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November 7, 2023

VIA ELECTRONIC FILING: www.regulations.gov

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Re: RIN 1235-AA39, Proposed Rule, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, 88 FR 62125 (September 8, 2023)

The America First Policy Institute (AFPI) submits these comments in response to the proposal of the Department of Labor (the "Department") to revise the overtime exemption regulations at 29 C.F.R. Part 541.

Eighty-five years ago, in 1938, Congress passed the Fair Labor Standards Act (the FLSA or the "Act") establishing a minimum wage for all hours worked and requiring the payment of overtime at 1.5 times an employee's regular rate for all hours worked over 40 in a workweek.[1]

But these protections never covered all businesses or all employees. The 1938 Act included many exemptions and exceptions, including the section 13(a)(1) exemptions for executive, administrative, and professional employees (the EAP exemptions).[2] Section 13(a)(1) did not define these

[1] 29 U.S.C. § 206 (minimum wage); 29 U.S.C. § 207 (overtime).
[2] 29 U.S.C. § 213(a)(1).

terms. Rather, Congress provided that the terms would be "defined and delimited from time to time by regulations of the Secretary" subject to the provisions of the Administrative Procedure Act (APA).[3]

The Secretary's power to define and delimit the EAP exemptions is not absolute. The Secretary is limited by the text of the FLSA itself and the APA. The Department's proposed regulations exceed the Secretary's authority by: (1) including *any* compensation requirement for the exemptions; (2) setting a minimum salary level for exemption that excludes millions of employees who perform executive, administrative, and professional duties; and (3) providing for automatic updates to the earning requirements without further notice-and-comment rulemaking.

Not only is the proposed rule unlawful, but it is also bad policy. This proposed rule would hurt salaried employees, effectively converting them to hourly employees and reducing their job flexibility without increasing their pay. Also, the Department seems uncaring of the impact of its proposal on lower-wage industries and small businesses and in rural areas—all of which would bear a disproportionate share of the admitted annual cost to businesses of between $1.5 billion and $2.7 billion.[4] According to the Department's data, its proposal will cost the retail sector $287.6 million annually, the healthcare sector $321.5 million annually, and the hospitality sector $105.1 million annually[5]—nearly half the costs imposed on just three industries. Small businesses will also bear almost half the costs: at least $776.8 million annually.[6] The Department estimates its proposal will cost employers in the South Census Region $963.3 million annually.[7]

The Department should withdraw its proposed regulations.

I. Compensation Requirements are Inconsistent with the FLSA

Section 13(a)(1) exempts "any employee employed in a bona fide executive, administrative, or professional capacity."[8] The EAP exemptions focus exclusively on whether an employee performs executive, administrative, or professional job duties. It does not include, or even mention, a salary level or salary basis requirement. Thus, in *Helix Energy Solutions Group, Inc. v. Hewitt*, Justice Kavanaugh concluded that "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." [9]

The Department asserts authority to use salary tests because it has done so since 1938, the tests have been "repeatedly upheld" by federal courts and are "helpful," and Congress has not amended the

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[3] *Id.*
[4] NPRM at 62185, Table 2 ($2.4 billion in year 1, $1.5 billion in year 2, and $2.7 billion by year 10).
[5] *Id.* at 62216, Table 26 (year 1 data only).
[6] *Id.* at 62233, Table 37 (year 1 data only).
[7] *Id.* at 62214, Tables 22 & 23 (year 1 data only).
[8] 29 U.S.C. § 213(a)(1).
[9] *Helix Energy Solutions Group, Inc. v. Hewitt,* 598 U.S. ___ (Feb. 22, 2023) (Kavanaugh, J., dissenting).

FLSA to prohibit such a test.[10] None of these reasons are a basis for ignoring unambiguous statutory language.

It is time for the Department to reevaluate its claim that the Secretary's authority under the Act "includes the authority to use a salary level test as one criterion for identifying employees who are employed in a bona fide executive, administrative, or professional capacity."[11]

A. Section 13(a)(1) of the FLSA Unambiguously Does Not Include a Compensation Requirement

Section 13(a)(1) of the FLSA states that the minimum wage and overtime requirements of the Act "shall not apply with respect to":

> "[A]ny employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5 [the Administrative Procedure Act] …"

Congress included this exemption in the original 1938 enactment of the FLSA.[12] Contemporaneous dictionaries defined the terms "executive," "administrative," and "professional" without reference to compensation; but rather by words that "relate to a person's performance, conduct, or function without suggesting salary."[13] In *Christopher v. SmithKline Beecham Corp.*, the Supreme Court found that the word "capacity" as used in section 13(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."[14] The modifying term "bona fide" merely reinforces the functional, responsibilities-based interpretation of the exemption. The Oxford English Dictionary defines "bona fide" as "[i]n good faith, with sincerity; genuinely."[15] Again, no reference is made to compensation.

