IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL	)	
PLAINTIFF,	)	
V.	)	
	)	**Case No. 1:24-cv-02618-APM**
UNITED STATES DEPARTMENT OF LABOR; JULIE SU, as the acting U.S. Secretary of Labor; ADMINISTRATOR JESSICA LOOMAN, as head of U.S. Department of Labor's Wage and Hour Division; and U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION	)	
DEFENDANTS.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

ARGUMENT

I. The 2024 Rule's Salary Level Increase Exceeds the Department's Statutory Authority

a. The Department's Authority to Define and Delimit the Terms of the EAP Exemption is Limited to the Plain Text of the Statute and its Focus on Duties

The Department's delegated authority to "define and delimit" the terms "bona fide executive, administrative, or professional capacity," is not without limits and must remain in the confines of Congressional authorization. 29 U.S.C. § 213(a)(1). "It is axiomatic that an

administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). As such, "a general grant of authority cannot displace the clear, specific text of the Act." *Murray Energy Corp. v. EPA*, 936 F.3d 597, 627 (D.C. Cir. 2019). When Congress authorizes a degree of discretion to an agency in a specific statute, the agency's authority is necessarily bound to, and limited to, the text of the statute. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 325 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."). Thus, when a statute delegates authority to an agency to give meaning to a particular word or phrase, it is "the role of the reviewing court under the APA, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024). The Department's authority to "define and delimit" the terms of the EAP exemption is therefore limited to the text of 29 U.S.C. § 213(a)(1).[1] *See Nevada*

[1] For purposes of ACSI's summary judgment briefing, ACSI is preserving, for future review, its assertion that the Department has no statutory authority to use *any* salary level. In *Prakash*, the D.C. Circuit upheld the Department's use of a salary level requirement, but did not engage in the proper standard of review for whether an agency exceeds its statutory authority. *See Prakash v. Am. Univ.*, 727 F.2d 1174, 1177 (1984). Rather, the court held that the use of a minimum salary level by the Secretary was "within the statutory bounds of his authority, and that his choice among possible alternative standards . . . is one which a rational person could have made." *Id.* at 1177 & n.18 (quoting *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218 (1943)). The standard of review cited and adopted in *Prakash* was based on the a "substantial evidence" standard in a case that predates the adoption of the APA, and that did not engage in the mode of statutory construction contemplated by the APA. *See Quaker Oats Co.*, 318 U.S. at 228. *Prakash* relied on cases that upheld the salary level test by applying the inapt "arbitrary and capricious" standard. *E.g. Walling v. Yeakley*, 140 F.2d 830, 832 (10th Cir. 1944); *Wirtz v. Miss. Publishers Corp.*, 364 F.2d 603, 608 (5th Cir. 1966); *see also Mayfield v. United States DOL*, No. 23-50724, 2024 U.S. App. LEXIS 23145, at *5 (5th Cir. Sep. 11, 2024) (holding that its prior decision in *Wirtz* was not controlling because it did not employ the standard of review for a claim that an agency exceeded its statutory authority). In all, although this Court need not reexamine *Prakash* today, the D.C. Circuit may wish to do so in a future proceeding.

II v. United States DOL, 275 F. Supp. 3d 795, 805 (E.D. Tex. 2017) (stating in regards to the EAP exemption that "the Department's authority is limited by the plain meaning of the words in the statute and Congress's intent.").

The statute's plain text does not mention salary or compensation requirements. 29 U.S.C. § 213(a)(1). The Department has thus recognized that there is no "specific Congressional authorization" for its salary level requirement. 81 Fed. Reg. 32431. (2016 Rule) Instead, the language of the EAP exemption unambiguously focuses on an employee's functions or duties. *See* Plaintiff's Memorandum in Support of Summary Judgment, ECF No. 26-1, at 12; *Texas v. DOL,* No. 4:24-CV-499-SDJ, 2024 U.S. Dist. LEXIS 114902, at *20 (E.D. Tex. June 28, 2024) (recognizing the Department's authority to use minimum salary levels, but preliminarily enjoining the Department from enforcing the 2024 Rule against the State of Texas).

