No. 16-41606

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF NEVADA; STATE OF TEXAS; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF NEBRASKA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF UTAH; STATE OF WISCONSIN; COMMONWEALTH OF KENTUCKY, by and through Governor Matthew G. Bevin; TERRY E. BRANSTAD, Governor of the State of Iowa; PAUL LEPAGE, Governor of the State of Maine; SUSANA MARTINEZ, Governor of the State of New Mexico; PHIL BRYANT, Governor of the State of Mississippi; ATTORNEY GENERAL BILL SCHUETTE, on behalf of the people of Michigan,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, DEPARTMENT OF LABOR, In his official capacity as Secretary of Labor; WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR; MARY ZIEGLER, in her official capacity as Assistant Administrator for Policy of the Wage and Hour Division; DOCTOR DAVID WEIL, in his official capacity as Administrator of the Wage and Hour Division,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Texas

REPLY BRIEF FOR APPELLANTS

Of Counsel:
NICHOLAS C. GEALE
Acting Solicitor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

STEVEN W. GARDINER
Senior Attorney

ERIN M. MOHAN
Attorney
U.S. Department of Labor

CHAD A. READLER
Acting Assistant Attorney General

BRIT FEATHERSTON
Acting United States Attorney

MICHAEL S. RAAB
ALISA B. KLEIN
Attorneys, Appellate Staff
Civil Division, Room 7235
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-1597
Alisa.klein@usdoj.gov

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INTRODUCTION AND SUMMARY

I. For more than 75 years, regulations issued by the Department of Labor have used a three-part test to identify workers who are employed in a "bona fide executive, administrative, or professional capacity" and thus exempt from the minimum wage and overtime pay protections of the Fair Labor Standards Act ("FLSA"). *See* 29 U.S.C. § 213(a)(1). To be subject to this "EAP" exemption, a worker must (1) be paid on a salary basis; (2) earn a specified salary level; and (3) satisfy a duties test. *See* 29 C.F.R. pt. 541.

In enjoining the 2016 rule, the district court reasoned that the salary-level component of this three-part test is unlawful. It concluded that "Congress defined the EAP exemption with regard to duties, which does not include a minimum salary level," ROA.3817, and that the statute "does not grant the Department the authority to utilize a salary-level test," ROA.3825. As our opening brief explained (at 19), that reasoning would apply to *all* prior versions of the salary-level test, including the salary level set by the 2004 regulations that the 2016 rule replaced.

Although plaintiffs defend the district court's broad reasoning, they offer no basis to call into question a regulatory test that has been in place since the FLSA's inception. Their argument is foreclosed by this Court's decision in *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603 (5th Cir. 1966), which expressly upheld the Department's use of a salary-level test. Contrary to plaintiffs' suggestion, this Court

in *Wirtz* did not ignore the statutory text. Writing for this Court, then-Judge Warren Burger rejected the textual argument that plaintiffs make here. Whereas plaintiffs argue that an employee's salary level *is not* "a natural and admissible attribute of the term 'bona fide executive and administrative * * * capacity,'" Pl. Br. 30, Judge Burger concluded that an employee's salary level *is* "rationally related to the determination of whether an employee is employed in a 'bona fide executive * * * capacity,'" and that the salary-level test is thus a permissible exercise of the Department's "broad latitude to 'define and delimit'" the exemption's terms. *Wirtz*, 364 F.2d. at 608 (quoting 29 U.S.C. § 213(a)(1)). As our opening brief explained (at 21-29), that holding has ample support in the text, purpose, and history of the EAP exemption, and Congress acquiesced in the Department's approach by amending the EAP exemption without altering the Department's regulations.

