CASE NO. 23-50724

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

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

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

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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, 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 Plaintiff-Appellant, 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 the resolution of this case, as it involves the questionable legal authority of the Department of Labor to impose a salary threshold in the Fair Labor Standards Act's white-collar exemption and the burden that raising that threshold will impose on businesses, including small business.

4.

Amici state their Motion for Leave to File A*mici Curiae* Brief is timely under Federal Rule of Appellate Procedure 29(a)(6) as it is being filed no later than seven days after the filing of the principal brief of 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 Motion for Leave to File *Amici Curiae* Brief. Counsel for Appellants indicated that Appellants do not oppose the filing of this

Motion. Counsel for Appellee indicated that Appellee does not oppose the filing of this Motion.

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, Robert Mayfield and R.U.M. Enterprises, Inc., in this matter.

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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 423 total words. I relied upon the word count of Microsoft Word 365 in determining the count.

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BRIEF OF *AMICI CURIAE* SUPPORTS THE REVERSAL OF THE DISTRICT COURT'S JUDGMENT

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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., 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.

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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.

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Amici curiae file this brief due to the questionable legal authority of the Department of Labor to impose a salary threshold in the Fair Labor Standards Act's

[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.

white-collar exemption and the burden that raising that threshold will impose on businesses, including small businesses.

SUMMARY OF ARGUMENT

This case presents an oft-occurring question: Can vague terms and phrases, ancillary to the operative statutory text, contravene the plain meaning of the operative text and grant broad authority for an administrative agency to regulate a significant portion of the national economy?

The Fair Labor Standards Act (Act or FLSA), 29 U.S.C. §§ 201, *et seq.*, contains an "executive, administrative, or professional" exemption (EAP exemption or exemption) from the Act's overtime and minimum wage mandates. *See* 29 U.S.C. § 213(a)(1). The question here is whether the EAP exemption's grant of authority to the Department of Labor (Department) to "define[] and delimit[]" the exemption's terms, allows it to impose a salary threshold test to determine if an employee qualifies for the exemption. *Id.*

The answer is no. The Department claims this broad authority from nothing more than a vague phrase distant to the exemption's operative text. The plain and ordinary meaning of the exemption's operative terms speak to the duties of an employee, completely ignoring an employee's salary. The structure of the Act confirms as such. It is a foundational maxim that the inclusion of words or language in a statutory provision but exclusion of the same words or language in a different

provision suggests a difference in meaning. Congress included compensation or salary requirements in other FLSA exemptions but did not do so in the EAP exemption. Therefore, the EAP exemption cannot be read to include, or permit, a salary requirement. Moreover, the Department's claim of broad authority from an ancillary and vague phrase, tucked in a parenthetical, tries to fit Dumbo into the home of Jerry (the mouse). But it does not fit, nor can it be reconciled with the Supreme Court's caselaw rejecting similar attempts to grasp broad regulatory authority. If Congress is to grant broad authority to an administrative agency to regulate significant portions of the economy, there must be a clear expression of its intent to do so based on the terms of the statute. The phrase "define[] and delimit[]" fails to meet this high bar.

Because there is no clear grant of broad authority from Congress in the EAP exemption, whether the exemption contains a salary threshold requirement is a decision best left for that representative body. Doing so allows for negotiation and consideration of different perspectives from across the country, in addition to maintaining political accountability for bad policy. And Congress has already taken up the issue, with pending bills in each chamber. The difficulty of the legislative process is an asset, not a detriment to be short-circuited by agency fiat.