Section 213(a)(1) states that "*any* employee employed in a bona fide executive, administrative, or professional *capacity*" qualifies for the EAP exemption. 29 U.S.C. § 213(a)(1) (emphasis added). The Department misconstrues the definition of "capacity" in an attempt to demonstrate that an employee's "capacity" includes the amount of compensation they receive. Defendants' Cross-Motion for Summary Judgment, ECF No. 30, at 13. Yet "capacity" at the time the FLSA was adopted "was defined as '[o]utward condition or circumstances; relation; character; position; *as in the capacity of a mason or carpenter*.'" *Texas*, 2024 U.S. Dist. LEXIS 114902, at *19 (quoting Webster's New Int'l Dictionary 396 (2d ed. 1934)) (emphasis added). As the Supreme Court has already noted, Section 213(a)(1)'s use of the word "capacity" "counsels in favor of a *functional*, rather than a formal, inquiry, one that views an *employee's responsibilities* in the context

of the particular industry in which the employee works." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 161 (2012) (emphasis added).

The terms "executive," "administrative," and "professional" also counsel in favor of a functional inquiry based on a person's performance, conduct, or function. *Nevada II*, 275 F. Supp. 3d at 804; *See* Pltf's Memo. in Support of MSJ, ECF No. 26-1, at 12. Taken together, the language of the EAP exemption makes "clear that the proper inquiry into whether someone works in an executive, administrative, or professional capacity must turn on that person's function and duties," not the person's salary level. *Texas*, 2024 U.S. Dist. LEXIS 114902, at *20; *see also Helix Energy Sols. Grp. Inc. v. Hewitt*, 598 U.S. 39, 67 (2023) (Kavanaugh, J., dissenting) ("The Act focuses on whether the employee performs executive duties, not how much an employee is paid or how an employee is paid."). In short, the EAP exemption is primarily concerned with duties.

Although the Department has authority under Section 213(a)(1) to "define and delimit" the terms "bona fide executive, administrative, or professional capacity," that authority must be rooted in the plain meaning of the statutory text i.e., focused on an employee's job duties or functions. The use of a salary level test (or any other test) must, at the very least complement, not supplant, the statute's focus on duties. *See Nevada II*, 275 F. Supp. 3d. at 806. The Department itself "has always maintained that the use of the phrase 'bona fide executive, administrative or professional capacity' in the statute requires the performance of specific duties." 69 Fed. Reg. 22173 (2004 Rule); 84 Fed. Reg. 51238 (2019 Rule) ("For most white collar, salaried employees, the exemption should turn on an analysis of their actual functions, not their salaries, as Congress instructed."). The Department's authority is therefore "limited to determining the essential qualities of precise signification of, or marking the limits of those 'bona fide executive, administrative, or professional

capacity' employees who perform exempt duties and should be exempt from overtime pay." *Nevada II*, 275 F. Supp. 3d at 805.

At bottom, it exceeds the Department's authority to "define and delimit" the EAP exemption in a manner by which millions of workers are denied their EAP exemption status based on factors, such as salary levels, that are unrelated to workers' job duties or functions. *See Nevada II*, 275 F. Supp. 3d. at 806.[2]

1. *Any Minimal Salary Level Test Must Be Tethered to The Text of The EAP Exemption and Not Supplant the Duties Test*

Although the Department has historically used a salary level threshold to determine whether a worker qualifies for the EAP exemption, the Department's "longstanding policy" is to set the salary level so as not to disqualify a substantial number of employees who work in an executive, administrative, and professional capacity from the EAP exemption. 84 Fed. Reg. 51238. "The salary level test's primary and modest purpose is to identify potentially exempt employees by screening out obviously nonexempt employees." *Id.*; *Nevada II*, 275 F. Supp. 3d. at 806 (quoting Harry Weiss, Report and Recommendations on Proposed Revisions of Regulations, Part 541, at 7–8 (1949)); 89 Fed. Reg. 32868 (2024 Rule) (Agreeing that the salary level test's function is to screen out obviously nonexempt employees.). Any salary level used should therefore "be somewhere near the lower end of the range of prevailing salaries for these employees." *Nevada II*, 275 F. Supp. 3d. at 806 (quoting Weiss Report, at 11–12); 69 Fed. Reg. 22171 (regarding the salary level for the 2004 Rule, the "Department believes that a $455 minimum salary level for exemption is consistent with

[2] Although the D.C. Circuit's cursory review of Section 213(a)(1) in *Prakash* upheld the Department's authority to use of a salary level, *Prakash* does not hold that the Department can use any salary level requirement it wants. *See Prakash.*,727 F.2d at 1177. In fact, the court's decision may have been prompted by the Appellees' refusal to defend the district court's ruling that a threshold weekly wage was inconsistent with the plain meaning of the Act. *Id.* at 1177–78 & n.20.

the Department's historical practice of looking to 'points near the lower end of the current range of salaries.'") (citation omitted). The salary test was also designed to reduce litigation and help furnish guidance in "borderline cases" when determining whether an employee qualified for the EAP exemption. 69 Fed. Reg. 22165; *see also* 84 Fed. Reg. 51237. In essence, the proper use of a salary level is to serve as a floor to screen out obviously nonexempt employees. *See* 84 Fed. Reg. 51237 (citing *Nevada II*, 275 F. Supp. 3d. at 806).

