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.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Association of Christian Schools International (ACSI) is a non-profit that serves over 2,300 member schools in the United States to ensure that students receive the highest quality Christian education. ACSI challenges a 2024 Department of Labor Overtime Rule ("the 2024 Rule" or "the Overtime Rule") that would reclassify some four million salaried workers and make them eligible for overtime pay under the Fair Labor Standards Act (FLSA). The 2024 Rule hinders ACSI's mission to provide the best education for Christian students. In a matter of months, the

Rule will force ACSI and its member schools to reclassify employees, incur added labor costs, and deprive workers of the flexibility they previously enjoyed as exempt employees. To make matters worse, the 2024 Rule calls for the automatic updating of the salary requirement every three years. These increases will further increase costs and divert resources from where they belong: the students.

The 2024 Rule is unlawful for three reasons. *First*, the 2024 Rule's dramatic increase in the salary level improperly supplants the focus on an employee's job functions and duties. *See Nevada v. U.S. Dep't of Labor*, 275 F. Supp. 3d 795, 806 (E.D. Tex. 2017). *Second*, under the plain text of the FLSA, the Department has no statutory authority to reclassify employees based on their salary level rather than their job functions or duties. *Third*, the Rule is also unlawful because it updates this salary level test every three years without providing notice and comment as required by the Administrative Procedure Act (APA). This Court should grant ACSI's Motion for Summary Judgment.

STATEMENT OF FACTS

I. The Department of Labor's 2024 Overtime Rule

a. Background of the FLSA

Enacted in 1938, the FLSA establishes overtime pay requirements affecting employees engaged in commerce. *See* 29 U.S.C. § 206. Covered employers who fail to abide by those requirements are subject to civil liability and criminal penalties. *See id.* § 216. The FLSA contains numerous exemptions to the overtime pay requirement. As relevant here, the EAP exemption exempts "any employee employed in a bona fide executive, administrative, or professional

capacity" from overtime pay, 29 U.S.C. § 213(a)(1), and delegates to the Secretary of Labor the task of "defin[ing] and delimit[ing]" these terms from "time to time." *Id.*

Since 1940, the Department's regulations have generally required employers to satisfy three factors before claiming the EAP exemption for their employees. The employer must satisfy a duties test, which requires it to show that an employee's duties primarily involve executive, administrative, or professional duties, and a salary basis test, which requires the employer to show that it pays the employee a fixed salary that isn't subject to reduction because of variations in the quality or quantity of work performed. 89 Fed. Reg. 32844 (Final 2024 Rule). As relevant here, although Section 213(a)(1) does not use the term "salary" or "compensation," 88 Fed. Reg. 62152 (Proposed 2024 Rule), the employer must also satisfy a salary level test, which requires the employer to pay the employee at or above a minimum specified amount to claim the EAP exemption. 89 Fed. Reg. 32844.

The Department has long maintained that the EAP exemption hinges on "the performance of specific duties." *See* 69 Fed. Reg. 22173 (2004 Rule). In 1949, the Department adopted two tests that examined an employee's duties in conjunction with salary level to determine whether the employee qualified for the EAP exemption. *See* 88 Fed. Reg. 62155 (adopting the "long test," which paired a lower earnings threshold with a more rigorous duties test, and the "short test," which paired a higher salary level and a less rigorous duties test).

b. The EAP Exemption and the Salary Level from 2004 to 2019

In 2004, the Department eliminated the "long" and "short" tests and adopted a single test for determining whether an employee qualified for the EAP exemption. *See* 88 Fed. Reg. 62155. The 2004 Rule set a single minimum salary level for employees to be eligible for the EAP

exemption. *Id*. The minimum salary required to qualify for the EAP exemption, regardless of the employee's duties or functions, was $455 per week ($23,660 annually). *Id*. The Department based this salary level on the 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South). *Id*.