The current salary threshold of $35,568/year not only lacks statutory authority, but it hurts the business community. *See* Defining and Delimiting the

Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51230 (Sept. 27, 2019) (codified at 29 C.F.R. § 541.600) (hereinafter "2019 Rule"). The raising of the salary threshold in the 2019 Rule directly affects millions of employees and has the potential to impact tens of millions more. The Department acknowledges that 47.6 million employees could fall under the 2019 Rule's umbrella. *Id.* at 51257. Under the challenged rule, employers wishing to keep an employee exempt under the EAP exemption had to increase that single employee's salary by $12,000, or almost 50 percent. And that barely scratches the surface. In total, the challenged 2019 Rule imposed hundreds of millions of dollars in compliance costs on businesses and thousands of dollars in per-entity costs on small businesses, and continues to do so each year.

There is no directly binding Supreme Court precedent on the legal issue raised in this case. A previous Fifth Circuit case considering the issue involved dicta and questionable statutory analysis. This case is therefore a vehicle to provide a thorough examination of the FLSA's EAP exemption and the Department's salary threshold test. *See Helix Energy Solutions Group, Inc. v. Hewitt*, 598 U.S. 39, 67–68 (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.").

ARGUMENT

I. The EAP Exemption Focuses on an Employee's Duties, Not Salary.

For decades, the Department has claimed authority to impose a salary threshold requirement in the FLSA's EAP exemption, affecting businesses nationwide and millions of private-sector employees. Upon closer review, the Act grants no such authority.

A. Nothing in the Text of 29 U.S.C. § 213(a)(1) Speaks to an Employee's Salary.

Congress exempted from the FLSA's minimum and overtime pay requirements "any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary, . . .)." 29 U.S.C. § 213(a)(1).

In statutory construction, words and phrases are given their plain and ordinary meaning. *See Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010); *United States v. Moore*, 71 F.4th 392, 395 (5th Cir. 2023). The plain meaning of words or phrases expresses the legislative purpose of the statute. *Hardt*, 560 U.S. at 251 (quoted source omitted). Ordinary meaning refers to that understanding which a reasonable person would garner from the statutory text. W. Eskridge, INTERPRETING LAW 33, 34–35 (2016) ("prime directive in statutory interpretation is

to apply the meaning that a reasonable reader would derive from the text of the law"); Antonin Scalia & Bryan Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012) (hereinafter "READING LAW") ("words mean what they conveyed to reasonable people at the time they were written"); *see also Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1766 (2020) (Alito, J., dissenting) (describing as the question in statutory interpretation: "[h]ow would the terms of a statute have been understood by ordinary people at the time of enactment").

Found nowhere in the text of the EAP exemption are the words salary, wage, benefit, compensation, pay, earnings, or any similar nouns that would indicate payment for services rendered.[2] At the very least, this omission urges caution before determining that the EAP exemption permits the Secretary to impose a salary threshold. The inquiry then becomes whether the phrase "bona fide executive,

[2] The full text of 29 U.S.C. § 213(a)(1) reads:

> **(a) MINIMUM WAGE AND MAXIMUM HOUR REQUIREMENTS**
>
> The provisions of [the minimum wage and maximum hours sections] 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)[.]

administrative, or professional capacity" means that the Secretary can impose a salary level threshold.

"[T]he plain meanings of executive, administrative, and professional capacity relate to a person's performance, conduct, or function." *Nevada v. Dep't of Labor*, 275 F. Supp. 3d 795, 804 (E.D. Tex. Aug. 31, 2017) (*Nevada II*) (resorting to dictionary definitions of these terms contemporaneous with the FLSA's passage). They do not "suggest[] salary." *Nevada v. Dep't of Labor*, 218 F. Supp. 3d 520, 529 (E.D. Tex. Nov. 22, 2016) (*Nevada I*). The court in *Nevada II* correctly observed that "the plain meaning of Section 213(a)(1) does not provide for a salary requirement[.]" 275 F. Supp. 3d at 806. Handcuffed by what it viewed as vertically binding Fifth Circuit precedent, the court then suggested that a perceived congressional intent could contravene what it already determined to be the plain meaning of the statute. *Compare Nevada II*, 275 F. Supp. 3d at 806 ("the plain meaning of Section 213(a)(1) does not provide for a salary requirement") *with Nevada II*, 275 F. Supp. 3d at 806 ("[t]he use of a minimum salary level in this manner is consistent with Congress's intent"). But courts cannot "displace the plain meaning of the law in favor of something lying beyond it[,]" such as a perceived legislative intent. *Bostock*, 140 S. Ct. at 1750. "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would

justify a Court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest." *United States v. Wiltberger*, 5 Wheat. 76, 95–96 (1820).