So, the Department has always recognized that salary levels alone cannot overtake Congress's and EAP exemption's focus on duties. 69 Fed. Reg. 22173 ("Congress rejected several statutory amendments during the FLSA's early history which would have established 'salary only' tests."); 81 Fed. Reg. 32446 ("the Secretary does not have the authority under the FLSA to adopt a 'salary only' test for the exemption."); 84 Fed. Reg. 51239 ("[T]he language of section 13(a)(1) precludes the Department from adopting a salary-only test because salary 'is not capacity in and of itself.'") (citations omitted). The use of a salary level that disqualifies whole swaths of workers based on salary alone without concern for their job duties "does not further the purpose of the Act, and is inconsistent with the salary level test's useful, but limited, role in defining the EAP exemption." 84 Fed. Reg. 51238.[3]

[3] Although ACSI is preserving for further review its claim that the Department's use of a salary level test (at any amount) exceeds its statutory authority, the cases upholding the use of a salary level have also recognized its limits. *See Walling,* 140 F.2d at 832 ("Obviously, the most pertinent test for determining whether one is a bona fide executive is the duties which he performs."); *Mayfield*, 2024 U.S. App. LEXIS 23145, at *14 (stating although a salary level test can be used as a permissible "proxy" if it "frequently yields different results than the characteristic Congress initially chose, then use of the proxy is not so much defining and delimiting the original statutory terms as replacing them.").

The Department's invalidated 2016 Rule illustrates how a large increase in salary level improperly supplants the analysis of an employee's job duties. The 2016 Rule increased the salary level from $455 per week ($23,660 annually) to $913 per week ($53,972 annually). 81 Fed. Reg. 32392. The result was that "4.2 million workers currently ineligible for overtime, and who fall below the minimum salary level, will automatically become eligible under the Final Rule without a change to their duties." *Nevada II*, F. Supp. 3d. at 806 (citing 81 Fed. Reg. 32405). Because the EAP exemption focuses on duties, the reviewing court ruled that the Department went beyond its statutory authority and Congress's intent by reclassifying millions of employees based only on their salary level and "thereby supplanting an analysis of an employee's job duties." *Id.* As the court explained: "Nothing in Section 213(a)(1) allows the Department to make salary rather than an employee's duties determinative of whether a 'bona fide executive, administrative, or professional capacity' employee should be exempt from overtime pay." *Id.* at 807. In all, although the Department might have authority to use a salary level as minimal screening floor, "it does not have the authority to use a salary-level test that will effectively eliminate the duties test as prescribed by Section 213(a)(1)." *Id.* at 805.

In promulgating the 2019 Rule, the Department admitted that in excluding 4.2 million workers "the 2016 final rule was in tension with the [FLSA] and with the Department's longstanding policy of setting a salary level that does not 'disqualify[] any substantial number of' bona fide executive, administrative, and professional employees from exemption." 84 Fed. Reg. 51238. The Department concluded that the 2016 Rule's result of reclassifying a substantial number of employees who worked in an EAP capacity was "inconsistent with the section 213(a)(1) exemption." *Id.* at 51241. "[T]he laudable goal of reducing misclassification cannot overtake the

statutory text, which grounds an analysis of exemption status in the capacity' in which someone is employed—i.e., that employee's duties." *Id*, at 51224. As creature of statute the Department must heed Congress's unambiguous command that the Department exempt from overtime pay "*any* employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1) (emphasis added). An increase in the salary level that excludes millions of workers who work in an EAP capacity, and who would otherwise qualify for the EAP exemption, is therefore beyond the Department's statutory authority.

b. The 2024 Rule's Reclassification of Millions of Employees Based on Salary Level Alone Far Exceeds Any Permissible Use of a Minimal Salary Level to Determine Whether an Employee Qualifies for the EAP Exemption

