department's Final Rule," ROA.3818 n.2, the district court's reasoning would invalidate *all* versions of the salary-level test that have been used for the past 75 years (which have always excluded from the exemption some workers who pass the duties test). Indeed, plaintiffs argued below that the salary-level test "has always been unlawful." ROA.134. Accepting that argument, the district court ruled that the statute "does not grant the Department the authority to utilize a salary-level test." ROA.3825. That ruling is irreconcilable with *Wirtz*.

The district court's reasoning is also inconsistent with the Supreme Court's unanimous decision in *Auer*, which rejected a challenge to an application of the Department's salary-basis test. The Supreme Court explained that under the Department's regulations, "one requirement for exempt status under § 213(a)(1) is that the employee *earn a specified minimum amount on a 'salary basis*.'" 519 U.S. at 455

(emphasis added). The Court noted that "[u]nder the Secretary's chosen approach, exempt status requires that the employee be paid on a salary basis, which in turn requires that his compensation not be subject to reduction because of variations in the quality or quantity of the work performed." *Id.* at 456 (quotation marks omitted). And the Court concluded that the Secretary's approach was "'based on a permissible construction of the statute.'" *Id.* at 457 (quoting *Chevron*, 467 U.S. at 843). The Supreme Court emphasized that "[t]he FLSA grants the Secretary broad authority to 'defin[e] and delimi[t]' the scope of the exemption for executive, administrative, and professional employees." *Id.* at 456.

The district court sought to distinguish *Auer* on the ground that the case involved a challenge to the application of the salary-basis test to police sergeants, rather than to the validity of the salary-basis test in general. ROA.3816 n.1; *see also Auer*, 519 U.S. at 457 (noting that the employers did not "raise any general challenge to the Secretary's reliance on the salary-basis test"). But the district court's reasoning implicates *all* applications of the salary-basis test, including the application that the Supreme Court upheld in *Auer*. The district court reasoned that the terms in Section 213(a)(1) "relate to a person's performance, conduct, or function without suggesting salary," ROA.3816-17, and it concluded that "Congress intended the EAP exemption to apply based upon the tasks an employee actually performs," ROA.3817. That reasoning would preclude use of a salary-basis test to exclude employees from the exemption, as occurred in *Auer* itself.

The district court also sought to distinguish *Auer* by noting that "a salary-basis test does not supplant the duties test and Congress's intent." ROA.3816 n.1. But the effect of failing the salary-basis test is not materially distinguishable from the effect of failing the salary-level test. Both tests can render the EAP exemption inapplicable based on an employee's compensation, even if the employee satisfies the duties test. Under the Department's longstanding regulations, all three tests (salary-basis, salary-level, and duties) must be satisfied for an employee to be subject to the EAP exemption. No single test "supplants" the others. Instead, the three tests properly work together to identify workers who are subject to the EAP exemption.

B. This Court's *Wirtz* Decision Was Correctly Decided

1. Although it is unnecessary for this Court to reach the issue because *Wirtz* is controlling precedent, *Wirtz* was correctly decided. Indeed, every circuit to consider the question has upheld the Department's salary-level test. *See Walling v. Yeakley*, 140 F.2d 830, 832-33 (10th Cir. 1944); *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), *vacated on other grounds*, *Morris v. McComb*, 332 U.S. 422 (1947).

The use of a salary level to identify exempt EAP workers would have been familiar to Congress when it enacted the FLSA in 1938. The EAP exemption was based on provisions contained in the earlier National Industrial Recovery Act of 1933 and state law precedents. *See* Report of the Minimum Wage Study Commission, vol. IV, at 240 (June 1981) (ROA.1291). Codes adopted under the National Industrial

Recovery Act typically exempted executive, administrative, and professional employees from maximum hour requirements, and these exemptions often included a salary requirement. *See* 1940 Stein Report 20 (ROA.1568). Likewise, state wage-and-hour laws in effect at the time of the FLSA's enactment often included a salary requirement in their exemptions for executive, administrative, and supervisory employees. *See, e.g.*, Female Labor Act for Arkansas, Walter L. Pope & C.M. Buck, *Digest of the Statutes of Arkansas*, ch. 108, §§ 9084-9090, 1921, amended by Act 33, Laws 1937 (ROA.1614-15); Colorado Six-Day-Week Law, 1937 Colo. Sess. Laws 418 (ROA.1624); *see also* 1940 Stein Report 20 (ROA.1568) (noting ten state wage-and-hour laws in effect in 1939 that exempted executive, administrative, and supervisory employees based on a salary qualification).