Thus, the terms in section 13(a)(1) unambiguously do not include a compensation requirement. Rather, the exemptions focus "upon the tasks an employee actually performs."[16]

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[10] RIN 1235-AA39, Proposed Rule, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, 88 FR 62125, 62160 (September 8, 2023) (the "NPRM").
[11] *Id*.
[12] 52 Stat. 1067, § 13(a)(1) (June 25, 1938).
[13] *Nevada v. U.S. Department of Labor*, 218 F. Supp. 3d 520, 529 (E.D. Tex. 2016) (quoting the *Oxford English Dictionary* (1933)).
[14] *Christopher v. SmithKline Beecham Corp.,* 567 U.S. 142, *citing* Webster's New International *Dictionary* 396 (2d ed. 1934) ("Outward condition or circumstances; relation; character; position"), and 2 *Oxford English Dictionary* 89 (def. 9) (1933) ("Position, condition, character, relation").
[15] Bona fide, 1 *The Oxford English Dictionary* (1933).
[16] *Nevada*, 218 F. Supp. 3d at 529.

The structure of the FLSA confirms this view, as Congress has included compensation requirements for other overtime exemptions. Section 7(i) provides that an employee of a retail or service establishment is not entitled to overtime if his regular rate of pay exceeds 1.5 times the minimum wage and more than half of his compensation is from commissions.[17] Section 13(a)(6) exempts certain agricultural employees if "paid on a piece rate basis."[18] A criminal investigator paid "availability pay" is exempt under section 13(a)(16).[19] Certain employees with computer programming, engineering, or systems analysis duties are exempt from overtime under section 13(a)(17) if "compensated on an hourly basis . . . at a rate not less than $27.63 an hour."[20] Section 13(a)(19) exempts baseball players "compensated pursuant to a contract that provides a weekly salary."[21] Local delivery drivers are exempt under section 13(b)(11) if "compensated for such employment on the basis of trip rates."[22] Section 13(b)(23) exempts married couples serving as house parents in a nonprofit boarding school who "are together compensated, on a cash basis, at an annual rate of not less than $10,000."[23]

Congress enacted three different types of exemptions—those that require performance of certain job duties, those that include compensation requirements, and a third category of exemptions focused on the type of the employer's establishment or business, such as the exemptions for seasonal amusement establishments,[24] agriculture,[25] and small newspapers.[26] The EAP exemptions in section 13(a)(1) focus solely on job duties. Congress could have added compensation requirements, as it did for other exemptions, but it did not.

B. Regulatory History, No Matter How Long and Unvaried, Cannot Justify Ignoring the Text of a Statute

The Department attempts to justify adding a compensation requirement for the EAP exemptions because it has done so since 1938. But regulatory history, no matter how long and unvaried, cannot justify adding a requirement for exemption that is not in the statute—especially when Congress did include compensation requirements for other exemptions and exceptions. If Congress wants compensation requirements in section 13(a)(1), it can add them. But otherwise, *casus omissus pro omisso habendus est*—a thing omitted from text was intentionally omitted. "[A] matter not covered is not covered."[27] "The absent provision cannot be supplied by the courts. What the legislature 'would have wanted' it did not provide, and that is the end of the matter."[28] Certainly, what courts cannot do, an administrative agency cannot, either.

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[17] 29 U.S.C. § 207(i).
[18] 29 U.S.C. § 213(a)(6).
[19] 29 U.S.C. § 213(a)(16).
[20] 29 U.S.C. § 213(a)(17).
[21] 29 U.S.C. § 213(a)(19).
[22] 29 U.S.C. § 213(b)(11)
[23] 29 U.S.C. § 213(b)(23).
[24] 29 U.S.C. § 213(a)(3).
[25] 29 U.S.C. § 213(a)(6); 29 U.S.C. § 213(b)(12).
[26] 29 U.S.C. § 213(a)(8).
[27] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012) ("Scalia, *Reading Law*").
[28] *Id.* at 94.