The 2024 Rule's exclusion of millions of employees from the EAP exemption based on salary levels alone is a return to a result similar to the invalidated 2016 Rule. The 2024 Rule increases the salary level from $684 per week ($35,568 annually) to $1,128 ($58,565 annually). 89 Fed. Reg. 32842. This increase is one of the largest in the Department's history. *Id*. at 32874. If the January 1, 2025, increase, using the 35th percentile methodology becomes effective, the Department estimates that a total of four million workers previously exempt will be disqualified from the EAP exemption purely based on a change in the salary level. *Id*. at 32882. What is more, under the 2024 Rule's automatic increases, the Department estimates that an additional one million workers will lose their exempt status by 2034 for a total of five million workers. *Id*. at 32891. Yet nothing about these employees' jobs has changed. Rather, they will simply lose their EAP exemption status purely based on the Department's increase in the salary level. Such a result is untethered to the text of Section 213(a)(1) and inconsistent with the historic function of the salary level test. *See Texas,* 2024 U.S. Dist. LEXIS 114902, at *27–28. The 2024 Rule, like the 2016 Rule,

"essentially make[s] an employee's duties, functions, or tasks irrelevant" for millions of employees and "fails to carry out Congress's unambiguous intent." *Nevada II*, 275 F. Supp. 3d. at 806–807. Accordingly, the 2024 Rule exceeds the Department's statutory authority.

Contrary to the Department's contention, it is the Department that "misses the mark" by not focusing on the number of employees who no longer are eligible for the EAP exemption based only on their salary level. *See* Defs' MSJ Opp., ECF No. 30, at 18. First, although the Department is correct that any salary level will necessarily exclude "some employees who might pass the duties test yet earn below the salary level" that proposition does not justify denying the EAP exemption to over four million employees who work in an EAP capacity. The text of Section 213(a)(1) is clear: "any employee" who works in an EAP capacity not "most' employees who meet the duties test (plus a salary threshold) or 'some' employees who meet the test (plus a salary threshold)" is eligible for the EAP exemption. *Texas*, 2024 U.S. Dist. LEXIS 114902, at *28. Moreover, the Department's reasoning is in tension with the Department's historic use of a salary level as a modest screening floor and understanding that the salary level should not "'disqualify[ ] any substantial number of' bona fide executive, administrative, and professional employees from exemption." 84. Fed. Reg. 51238 (citations omitted). As the Department's longstanding policy correctly recognizes, under the plain text of Section 213(a)(1), a salary level cannot substitute for the duties test for millions of employees. 5

Second, the Department downplays the number of employees potentially affected by the increase in the salary level. As a result of the 2024 Rule's increase, about 12.7 million (out of 45.4 million) salaried white-collar workers (28% of all white-collar employees) will earn below the 2024 Rule's salary level. *Id.* at 32879, 32898. The Department has no authority to categorically exclude

EAP exemption status to 12.7 million salaried white-collar workers without any inquiry into their job duties. *See Nevada II*, 275 F. Supp. 3d at 805. The result of the 2024 Rule is that in any individual assessment or adjudication to determine whether any one of these 12.7 million employees qualifies for the EAP exemption, the only inquiry is their salary level.[4] The 2024 Rule thus creates a "salary only" test for 12.7 million white-collar workers. But the Department has no authority under Section 213(a)(1) to increase salary levels which in effect creates a "salary only" test for the EAP exemption. *Nevada II,* 275 F. Supp. 3d at. 806; 81 Fed. Reg. 32446.

Last, the Department primarily defends the 2024 Rule's January 2025 increase to set the salary level at the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region, based on the purported soundness of the chosen methodology, not the end result of the rule. *See* Defs' MSJ Opp., ECF No. 30 at 15–19. But ACSI is not arguing that the 2024 Rule is "arbitrary and capricious." Instead, the issue in this case is whether reclassifying millions of EAP employees based on salary alone is consistent with Section 213(a)(1)'s focus on an employee's duties. Moreover, the Department's justification for the 2024 Rule, that it is attempting account to for the shift from a two-test system (the short and long tests) to a single-test system (the

[4] Although the Department estimates that four million employees out of the 12.7 million would pass the duties test, this estimate is not based on any data source that "identifies workers as EAP exempt." 89 Fed. Reg. 32898. As the Department admits, the data used in the 2024 Rule does "not capture information about job duties." *Id* at 32895. Therefore, the Department used "probability estimates of passing the duties test by occupational title to estimate the number of workers passing the duties test." *Id*. Thus, in any dispute regarding an employee's EAP exemption status, an individualized review of that employee's job duties is required to determine if the employee truly passes the duties test. Yet, under the 2024 Rule, 12.7 million salaried white-collar workers are automatically ineligible for the EAP exemption regardless of their job duties.