A reasonable person at the time of the FLSA's enactment would not have read the text of the EAP exemption to permit a salary threshold. Consider a simpler hypothetical statute. The statute reads: "No employer shall require an employee to work on more than four days in any seven-day, Sunday through Saturday, week. The preceding prohibition shall not apply to employees employed in a bona fide executive, administrative, or professional capacity." The average bystander in 1938 would not have understood this statute to impose a salary threshold requirement before the exemption takes effect. *See Executive*, 8 *The Oxford English Dictionary* (1st ed. 1933) ("[c]apable of performance; operative . . . [a]ctive in execution, energetic . . . [a]pt or skillful in execution"); *Administrative*, 1 *The Oxford English Dictionary* (1st ed. 1933) ("[p]ertaining to, or dealing with, the conduct or management of affairs; executive"); *Professional*, 8 *The Oxford English Dictionary* (1st ed. 1933) ("[p]ertaining to, proper to, or connected with a or one's profession or calling"); *Capacity*, 2 *The Oxford English Dictionary* (1st ed. 1933) ("position, condition, character, relation" or "to be in, put into . . . a position which enables or renders capable"). No reasonable person would conclude by the terms of this statute that an executive, administrative, or professional employee making less than

$35,568/year cannot work more than four days in a seven-day week, but that same employee making $35,568/year or more can be required to work five, six, or even seven days in a seven-day week. Even simpler, if ordinary people were asked whether they worked in an executive, administrative, or professional capacity, it is highly unlikely that respondents would consider their salary when answering the question. *Cf. Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1140 (2018) ("If you ask the average customer who services his car, the primary, and perhaps only, person he is likely to identify is his service advisor."). They correctly would have thought about the work they perform—that is, their duties.

Further evidence that Congress did not authorize a consideration of compensation, let alone a salary threshold test, in the EAP exemption comes from other exemptions listed in 29 U.S.C. § 213. Congress included compensation and salary requirements in multiple other exemptions from the FLSA's requirements. Thus, Congress knew how to, and has, imported a compensation requirement where it wants an exemption to turn on compensation. For example:

- Some agricultural employees are exempt if they are "paid on a piece rate basis" and "paid at the same piece rate as employees over age sixteen are paid on the same farm[.]" 29 U.S.C. § 213(a)(6).

- The statute exempts criminal investigators who are "paid availability pay under section 5545a of title 5[.]" 29 U.S.C. § 213(a)(16); 29 U.S.C. § 213(b)(30).
- Computer workers can be exempt if they perform certain duties and are "compensated at a rate of not less than $27.63 an hour[.]" 29 U.S.C. § 213(a)(17)(D).
- Baseball players are exempt if they earn a "weekly salary" that is "equal to the minimum wage" requirements of the Act. 29 U.S.C. § 213(a)(19).
- Local delivery drives are exempt if they are "compensated . . . on the basis of trip rates[.]" 29 U.S.C. § 213(b)(11).
- Agricultural employees engaged in livestock auction operations can be exempt if "paid . . . at a wage rate not less than that prescribed" by another provision of the Act. 29 U.S.C. § 213(b)(13).
- A category of employees employed by a "nonprofit educational institution" caring for certain categories of children are exempt only if "compensated . . . at an annual rate of not less than $10,000[.]" 29 U.S.C. § 213(b)(24).
- Employees of private entities providing services in national parks or forests are exempt if they receive "compensation for employment in excess of fifty-

six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed[.]" 29 U.S.C. § 213(b)(29).

