**CASE NO. 23-50724**

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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ROBERT MAYFIELD; R.U.M. ENTERPRISES, INC.,

*Plaintiffs – Appellants*

V.

U.S. DEPARTMENT OF LABOR; JULIE A. SU, in her official capacity as Acting U.S. Secretary of Labor,

*Defendants - Appellees*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, NO. 1:22-CV-792

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# MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* ON BEHALF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. AND MANHATTAN INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

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**MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***

NOW INTO COURT, through undersigned counsel, come the National Federation of Independent Business Small Business Legal Center, Inc. and Manhattan Institute for Policy Research, collectively "*Amici*," who respectfully request that, pursuant to Federal Rule of Appellate Procedure 29(a)(3), they be granted leave of Court to file brief as *Amici Curiae* in support of the Petition for Rehearing En Banc filed by Plaintiffs-Appellants, Robert Mayfield and R.U.M. Enterprises, Inc., and who further show:

1.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

2.

The Manhattan Institute for Policy Research (MI) is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, MI has historically sponsored scholarship and filed briefs supporting economic freedom against government overreach.

3.

*Amici* have a significant interest in en banc review of this case, as it involves conflicting authorities within the Fifth Circuit on the Department of Labor's legal authority to use salary as a proxy for duties in the Fair Labor Standards Act's executive, administrative, or professional exemption, and the erroneous perception of the FLSA's exemptions.

4.

*Amici* state their Motion for Leave to File A*mici Curiae* Brief is timely under Federal Rule of Appellate Procedure 29(b)(5) as it is being filed no later than seven days after the filing of the Petition for Rehearing En Banc by Plaintiffs-Appellants, the parties being supported.

5.

The Brief of *Amici Curiae* accompanies this Motion.

6.

*Amici* state that they have contacted counsel for Appellants and Appellee regarding whether they oppose this *Amici Curiae* brief. Counsel for Appellants indicated that Appellants do not oppose the filing of this brief. Counsel for Appellee indicated that Appellee does not oppose the filing of this brief.

WHEREFORE, Movants, the National Federation of Independent Business Small Business Legal Center, Inc. and Manhattan Institute, respectfully request that they be granted leave of Court to file brief as *Amici Curiae* in support of Plaintiffs-Appellants' Petition for Rehearing En Banc.

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## CERTIFICATE OF COMPLIANCE

I certify the foregoing Motion for Leave to File Amicus Brief complies with the type-volume limitation contained in Fed. R. App. Proc. 27(d)(2). I used Times New Roman, 14-point font to prepare the Motion. The Motion consists of 428 total words. I relied upon the word count of Microsoft Word 365 in determining the count.

*/s/ Alexandra C. Hains*
Alexandra C. Hains (La. Bar #35086)

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# BRIEF OF *AMICI CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. AND MANHATTAN INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS

## BRIEF OF *AMICI CURIAE* SUPPORTS THE PETITION FOR REHEARING EN BANC

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## DISCLOSURE STATEMENT

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a 501(c)(3) public interest law firm and is affiliated with the National Federation of Independent Business, Inc., (NFIB) a 501(c)(6) business association. The NFIB Legal Center is incorporated in the State of Tennessee, has no parent corporation, and no publicly held company has 10% or greater ownership in the NFIB Legal Center.

The Manhattan Institute for Policy Research (MI) is a 501(c)(3) nonprofit public policy research foundation. MI has no parent corporation, no affiliates, and does not issue shares.

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## INTEREST OF *AMICI CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

The Manhattan Institute for Policy Research (MI) is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, MI has historically sponsored scholarship and filed briefs supporting economic freedom against government overreach.

*Amici curiae* urge this court to grant the Petition for Rehearing En Banc. Review is necessary to provide certainty within the circuit and decide an important question to employers and employees throughout Louisiana, Mississippi, and Texas.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, other than *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund its preparation or submission.