Soon after the FLSA was enacted, the Department of Labor conducted hearings on the EAP exemption. In the report that accompanied its 1940 regulations, the Department found that the salary an employer pays an employee provides "a valuable and easily applied index to the 'bona fide' character of the employment for which exemption is claimed." 1940 Stein Report 19 (ROA.1567). The Department explained that "if an employer states that a particular employee is of sufficient importance to his firm to be classified as an 'executive' employee," for example, "and thereby exempt from the protection of the act, the best single test of the employer's good faith in attributing importance to the employee's services is the amount he pays for them." *Id.*; *see also id.* at 5 (ROA.1553) ("the good faith specifically required by the

act is best shown by the salary paid"); 1949 Weiss Report 9 (ROA.1653) ("salary is the best single indicator of the degree of importance involved in a particular employee's job"). The Department found that the salary-level test helps to ensure that the Section 213(a)(1) exemption does not "invite evasion" of the minimum wage and overtime requirements for "large numbers of workers to whom the wage-and-hour provisions should apply." 1940 Stein Report 19 (ROA.1567).

Since the time the Department first adopted a salary-level test in 1938, *see* 3 Fed. Reg. 2518 (Oct. 20, 1938), Congress has amended the FLSA many times. Congress has amended Section 213(a)(1) itself several times to change the universe of executives, administrators, and professionals included in the exemption.[3] None of these amendments called the Department's longstanding salary-level test into question. The Supreme Court has emphasized that when, as here, Congress "revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827–28 (2013) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986)).

[3] *See* Pub. L. No. 87-30, 75 Stat. 65, sec. 9, § 13(a)-(b), 75 Stat. 65, 71-74 (1961) (adjusting for expansion of FLSA coverage to retail employees); Pub. L. No. 89-601, 80 Stat. 830, sec. 214, § 13(a)(1), 80 Stat. 830, 837 (1966) (exempting teachers and academic administrative personnel); Pub. L. No. 101-583, 104 Stat. 2871, sec. 2, § 13(a)(1), 104 Stat. 2871, 2871 (1990) (instructing the Secretary to promulgate regulations exempting computer professionals).

2. The district court nonetheless pronounced the salary-level test unlawful, based on its reading of various dictionary definitions. The court noted, for example, that the 1933 *Oxford English Dictionary* ("OED") defined "executive" as someone "[c]apable of performance; operative . . . [a]ctive in execution, energetic . . . [a]pt or skillful in execution," ROA.3816, and it declared that these terms "relate to a person's performance, conduct, or function without suggesting salary," ROA.3817. The court thus ruled that Section 213(a)(1) "does not grant the Department the authority to utilize a salary-level test." ROA.3825.

That reasoning is doubly flawed. First, the court misunderstood the Secretary's "broad authority to 'defin[e] and delimi[t]' the scope of the exemption" for workers employed in a bona fide executive, administrative, or professional capacity. *Auer*, 519 U.S. at 456 (quoting 29 U.S.C. § 213(a)(1)). That is not an *implicit* grant of authority to define ambiguous terms (as was at issue in *Chevron*). It is an *explicit* grant of substantive rulemaking authority that allows the Department to define and delimit the scope of the exemption. As a consequence, regulations implementing Section 213(a)(1) "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.[4]

[4] The Supreme Court in *Chevron* explained:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight

The Supreme Court underscored the breadth of such a delegation when it considered a parallel FLSA exemption of "any employee employed in domestic service employment to provide companionship services * * * *as such terms are defined and delimited by regulations* of the Secretary" of Labor. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 162 (2007) (quoting 29 U.S.C. § 213(a)(15)) (emphasis added). The question in *Coke* was whether this exemption applies to employees who are hired by "third-party employers" such as home care agencies. *Id.* at 174-75. The Supreme Court held that that question was a matter for the agency to decide. It explained that "the FLSA explicitly leaves gaps, for example, as to the scope and definition of statutory terms such as 'domestic service employment' and 'companionship services,'" and it "provides the Department with the power to fill these gaps through rules and regulations." *Id.* at 165 (citing 29 U.S.C. § 213(a)(15) and Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76 (1974)). The Court emphasized that "[t]he subject matter of the regulation in question concerns a matter in respect to which the agency is expert, and