2004 Rule and onward), is the same reasoning that underlined the invalidated 2016 Rule. *See* 84 Fed. Reg. at 10908. To correct this "mismatch," the 2016 Rule, like the 2024 Rule:

> failed to account for the absence of a long test that employers could use to claim the exemption for lower-paid white-collar workers who were traditionally exempt. The Department's analysis did not sufficiently account for this change, and as a result, the $913 per week standard salary level deviated from the Department's longstanding policy of setting a salary level that does not "disqualify[ ] any substantial number of" bona fide executive, administrative, and professional employees from exemption

Id. at 10908.[5]

In any event, the fundamental problem with the 2024 Rule, like the 2016 Rule, is that "except at the relatively low levels of compensation where EAP employees are unlikely to be found, the salary level is not a substitute for an analysis of an employee's duties. It is, at most, an indicator of those duties." *Id*. The Department's desire to give overtime protection to more white-collar salaried employees (whether it's sound policy or not) who work in EAP capacity cannot supplant the statutory text. *See Ala. Ass'n of Realtors v. HHS,* 594 U.S. 758, 766 (2021) ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends."). At bottom, regardless of the reasoning, the use of a salary level cannot lawfully result in a situation whereby millions of employees who work in an EAP capacity are no longer eligible for the EAP exemption.

As a result of the January 1, 2025, increase, the 2024 Rule exceeds the historic screening function of the salary level test and creates a "salary only" test for millions of employees in violation of Section 213(a)(1). The Department therefore exceeded its statutory authority to "define and

[5] In addition, the reason that the 2004 Rule did not adopt the "short test's higher salary threshold after eliminating the long duties test" was because such an approach "would have departed from the historical role of using the salary level to screen out only obviously nonexempt employees and would have risked violating the statutory requirement to base EAP status on the 'capacity' in which the employee is employed." 84 Fed. Reg. at 51243 (citing 29 U.S.C. 213(a)(1)).

delimit" the EAP exemption and the 2024 Rule's January 1, 2025, increase of the salary level is unlawful and must be set aside. 5 U.S.C. § 706(2)(C).

c. The Major Questions and Nondelegation Doctrines Foreclose the Department's Assertion of Expansive Authority to set a Salary Level

Even assuming the Department has the authority and some discretion in choosing the amount of salary to set as the minimum salary level threshold, the Department cannot exercise its discretion in a way that intrudes into the lives of millions of individuals and employment relationships without clear congressional authorization. The major questions doctrine and nondelegation doctrine serve similar purposes in ensuring that when administrative agencies "seek to regulate the daily lives and liberties of millions of Americans," that they do so with explicit authority from Congress. *See Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 595 U.S. 109 (2022) (Gorsuch, J., concurring). There are 53.5 million white-collar salaried workers potentially eligible for the EAP exemption. 89 Fed. Reg 32898, Figure 2. In the 2024 Rule, the Department estimates that 29.7 million EAP exempt workers are "potentially affected" by the 2024 Rule. *Id*. Given the EAP exemption's potential to affect so many individuals and employment relationships, both the major questions and nondelegation doctrines shed light on the need to exercise caution when determining the boundaries of the Department's authority to set salary levels under Section 213(a)(1). *See Jennings v. Rodriguez*, 583 U.S. 281, 286, (2018) ("[W]hen statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems.").

Under the major questions doctrine, when an agency is "filling the gap" in statutory terms and regulating matters of "economic and political significance," "the agency must point to 'clear congressional authorization' for the power it claims." *West Virginia v. EPA*, 597 U.S. 697, 721–723

(2022) (citations omitted); *see also Util. Air Regulatory Grp.*, 573 U.S. at 326 ("Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always 'give effect to the unambiguously expressed intent of Congress.'"). The 2024 Rule and the authority to set salary levels for the EAP exemption have significant economic and political implications.[6]

First, not only does the 2024 Rule affect the rights and obligations of millions of individuals and businesses across the economy, 89 Fed. Reg. 32898, but it also imposes substantial monetary costs and transfers. *See* 89 Fed. Reg. 32900. Second, that the Department reviewed approximately 33,000 comments during the 2024 Rule highlights the Rule's political significance. ECF No. 30 at 15. Third, because the EAP exemption also applies to the States, it implicates matters of federalism. *See Nevada II*, 275 F. Supp. 3d at 802 (E.D. Tex. 2017) (discussing FLSA's application to the states); *Texas*, 2024 U.S. Dist. LEXIS 114902, at *28–43 (discussing the 2024 Rule's harms to the State of Texas).