## SUMMARY OF ARGUMENT

The Fair Labor Standards Act (Act or FLSA), 29 U.S.C. §§ 201, *et seq.*, contains an "executive, administrative, or professional" exemption (EAP exemption) from the Act's overtime and minimum wage mandates. *See* 29 U.S.C. § 213(a)(1). In 2019, the Department of Labor (Department) promulgated a final rule (2019 Rule) increasing the salary threshold for the EAP exemption from $455/week, or $23,660/year, to $684/week, or $35,568/year. 84 Fed. Reg. 51230, 51231, 51306. The question for the panel was whether the EAP exemption's grant of authority to the Department to "define[] and delimit[]" the exemption's terms, allows it to impose a salary threshold for exempt status. 29 U.S.C. § 213(a)(1). Contrary to the panel decision, *amici* maintain that the answer is no.

En banc review is appropriate not to simply correct an erroneous panel decision, but to bring clarity and uniformity to the FLSA's EAP exemption. As the Department continues to raise the EAP exemption's salary-level threshold, only full review by this court can reconcile conflicting authorities within the Fifth Circuit about the limit on the Department's ability to impose a salary threshold.

Prior to the panel decision, the Eastern District of Texas, reviewing a 2016 EAP exemption salary threshold increase, held that the salary threshold could not be increased in a manner that would render an employee's duties irrelevant. During en banc review in an unrelated case, five members of this court approvingly cited that

district court decision. The panel here held that it was permissible to use salary as a proxy for an employee's duties in determining EAP exemption status. The panel decision—that salary alone can be used, without qualification, as a proxy for EAP exemption status—directly conflicts with the rationale of the previous district court decision, cited favorably by members of this court.

The FLSA's many exemptions, including the EAP exemption, are as important to the statute's overall purpose as its minimum wage and overtime mandates. But the panel decision permits the Department to continue restricting the EAP exemption beyond what a fair reading of the text authorizes. This practice deprives employers of the exemption to which the statute entitles them for their executive, administrative, and professional employees. Moreover, restriction of the EAP exemption will not automatically result in employees being paid more because small businesses will aim to control their costs by limiting overtime. The result is greater compliance costs for small businesses by having to track hours and employees being no better off, and in many instances, worse off.

The court should grant the Petition.

## ARGUMENT

### I. The Decision Below Creates Uncertainty Within the Fifth Circuit About the Department's Ability to Raise the Salary Threshold.

*Amici*'s position is that the EAP exemption focuses solely on the duties of an employee and provides no authority for the Department to impose a salary threshold

test.[2] Two justices of the Supreme Court seemingly agree with this position. *See Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 67 (2023) (Kavanaugh, J., dissenting, joined by Alito, J.) ("The [FLSA] focuses on whether the employee performs executive duties, not how much an employee is paid or how an employee is paid. So it is questionable whether the Department's regulations—which look not only at an employee's duties but also at how much an employee is paid and how an employee is paid—will survive if and when the regulations are challenged as inconsistent with the Act."). The panel's decision to the contrary complicates treatment of the FLSA EAP exemption within the Fifth Circuit's jurisdiction.

The panel first concluded that this case did not implicate the major questions doctrine. *Mayfield v. Dep't of Labor*, 117 F.4th 611, 616–17 (5th Cir. 2024). This was so, according to the panel, because the case was not one of "economic significance" based on Supreme Court precedent involving "hundreds of billions of dollars of impact," while noting that the DOL rule raising the salary threshold involved only "$472 million in the first year." *Id.* at 616.[3] One of the cases used for

[2] *See* Brief for National Federation of Independent Business Small Business Legal Center, Inc. & Manhattan Institute as Amici Curiae supporting Plaintiffs-Appellants, *Mayfield v. Dep't of Labor*, No. 23-50724 (5th Cir. Jan. 24, 2024).

[3] It is unclear where the $472 million figure comes from, as the final rule projects $543 million in first year direct employer costs, with 10-year annualized direct costs of between $164 million and $173.3 million. 84 Fed. Reg. 51230, 51231–32, 51254–55, 51261–62. "In addition to these direct costs, [the] final rule will transfer income from employers to employees" resulting in $396.4 million in year one, and between $295 million and $298.8 million each year thereafter. 84 Fed. Reg. 51230, 51231–32, 51254–55, 51261–62.

support was *West Virginia v. EPA*, 597 U.S. 697 (2022), which involved "($1 trillion by 2040)." *Mayfield*, 117 F.4th at 616. By comparing only first-year costs of the DOL's EAP rule to the 20-year costs in *West Virginia v. EPA*, the panel's decision renders unclear the appropriate time horizon to determine if a case is one of "economic significance" sufficient to trigger the major questions doctrine.