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> unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.
>
> 467 U.S. at 843-44 (footnotes omitted).

it concerns an interstitial matter, *i.e.*, a portion of a broader definition, the details of which, as we said, Congress entrusted the agency to work out." *Id.*[5]

Here, too, the question whether to treat salary level as an attribute of "bona fide executive, administrative, or professional capacity" is an interstitial matter that Congress entrusted to the Secretary. The question is not whether that phrase explicitly requires, or even affirmatively suggests, a salary qualification, but whether it prohibits one. In the absence of any such prohibition, "the FLSA entrusts matters of judgment such as this to the Secretary, not the federal courts." *Auer*, 519 U.S. at 458. "Congress did not see fit to leave embraced within the exempted employments every employee who might fall within the general meaning of the phrases employed, but directed the Administrator to specifically define *and delimit* such phrases." *Walling v. Yeakley*, 140 F.2d 830, 832 (10th Cir. 1944) (emphasis added).

Second, the district court's reliance on dictionary definitions also fails on its own terms. The court incorrectly stated that the Department does "not dispute or contest" that the "plain meanings" of the terms "executive," "administrative," and "professional" relate solely "to a person's performance, conduct, or function without suggesting salary." ROA.3817. The Department has long interpreted the phrase

[5] Several years after *Coke* was decided, the Department amended the regulation that the Supreme Court had upheld in *Coke*. The amended regulation was challenged by employers, and the D.C. Circuit upheld it as a valid exercise of the Department's rulemaking authority. *See Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2506 (2016).

"executive, administrative, or professional capacity" to imply a status not attained by low-wage workers. *See* 1940 Stein Report 5 (ROA.1553); *see also id.* at 19 (ROA.1567) (explaining that the "term 'executive' implies a certain prestige, status, and importance"). During the 1940 hearings, employee and employer stakeholders widely agreed that that the language of Section 213(a)(1) implies a status not attained by workers whose pay is close to the minimum wage. *Id.* at 5 (ROA.1553). That consensus was entirely consistent with the OED definition on which the district court relied, which defined "capacity" to include "position, condition, character, relation." *Capacity*, 2 *Oxford English Dictionary* (1933 ed.).

The longstanding interpretation of Section 213(a)(1) to require a salary level is reinforced by the statute's inclusion of the term "bona fide," which requires an employer's "good faith," "sincerity," or "genuine[ness]." *Bona fide*, 1 *Oxford English Dictionary* (1933 ed.). The Department has found that such good faith is best demonstrated through the salary the employer pays. *See* 1940 Stein Report 5 (ROA.1553) (explaining that "the good faith specifically required by the act is best shown by the salary paid"); *id.* at 19 (ROA.1567) (explaining that the salary an employer pays an employee provides "a valuable and easily applied index to the 'bona fide' character of the employment for which exemption is claimed"). After the first hearings on the EAP exemption, the Department determined that "if an employer states that a particular employee is of sufficient importance . . . to be classified as an 'executive' employee," and "thereby exempt from the protection of the act, the best

single test of the employer's good faith in attributing importance to the employee's services is the amount he pays for them." *Id.* at 19 (ROA.1567).

Without a salary-level test, a significant number of employees could be deprived of the FLSA's protections even though they earn less than the workers they supervise or even if their wage per hour is lower than the minimum wage.[6] This is because, unlike employees protected by the FLSA who earn overtime compensation for all hours of work exceeding 40 in a work week, exempt employees do not earn overtime premium pay regardless of how many hours they work each week. *See* 29 U.S.C. § 207(a)(1). Congress could not have intended such low-wage employees to fall within the phrase "bona fide executive, administrative, or professional capacity." *Id.* § 213(a)(1). The minimum wage and overtime pay requirements of the FLSA are "among the nation's most important worker protections," 69 Fed. Reg. 22122 (Apr. 23, 2004), and the Section 213(a)(1) exemptions were premised on an understanding that the exempted workers typically earn salaries well above the minimum wage, *see* Report of the Minimum Wage Study Commission, vol. IV, at 240 (June 1981) (ROA.1291). Nothing in the text, history, or purposes of the statute

[6] This also becomes an issue if the salary level is too low. The Department received comments on the Final Rule from salaried employees currently classified as exempt managers who stated that that they earned less per hour than the employees they supervise, *see* 81 Fed. Reg. 32405, and it estimated that 11,000 employees who will gain overtime protections as a result of the Final Rule earn less per hour than the higher of the federal minimum wage and their state minimum wage, *see* 81 Fed. Reg. 32470, Table 13.

provides a basis to overturn the 75-year-old approach used by the agency charged with implementing the FLSA.