Properly read, these other exemptions where Congress expressly included compensation requirements informs the interpretation of the EAP exemption. *See* Scalia & Garner, READING LAW, *supra*, at 167 ("The text must be construed as a whole. . . . Context is a primary determinant of meaning"). It is well understood that "[t]he expression of one thing implies the exclusion of others." *Id.* at 107 (Negative-Implication Canon/*expressio unius est exclusio alterius*). As the Supreme Court has made clear, "[w]hen Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*)." *Bittner v. United States*, 598 U.S. 85, 94 (2023); *see also Dep't of Homeland Security v. MacLean*, 574 U.S. 383, 391 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." (cited source omitted)); *Russello v. United States*, 464 U.S. 16, 23 (1983) (using the principle).

Bittner illustrates an application of the principle especially relevant here. The Supreme Court interpreted whether the Bank Secrecy Act's financial penalty for a "violation" applied on a per-report or per-account basis. The government argued that Congress expressly provided for certain willful violations to be account specific, so

other provisions speaking to non-willful violations should likewise apply on a per-account basis. Rejecting this argument, the Court made clear that the exact opposite was true: Congress's lack of account-specific language for non-willful violations, where this language appeared elsewhere for certain willful violations, meant that non-willful violations were not account specific. *See Bittner*, 598 U.S. at 93–95.

So too is the case here. Over the years, Congress has exempted forty-nine 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 contain compensation or salary requirements, *see infra*, while others do not. 29 U.S.C. § 213(a-b). This distinction must be given meaning. Congress's express delineation of compensation and salary requirements for certain FLSA exemptions and not others means that those exemptions without compensation or salary terms do not include, nor depend on, compensation or salary.

The plain and ordinary meaning of 29 U.S.C. § 213(a)(1) is that the exemption depends on workers' functions, not their compensation or salary.

B. Vague Statutory Phrases Must be Fairly Read to Grant Limited Authority Instead of Broad Latitude.

The Department has long claimed authority to impose a salary threshold based not on an express grant of authority to impose a salary test in 29 U.S.C. § 213(a)(1), but instead based on an ancillary parenthetical giving it the power to "define[] and delimit[]" the terms within the exemption. 29 U.S.C. § 213(a)(1); 84 Fed. Reg. at

51232; *see also Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603, 608 (5th Cir. 1966) ("The statute gives the Secretary broad latitude to 'define and 'delimit' the meaning of the term 'bona fide executive . . . capacity.'").

1. This Court Is Not Bound by any Precedent on Whether "Define[] and Delimit[]" Authorizes a Salary Threshold Test.

Amici acknowledge that a panel of this Court is bound to follow previous panel decisions under the "law of the circuit" rule. *Jacobs v. National Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008).

But *Wirtz* is problematic for multiple reasons. First, the panel engaged in no statutory analysis of the FLSA to determine whether the Act permitted a salary threshold test. In one-sentence conclusory fashion, the opinion states that "[t]he statute gives the Secretary broad latitude to 'define and delimit' the meaning of the term 'bona fide executive . . . capacity.'" *Wirtz*, 364 F.2d at 608. Secondly, and the reason this Court is not bound by *Wirtz*, the above statement in *Wirtz* was dicta. The question on appeal in *Wirtz* was whether the district court properly continued for a year the Secretary's action to enjoin the defendants from violating provisions of the FLSA. *Id.* at 604. Prior to its "broad latitude" statement, the Court held that the district court used an "incorrect" injunction standard and that the "facts already found by the District Court demonstrate than an injunction should have been issued[.]" *Id.* at 606–07. This alone was enough to decide the case. The additional broad and conclusory pronouncement about the FLSA was unnecessary to the result.