C. The Department Cannot Add Compensation Tests Because They Are Helpful, Valuable, or Easily Applied

The Department also claims authority to add salary tests to section 13(a)(1) because the tests are "a helpful indicator of the capacity in which an employee is employed" and "a valuable and easily applied index to the 'bona fide' character of employment for which exemption is claimed."[29] Section 13(a)(1) instructs the Secretary to define and delimit the terms executive, administrative, and professional, and "the amount an employee is paid is … the principal delimiting requirement preventing abuse of the exemption."[30] If an employee ''is of sufficient importance to be classified as a bona fide'' EAP employee and ''thereby exempt from the protection of the Act, the best single test of the employer's good faith in attributing importance to the employee's services is the amount it pays for them.''[31] Employee compensation is a relevant indicator of exemption status, the Department asserts, because "individuals who are employed in a bona fide executive, administrative, or professional capacity typically earn higher salaries and enjoy other privileges to compensate them for their long hours of work, setting them apart from nonexempt employees entitled to overtime pay."[32]

There is no "helpfulness" standard in the canons of statutory interpretation. Nor are we aware of any case law that allows agencies to enact regulations that contradict statutes because they are "valuable" or "easily applied." The Department cites no data to support the claim that EAP employees "earn higher salaries and enjoy other privileges." Rather, the Department relies on quotes from the 1940 Stein Report.[33] It is time for the Department to stop quoting from an 83-year-old report. Any data it contains is long since obsolete. Further, the report begins by stating: "The general rule in a statute of this nature, that coverage should be broadly interpreted and exemptions narrowly interpreted, is so well known as to need little elaboration here."[34] The Supreme Court rejected the principle that FLSA exemptions should be construed narrowly five years ago in *Encino Motorcars, LLC v. Navarro*:

> We reject this principle as a useful guidepost for interpreting the FLSA. Because the FLSA gives no "textual indication" that its exemptions should be construed narrowly, "there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation." The narrow construction principle relies on the flawed premise that the FLSA pursues its remedial purpose at all costs. But the FLSA has over two dozen exemptions in §213(b) alone, including the one at issue here. Those exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement. We thus have no license to give the exemption anything but a fair reading.[35]

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[29] NPRM at 62160.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] ''Executive, Administrative, Professional * * * Outside Salesman'' Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct. 10, 1940) (''Stein Report'') at 2, 5, 19, 24 & 26.
[34] Stein Report at 2.
[35] 138 S. Ct. 1134, 1142 (2018) (citing Scalia, *Reading Law* at 363; other citations omitted).

As the entire premise for the Stein Report is now invalid, it cannot support the addition of compensation requirements to section 13(a)(1).

The Department also cites the 1981 Report of the Minimum Wage Study Commission, which merely quotes the Stein Report. The Department's reliance on this report is curious, as it concludes on the very page cited by the Department: "It is clear that the Congress intended all bona-fide executives, administrators and professionals to be exempt from both the minimum wage and maximum hours provisions of the Act. The current salary test as a basic criterion used to identify exempt workers implicitly introduces a minimum wage type concept in the administration of this provision *which is counter to the original intent of the exemption*."[36]

The statute does permit the Department to define and delimit the exemptions, and that authority gives the agency "significant leeway to establish the types of *duties* that might qualify an employee for the exemption."[37] But the Department's authority is limited by the text. The text does not include a compensation requirement, although Congress included compensation requirements in other exemptions. Nothing in section 13(a)(1) gives the Secretary authority to define and delimit by adding the salary level and salary basis requirements.

Compensation is no more helpful than would be a dress code test: exempt employees wear button down shirts and ties; non-exempt workers wear t-shirts and hardhats. Or a test based on the employee benefits: exempt employees receive paid lunch breaks, without time limits; non-exempt workers receive 30-minute unpaid lunch breaks. How about: exempt employees never work third shift? "Defining" and "delimiting" refer to the type of work performed by executive, administrative, and professional employees. An executive, for example, is defined by his supervisory duties—not by his compensation, employee benefits, what he wears, when he works, or any other factor.