Plaintiffs incorrectly state that before 2016, the salary level was "set so low as to be inconsequential." Pl. Br. 4. *Wirtz* itself involved employees who met the duties test then in place, but whose salaries were below the level that was in effect at the time. 364 F.2d at 607. And in the 2004 regulations, the Department made "the largest increase of the salary levels in the 65-year history of the FLSA." 69 Fed. Reg. 22122 (Apr. 23, 2004). As a result of that 2004 increase, 1.3 million white-collar workers who were exempt under the previous regulations gained FLSA protection, *id.* at 22123, a result that was not inconsequential.

The amicus brief filed by business associations rejects plaintiffs' broad contention that the FLSA precludes use of *any* salary-level test in the EAP regulations. *See* Business Assoc. Amicus Brief 10-11. In the 2016 rulemaking, most business groups supported an increase in the salary level that had been in place since 2004. *See*, *e.g.*, Small Business Association ("SBA") Comment at 10 (Add. 10) (indicating that "small businesses support a modest increase in the salary threshold under the 'white collar' FLSA exemption"); National Restaurant Association ("NRA") Comment at 9 (Add. 19) ("To be clear, we do support raising the salary threshold.").[1] The business associations object to the particular salary level ($913 per week) set by the 2016 regulations and to the particular methodology used to arrive at that amount. The district court did not address those specific objections, however, and this Court likewise should not do so. This Court should simply lift the cloud created by the district court's broad reasoning, which would call into question *any* salary-level test adopted by the Department.

II. The district court correctly held that plaintiffs' Tenth Amendment claim is foreclosed by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which held that the FLSA is constitutional as applied to state and local government employers. Plaintiffs' alternative contention that the FLSA unconstitutionally

[1] For the convenience of the Court, excerpts from the rulemaking comments cited in this reply brief were reproduced in an addendum to this brief. However, the addendum was not accepted by the Clerk's office. *See* Letter of July 6, 2017. We are prepared to submit the addendum at the Court's request.

delegates legislative power to the Department rests on the incorrect premise that the Department claimed "unconstrained" power to define and delimit the EAP exemption's scope. Pl. Br. 44. The Department made no such claim; instead, it determined that salary level is a relevant consideration in determining whether a worker is employed in a "bona fide executive, administrative, or professional capacity." The historical record demonstrates "surprisingly wide agreement" on that point among employers and employees alike. 1940 Stein Report 19 (ROA.1567).

ARGUMENT

I. Plaintiffs Provide No Basis To Overturn The Regulatory Test That Has Been Used Since The Inception Of The FLSA.

A. Plaintiffs' Statutory Argument Is Foreclosed by This Court's Decision in *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603 (5th Cir. 1966).

1. Section 13(a) of the FLSA exempts from the Act's minimum wage 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 [of Labor])." 29 U.S.C. § 213(a)(1). Since 1938, the Department's implementing regulations have relied in part on a salary-level test to identify workers who are "employed in a bona fide executive, administrative, or professional capacity."

In enjoining the 2016 rule, the district court reasoned that a salary-level test is unlawful. It concluded that "Congress defined the EAP exemption with regard to

duties, which does not include a minimum salary level," ROA.3817, and that the FLSA "does not grant the Department the authority to utilize a salary-level test" in the EAP regulations. ROA.3825.[2] Defending that broad reasoning, plaintiffs likewise argue that the salary-level test has "always been an unauthorized DOL invention," Pl. Br. 3, and they declare that "[t]he longevity of an unlawful rule makes no difference," Pl. Br. 35.

Although longevity would not save an unlawful rule, this Court expressly rejected the claim that the salary-level test is unlawful. In *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603 (5th Cir. 1966), the employers argued that "the minimum salary requirement is not a justifiable regulation under Section 13(a)(1) of the Act because not rationally related to the determination of whether an employee is employed in a 'bona fide executive * * * capacity.'" *Id.* at 608. This Court concluded that "[t]hese contentions lack merit." *Id.* Writing for this Court, then-Judge Warren Burger (sitting by designation) reasoned that "[t]he statute gives the Secretary broad latitude to 'define and delimit' the meaning of the term 'bona fide executive * * * capacity," and he rejected the contention that "the minimum salary requirement is arbitrary or capricious." *Id.*