In 2016, the Department increased the salary level to $913 per week ($47,476 annually). *Id*. at 62156. The Department arrived at this number by setting the salary level at the 40th percentile (rather than the 20th percentile) of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South). *Id*. The 2016 Rule also added a mechanism to automatically increase the salary level every three years. *Id*. Under the 2016 Rule, 4.2 million employees would have been reclassified as nonexempt employees based purely on the increase in the salary level. 81 Fed. Reg. 32405 (2016 Rule). The U.S. District Court for the Eastern District of Texas preliminary enjoined the 2016 Rule and then issued a summary judgment order holding that the 2016 Rule's salary level and automatic updating mechanism exceeded the Department's statutory authority under the FLSA and were unlawful. *See Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 534 (E.D. Tex. 2016) (*Nevada I*); *Nevada v. U.S. Dep't of Labor*, 275 F. Supp. 3d 795, 808 (E.D. Tex. 2017) (*Nevada II*).

In 2019, the Department raised the salary level from $455 to $684 per week ($35,568 annually) using the same methodology as the 2004 Rule (20th percentile of weekly earnings in the lowest wage region). 88 Fed. Reg. 62156. In promulgating the 2019 Rule, the Department acknowledged that the 2016 Rule was excessive and that the salary level test cannot overtake the statutory text of the FLSA, "which grounds an analysis of exemption status in the 'capacity' in which someone is employed—i.e., that employee's duties." *See* 84 Fed. Reg. 51244 (2019 Rule).

c. The 2024 Final Overtime Rule

On September 8, 2023, the Department announced rulemaking to further increase the salary level to determine if an employee is eligible for the EAP exemption. 88 Fed. Reg. 62152. On April 26, 2024, the Department issued its final rule. 89 Fed. Reg. 32842. The 2024 Rule encompasses two salary level increases: an initial increase on July 1, 2024, and a second increase on January 1, 2025. *Id.* at 32843. The initial increase applies the methodology the Department used in its 2004 Rule (20th percentile of weekly earnings in the lowest wage region) to increase the salary level from $684 to $844 per week ($43,888 annually). *Id.* The second increase, which will take place on January 1, 2025, will set the salary level at the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region resulting in a salary level of $1,128 per week ($58,656 annually). *Id.* at 32842. The January 2025 increase under the 2024 Rule is a 65 percent increase from the salary level in the 2019 Rule. *Id.* at 32874. According to the Department, the 2024 Rule calls for one of the largest percentage increases of the salary level threshold in the Department's history. *Id.* In total, under the 2024 Rule, four million previously exempt workers will be disqualified from the EAP exemption based on their salary level alone. *Id.* at 32891, 32900.

The 2024 Rule also includes a mechanism to automatically increase the salary level every three years starting from July 1, 2024. *Id.* at 32848. The Department estimates that an additional one million employees will lose their eligibility for the EAP exemption by 2034 due to the Rule's automatic update mechanism. *Id.* at 32891. Thus, the Department projects that five million employees will no longer be eligible for the EAP exemption by 2034. *Id.*

For each affected worker under the 2024 Rule, employers "will need to decide whether they will increase their salary, adjust their hours, or some combination of the two." *Id.* at 32909.

As a result of the wide-reaching effects of the 2024 Rule, the Department garnered many comments from businesses, associations, and non-profits who objected to the scope and size of the 2024 Rule's salary level update and expressed concerns that the 2024 Rule would have negative effects for both businesses and workers. *See id.* at 32867, 32872, 32876–77. One of those comments came from ACSI, which objected that the Rule's sizeable increase in the salary level will "shrink[] or limit[] their operational capacity, exacerbate financial burdens, and harm[] the academic efforts of the schools." Comment from ACSI, WHD-2023-0001-26289.