See United States v. Segura, 747 F.3d 323, 329 (5th Cir. 2014) (concluding that prior panel statement of law was "not 'necessary to the result'" (quoted source omitted)); *Int'l Truck and Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004) ("statement is dictum if it 'could have been deleted without seriously impairing the analytical foundations of the holding' . . . [a] statement is not dictum if it is necessary to the result" (citations omitted)). A broad pronouncement about the Secretary's authority to define the term "executive" in the FLSA was not necessary to determine whether the district court used the correct standard for issuing an injunction.

Wirtz failed to engage in any meaningful analysis of the FLSA's EAP exemption. Because its pronouncement on the Secretary's authority was unnecessary to resolve the case, that statement is dicta, and not binding on this Court.

2. The Supreme Court Has Repeatedly Rejected Agency Claims of Broad Authority Based on Vague Statutory Phrases.

The Department's proffered broad grant of authority to impose a salary threshold test from the vague phrase "define[] and delimit[]" fails for another reason. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001) (citations omitted); *Environmental Integrity Project v. EPA*, 969 F.3d 529, 542–43 (5th Cir. 2020) (applying the principle). Courts give statutory terms and phrases their fairest reading—"vague terms or ancillary provisions" are not read to grant significant regulatory authority. *E.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2609–10 (2022); *Whitman*, 531 U.S. at 468. With

the salary threshold test, the Department imposes a requirement potentially impacting 47.6 million American workers. 84 Fed. Reg. at 51257 ("White collar, Salaried, Not Eligible for Another (Non-EAP) Overtime Exemption"), accounting for almost one-third of the entire civilian labor force. The widescale impact of the salary threshold cautions against a broad grant of authority. *See NFIB v. OSHA*, 595 U.S. 109, 117 (2022) (per curiam) (determining that agency regulation applying to 84 million workers—half of the civilian work force—suggested a question of economic and political significance cautioning against broad grant of authority).

The takeaway from the Supreme Court's recent doctrine on administrative agencies claiming extraordinary powers from vague phrases or ancillary provisions is that those phrases deserve only a fair and limited reading. In *MCI Telecomm. Corp. v. AT&T. Co.*, the Court held that the Federal Communications Commission did not have authority to make tariff filing optional based on statutory authority to "modify any requirement." 512 U.S. 218, 221, 224–34 (1994). In *FDA v. Brown & Williamson Tobacco Corp.*, the Court rejected the agency's attempt to regulate a significant portion of the economy based on broadly defining "devices" to include tobacco products. 529 U.S. 120, 135, 160–61 (2000). During the COVID-19 pandemic, the Court read the Public Health Service Act's grant of authority to "make and enforce such regulations as . . . are necessary" in a fair and limited manner based on context and separation of powers principles. In doing so, it rejected the CDC's

preferred reading that "necessary" meant an unlimited grant of authority, including issuing and enforcing a nationwide eviction moratorium impacting between 6 and 17 million people. *Alabama Assoc. of Realtors v. Dep't of HHS*, 141 S. Ct. 2485, 2487–89 (2021). In a similar COVID-19 pandemic-era case, the Court rejected OSHA's attempt to engraft, into a statute giving authority to regulate workplace safety, the authority to impose a nationwide vaccine mandate. *NFIB*, 595 U.S. at 117–19. Nor could the EPA rely on an ancillary provision of the Clean Air Act to give it unmoored authority to transform the nation's electric grid, without a clear grant of authority from Congress. *See West Virginia*, 142 S. Ct. at 2610–14. And most recently, the Court rejected the Department of Education's argument that a vague statutory phrase gave it broad authority to discharge student loans.

The student loan case is particularly helpful. There, the Department of Education claimed that the vague statutory grant of authority to "waive or modify" student financial assistance requirements during an emergency gave it authority to completely cancel some obligations. *Biden v. Nebraska*, 143 S. Ct. 2355, 2363–64 (2023). The Court rejected this claimed significant grant of authority from a vague statutory phrase. While "waive or modify" could perceivably mean reduce entirely, the Court determined that the "power has limits" and it "does not authorize 'basic and fundamental changes in the scheme' designed by Congress." *Id.* at 2368 (quoted source omitted). Moreover, debt cancellation could not "*fairly* be called a waiver."