Here, as discussed *supra* at Argument I.a., the EAP exemption in Section 213(a)(1) does not refer to the term "salary" and is unambiguously concerned with functional inquiries, i.e. an employee's duties, to determine whether the EAP exemption applies. Even if the Department has discretion to use salary levels as a screening floor for the EAP exemption, this authority cannot be used to supplant the statute's focus on duties. "Agencies have only those powers given to them by

[6] Although the Fifth Circuit held the 2019 Rule did not implicate major questions doctrine, the 2019 Rule only removed 1.2 million employees the EAP exemption (who would otherwise be exempt) and only imposed a cost of $472 million. *See Mayfield*, 2024 U.S. App. LEXIS 23145, at *8. The 2024 Rule in contrast, removes an estimated four million employees from the EAP exemption and excludes 12.7 million employees from any analysis of job duties. 89 Fed. Reg. 32898. The 2024 Rule also imposes more than twice the costs in first year at $1.4 billion and then further imposes 10-year annualized costs of $802.9 million per year. *Id.* at 32900. It also transfers $1.5 or $1.6 billion worth of income in the first year. *Id.* In short, the 2024 Rule's economic impact is much larger than the 2019 Rule's economic impact.

Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" *West Virginia*, 597 U.S. at 723 (2022) (citation omitted). Congress has not expressly authorized the use of salary of a level in such a manner that denies the EAP exemption to millions of employees who work in an EAP capacity. Given the wide-ranging effects of the 2024 Rule and the use of salary levels generally, the Department should therefore be limited in its authority to set salary levels higher than the low end of the salary range. *See id.* ("We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'") (citations omitted).

Like the major questions doctrine, the nondelegation doctrine "ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials" *Nat'l Fed'n of Indep. Bus.* 595 U.S. at 124 (Gorsuch, J., concurring). Congress must supply an intelligible principle for an agency to exercise delegated authority. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Although a proper reading of Section 213(a)(1) does provide for an intelligible principle with its focus on duties, the Department's construction of the statute, that it has wide latitude to set a salary level at almost any amount it wishes, lacks an intelligible principle. *See* Defs' MSJ Opp., ECF No. 30, at 12–15 (Department's discussion of its authority to use a salary level). The Court should reject an interpretation of Section 213(a)(1) that effectively gives the Department an open-ended grant of authority to set the salary level at higher amounts of compensation. *See Indus. Union Dep't, AFL-CIO v. API,* 448 U.S. 607, 646 (1980) (Favoring a construction of a statute that avoided an open-ended grant of the authority and a nondelegation problem and stating that such a "sweeping delegation of legislative power… might be unconstitutional under" the nondelegation doctrine).

In all, the major questions and nondelegation doctrines counsel in favor of interpreting the Department's authority to use a salary level under Section 213(a)(1) as a modest one. The Department's ability to set a salary level should not reclassify a substantial number of employees. Instead, it should remain at the lower end of the salary range to serve its purpose as a screening floor to identify obviously nonexempt employees. The 2024 Rule's increase in the salary level goes beyond this standard and therefore exceeds the boundaries of the Department's statutory authority.

II. The 2024 Rule's Automatic Update Mechanism Is Unlawful

a. The Department Has No Authority to Automatically Update and Increase the Salary Level

The Department's sweeping claim that its ability to "define and delimit" the terms "executive," "administrative," "professional," and "capacity" includes the authority to update the salary level threshold every three years without undergoing any rulemaking process is contrary to the text of Section 213(a)(1) and the Department's historic practice. Section 213(a)(1) is clear that the Department shall "define and delimit" the EAP exemption "from time to time," "subject to the provisions of the Administrative Procedure Act" through notice and comment rulemaking. *See also* 69 Fed. Reg. 22124 ("FLSA delegates to the Secretary of Labor the power to define and delimit the specific terms of these exemptions through notice-and-comment rulemaking."). The "from time to time" requirement highlights Congress's intent to update the EAP exemption in accordance with changing economic conditions. *Id.* Thus, "salary levels should be adjusted when wage survey data and other policy concerns support such a change." 69 Fed. Reg. 22171.