II. The 2024 Rule's Effect on ACSI

ACSI is a non-profit organization whose mission is to strengthen and equip Christian schools and educators. Verified Complaint ¶¶ 1, 7. As the largest Protestant school association in the world, ACSI provides its services to thousands of Christian schools and Christian educators worldwide. *Id.* The 2024 Rule's January 1, 2025, increase in salary level will force ACSI and some of its member schools to reclassify currently exempt employees to non-exempt status. *See id.* ¶¶ 43–46. The 2024 Rule thus forces ACSI to incur added labor costs or limit the number of hours that newly non-exempt employees may work. *See id.* The 2024 Rule also saddles ACSI with additional compliance costs and hampers its ability to manage an effective workforce. *Id.* ¶¶ 49–50.

STANDARD OF REVIEW

In cases involving judicial review of final agency action, the standard of review for summary judgment "set forth in Rule 56(a) does not apply because of the limited role of a court in reviewing the administrative record." *Kadi v. Geithner*, 42 F. Supp. 3d 1, 8 (D.D.C. 2012). Instead, the role of a district court "is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Id.* at 8–9. (citations omitted). In effect,

"when a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The entire case on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (2001) (internal citations and quotation marks omitted).

ARGUMENT

I. The 2024 Rule's Use of and Increase of the Salary Level Requirement Exceeds the Department's Authority under the FLSA

The FLSA exempts from overtime pay requirements "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Although Section 213(a)(1) confers authority to the Department to "define and delimit" the terms "bona fide executive, administrative, or professional capacity," the plain text of the statute makes no mention of "salary" or "compensation." 81 Fed. Reg. 32431 (Department's acknowledgment that there is no "specific Congressional authorization" for its salary level requirement).

Yet, as a creature of statute, the Department "possess[es] only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 665 (2022). Nothing in the text of Section 213(a)(1) grants the Department authority to determine which employees qualify for the EAP exemption based on the amount of money an employee is paid. As Justice Kavanaugh has recently remarked:

> The Act 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.

Helix Energy Sols. Grp., Inc. v. Hewitt, 598 U.S. 39, 67 (2023) (Kavanaugh, J., dissenting).

The Department's 2024 Rule denying EAP exemption status to all employees who make

less than $1,128 per week ($58,656 annually), regardless of their duties performed in the scope of their employment, is inconsistent with the text of the FLSA and exceeds the Department's authority for three reasons. First, the 2024 Rule's salary level improperly supplants the EAP exemption's focus on an employee's duties and denies the EAP exemption to millions of employees who work in "bona fide executive, administrative, or professional capacit[ies]." Second, the 2024 Rule is inconsistent with the plain text of the EAP exemption, which does not give the Department the authority to base EAP exemption status on an employee's salary level.[1] Third, the structure of the FLSA confirms that if Congress wanted the Department to impose salary requirements, it could have easily said so.

a. The 2024 Rule's Reclassification of Millions of Employees Who Work in an Executive, Administrative, or Professional Capacity Improperly Supplants the EAP Exemption's Focus on Duties

The 2024 Rule suffers the same fatal flaw as the invalidated 2016 Rule: it effectively eliminates the focus on duties prescribed by Section 213(a)(1) and categorically disqualifies four million employees who work in "bona fide executive, administrative, or professional" capacities based on salary alone. *See Nevada II*, 275 F. Supp. 3d at 805. Historically, the Department has used modest minimal salary levels to "screen out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary." *Id*. at 806 (quoting *Harry Weiss, Report and Recommendations on Proposed Revisions of Regulations*, Part 541, at 7–8 (1949)) (stating that the salary level should be near the lower end of the range of prevailing salaries for these employees). At the

[1]The D.C. Circuit has previously upheld the Department's use of a salary level requirement for the EAP exemption in *Prakash v. American Univ.*, 727 F.2d 1174, 1177 (D.C. Cir. 1984). The Court's cursory examination of the issue in that case led to its reaching a decision that is contrary to the plain text of the FLSA. Plaintiff therefore raises the issue in this Motion to preserve it for further review.