C. The Updated Salary Level Set by the Final Rule Is Commensurate with Salary Levels That the Department Has Set Over the Past 75 Years

The district court did not identify any plausible basis for ruling that the Final Rule "does not deserve deference at *Chevron* step two." ROA.3819. The updated salary level is commensurate with salary levels that the Department has set over the past 75 years, and the updated salary-level test operates in the same manner as prior salary-level tests.

1. Although plaintiffs described the $30 per week compensation level adopted for executive and administrative employees in 1938 as "minimal," ROA.103, the ratio between the salary level and minimum wage is nearly the same under the Final Rule as it was under the 1938 regulations. The federal minimum wage in 1938 was 25 cents per hour. *See* 52 Stat. 1062. Thus, the $30 weekly salary level set by the 1938 EAP regulations was three times the minimum wage for a 40-hour workweek ($10). In the 1940 regulations, the Department retained the $30 per week salary level for executive employees, and established a $50 per week level for administrative and professional employees. 5 Fed. Reg. 4077 (Oct. 15, 1940); 1940 Stein Report 23, 32, 43 (ROA.1571, 1581, 1592). The minimum hourly wage was 30 cents per hour in 1940, *see* 52 Stat. 1062, so the $50 weekly salary level for administrative and professional employees was 4.16 times the minimum wage for a 40-hour workweek ($12).

Under the 2016 Final Rule, the weekly salary level is $913, *see* 29 C.F.R. § 541.600, and the current minimum wage is $7.25 per hour, *see* 29 U.S.C. § 206(a)(1)(C). Thus, the current weekly salary level is 3.15 times the current minimum wage for a 40-hour workweek ($290). The updated salary level is therefore comparable to the levels set in the early years of the FLSA's implementation.

2. The district court found it significant that the updated salary level will extend the FLSA's protections to many workers who would be exempt if the standard duties test alone were used to determine their exempt status. ROA.3820 (citing 81 Fed. Reg. 32405). The court noted that the Department "has admitted that it cannot create an evaluation 'based on salary alone,'" *id.* (quoting 1949 Weiss Report 23 (ROA.1667)), and it declared that the 2016 salary level "creates essentially a de facto salary-only test." *Id.*

That reasoning misunderstands both the Department of Labor report on which the district court relied, and the way in which the 2016 salary level (and all prior salary levels) operates. In the 1949 Weiss Report quoted by the district court, the Department indicated that it could not establish a "salary only" test that would exempt from overtime protections employees who do *not* perform EAP duties—such as mechanics and carpenters—merely because they are well paid. *See* 1949 Weiss Report 23 (ROA.1667); *see also* 69 Fed. Reg. 22173. The Department has never suggested that it lacks authority to set a salary-level test for employees who *do* perform EAP duties. To the contrary, since 1938, the Department's regulations have always

required most employees who perform EAP duties also to meet a salary-level test in order to be subject to the exemption. Indeed, this Court's decision in *Wirtz* involved employees who met the duties test that was in place at that time, but whose salaries were below the level that was then in effect. 364 F.2d at 607.

Nor does the Final Rule create "a de facto salary-only test," ROA.3791, either as a matter of law or in practice. The Final Rule continues the Department's longstanding requirement that an employee meet both a salary-level test and a duties test to be subject to the EAP exemption. As the Department explained in the preamble to the Final Rule, only 22% of salaried white collar workers who currently meet the standard duties test earn less than $913 per week, which is the salary level set by the Final Rule. 81 Fed. Reg. 32413. By contrast, nearly half (47%) of salaried white collar workers who earn more than $913 per week do not satisfy the standard duties test. *Id.* Accordingly, for these 6.5 million workers, the standard duties test (rather than the salary-level test) determines their nonexempt status. *Id.*

3. The district court stated that, historically, the "salary level was purposefully set low to 'screen[] out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary.'" ROA.3819-20 (quoting 1949 Weiss Report 8 (ROA.1652)). But the quoted language from the Weiss Report was referring to the salary level that was paired with the more protective "long" duties test. For 50 years (between 1949 and 2004), the Department paired the "short" duties test—which had no percentage cap on nonexempt work—with a higher salary level. 81 Fed. Reg.