Plaintiffs provide no basis to disregard this Circuit precedent. *Wirtz* does not cease to bind this panel merely because it is "pre-*Chevron* case law." Pl. Br. 27. The

[2] The district court invalidated the final rule's indexing mechanism for the same reason. *See* ROA.3821; *see also* Pl. Br. 36.

interpretive principle on which the district court here relied—that the Judiciary "must give effect to the unambiguously expressed intent of Congress," ROA.3787 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984))—was established long before *Chevron*, and it governed the analysis in *Wirtz*. Moreover, *Chevron* increased (rather than diminished) the deference that courts give to an agency's interpretation of the statute it is charged with administering.

Nor is the Supreme Court's decision in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), license for courts to disregard circuit precedents predating *Chevron*. The *Brand X* decision addressed the relationship between judicial decisions and *agency* prerogatives: "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." 545 U.S. at 982. That holding has no relevance here.

Far from ignoring the statutory text as plaintiffs suggest, Pl. Br. 28, this Court in *Wirtz* rejected the textual argument that plaintiffs make here. Plaintiffs contend that a 1941 district court decision correctly held that salary level is *not* "a natural and admissible attribute of the term 'bona fide executive and administrative * * * capacity.'" Pl. Br. 30 (quoting *Devoe v. Atlanta Paper Co.*, 40 F. Supp. 284, 286 (N.D. Ga. 1941)). But this Court reached the opposite conclusion in *Wirtz* and held that

salary level *is* "rationally related to the determination of whether an employee is employed in a 'bona fide executive * * * capacity.'" 364 F.2d at 608.

As our opening brief explained (at 21-29), *Wirtz*'s holding has ample support in the text, history, and purpose of the EAP exemption. Indeed, there was widespread support for the Department's conclusion that salary level is a relevant consideration in determining whether a worker is employed in a bona fide executive, administrative, or professional capacity. Although plaintiffs assert that "the salary-level test was controversial when first implemented and remained so," Pl. Br. 8, the reports on which they rely actually demonstrate that the salary-level test was endorsed by employer and employee representatives alike. Plaintiffs emphasize a sentence in the 1940 Stein Report stating that "[i]t was asserted by some that the Administrator has no authority to include a salary qualification." Pl. Br. 9 (quoting ROA.1567). But the Stein Report went on to explain that "[t]his view had little support," and "[t]here was indeed surprisingly wide agreement that a salary qualification in the definition of the term 'executive' is a valuable and easily applied index to the 'bona fide' character of the employment for which exemption is claimed and which must be of a 'bona fide' executive character by the terms of the statute itself." ROA.1567. The report noted that thirty-two employer representatives expressed approval of the salary-level test, while only four employer representatives expressed disapproval. ROA.1567 n.65.

Similarly, the 1949 Weiss Report explained that witnesses for both employers and employees testified to the "usefulness and propriety" of the salary-level test. 1949 Weiss Report 8 (ROA.1652). The "use of a salary test was supported by a very substantial number of management witnesses in addition to the almost universal support it had from labor representatives." *Id.* at 9 (ROA.1653). And "[t]here was testimony that, generally speaking, salary is the best single indicator of the degree of importance involved in a particular employee's job." *Id.*

Contrary to plaintiffs' assertion, the Minimum Wage Study Commission did not "admit[] in 1981 that the salary-level test impermissibly acts as a minimum wage contrary to Congressional intent." Pl. Br. 4 (citing ROA.1291). The statement in the staff paper on which plaintiffs rely did not represent the conclusion of the Commission, *see* ROA.1057, which recommended that the salary level be increased. *See* Report of the Minimum Wage Study Commission, vol. I, at 137-38 (June 1981)[3] ("The Commission recommends that this exemption be retained and that salary test levels used as a partial criterion to determine eligibility for this exemption *be raised* to the historical level prevailing during the period 1950 to 1975 *and adjusted upward* as needed to maintain this historical relationship.") (emphasis added; other emphasis omitted).