Compensation is not (and should not be) the "principal" delimiting factor between bona fide EAP employees and others. In fact, the Department has never imposed compensation requirements for attorneys, doctors, medical interns, medical residents, teachers, and outside sales employees.[38] The Department acknowledges it has no authority to adopt a salary-only test.[39] It 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."[40]

Compensation can be irrelevant but may not be all, so the Department concludes. That leaves a vast, amorphous middle that has created lengthy regulatory and litigation battles on what the salary levels should be, with no end in sight. Duties tests are not bright-line rules that are easy to apply, but they are what Congress gave us.

The authority to define and delimit does not give the Department carte blanche to add requirements it finds helpful and easy to apply. This is never more clear than when the Department

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[36] Volume IV, pp. 236 & 240 (June 1981) (emphasis added).
[37] Nevada, 218 F. Supp. 3d at 530 (emphasis added).
[38] 29 C.F.R. §§ 541.303, 541.304, 541.500(g).
[39] NPRM at 62160, fn. 120.
[40] 2004 Final Rule at 22173.

proposes a salary level that, by its own admission, will deny exemption to no less than 3.4 million employees who currently perform exempt duties—a full 12 percent of exempt EAP employees today.[41]

D. The Salary Tests Have Not Been Repeatedly Upheld by Federal Courts

The Department's claim that the salary tests have been "repeatedly upheld" demonstrates the danger of using adverbs. "Historically" upheld would be equally descriptive as the three cases cited in support hail from 1944 and 1966. Facts cut through the adverbs.

The Department cites only three federal appellate court cases, from 79 and 57 years ago, for the proposition that the salary tests have been repeatedly upheld. We are not aware of any others. Only one of the cases provides any legal analysis supporting the salary tests. But that one was decided in 1944, four decades before the U.S. Supreme Court's *Chevron* decision set the standard for judicial review of agency interpretations. Thus, there is no judicial support for the salary tests.

Claiming even three cases in support of the salary tests is an exaggeration. One case, *Fanelli v. U.S. Gypsum Co.*,[42]decided in 1944, does not mention the salary tests at all. Rather, the Second Circuit merely confirmed the district court's refusal to instruct the jury to disregard the regulations *in their entirety* as Congress "did not unconstitutionally delegate powers vested in the legislative branch." The court was deciding whether the Department could regulate *at all*. Neither litigants nor the court discussed the salary tests. The single relevant paragraph is reprinted below in full:

> Section 13(a) explicitly authorizes the Administrator to 'define and delimit,' by regulations, the terms used in that section. As his regulations are reasonable, they are as binding on the courts as if they had been directly enacted by Congress. In conferring such authority upon the Administrator, 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. The statutory standards here are far more precise than many which the Supreme Court has held sufficient; the delegation is unmistakably within the scope of rulings made by the Supreme Court over the course of many years. The trial judge therefore properly refused to instruct the jury that it could disregard the regulations.

The only issue decided by the court was whether Congress had unconstitutionally delegated its powers to the Department. It decided in the negative and, with that, we are forced to agree.

Walling v. Yeakley[43] and *Wirtz v. Mississippi Publishers Corporation*,[44] then, are the only two cases in the 85-year history of the Part 541 regulations that squarely addressed and upheld the validity of the salary tests.

[41] 2023 NPRM at 62174 & fn. 214.
[42] 141 F.2d 216, 218 (2d Cir. 1944).
[43] 140 F.2d 830 (10th Cir. 1944).
[44] 364 F.2d 603 (5th Cir. 1966).

But *Wirtz*, decided by the Fifth Circuit in 1966, spent just a paragraph on the employer's "final contentions" that the regulations are vague and "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."[45] The court upheld the salary tests, relying on *Walling*:

> The statute gives the Secretary broad latitude to 'define and delimit' the meaning of the term 'bona fide executive … capacity.' We cannot say that the minimum salary requirement is arbitrary or capricious.[46]

That's it. The court provided no legal or statutory analysis whatsoever.