32401. The $913 salary level set by the Final Rule is at the "low end of the historical range of short test salary levels." *Id.* at 32405. It is below the real value of the short test salary level in all previous years when it was updated, and only slightly above the real value of the (less protective) long test salary level in several years when it was updated. *Id.* at 32450. Accordingly, the Final Rule's salary level is aligned with the salary levels that have worked appropriately with the short duties test throughout most of the history of the Section 13(a)(1) exemption.[7]

The updated salary level in the Final Rule thus addresses the concern raised by employee representatives: that the solely qualitative nature of the standard duties test may allow the classification of employees as exempt—and thus ineligible for overtime pay—even when their work includes a considerable amount nonexempt work, such as manual labor or clerical tasks. 81 Fed. Reg. 32445-46. As the Department explained,

[7] The Department considered a range of alternatives before setting the salary-level methodology in the Final Rule, including methodologies that would have resulted in a lower salary level. For example, the Department considered: (1) adjusting the 2004 level for inflation ($570 per week); (2) using the 2004 method for setting the salary level ($596 per week); (3) using the long-test salary method for setting the salary level ($684 per week). *See* 81 Fed. Reg. 32504, Table 32. The Department also considered the possibility of adopting a salary level equal to the 35th percentile of weekly earnings of full time employees in the lowest-wage Census region ($842 per week), or setting the salary level at the 40th percentile of full-time employees in the retail industry ($848 per week) or restaurant industry ($724 per week). *Id.* at 32410. Each of these methodologies, however, resulted in "a salary level lower than the bottom of the historical range of short test salary levels, based on the historical ratios between the short and long test salary levels," and therefore would not work appropriately with the standard duties test (which is based on the short duties test). *Id.* at 32410; *see also id.* at 32467.

the salary level takes on particular importance when, as under the standard duties test, the regulations place no percentage cap on the number of hours an exempt employee can spend on nonexempt work. *Id.* at 32400. If the salary level test is too low, the effect is "to exempt from overtime many lower-wage workers who performed little EAP work and whose work was otherwise indistinguishable from their overtime-eligible colleagues," as had occurred under the salary-level test set by the 2004 regulations. *Id.* at 32400. One commenter illustrated this phenomenon by noting the experience of a store manager who was classified as exempt even though she "regularly worked 70 hours per week, spending her time performing routine tasks such as 'unloading merchandise from trucks, stocking shelves and ringing up purchases.'" *Id.* at 32406 n.30.[8]

Although the Department might have addressed these concerns by resurrecting a percentage cap on the amount of time an employee could spend on nonexempt work and still be treated as exempt, that alternative was strenuously opposed by employer representatives based on the same concerns that had prompted the Department to eliminate the cap in 2004. 81 Fed. Reg. 32446. As the Department

[8] *See also*, *e.g.*, *In re Family Dollar FLSA Litigation*, 637 F.3d 508, 511, 516-18 (4th Cir. 2011) (holding that a retail manager was an exempt executive under the 2004 rule even though she "devoted most of her time to doing . . . mundane physical activities" such as unloading freight, stocking shelves, working the cash register, or sweeping the floors); *Soehnle v. Hess Corp.*, 399 F. App'x 749, 750 (3d Cir. 2010) (holding that a gas station manager who worked approximately 70 hours per week, and spent 85% of the time operating a cash register, was an exempt executive under the 2004 rule).

explained in the 2004 rulemaking, the percentage cap on nonexempt work effectively required employers to time-test managers for the duties they perform, hour-by-hour in a typical workweek, even though employers are generally not required to maintain any records of daily or weekly hours worked by exempt employees. 69 Fed. Reg. 22122, 22126 (Apr. 23, 2004). In comments submitted during the 2004 rulemaking, the U.S. Chamber of Commerce stated that its members found the percentage cap to be difficult to apply and of little utility. *Id.* at 22127. And the National Small Business Association indicated that a move away from a percentage basis test would alleviate the burden on small business owners. *Id.*

Instead of resurrecting a percentage cap on nonexempt work, the 2016 Final Rule increases the salary level so that it corresponds with historical short-test salary levels. The Department determined that this approach strikes an appropriate balance between protecting overtime-eligible workers and reducing undue exclusions from exemption of bona fide EAP employees, and that it does so without necessitating a return to the quantitative limit on nonexempt work that employer representatives strongly opposed. 81 Fed. Reg. 32414. Judgments of this sort "turn upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency, such as the DOL, possesses." *Coke*, 551 U.S. at 167-68. As the Supreme Court emphasized in *Coke*, "Congress intended its broad grant of definitional authority to the Department to include the authority to answer these kinds of questions." *Id.* at 168.