Id. at 2371 (emphasis added). So too here. Just as "waive or modify" cannot be fairly read to allow cancellation of student loan obligations, "define[] and delimit[]" cannot be fairly read to allow the displacement of Congress's statutory focus on duties in the EAP exemption by imposing a salary threshold test.

While the Supreme Court has yet to consider the statutory authority for a salary threshold test in the EAP exemption, three justices have expressed skepticism. *See Helix*, 598 U.S. at 67–68 (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."); *Id.* at 63 (Gorsuch, J., dissenting) (describing as a "foundational argument" for later resolution whether the FLSA focuses only on an employee's duties).

3. The Department's Interpretation of the EAP Exemption Fails Because It Provides No Limiting Principle.

The Department's reading of the EAP exemption—that the authority to "define[] and delimit[]" the terms of the statute allows it to impose a salary threshold test—raises another significant problem. How high is too high? If the Department can impose a salary threshold, can it impose one so high as to completely negate the duties test? If not, where in the statute is the limiting principle? If the statute permits

a salary threshold of $23,660/year (2004 Final Rule)[3], what in the statute prohibits the threshold of $47,476/year (2016 Final Rule)[4]? *See Nevada II*, 275 F. Supp. 3d at 806 (concluding that the doubling of the salary threshold in the 2016 rule was too much). The *Nevada II* court clearly thought there was some upper limit, based on its striking down the 2016 Final Rule's salary threshold increase as too high. Thus, even if this Court were to conclude it is bound by *Wirtz*, *but see infra* Section I.B.1, the decision in *Nevada II* demonstrates that *Wirtz* does not stand for the proposition that the Secretary has the authority to impose an increase by any amount.

The administration is currently proposing to increase the salary threshold even further than the 2019 rule, to at least $55,068 and possibly $60,209. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. 62152, 62153 n.3 (Sept. 8, 2023). Will other courts find persuasive the rationale of *Nevada II*, or instead, uphold this new increase? If the EAP exemption allows a salary threshold, is $35,568 (2019 Rule) the proper line between $23,660 and $47,476? Why $35,568 instead of $30,000 or $40,000? The EAP exemption neither considers nor speaks to any of these amounts, let alone the right amount, because a salary threshold is not within

[3] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122 (Apr. 23, 2004).
[4] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391 (May 23, 2016).

its bounds. But if this Court approves the salary level test, courts will be inundated with litigation every time the Department changes the required salary.

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The EAP exemption in the FLSA focuses on an employee's duties, not their salary. The exemption's terms and the Act's inclusion of salary in different exemption provisions demonstrate that salary is entirely irrelevant to the EAP exemption. Moreover, the Department's broad claim of authority from the vague phrase "define[] and delimit[]" cannot be reconciled with the Supreme Court's precedent when faced with similar claimed grants of broad authority from vague provisions. Finally, accepting the Department's salary threshold test raises difficult questions of how much the threshold can increase before it becomes problematic, if it even does, and where the proper threshold ultimately lies. Determining this difficult question properly lies with only one branch of our government.

II. The Decision to Import Salary Requirements in the EAP Exemption Should Rest with Congress.

If the EAP exemption of the Fair Labor Standards Act is to include a salary threshold requirement, then Congress, not the Department, should decide the threshold and rate increases. Updating the FLSA through Congress allows members of the public to express concerns to their elected officials, and those elected officials to consider the best interests of their state or district, negotiate with each other, and ultimately be accountable to their constituents for burdensome proposals. This Court

should be wary of unelected bureaucrats performing an end-run around the legislative branch for the sake of ease or convenience.