[3] Available at http://rsickles.rice.edu/files/2015/11/Minimum-Wage-Study-1983-Carter-Administration-1hkd1cv.pdf.

Likewise, in comments submitted during the 2016 rulemaking, many business groups supported an increase in the salary level (although they opposed the particular increase that the Department proposed). For example, the National Restaurant Association "agree[d] that the 2004 salary threshold for exempt status is now too low and should be raised." NRA Comment at 2 (Add. 12). The SBA Office of Advocacy explained that "small businesses support a modest increase in the salary threshold under the 'white collar' FLSA exemption." SBA Comment at 10 (Add. 10). The International Franchise Association ("IFA") indicated that it would not oppose a "modest increase to the standard salary level." IFA Comment at 22 (Add. 52). Other business groups, including several amici, asked the Department to consider a small increase to the salary level. *See*, *e.g.*, American Hotel & Lodging Association Comment at 2 (Add. 55) (urging the Department to "utilize the methodology it used in 2004 in setting the standard salary level for exempt employees"); Independent Insurance Agents and Brokers of America ("IIABA") Comment at 1 (Add. 68) ("IIABA recognizes that the salary levels have not been altered since 2004 and agrees that a modification of some form is warranted[.]"); National Retail Federation Comment at 4 (Add. 75) (urging the Department to maintain the methodology used in 2004 "with adjustments for inflation"); U.S. Chamber of Commerce Comment at 20 (Add. 108) (explaining that "[t]he application of other measures and methodologies results in salary levels thousands of dollars below the $50,440 proposed by the Department").

2. As our opening brief explained (at 21-29), the district court's broad reasoning would fail even if *Wirtz* were not binding precedent. Every circuit to consider the issue has upheld the salary-level test as a permissible component of the EAP regulations. *See Walling v. Yeakley*, 140 F.2d 830, 833 (10th Cir. 1944) ("in most cases, salary is a pertinent criterion and we cannot say that it is irrational or unreasonable to include it in the definition and delimitation"); *see also Fanelli v. U.S. Gypsum Co.*, 141 F.2d 216, 218 (2d Cir. 1944); *Walling v. Morris*, 155 F.2d 832, 836 (6th Cir. 1946), *vacated on other grounds*, 332 U.S. 422 (1947).

Although plaintiffs and their amici give short shrift to this aspect of the statute's text, Section 213(a)(1) explicitly grants the Department authority to "defin[e] and delimi[t]" the scope of the exemption. 29 U.S.C. § 213(a)(1). Thus, the phrase "bona fide executive, administrative, or professional capacity" is necessarily ambiguous, as Congress "explicitly left a gap for the agency to fill," and the Department's interpretation must be "given controlling weight" unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44. And that ambiguous phrase can be reasonably read to connote a status not attained by low-paid workers. Moreover, the Department's longstanding interpretation of Section 213(a)(1) to require a salary level is reinforced by the statute's inclusion of the term "bona fide." The Department has found that such good faith is best demonstrated through the salary the employer pays.

The breadth of the Department's authority to define and delimit the scope of the EAP exemption was underscored by the Supreme Court in *Auer v. Robbins*, 519 U.S. 452 (1997). Plaintiffs make no attempt to reconcile their position with the Supreme Court's decision, which rejected a challenge to an application of the salary-basis test. In *Auer*, the Supreme Court explained that under the EAP regulations, "one requirement for exempt status under § 213(a)(1) is that the employee *earn a specified minimum amount on a 'salary basis.'*" 519 U.S. at 455 (emphasis added). The Court noted that "[u]nder the Secretary's chosen approach, exempt status requires that the employee be paid on a salary basis, which in turn requires that his compensation not be subject to reduction because of variations in the quality or quantity of the work performed." *Id.* at 456 (quotation marks omitted). And the Court concluded that the Secretary's approach was "based on a permissible construction of the statute." *Id.* at 457 (quoting *Chevron*, 467 U.S. at 843).