D. The Final Rule's Mechanism for Updating the Minimum-Salary Level Is Permissible

The Final Rule provides that, beginning January 1, 2020, the Secretary will update the salary level every three years using the same methodology that the Department used to set the salary level in 2016. *See* 81 Fed. Reg. 32393; 29 C.F.R. § 541.607. The district court concluded that "[b]ecause the Final Rule is unlawful," "the Department also lacks the authority to implement the automatic updating mechanism." ROA.3821. That was the sole reason the district court gave for invalidating the updating mechanism.

We have already shown that the Final Rule's salary level is lawful and that the order enjoining the Department from implementing and enforcing the updated salary level should be reversed. Accordingly, the order enjoining the Final Rule's updating mechanism likewise should be reversed.

II. The Balance Of Harms And The Public Interest Preclude A Preliminary Injunction

A. The Harm to Employees That Results from the Preliminary Injunction Strongly Outweighs Plaintiffs' Compliance Costs

The Final Rule was promulgated with an effective date of December 1, 2016. The district court declared that "if the Final Rule is valid, then an injunction will only delay the regulation's implementation." ROA.3823. As the district court acknowledged, however, the Final Rule extends the FLSA's protections to about 4.2 million workers who were treated as exempt under the out-of-date regulations that

the Final Rule amended. ROA.3820 (citing 81 Fed. Reg. 32405). The effect of the outdated regulations was "to exempt from overtime many lower-wage workers who performed little EAP work and whose work was otherwise indistinguishable from their overtime-eligible colleagues." 81 Fed. Reg. 32400. The preliminary injunction, with the attendant delay in the Department's implementation and enforcement of the regulation, is thus causing direct and immediate harm to employees.

Delaying the Department's implementation of the Final Rule is particularly unwarranted here because plaintiffs waited nearly four months after the Final Rule was published to bring this suit, ROA.32, and then waited an additional three weeks to seek a preliminary injunction, ROA.87. Plaintiffs' own delay thus consumed nearly five of the six months between the Final Rule's publication and its effective date. Under these circumstances, plaintiffs could not properly rely on the approaching effective date as a ground for emergency relief. It is well settled that "equity aids the vigilant and not those who slumber on their rights." *National Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 708 (5th Cir. 1994). Indeed, the fact that the district court enjoined the Department from implementing and enforcing the Final Rule just a little over a week before its effective date has created significant uncertainty for employers and employees alike.[9]

[9] *See, e.g.*, Jonelle Marte, *Millions of Workers in Limbo After Rule Expanding Overtime Pay Eligibility is Put on Hold*, Washington Post (Dec. 1, 2016), available at https://www.washingtonpost.com/news/get-there/wp/2016/11/30/workers-

In any event, plaintiffs also failed to demonstrate the irreparable harm that is an essential prerequisite to a preliminary injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction.") (emphasis omitted). Although the Final Rule extends the FLSA's protections to millions of workers across the nation, the effect on any particular employer depends on the particular characteristics of its workforce.

For example, the Department found that 60.4% of workers who gain overtime protection under the Final Rule do not work any overtime, and that 19.3% work only occasional overtime. 81 Fed. Reg. 32490. For these workers, the employers' compliance costs should be relatively low. For state and local government employers in particular, the Department found that total costs in the first year of the Final Rule's implementation will be approximately .01% of state and local government payrolls and a mere .004% of state and local government revenues. *Id.* at 32547.