Of our three branches of government, "Congress is the most responsive to the will of the people." *Tiger Lily, LLC v. Dep't of HUD*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring). The legislative process, while difficult, "ensures that the *People can be heard* and that their *representatives have deliberated* before the strong hand of the federal government raises to change the rights and responsibilities attendant to our public life." *Jarkesy v. SEC*, 34 F.4th 446, 459–60 (5th Cir. 2022) (emphasis added). Our Constitution, "by directing that legislating be done only by elected representatives in a public process," "sought to ensure that the *lines of accountability would be clear*: The *sovereign people* would know, without ambiguity, *whom to hold accountable* for the laws they would have to follow." *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (emphasis added). In the legislative process, the people clearly know whom to hold accountable for burdensome policies.

And Congress has already taken up the salary threshold issue. In each chamber, bills are pending to raise the salary threshold for EAP exempt employees. *See* Restoring Overtime Pay Act of 2023, S.1041, 118th Cong. (2023); Restoring Overtime Pay Act of 2023, H.R. 2395, 118th Cong. (2023). Both bills would raise the salary threshold to $45,000 shortly after enactment, with regular increases at the

beginning of each calendar year thereafter. *See* S.1041 § 3; H.R. 2395 § 3. And the proposals are moving. Senate Bill 1041 has one-fifth of the body cosponsoring it and has been referred to the Committee on Health, Education, Labor, and Pensions. Likewise, House Bill 2395 has been referred to the House Committee on Education and the Workforce and has gained seventeen additional cosponsors since November 1st. Further evidence of the legislative process working is that similar versions of the bill were introduced in the 116th and 115th Congresses.[5] Granted, the legislative process may prove difficult at times, but that is no reason to abandon it. Just because these prior bills failed does not mean that Congress's current consideration of the salary threshold will fail or that the legislative process is broken. On the contrary, both the 2019 Senate and House bills had more cosponsors than their respective 2017 bills. Nearly 25 percent of the whole House supported the 2019 bill, including support from members of both political parties. The 2023 Senate bill already has as many cosponsors as the 2019 Senate bill. This is the legislative process in action.

Without a clear statutory authorization from Congress, *see infra* Section I, and in light of then-concurrent legislation providing the same fix, the Department was wrong to bypass Congress. Imposing a salary threshold in the EAP exemption is a decision best addressed by Congress, and this Court should be skeptical of the

[5] Restoring Overtime Pay Act of 2019, S. 1786, 116th Cong. (2019); Restoring Overtime Pay Act of 2019, H.R. 3197, 116th Cong. (2019); Restoring Overtime Pay Act of 2017, S. 2177, 115th Cong. (2017); Restoring Overtime Pay Act of 2017, H.R. 4505, 115th Cong. (2017).

Department attempting to circumvent the legislative process. This is especially the case where, as here, Congress already decided not to place a salary requirement in the EAP exemption but did so for other FLSA exemptions. *See* 29 U.S.C. § 213; *infra* Section I.A.

III. The Department's Invalid Implementation of Salary Thresholds for the EAP Exemption Significantly Harms the Business Community.

Small businesses drive the nation's economy. In the words of President Biden, small businesses are "the backbone of our economy and the glue of our communities[.]" White House, *A Proclamation on National Small Business Week*, 2023 (Apr. 28, 2023), http://tinyurl.com/y5zj42fe. They "account for almost half of our Nation's gross domestic product . . . [and] create many of the goods and services Americans rely on to sustain their everyday lives." *Id.*

Congress has long recognized the importance of small businesses to the Nation's success. Over four decades ago, Congress unanimously passed the Regulatory Flexibility Act (RFA), Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601, *et seq.*). The RFA was meant to address the "disproportionate impact of federal regulations on small businesses." SBA Off. of Advoc., REPORT ON THE REGULATORY FLEXIBILITY ACT, FY 2021 3 (2022), http://tinyurl.com/rfxhzc7u.[6]

[6] For more information on the Regulatory Flexibility Act, its history, its requirements, and current treatment by administrative agencies, *see* Rob Smith, NFIB, *The Regulatory Flexibility Act:*

The judiciary, during performance of its constitutional role to exercise judgment in cases or controversies, has acknowledged the importance of small businesses. *See NFIB v. Perez*, No. 5:16-cv-00066 2016 WL 3766121 *37–39 (N.D. Tex. June 27, 2016) (issuing a partial preliminary injunction against enforcement of a Department of Labor rule due to a likelihood of success on Plaintiffs' RFA claim).