Plaintiffs do not dispute that their position, if adopted, would invalidate the salary-basis test upheld in *Auer* as well as the salary-level test upheld in *Wirtz*. Instead, they quote the Supreme Court's observation that the respondents did "not raise any general challenge to the Secretary's reliance on the salary-basis test," Pl. Br. 31 (quoting *Auer*, 519 U.S. at 456-57), and they declare that "some have read the Court's statement pointing out respondents' concessions as a subtle invitation to challenge" the salary-basis test, Pl. Br. 32. Plaintiffs do not cite any support for the assertion that *Auer* was a "subtle invitation" to challenge the salary-basis test, *id.*, and nothing in the

Supreme Court's reasoning called that longstanding test into question. To the contrary, the unanimous Supreme Court emphasized that the "FLSA grants the Secretary broad authority to 'defin[e] and delimi[t]' the scope of the exemption for executive, administrative, and professional employees," *Auer*, 519 U.S. at 456, and it upheld the Secretary's approach because it was "based on a permissible construction of the statute," *id.* at 457.

B. Plaintiffs Also Misunderstand the Way the EAP Regulations Work.

Plaintiffs' various subsidiary arguments also reveal a basic misunderstanding of the way the EAP regulations work.

First, plaintiffs note that the Department of Labor "is not authorized to set wages or salaries for executive, administrative, and professional employees," Pl. Br. 2 (quoting ROA.1655), and they argue that the salary-level test is "a battering-ram to force a species of minimum wage through the backdoor," *id.* But the salary-level test does not alter the minimum wage set by Congress. The salary-level test does not require any employer to pay its employees the salary level it sets. Rather, the EAP regulations use the salary-level test, together with the salary-basis and duties tests, to identify those workers who are *exempt* from the statutory requirement to pay the minimum wage and overtime. Workers who are not exempt must be paid in accordance with Congress's directives as set forth in the FLSA, including the minimum wage (currently $7.25 per hour) set by Congress.

Second, plaintiffs incorrectly state that before 2016, the salary level was "set so low as to be inconsequential." Pl. Br. 4. That assertion is refuted by *Wirtz* itself, where employees who met the duties test nonetheless did not qualify for the EAP exemption because their salaries were below the salary level then in effect. *See Wirtz*, 364 F.2d at 607.

Nor was there anything inconsequential about the salary level set by the 2004 regulations. As a result of the 2004 salary-level increase, 1.3 million white-collar workers who were exempt under the previous regulations gained FLSA protection. *See* 69 Fed. Reg. 22123. Plaintiffs note that "by 2004," the long test salary level had fallen "below the minimum wage." Pl. Br. 10 (citing 69 Fed. Reg. 22164). But as the cited Federal Register notice explained, that erosion of the salary level was a catalyst for the 2004 salary-level increase. The preamble to the 2004 rule explained that "[b]ecause the salary levels have not been increased since 1975, the existing salary levels are outdated and no longer useful in distinguishing between exempt and nonexempt employees." *Id.* at 22164. The preamble emphasized that "[t]he minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA) are among the nation's most important worker protections." *Id.* at 22122. And the preamble explained that "[r]evisions to both the salary tests and the duties

tests [were] necessary to restore the overtime protections intended by the FLSA which have eroded over the decades." *Id.*[4]

Third, plaintiffs note that "employees earning less than the new level 'will not qualify for the EAP exemption * * * *irrespective of their job duties and responsibilities*." Pl. Br. 6 (quoting 81 Fed. Reg. 32391, 32405 (May 23, 2016)). That result is not unique to the 2016 update; it flows from the longstanding requirement that an employee meet all three tests—salary basis, salary level, and duties—to be subject to the EAP exemption. Indeed, the language that plaintiffs emphasize appeared verbatim in the preamble to the 2004 rule. *See* 69 Fed. Reg. 22164 ("Employees paid below the minimum salary level are not exempt, *irrespective of their job duties and responsibilities*.") (emphasis added).