And that leaves us just one case: *Walling*, decided by the Tenth Circuit in 1944. The case decided whether the district court was correct in holding "that the salary requirements of the regulations were arbitrary and unreasonable."[47] Finally, we have a bit of analysis. The court framed the issue presented as "whether the power exercised by the Administrator in promulgating the regulations was lawfully delegated and lawful exercised."[48] On delegation, the court held: "We think there can be no question that the power was lawfully delegated."[49] On the salary test, the court held:

> Obviously, the most pertinent test for determining whether one is a bona fide executive is the duties which he performs. Admittedly, a person might be a bona fide executive in the general acceptation of the phrase, regardless of the amount of salary which he receives. On the other hand, it is generally true that those in executive positions assume more responsibility and are generally higher paid than those who work under the supervision and direction of others. The same is true with respect to those employed in administrative and professional capacities. Therefore, 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.[50]

The Tenth Circuit, then, upheld the salary tests because they were not "irrational or unreasonable." For this standard, the court relied on the Supreme Court's 1941 decision in *Gray v. Powell*[51] and its 1943 decision in *Federal Security Administrator v. Quaker Oats Co.*[52] *Gray* presented the question of whether a railroad met the requirements for an exemption from the Bituminous Coal Code. In discussing the deference to be given Bituminous Coal Division, the Supreme Court stated:

> Where, as here, a determination has been left to an administrative body, this delegation will be respected, and the administrative conclusion left untouched. … Unless we can say

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[45] 364 F.2d at 608 (the primary issue in the case was the standard for granting the Department's request for an injunction against further violations of the FLSA).
[46] *Id.*
[47] 140 F.2d at 831.
[48] *Id.* at 832.
[49] *Id.*
[50] *Id.*at 832-33.
[51] 314 U.S. 402 (1941).
[52] 318 U.S. 218 (1943).

> that a set of circumstances deemed by the Commission to bring them within the concept 'producer' is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed."[53]

In *Quaker Oats*, the Supreme Court let stand regulations of the federal security administrator acting under the Food, Drug and Cosmetic Act. That statute provided that "the Administrator's regulations must be supported by findings based on 'substantial evidence' adduced at the hearing" and that "the Administrator's findings as to facts, if based on substantial evidence, are conclusive."[54] Under these circumstances, the Supreme Court stated:

> The judicial is not to be substituted for the legislative judgment. It is enough that the Administrator has acted within the statutory bounds of his authority, and that his choice among possible alternative standards adapted to the statutory end is one which a rational person could have made.[55]

Of all these cases, only *Wirtz* was decided after Congress enacted the Administrative Procedure Act.[56] At least the words "arbitrary and capricious" appeared in the decision, although without any analysis. The *Wirtz* court, however, left out some key phrases. Under the APA, a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[57] *Wirtz* did not determine whether the salary tests are within the Department's statutory authority.

Even then, *Wirtz* was decided 18 years before *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[58] The *Gray, Quaker Oats*, and *Walling* cases came *four decades* before *Chevron* (43, 41 and 40 years). Thus, none of the Department's three cases can support its salary tests because none evaluated the Part 541 regulations under *Chevron.*[59]

The salary tests fail under *Chevron*, even assuming *Chevron* deference to administrative agencies survives the next Supreme Court term.[60] The Department's salary tests are not entitled to deference under *Chevron* because "Congress has directly spoken to the precise question at issue"[61] here. "Applying

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[53] 314 U.S. at 412-13.
[54] 318 U.S. at 227.
[55] *Id.* at 233.
[56] The APA became law on June 11, 1946.
[57] 5 U.S.C. § 706.
[58] 468 U.S. 837 (1984).
[59] *Nevada*, 218 F. Supp. 3d at 531 n.3 (refusing to follow *Wirtz* because it did not evaluate the lawfulness of a salary-level test under Chevron).
[60] The Supreme Court has granted *certiorari* for its 2023-24 term to two cases asking it to overrule *Chevron*: *Loper Bright Enterprises v. Raimondo*, No. 22-451 and *Relentless v. Department of Commerce*, No. 22-1219. The question accepted by the courts also includes whether it should clarify that "statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." *See also* Brief amicus curiae of the America First Policy Institute (July 24, 2023).
[61] *Chevron,* 468 U.S. at 842.

traditional tools of statutory construction,"[62] as we did under subsection A, above, section 13(a)(1) of the Act unambiguously does not include compensation tests, although Congress included such requirements for other exemptions. The "intent of Congress is clear" and "that is the end of the matter; the court as well as the agency must give effect to the unambiguously expressed intent of Congress."[63] "Congress intended the EAP exemption to apply to employees doing actual executive, administrative, and professional duties."[64]