Of the twenty States that joined this lawsuit, two-thirds (13) did not even submit declarations attempting to demonstrate irreparable harm. And the

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paychecks-in-limbo-because-of-a-delay-in-overtime-rules/?utm_term=.de666987f67a; Lisa Jennings, *Overtime Rule Freeze Likely Too Late for Restaurants*, Nation's Restaurant News (Nov. 28, 2016), available at http://nrn.com/workforce/overtime-rule-freeze-likely-too-late-restaurants; Alexia Elejalde-Ruiz, *Chicago Employers in Limbo After Court Blocks Obama's Overtime Pay Rule*, Chicago Tribune (Nov. 23, 2016), available at http://www.chicagotribune.com/business/ct-overtime-rule-employers-adapt-1127-biz-2-20161123-story.html.

declarations filed by the remaining seven States (none of which is located in this Circuit) failed to include facts sufficient to support their cost estimates or the assumptions on which they were based.

For example, the cost estimates in the Kansas declaration on which the district court relied, ROA.3821-22, assumed that Kansas will raise to $913 the weekly salaries of *all* previously exempt employees who are now protected by the FLSA. *See* ROA.156 (Kansas Decl. ¶¶ 5, 6). But it would make no financial sense for Kansas to do so unless these employees are working significant amounts of overtime, and the Kansas declaration makes no such claim regarding the affected employees. The same is true of the declarations submitted by Wisconsin and Oklahoma. *See* ROA.160-61 (Wisconsin Decl. ¶ 5); ROA.173 (Oklahoma Decl. ¶ 9).

Likewise, the States have no reason to expect to pay overtime for every newly eligible employee each week, as Oklahoma's alternative estimates assume. ROA.174 (Oklahoma Decl. ¶ 13). South Carolina estimates potential fiscal impacts based on 4,651 employees who "have the potential to be affected by the new Rule," ROA.151 (South Carolina Decl. ¶ 5), but does not state that these employees work significant amounts of overtime. Arkansas relies on such broad generalizations that there is no way to assess the reasonableness of its estimates. ROA.165-66 (Arkansas Decl.). Indiana states that it will cost about $3 million to raise the salaries for some employees to retain the exemption, ROA.168 (Indiana Decl. ¶ 5), but then goes on to estimate, without explanation, that the Final Rule will cost the State $20 million annually, *id.*

(Indiana Decl. ¶ 6). And although Iowa estimates costs for the State's higher education institutions, ROA.162-63 (Iowa Decl. ¶¶ 4-6), it is unclear whether the State took into account that teachers are not subject to the salary-level test (and thus are not affected by the rulemaking), and that academic administrative personnel need only earn a salary equivalent to an entry-level teacher to be exempt, *see* 29 C.F.R. §§ 541.303(d), 541.600(c). Thus, the declarations failed to satisfy the States' burden of demonstrating irreparable harm.

B. The District Court Erred by Enjoining the Department from Enforcing the Final Rule Against Third Parties

The district court independently erred by enjoining the Department of Labor from enforcing the Final Rule against employers that are not parties to this case and that did not seek a preliminary injunction. The district court declared that a "nationwide injunction is proper" because the Final Rule "is applicable to all states." ROA.3824. The Supreme Court, however, has admonished that an injunction should extend no further "than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Anything "not . . . found to have harmed any plaintiff in th[e] lawsuit" is "not the proper object of th[e] District Court's remediation" and must be "eliminate[d] from the proper scope of th[e] injunction." *Lewis v. Casey*, 518 U.S. 343, 358 (1996).

This Court has repeatedly recognized the same principle. *See, e.g.*, *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 703 (5th Cir. 2011) (holding that the district court abused its discretion by imposing an injunction that was "broader and more burdensome than necessary to afford [plaintiff] full relief"); *Hernandez v. Reno*, 91 F.3d 776, 781 (5th Cir. 1996) (modifying overbroad injunction to "apply to [plaintiff] only" where "[t]he breadth of the injunction issued by the trial judge . . . is not necessary to remedy the wrong suffered by [plaintiff]"); *Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974) (per curiam) (vacating preliminary injunction as overbroad because, "[i]n this case, which is not a class action, the injunction against the School District from enforcing its regulation against anyone other than [plaintiff] reaches further than is necessary"). Thus, even if there were a basis for any preliminary injunction in this case (which there is not), the injunction issued by the district court could not be sustained.

CONCLUSION

For the foregoing reasons, the preliminary injunction should be reversed.

Respectfully submitted,

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December 2016

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2016, 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/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 10,522 words.

s/ Alisa B. Klein
Alisa B. Klein

ADDENDUM

TABLE OF CONTENTS

29 U.S.C. § 213(a)(1)

(a) Minimum wage and maximum hour requirements

The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—

> (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities)[.]