same time, the Department has always maintained that an employee's duties are the primary focus in determining whether an employee qualifies for the EAP exemption. 69 Fed. Reg. 22173 ("The Department 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."); 84 Fed. Reg. 51244 ("the 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."); 89 Fed. Reg. 32897 (recognizing that salary level "should not eclipse the duties test"). Yet the 2024 Rule, like the 2016 Rule, effectively sets a de facto "salary level only test" and "exclude[s] those who perform 'bona fide executive, administrative, or professional capacity' duties based on salary level alone." *Nevada II*, 275 F. Supp. 3d at 806; 81 Fed. Reg. 32446 (The Department acknowledged in the 2016 Rule that "the Secretary does not have the authority under the FLSA to adopt a 'salary only' test for the exemption.").

The 2024 Rule's increase in salary level from $684 per week ($35,568 annually) to $1,128 ($58,565 annually) will result in the reclassification of roughly four million employees who were previously entitled to the EAP exemption. 89 Fed. Reg. 32891. The result of the 2024 Rule is essentially the same as the invalidated 2016 Rule. The 2016 Rule increased the salary level from $455 per week ($23,660 annually) to $913 per week ($53,972 annually). *Nevada II*, 275 F. Supp. 3d at 799. The Department estimated that under the 2016 Rule, "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." *Id.* at 806 (citing 81 Fed. Reg. 32405). The court concluded that "[b]ecause the Final Rule would exclude so many employees

who perform exempt duties, the Department fail[ed] to carry out Congress's unambiguous intent" *Id*. at 207.

So too here. Under the 2024 Rule, "entire categories of previously exempt employees who perform bona fide executive, administrative, or professional capacity duties" will no longer qualify for the "EAP exemption based on salary alone." *Id*. at 806. While the Department claims that using the 35th percentile rather than the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region saves the 2024 Rule, 89 Fed. Reg. 32854, it is hard to imagine that the district court in *Nevada II* would have changed its holding if only the 2016 Rule affected four million rather than 4.2 million employees. What is more, under the 2024 Rule's automatic increase mechanism, the Department estimates that five million employees will be ineligible for the EAP exemption by 2034. 89 Fed. Reg. 32891. The 2024 Rule's increase in the salary level, just like the 2016 Rule's increase, "essentially make[s] an employee's duties, functions, or tasks irrelevant if the employee's salary falls below the new minimum salary level." *Nevada II*, 275 F. Supp. 3d at 806. The 2024 Rule's increase in salary level therefore exceeds the Department's statutory authority.

b. The Plain Text of Section 213(a)(1) of the FLSA Precludes the Department from Disqualifying EAP Employees Based on a Minimum Salary Level

The EAP exemption unambiguously states that the overtime pay requirement of the FLSA does not apply to "*any* employee employed in a bona fide executive, administrative, or professional *capacity*." 29 U.S.C. § 213(a)(1) (emphasis added). The EAP exemption listed in Section 213(a)(1) is "as much a part of the FLSA's purpose as the overtime-pay requirement" and must be given a "fair reading." *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 89 (2018). Although Congress did not explicitly define the terms "executive," "administrative," or "professional" in Section

213(a)(1), courts "must interpret the statutory text 'consistent with [its] ordinary meaning at the time Congress enacted the statute,'" *Earthworks v. United States DOI*, 105 F.4th 449, 466 (D.C. Cir. 2024). "Contemporary meaning is determined by referencing dictionaries published around the time of enactment." *Fair Lines Am. Found. Inc. v. United States DOC*, 619 F. Supp. 3d 212, 220 (D.D.C. 2022) (citing *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 434 (2019)). If the meaning of a statute's terms is plain and unambiguous, the analysis ends. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 673 (2020).[2]