Contrary to plaintiffs' understanding, the fact that salary level will be dispositive of exempt status in some cases does not transform the Department's three-part regulations into a "salary only" test. As our opening brief explained (at 29-30), the Department has long recognized that it cannot establish a "salary only" test that would exempt from the FLSA employees who do *not* perform EAP duties—such as mechanics and carpenters—merely because they are well paid. *See* 1949 Weiss Report

[4] Plaintiffs also quote language from the 1949 Weiss Report stating that the salary level was historically set low to screen out obviously nonexempt employees. *See*, *e.g.*, Pl. Br. 9, 11, 15. But as our opening brief explained (at 31), those statements referred to the salary level that was paired with the more rigorous long duties test, rather than to the higher salary level paired with the less rigorous short duties test.

23 (ROA.1667); *see also* 69 Fed. Reg. 22173 (rejecting requests from commenters that the Department eliminate the duties test entirely for highly compensated employees). By contrast, the Department has never suggested that it lacks authority to set a salary-level test for employees who *do* perform EAP duties. As noted above, this Court's *Wirtz* decision itself involved employees who met the duties test in place at that time, but whose salaries were below the level then in effect. 364 F.2d at 607.

Fourth, plaintiffs argue that instead of relying in part on a salary-level test, the Department should impose "a more accurate and rigorous duties test." Pl. Br. 13. Plaintiffs are correct to note that the Department has historically paired a lower salary level with a more rigorous duties test (just as it has historically paired a higher salary level with a less rigorous duties test). *See* Opening Br. 6-7. But as our opening brief explained (at 8, 11, 32-33), employer representatives strongly opposed a more rigorous duties test. Indeed, concerns raised by employers prompted the Department to eliminate the more rigorous long duties test in 2004. That test was more rigorous because it imposed a bright-line, twenty percent cap on the amount of time an employee could spend performing nonexempt work (such as manual labor or clerical work) and still be treated as exempt. But the percentage cap required employers to time-test managers for the duties they performed, hour-by-hour in a typical workweek, even though employers are generally not required to maintain any records of daily or weekly hours worked by exempt employees. 69 Fed. Reg. 22126. The cap was opposed by the U.S. Chamber of Commerce and the National Small Business

Association, which argued that a move away from a percentage cap on nonexempt work would alleviate the burden on small business owners. *Id.* at 22127.

In the 2016 rulemaking, employer representatives again opposed a percentage cap on the amount of time an employee could spend on nonexempt work and still be treated as exempt. 81 Fed. Reg. 32446. Many employer representatives argued that such a cap would prevent exempt employees from "pitching in" during staff shortages or busy periods, thus increasing labor costs or negatively affecting business efficiency and customer service. *Id.* They explained that a cap on nonexempt work would impose significant recordkeeping burdens on employers. *Id.* And they predicted that resurrecting a quantitative cap on nonexempt work would increase FLSA litigation because of the administrative difficulties associated with tracking the hours of exempt employees, and result in the upheaval of the past decade of case law and agency opinions. *Id.*

Without acknowledging the concerns raised by employer representatives, plaintiffs suggest that it would not be "difficult" to make the current duties test "more rigorous." Pl. Br. 15. But judgments of this sort "turn upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency, such as the DOL, possesses." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 167-68 (2007). And as the Supreme Court explained in addressing a parallel FLSA exemption that authorized the Department to define and delimit its terms, "Congress intended its broad grant of definitional authority to the Department

to include the authority to answer these kinds of questions." *Id.* at 168; *see also Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084, 1091 (D.C. Cir. 2015) (concluding that the FLSA's exemptions for companionship services and live-in domestic services "invite further specification, the details of which 'turn upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency, such as the DOL, possesses.'") (quoting *Coke*, 551 U.S. at 165, 167-68).[5]