The Department's rendition of its own historic position regarding its authority to implement automatic increases to the salary level is inconsistent with the administrative record. *See* Defs' MSJ Opp., ECF No. 30 at 21 & n.6. First, the Department has admitted that while Congress

has provided automatic indexing to other statutes, "Congress has not adopted indexing for the Fair Labor Standards Act." 69 Fed. Reg. 22171. By extension, the Department found "nothing in the legislative or regulatory history that would support indexing or automatic increases." *Id*. Contrary to the Department's claim that the 2004 Rule was only concerned with an "inflation-based" mechanism in automatic updates, Defs' MSJ Opp., ECF No. 30, at 21, the worry about inflation was an additional practical concern distinct from the question of whether the Department had authority to implement automatic updating. *Id*. This should come as no surprise. The Department's current position that it has always had the authority to use automatic updating is striking when considering that the Department never attempted to use automatic updating for over seventy-five years. *See* 84 Fed. Reg. 51251. If the Department believes more frequent adjustments to the salary level are required, then the answer is to engage in more consistent and frequent rulemaking as required by Section 213(a)(1).

b. The 2024 Rule's Automatic Updating of the Salary Level Violates the Administrative Procedure Act's Notice and Comment Requirement

The Department's reasoning that the requirements of the APA, including notice and comment, do not apply to salary level increases that use the same methodology established in a previous rule underscores a fundamental misunderstanding of the APA. *See* Defs' MSJ Opp., ECF No. 30 at 21. First, the text of Section 213(a)(1) itself states that any regulation defining and delimiting the EAP exemption is "subject to the provisions of the Administrative Procedure Act." Second, any salary level increase constitutes a legislative rule that has the "force and effect of law," triggering the notice and comment requirement under the APA. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). And third, due to the importance of the APA's notice and comment provisions any exception to notice and comment is narrowly construed, and the

Department has failed to claim any valid exception. *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004).

Salary level increases dictate whether many employees are eligible for the EAP exemption. This in turn affects the rights and obligations of employees and employers. If an employee is no longer exempt, overtime pay is required and employers face civil and criminal penalties for non-compliance with the FLSA's overtime requirements. 29 U.S.C. § 216. A salary level increase thus imposes rights and obligations on individuals and is therefore a legislative rule. *GE v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002). Any agency action that has binding legal obligations without engaging in notice and comment "lacks legitimacy." *Shands Jacksonville Med. Ctr. v. Burwell,* 139 F. Supp. 3d 240, 268 (D.D.C. 2015). It is immaterial that the Department's proposed automatic salary increases use the same methodology as promulgated in the 2024 Rule or that the Department can engage in future rulemaking. An increase in the salary level has the force of law and notice and comment is mandated under the APA. 5 U.S.C. § 553.

The Department has cited no authority for the proposition that its authority under Section 213(a)(1) allows it to bypass the APA's notice and comment requirement. Likewise, the Department has not claimed any recognized exception to notice and comment requirement, nor could it. *See Am. Bus Asso. v. United States,* 627 F.2d 525, 528 (D.C. Cir. 1980). The APA's robust notice and comment provisions provide a whole host of benefits, but most importantly notice and comment serve as a democratic check on agency action. *See District of Columbia v. US Dep't Agric.*, 496 F. Supp. 3d 213, 228 (D.D.C. 2020). Because the 2024 Rule's automatic update mechanism does not provide for notice and comment under the APA, it is unlawful and must be set aside.

III. If Unlawful, the 2024 Rule's January 1, 2025, Salary Level Increase and the Automatic Update Provision Must be Set Aside and Vacated

The APA specifically authorizes courts to set aside and vacate unlawful agency rules. 5 U.S.C. § 706(2); *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2462 (2024) (Kavanaugh, J., concurring) ("The text and history of the APA authorize vacatur."). It is the law in this circuit that "'vacatur is the normal remedy' when a rule is found unlawful." *Am. Pub. Gas Ass'n v. United States DOE*, 72 F.4th 1324, 1342 (D.C. Cir. 2023) (citation omitted). As the D.C. Circuit has made clear, "when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated--not that their application to the individual petitioners is proscribed." *Nat'l Mining Ass'n v. United States Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (citing *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). Under D.C. Circuit precedent, unlawful portions of the 2024 Rule must therefore be set aside and vacated.[7]