First, while Section 213(a)(1) confers authority to the Department to "define and delimit" the terms "bona fide executive, administrative, or professional capacity," there is no mention of salary or compensation in the plain text of Section 213(a)(1). Rather, Section 213(a)(1) states that it is "capacity," i.e. the duties or function of the work an employee performs, that qualifies an employee for the EAP exemption. As the Supreme Court has already established, "capacity" in Section 213(a)(1) "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) (determining whether pharmaceutical sales representatives were "outside salesman" under Section 213(a)(1) and thus exempt from FLSA's overtime requirements). The fact that Section 213(a)(1) states that employees

[2] The Supreme Court has just overruled its earlier decision in *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Thus, even if Section 213(a)(1) is ambiguous, the Department no longer receives deference when interpreting the EAP exemption. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (Courts "may not defer to an agency interpretation of the law simply because a statute is ambiguous."). In fact, without the benefit of *Chevron* deference, the Department has now lost an argument it has relied on in previous litigation defending the salary level test. *See Mayfield v. United States DOL,* No. 1:22-cv-792-RP, 2023 U.S. Dist. LEXIS 168054, at *15 (W.D. Tex. Sep. 20, 2023).

"employed in a bona fide executive, administrative, or professional *capacity*," rather than mentioning salary or compensation demonstrates that Congress was concerned with an employee's function or duties rather than an employee's salary level.

Second, the dictionary definitions at the time the FLSA was enacted also support the conclusion that the "plain meanings of executive, administrative, and professional capacity relate to a person's performance, conduct, or function." *Nevada II*, 275 F. Supp. 3d at 804. "Executive" under the Oxford English Dictionary was defined "as someone '[c]apable of performance; operative . . . [a]ctive in execution, energetic . . . [a]pt or skillful in execution.'" *Id.* (quoting *Executive*, 8 The Oxford English Dictionary (1st ed. 1933)). "'Administrative' was defined as '[p]ertaining to, or dealing with, the conduct or management of affairs; executive.'" *Id.* (quoting *Administrative*, 1 The Oxford English Dictionary (1st ed. 1933)). Professional was defined as "[p]ertaining to, proper to, or connected with a or one's profession or calling . . . [e]ngaged in one of the learned or skilled professions . . . [t]hat follows an occupation as his (or her) profession, life-work, or means of livelihood." *Id.* (quoting *Professional*, 8 The Oxford English Dictionary (1st ed. Supp. 1933)). As the dictionary definitions demonstrate, "executive," "administrative," and "professional" are defined in functional terms. Read in conjunction with the statute, it is clear that "Congress defined the EAP exemption with regard to duties" *Nevada II*, 275 F. Supp. 3d at 805.

Although the Department has authority to "define and delimit" the terms "executive," "administrative," or "professional," 29 U.S.C. § 213(a)(1), this authority must be tethered to the statutory text which focuses on duties, not salary requirements.[3] "Nothing in the EAP exemption

[3] The Fifth Circuit recently employed an overly broad view of the Department's authority to "define and delimit" the EAP exemption. *See Mayfield v. United States DOL*, No. 23-50724, 2024 U.S. App. LEXIS 23145, at *11 (5th Cir. Sep. 11, 2024). *Mayfield* is not binding on this Court and

indicates that Congress intended the Department to define and delimit with respect to a minimum salary level." *Nevada I*, 218 F. Supp. 3d at 530. Congress, in providing the Department the authority to "define and delimit" the EAP exemption, merely authorized the Department to clarify what type of duties or functions an employee must perform to qualify for the EAP exemption. *Nevada II*, 275 F. Supp. 3d at 805.

Nonetheless, the Department's salary level requirement disqualifies, from the EAP exemption, millions of employees in executive, administrative, and professional roles. By the Department's own count, there are nearly five million employees that the salary level test disqualifies from the EAP exemption, including roughly four million employees who were disqualified because of the substantial increase in salary level from the 2019 Rule to the 2024 Rule. *See* 89 Fed. Reg. 32880–82. All this contradicts the statutory text, which exempts *any employee* who works in an EAP capacity from the overtime pay requirement. 29 U.S.C. § 213(a)(1).