The district court did not determine whether the salary level set by the 2016 final rule is arbitrary and capricious or unsupported by the administrative record. Because the preliminary injunction rested on the legal conclusion that the Department lacks authority to set a salary level, it may be reversed on the ground that that legal ruling was erroneous. The Department has decided not to advocate for the specific salary level ($913 per week) set in the final rule at this time and intends to undertake further rulemaking to determine what the salary level should be. Accordingly, the Department requests that this Court address only the threshold legal question of the Department's statutory authority to set a salary level, without addressing the specific

[5] Plaintiffs note that in *Home Care*, the D.C. Circuit relied in part on the Department's general rulemaking authority. *See* Pl. Br. 33. That general authority mattered in *Home Care* because one of the two exemptions at issue there did not contain language authorizing the Department to "define and delimit" its terms. *See Home Care*, 799 F.3d at 1091 ("Appellees also stress that the companionship-services exemption provides for the Secretary to 'define[ ] and delimit[ ]' its terms, while the live-in worker exemption contains no similar supplement."). By contrast, the FLSA grants the Department "broad authority to 'defin[e] and delimi[t]' the scope of the [EAP] exemption." *Auer*, 519 U.S. at 456.

salary level set by the 2016 final rule. In light of this litigation contesting the Department's authority to establish any salary level test, the Department has decided not to proceed immediately with issuance of a notice of proposed rulemaking to address the appropriate salary level. The rulemaking process imposes significant burdens on both the promulgating agency and the public, and the Department is reluctant to issue a proposal predicated on its authority to establish a salary level test while this litigation remains pending. Instead, the Department soon will publish a request for information seeking public input on several questions that will aid in the development of a proposal.

II. Plaintiffs' Constitutional Claims Are Meritless.

A. Plaintiffs' Tenth Amendment Argument Is Foreclosed by the Supreme Court's Decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

Plaintiffs' constitutional claims are likewise unavailing. They first contend that the FLSA and its implementing regulations are unconstitutional as applied to state and local government employers. The district court correctly recognized that this claim is foreclosed by the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which "established that Congress had authority under the Commerce Clause to impose the FLSA's minimum wage and overtime requirements on state and local employees." ROA.3813 (citing 469 U.S. at 554).

Although plaintiffs assert that "*Garcia* has been—or should be—overruled," Pl. Br. 36, the Supreme Court has not overruled *Garcia*. To the contrary, in *Auer*, the

Supreme Court reiterated *Garcia*'s holding that the extension of "FLSA coverage to virtually all public-sector employees * * * was consistent with the Tenth Amendment." 519 U.S. at 457. And in *Reno v. Condon*, 528 U.S. 141, 151 (2000), the Court reaffirmed that "generally applicable" laws regulating private as well as governmental entities present no Tenth Amendment issue.

The commandeering decisions on which plaintiffs rely—*Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992)—are inapposite because the FLSA does not commandeer state and local governments. Instead, the FLSA regulates state and local governments in their capacity as employers and in the same manner as private employers. The Supreme Court has repeatedly held that Congress does not "commandeer" state and local governments when it regulates them directly, rather than requiring them to enact or enforce a federal regulatory scheme. *See Condon*, 528 U.S. at 150-151 (citing *South Carolina v. Baker*, 485 U.S. 505 (1988)). Indeed, in the *New York* decision, the Supreme Court emphasized that "this is not a case in which Congress has subjected a State to the same legislation applicable to private parties."

As the district court further explained, plaintiffs' "clear statement" argument does not advance their position because the FLSA clearly applies to state and local governments. ROA.3814; *see also*, *e.g.*, *Auer*, 519 U.S. at 457 ("In 1974 Congress extended FLSA coverage to virtually all public-sector employees."). Contrary to plaintiffs' suggestion, no additional clear statement from Congress is needed to make

state and local governments subject to the FLSA's implementing regulations. Indeed, in *Auer*, the Supreme Court unanimously held that "the Secretary of Labor's 'salary-basis' test for determining an employee's exempt status reflects a permissible reading of the statute *as it applies to public-sector employees*." 519 U.S. at 454 (emphasis added).[6]

B. Plaintiffs' Nondelegation Claim Rests on the Incorrect Assumption That the Department's Power to Define and Delimit the EAP Exemption Is Unconstrained.