The Department fails to cite any contravening case law from the D.C. Circuit that vacatur of unlawful agency action is unauthorized under the APA. Instead, the Department cites Justice Gorsuch's concurrence in *United States v. Texas*, 599 U.S. 670, 695 (2023) where he expressed skepticism on the practice of vacating unlawful rules under APA. Even so, the Supreme Court has never adopted this skepticism in binding case law and the issue is far from settled. For example, Justice Kavanaugh, when answering the question of whether the APA authorizes vacatur of unlawful agency actions, stated: "The answer is yes–in light of the text and history of the APA, the longstanding and settled precedent adhering to that text and history, and the radical consequences

[7] For purposes of relief, ACSI agrees with the Department to the extent that vacatur should be limited to the portions of the 2024 Rule that the Court determines unlawful.

for administrative law and individual liberty that would ensue if vacatur were suddenly no longer available." *Corner Post, Inc.* 144 S. Ct. at 2462 (Kavanaugh, J., concurring). The Department provides no basis to deviate from D.C. Circuit case law that vacatur is the normal remedy when agency action is unlawful under the APA.

Moreover, the traditional principles of equitable relief are inapplicable to judicial review under the APA. *Id.* at 2467.[8] "The text of § 706(2) directs federal courts to vacate agency actions in the same way that appellate courts vacate the judgments of trial courts." *Id.* (citing M. Sohoni, The Power to Vacate a Rule, 88 Geo. Wash. L. Rev. 1121, 1131-1134 (2020)). Nor is this case about ACSI's standing to sue on behalf of unrelated third parties. As an object of the 2024 Rule, ACSI plainly has standing (which the Department does not contest), and "[t]he meaning of 'set aside' in the APA cannot reasonably depend on the specific party before the court." *Id.* at 2469; *Harmon*, 878 F.2d at 495 n. 21 ("the ordinary result is that the rules are vacated -- not that their application to the individual petitioners is proscribed.").

In all, the Department fails to present any legal authority to warrant a departure from this Court's ordinary practice to set aside that unlawful agency actions under the APA. If the Court finds that the 2024 Rule's January 1, 2025, salary increase, and automatic update provision exceed the Department's statutory authority then the proper remedy is to set aside and vacate both portions of the 2024 Rule.

Even if the Court declines to vacate unlawful portions of the 2024 Rule, the salary level increase will not only affect ACSI, but many of its members schools as well. More than eighty of

[8] The Department's reliance on *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570 (2024) is misplaced. That case was not brought under the APA and dealt with preliminary injunctions in relation to the National Labor Relations Act. *Id.* at 1574.

ACSI's member schools are injured by the January 1, 2025, salary increase. *See* Declaration of Philip Scott, ¶ 3. An organization can assert associational standing on behalf of its members if: "(1) at least one of their members has standing to sue in her or his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of an individual member in the lawsuit." *Elec. Privacy Info. Ctr. v. United States DOC*, 928 F.3d 95, 101 (D.C. Cir. 2019). ACSI has collected around eighty-two impact statements from member schools that must reclassify employees based on the 2024 Rule's January 1, 2025, increase of the salary level threshold. *See*, *e.g.*, Declaration of Philip Scott, Exhibit A (member school Classical Christian School DBA Omega Academy).

Like ACSI itself, the member schools, as objects of the 2024 Rule, easily meet Article III's standing requirements. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The 2024 Rule caused their injuries and a judgment preventing enforcement of the 2024 Rule's January 1, 2025, salary increase would redress their injury. *Id.* The interests of its member schools that ACSI seeks to protect are germane to its purpose of offering a "wide range of services, including legal advocacy, support, training, and other resources to Christian schools and educators" ECF. No.1, at ¶ 7; Declaration of Philip Scott, ¶ 2. Moreover, ACSI's claim that the 2024 Rule exceeds the Department's statutory authority and its requested relief do not require the participation of any ACSI member school. ACSI can therefore assert associational standing on behalf of its members and requests that the scope of any relief also apply to its member schools.[9]

[9] If the Court is inclined to consider limited relief rather than vacating the unlawful portions of the 2024 Rule, ACSI requests an opportunity for supplemental briefing on the scope of relief in the event that judgment is rendered in ACSI's favor.

CONCLUSION

This Court should grant ACSI's Motion for Summary Judgment and deny Defendants' Cross-Motion for Summary Judgment.

Dated: October 8, 2024.

Respectfully submitted,

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