If upheld, DOL's 2019 Rule raising the salary threshold for the EAP exemption, 84 Fed. Reg. 51230, will continue to impose major financial consequences for the business community. The rule raised the salary level threshold from $455/week or $23,660/year to $684/week or $35,568/year. *Id.* at 51230–31. This near 50% increase resulted in burdensome financial obligations for businesses.

These costs included $543 million in direct employer costs for 2020, and $173.3 million each year thereafter, *id.* at 51255, along with regulatory familiarization costs in excess of $340 million. *Id.* at 51266. Other employer costs included reevaluating employee exemption status, updating overtime policies, notifying employees of changes, and updating payroll systems. These 2020 "adjustment" costs were estimated as $68 million, and nearly $12 million in the years after. *Id.* at 51261.

Turning a Paper Tiger into a Legitimate Constraint on One-Size-Fits-All Agency Rulemaking (May 2023), http://tinyurl.com/2b6mhk2v.

Small businesses were even harder hit by the 2019 Rule. Even *assuming* that the DOL analysis of affected entities is correct,[7] the 2019 Rule acknowledged that 81% of those would be small businesses. *Id.* at 51291. The total bill of the 2019 Rule for small entities will range from $1,678–$31,118, with the average being $3,656. *Id.* at 51290. Small-entity payroll increases per affected entity will amount to $2,393, ranging from $0 to over $25,000. *Id.*

The imposition of an unauthorized salary threshold test significantly harms the business community, and small businesses in particular. Businesses will spend hundreds of millions of dollars to comply. And the already-slim margins of small businesses will be stressed even further by thousands of dollars in per-entity compliance costs.

[7] The Department's economic analysis fails to acknowledge the difference between large and small entities in analysis of the 2019 Rule's costs. For example, it estimates one hour of time per entity to familiarize themselves with the requirements. *Id.* at 51266, 51290. ***But see*** Pub. L. 96-354, § 2(a)(4) (codified at 5 U.S.C. § 601 note) ("[T]he failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity[.]"). The Department does so even though the SBA Office of Advocacy warned that "it may take [small businesses] many hours and several weeks to understand and implement this rule[.]" SBA Office of Advoc., Comment Letter on 2019 Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (May 20, 2019) (hereinafter "2019 SBA Comment Letter"), http://tinyurl.com/bdh687an. For one small Alabama business, it took *10-15 hours* for a hired *attorney* to review the 2016 final rule. *Id.* Yet DOL expects a small business owner to understand the 2019 rule in one hour. Moreover, the 2019 Rule vastly underestimates payroll costs. *See* 84 Fed. Reg. at 51290 (disregarding SBA's warning that payroll costs will be "in the thousands of dollars" because neither SBA nor the small businesses making this claim would do the Department's analytical work for it); 2019 SBA Comment Letter, *supra* ("Small businesses have told Advocacy that their payroll costs will be in the thousands of dollars.").

CONCLUSION

For the above-mentioned reasons, the judgment below should be reversed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the above and foregoing Brief of *Amici Curiae,* National Federation of Independent Business Small Business Legal Center, Inc. and Manhattan Institute, complies with the type-volume limitation contained in the Federal Rules of Appellate Procedure. I used Times New Roman, 14-point font to prepare the brief. The Brief of *Amici Curiae* consists of 6057 total words in the Brief (excluding those portions allowed by Rule 32(f)). I relied upon the word count of Microsoft Word 365 in determining the count.

This 24th day of January, 2024.

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