Plaintiffs also allege that the FLSA's EAP exemption unlawfully delegates legislative power to the Department of Labor, but no precedent supports that claim. To the contrary, courts have long upheld that delegation of rulemaking authority. *See*, *e.g.*, *Walling v. Yeakley*, 140 F.2d 830, 832 (10th Cir. 1944) ("We think there can be no question that the power" to "define and delimit" the EAP exemption "was lawfully delegated."); *Fanelli v. U.S. Gypsum Co.*, 141 F.2d 216, 218 (2d Cir. 1944) ("In conferring such authority upon the Administrator" to "define and delimit" the terms in the EAP exemption, "Congress acted in accordance with a long established tradition (frequently sanctioned by the Supreme Court), and did not unconstitutionally delegate powers vested in the legislative branch.").

[6] Plaintiffs' irreparable harm argument rests on the premise that the FLSA is an unconstitutional "intrusion into the States' sovereign authority to structure employment relationships and provide integral governmental services." Pl. Br. 45. For the reasons discussed in the text, that argument is foreclosed by *Garcia*. Plaintiffs' claims of monetary harm are unsubstantiated for reasons discussed in our opening brief (at 36-39).

The nondelegation doctrine requires that Congress "lay down by legislative act an intelligible principle to which the person or body authorized [to exercise the delegated authority] is directed to conform." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Rooted in "common sense and the inherent necessities of the government co-ordination," this minimal requirement stems from the "practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *see also Loving v. United States*, 517 U.S. 748, 773 (1996) ("Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes.").

The Supreme Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law," *Whitman*, 531 U.S. at 474-75, and has "found the requisite 'intelligible principle' lacking in only two statutes"—both from cases in 1935—"one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition,'" *id.* at 474 (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

To set forth a constitutionally permissible "intelligible principle" while delegating authority to one of its coordinate Branches, Congress needs only to "'clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta*, 488 U.S. at 372-73 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). The FLSA's overtime exemption easily meets that standard. Plaintiffs' contrary argument rests entirely on the premise that the Department has claimed "unconstrained" power to define and delimit the terms of the EAP exemption. Pl. Br. 44. But the Department has never claimed that its power to define and delimit the exemption's scope is unconstrained by the exemption's text, history or purpose. Instead, the Department concluded that salary level is a relevant consideration in determining whether a worker is employed in a "bona fide executive, administrative, or professional capacity," and this Court upheld that conclusion in *Wirtz*.

CONCLUSION

For the foregoing reasons, the Department requests that this Court reverse the judgment of the district court because it was premised on an erroneous legal conclusion, and reaffirm the Department's statutory authority to establish a salary level test. The Department requests that this Court not address the validity of the specific salary level set by the 2016 final rule ($913 per week), which the Department intends to revisit through new rulemaking.

Respectfully submitted,

Of Counsel:

NICHOLAS C. GEALE
Acting Solicitor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

STEVEN W. GARDINER
Senior Attorney

ERIN M. MOHAN
Attorney
U.S. Department of Labor

CHAD A. READLER
Acting Assistant Attorney General

BRIT FEATHERSTON
Acting United States Attorney

MICHAEL S. RAAB

s/Alisa B. Klein
ALISA B. KLEIN
Attorneys, Appellate Staff
Civil Division, Room 7235
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
(202) 514-1597
Alisa.klein@usdoj.gov

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2017, I electronically filed the foregoing reply brief with the Clerk of this Court by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). The reply brief contains 5,589 words.

s/ Alisa B. Klein
Alisa B. Klein