Perhaps recognizing that the text of the EAP exemption focuses on duties instead of salary level, the Department primarily justifies its use of a salary level test on its longstanding use of that test. *See* 89 Fed. Reg. 32845. But the Department cannot insulate itself from the unambiguous text of the EAP exemption merely because the Department has used salary level requirements in the past. Entrenched executive error is still an error and subject to judicial review. *Rapanos v. United States*, 547 U.S. 715, 752 (2006); *see also Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 746 (6th Cir. 2012) ("an agency may not insulate itself from correction merely because it has not been corrected

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overlooked the key statutory command in Section 213(a) that *any* employee employed in an EAP *capacity* qualifies for the EAP exemption. 29 U.S.C. § 213(a)(1). Under the logic in *Mayfield*, an employee who undisputedly works in an EAP capacity, but makes under a certain salary level, would be ineligible for the EAP exemption. Such a result is contrary to the plain text of Section 213(a) which focuses on an employee's duties. *See Helix,* 598 U.S. at 67 (Kavanaugh, J., dissenting).

soon enough, for a longstanding error is still an error."). In a similar vein, the fact that Congress has not amended Section 213(a)(1) after the Department implemented the use of salary levels does not shield the statutory text from judicial review. *See Rapanos*, 547 U.S. at 752; *United States v. Craft*, 535 U.S. 274, 287 (2002) ("Congressional inaction lacks persuasive significance"). Congress "says in a statute what it means and means in a statute what it says there." *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992). The text of the EAP exemption is clear. It states that *any* employee working in an executive, administrative, or professional *capacity* is eligible for the EAP exemption. 29 U.S.C. § 213(a)(1). The 2024 Rule's use of a salary level to determine eligibility for the EAP exemption is thus unlawful.

c. The Structure of The FLSA Confirms that the EAP Exemption Is Conditioned on Duties Not Salary Level Requirements

The structure of the FLSA further supports the conclusion that eligibility for the EAP exemption must be based on duties rather than salary level. Section 213(a) contains a long list of exemptions that are consistently defined with reference to duties, specific trades and occupations, or certain types of employment. *See* 29 U.S.C. § 213(a)(1)–(19). The term "salary" is used in Section 213(a)(19), which states that a baseball player must be paid a salary level equal to or greater than what they would be earning if working "40 hours" a week at "minimum wage" before he may be exempted from the overtime pay requirement. The fact that Congress used the term "salary" concerning baseball players and did not include the term salary concerning employees in the EAP exemption demonstrates that Congress never intended to impose salary level requirements on EAP employees. *Russello v. United States*, 464 U.S. 16, 23 (1983) (When Congress uses a word in one section of a statute, but not another, it is presumed Congress acted purposefully). Any contrary construction would also violate the statutory canon of *expressio unius est exclusio alterius* "mention

of one thing implies the exclusion of another thing." *Halverson v. Slater*, 129 F.3d 180, 185 (1997) (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1061 (1995)) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.") (citations omitted).

Moreover, nothing in Section 213(a)(1) provides the Department with any guidance or criteria on how to determine what level of compensation is required to qualify for the EAP exemption. In fact, the one exemption that mentions salary provides a formula to determine whether a baseball player's compensation warrants an exemption. 29 U.S.C. § 213(a)(19). Congress was thus capable of providing guidance for salary requirements. Moreover, one would expect Congress to give clear instructions on whether or how to set salary level requirements for the EAP exemption given the political and economic significance of such a policy. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2608–09 (2022). The major questions doctrine cautions against an assumption that the Department has the authority to set salary levels, particularly when the text of Section 213(a)(1) is silent on salary and focuses on an employee's duties. *Id.*

Similarly, a reading of Section 213(a)(1) that grants the Department unfettered discretion to determine what amount of salary qualifies an employee for the EAP exemption, without regard to the employee's duties, would raise constitutional and separation-of-power concerns, including a nondelegation problem. *See Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 646 (1980); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr.*, 485 U.S. 568, 575 (1988) (courts must construe statutes to avoid serious constitutional problems unless such construction is plainly contrary to Congress's intent). Here, Section 213(a)(1) provides no standards for the Department to cabin its discretion in determining whether millions of employees are eligible for the EAP exemption based on salary levels. *See Panama Refin. Co. v. Ryan*, 293 U.S. 388, 418–19 (1935).