The panel then determined that the 50.3 percent salary threshold increase in the 2019 Rule was within the Department's statutory authority because "a definition can rely on multiple types of characteristics," such as duties and salary, and "[u]sing *salary as a proxy for EAP status* is a *permissible* choice[.]" *Mayfield*, 117 F.4th at 619 (emphasis added). Under the panel's reading of the EAP exemption, the Department could use salary alone to determine EAP status, even though the exemption's text speaks only of an employee's duties and mentions nothing of salary.

The panel's decision upholding the use of "salary as a proxy for EAP status" under the 2019 Rule conflicts with a prior decision from the Eastern District of Texas striking down a 2016 rule raising the salary threshold for EAP status. *See Nevada v. Dep't of Labor*, 275 F. Supp. 3d 795 (Aug. 31, 2017); 81 Fed. Reg. 32391 (2016 Rule). Under the 2016 Rule, the salary threshold for EAP status would have increased from $455/week, or $23,660/year, to $913/week, or $47,476/year—a more than 100% increase. *Nevada*, 275 F. Supp. 3d at 799; 81 Fed. Reg. at 32393. In

*Nevada*, the court held that the 2016 Rule did "not give effect to Congress's unambiguous intent" as expressed in the words of the FLSA. 275 F. Supp. 3d at 806.[4] This was because the "[f]inal [r]ule more than doubles the Department's previous minimum salary level," such a "significant increase [that] would essentially make an employee's duties, functions, or tasks irrelevant if the employee's salary falls below the minimum salary level." *Id.* at 806.

In terms of judicial hierarchy, the panel decision in *Mayfield* has a broader binding impact and carries more weight than the *Nevada* decision. But in terms of persuasiveness of rationale, it is unclear to judges and future litigants which decision properly interprets the EAP exemption. The conclusions are fundamentally opposite, and both remain good law given that they involve two different regulations with different salary increases. Complicating matters further, five judges of this court, in an unrelated case, approvingly cited the rationale of *Nevada* and its striking down of the 2016 Rule salary increase. *See Hewitt v. Helix Energy Sols. Grp., Inc.*, 15 F.4th 289, 314–16 (5th Cir. 2021) (Jones, J., dissenting), *aff'd*, 598 U.S. 39 (2023). Under *Mayfield*, a 50.3% increase in the salary threshold is acceptable, and any use of "salary as a proxy for EAP status" is "permissible." *Mayfield*, 117 F.4th at 619. But under *Nevada*, a 100% salary threshold increase for the EAP exemption is

[4] Amicus National Federation of Independent Business Small Business Legal Center, Inc. was a private-party plaintiff in *Nevada v. Dep't of Labor*, 275 F. Supp. 3d 795 (E.D.Tex. Aug. 31, 2017).

unacceptable because it "would essentially make an employee's duties . . . irrelevant if the employee's salary falls below the new minimum salary level." *Nevada*, 275 F. Supp. 3d at 806; *compare Hewitt*, 15 F.4th at 315 (5th Cir. 2021) (Jones, J., dissenting) ("[R]egulations cannot supplant the statutory exemption based on an employee's duties with a salary-based exemption. . . . It's their duties and not their dollars that really matter.") *with Mayfield*, 117 F.4th at 619 (approving the use of salary as a "proxy" for duties).

En banc review is necessary to provide clarity and uniformity within the Fifth Circuit on the use of salary for EAP status. Litigants will use the opposite decisions in *Mayfield* and *Nevada* as justification for arguing that a given salary threshold increase conforms to or violates the EAP exemption. And this is not an abstract concern—the Department has recently published a final rule (2024 Rule) again raising the salary threshold for EAP status. As of January 1, 2025, the new salary threshold will be $1,128/week, or $58,656/year. 89 Fed. Reg. 32842, 32862. This represents a 64% increase in the salary threshold.[5]

Only the full Fifth Circuit can provide uniformity and guidance to district court judges and litigants on reconciling *Mayfield* and *Nevada*. Guidance is needed on an array of questions. Did *Mayfield* nullify *Nevada* so that any salary increase for

[5] Amicus National Federation of Independent Business Small Business Legal Center, Inc. is a party challenging the 2024 Rule in the Eastern District of Texas. *See Plano Chamber of Commerce v. Su*, No. 4:24-CV-468, consolidated with *Texas v. Dep't of Labor*, No. 4:24-CV-499.