In all, this Court should hold that the 2024 Rule far exceeds any permissible use of salary level as a minimal screening function and a court in later proceedings should hold that the plain text of the FLSA precludes the Department from using salary at all in determining whether an employee qualifies for the EAP exemption. Either way, the 2024 Rule exceeds the Department's statutory authority and must be set aside. 5 U.S.C. § 706(2)(C).

II. The 2024 Rule's Automatic Increase Mechanism is Unlawful

a. The Department Lacks Statutory Authority to Automatically Increase Salary Levels

Neither Section 213(a)(1) nor any other section of the FLSA gives the Department authority to create an index provision that automatically increases the salary level every three years. *See* 89 Fed. Reg. 32973. As discussed above, not only is the 2024 Rule's use and increase of the salary level requirement unlawful, but the Rule's automatic update mechanism also exceeds the Department's statutory authority. Section 213(a)(1) states that the Department shall "define and delimit" what constitutes EAP duties from "time to time." Congress's inclusion of the phrase "time to time" shows that Congress intended for the Department to define and delimit the EAP exemption in real time based on changes to economic conditions rather than use an automatic index system every three years without regard to current economic conditions or other policy concerns. *See* 69 Fed. Reg. 22124, 22171 (stating that the underpinning of the "time to time" requirement is to require the Department to reexamine and update the EAP exemption and that salary levels should be adjusted when wage survey data and other policy concerns support such a change).

There is no textual indication in the FLSA that Congress intended for a minimum salary level to be indexed every three years. As the Department has recognized, "[a]lthough an automatic indexing mechanism has been adopted under some other statutes, Congress has not adopted

indexing for the Fair Labor Standards Act." *Id*. at 22171. This is precisely why the Department has historically held the view "that adopting such approaches in this rulemaking is both contrary to congressional intent and inappropriate." *Id*. at 22172 (referring to a proposal to create an automatic update mechanism). "[T]he Department finds nothing in the legislative or regulatory history that would support indexing or automatic increases." *Id*. at 22171. In short, there is no statutory authority for the Department to create an index system and automatically increase the salary level requirement every three years.

b. The Automatic Update Mechanism Violates the APA's Notice and Comment Rulemaking Requirement

The 2024 Rule's automatic updating provision explicitly states that the Secretary will determine future salary level increases every three years without undergoing notice and comment rulemaking. 89 Fed. Reg. 32973. Nevertheless, agencies must comply with the APA before promulgating regulations with the force of law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979). "'[T]he [APA] requires agencies to afford notice of a proposed rulemaking and an opportunity for public comment prior to a rule's promulgation, amendment, modification, or repeal.'" *Liquid Energy Pipeline Ass'n v. FERC*, 109 F.4th 543 (D.C. Cir. 2024).

The 2024 Rule is a legislative rule that "purports to impose legally binding obligations or prohibitions on regulated parties — and that would be the basis for an enforcement action for violations of those obligations or requirements." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). As stated above, the Rule's salary level increase determines whether millions of Americans are eligible for the EAP exemption. The Rule also places new burdens on employers that must reclassify their employees or face civil and criminal penalties for non-compliance. 29 U.S.C. § 216. Because the 2024 Rule's automatic updating mechanism is a legislative rule, the

Department's insistence on automatically increasing the salary level threshold without notice and comment violates the APA and must be set aside.

CONCLUSION

For these reasons, this Court should grant Plaintiff's Motion for Summary Judgment.

Dated: September 17, 2024.

Respectfully submitted,

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