EAP status is permissible, even if it makes an employee's duties irrelevant? If so, can the Department raise the salary so extensively that it renders the EAP exemption into desuetude? If the answers to these questions are no, as they should be, what salary increase between 50.3% (*Mayfield*) and 100% (*Nevada*) becomes violative of the FLSA? Is it 51%? Or the 2024 Rule's 64%? Would 80% be too high? Can the Department do in two separate rulemakings, increasing the salary threshold by 50% each, what it could not do in *Nevada*, increasing the threshold by 100%? Without full court review, confusion on these questions and more will continue to linger in the Fifth Circuit.

## II. FLSA Exemptions Are Not a Boogeyman, but Instead, Represent a Delicate Balance Struck by Congress.

The FLSA's purpose is to eliminate certain "conditions [in industries engaged in commerce or the production of goods for commerce] without substantially curtailing employment or earning power." 29 U.S.C. § 202(b). These conditions are those "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well being of workers[.]" 29 U.S.C. § 202(a). Congress meant to eliminate these conditions, because their existence negatively burdens commerce, the free flow of goods, competition, and marketing of goods. *Id.* To prevent any negative burden on commerce and competition, Congress set forth minimum wage and overtime requirements for workers. *See* 29 U.S.C. §§ 206, 207.

The Act's purpose has been mischaracterized as solely remedying "'substandard wages' or 'oppressive working hours.'" *Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 44 (2023) (quoting *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981)). Doing so ignores that Congress meant to eliminate detrimental labor conditions negatively impacting commerce "without curtailing employment or earning power." 29 U.S.C. § 202(b). It also pretends Congress has not made exemptions to these requirements. On the contrary, Congress has exempted 49 categories of workers from the FLSA's general requirements. 29 U.S.C. § 213(a-b). Of these 49, 15 have been repealed. *Id.* Of the remaining 34, some, like the Baseball exemption, contain compensation or salary requirements, while others, like the EAP exemption, do not. 29 U.S.C. § 213(a-b).

These FLSA "exemptions are as much a part of the FLSA's purpose" as the minimum wage and overtime requirements. *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 88–89 (2018) (rejecting the argument that FLSA exemptions should be narrowly construed). "Legislation is, after all, the art of compromise"—the exemptions in the FLSA, including the EAP exemption, may have been just as crucial to the Act's passage as the desire to eliminate certain labor practices detrimental to commerce. *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017).

Reading the exemptions as part of the FLSA's purpose is important because exempt status provides benefits to both employers and employees. Employees enjoy better opportunities for advancement that comes from the flexibility that exempt status provides. When an exempt employee is paid a salary, the number of hours an employee works and when an employee works those hours is not an issue. This affords exempt employees flexibility and the opportunity to participate in job training knowing they can complete their assigned duties later without creating an overtime wage burden.

Restricting the EAP exemption, however, means more employees are transferred back to nonexempt hourly positions. Reclassification to nonexempt status will result in more costly recordkeeping for employers. Restriction will also force employers to exert more control over employee work hours to keep costs in check and avoid overtime. This control and reclassification will come at a cost for employees, in the form of less flexibility, reduced benefits, and fewer opportunities for career growth.

In construing the EAP exemption, courts should remember that the Act's exemptions are just as important to the statute's purpose as its mandates. *Encino Motorcars, LLC*, 584 U.S. at 88–89. The Department's narrowing of the EAP exemption beyond what its text fairly implies harms both employers and employees by prioritizing nonexempt status over exempt status and disregarding the benefits

that come with exempt status. It also upsets the compromise of Congress and balance that body created by passing the FLSA in its entirety.

## CONCLUSION

For these reasons, the Court should grant the Petition.

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***Attorneys for National Federation of Independent Business Small Business Legal Center, Inc. and Manhattan Institute***

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This 4th day of November, 2024.

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