Even if section 13(a)(1) is ambiguous, the Department deserves no deference under *Chevron* step 2 because its compensation requirements are "arbitrary, capricious, or manifestly contrary to the statute."[65] Congress exempted "*any employee* employed in a bona fide executive, administrative, or professional capacity."[66] Yet, the Department admits that 11.7 million salaried white-collar employees earn below its proposed salary level, and its proposal would deny exemption for the first time to 3.2 million employees performing exempt EAP duties: "salary would be determinative of their nonexempt status."[67] We think that number is higher, as explained in section II below; the number of EAP employees between the current salary level of $684 per week and the proposed salary level of $1,059 per week is 7.5 million.[68] Whether the number is 11.7 million, 7.5 million employees, or even 3.2 million, the Department's regulations "create[] essentially a de facto salary-only test" for these employees.[69] "Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption" and, therefore, the compensation requirements "should not be accorded *Chevron* deference because [they are] contrary to the statutory text and Congress's intent."[70]

E. No Inference Can Be Drawn from Congress' Failure to Amend

The Department also finds support for its salary tests because, "[d]espite having amended the FLSA numerous times over the years, Congress had not amended section 13(a)(1) to alter these regulatory salary requirements."[71]

"[V]indication by Congressional inaction is a canard."[72] Such arguments "deserve little weight in the interpretive process."[73] "Congressional inaction lacks persuasive significance because several equally

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[62] *Id.* at 843 n.9.
[63] *Id.* at 842-43.
[64] *Nevada*, 218 F. Supp. 3d at 529.
[65] *Chevron*, 468 U.S. at 844.
[66] 29 U.S.C. § 213(a)(1) (emphasis added).
[67] NPRM at 62170.
[68] *Id.* at 62170, Figure A (showing 7.5 million salaried white-collar workers between the current salary level and the Department's proposed salary level).
[69] *Nevada*, 218 F. Supp. 3d at 531.
[70] *Id.*
[71] NPRM at 62160.

[72] *Johnson v. Transportation Agency*, 480 U.S. 616, 672 (1987) (Scalia, J. dissenting) (cited by the Court with approval in *Alexander v. Sandoval*, 532 U.S. 275, 292-93 (2001), and *Patterson v. McLean Credit Union*, 491 U. S. 164, 175, n. 1 (1989).
[73] *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994); *see also United States v. Craft*, 535 U.S. 274, 287 (2002) ("Congressional inaction lacks persuasive significance").

tenable inferences may be drawn from such action."[74] For example: "it's impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice."[75]

Congress did not amend section 13(a)(1) to add compensation requirements, but it did amend other sections of the FLSA to add exemptions with compensation requirements: In 1961, Congress added section 7(i), an overtime exemption for employees of retail or service establishments if paid a regular rate exceeding 1.5 times the minimum wage and more than half of compensation from commissions.[76] In 1966, narrowing the exemption for agricultural employees, Congress exempted seasonal agricultural employees paid on a piece rate.[77] In 1974, Congress amended the FLSA to add the section 13(b)(23) overtime exemption for married couples serving as house parents in a non-profit boarding school who "are together compensated, on a cash basis, at an annual rate of not less than $10,000."[78] Most recently, in 1996, Congress amended the FLSA to add section 13(a)(17), providing an exemption for certain computer employees "who, in the case of an employee is compensated on an hourly basis, is compensated at a rate not less than $27.63 an hour."[79] From the congressional action of adding compensation requirements for other FLSA exemptions, it is equally tenable to infer that Congress intentionally did not add compensation requirements to section 13(a)(1).[80]

II. A Salary Level at the 35th Percentile is Inconsistent with the FLSA

The Department proposes to increase the minimum salary for exemption "to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South) – $1,059 per week ($55,068 annually for a full year worker)."[81] The new proposed salary level is a $375 per week, 54 percent increase over the current level of $684 per week ($35,568 annually).

Any compensation requirement for the EAP exemptions is invalid. The Department has no authority to proclaim a minimum wage for executive, administrative, or professional employees Congress has exempted from both the minimum wage and overtime requirements of the FLSA. But, even if the Department has authority to add salary requirements, it exceeds that authority by selecting a salary level that excludes from the exemption millions of employees who perform executive, administrative, and professional duties. A salary test, we must remember, acts to automatically exclude

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[74] *Central Bank,* 511 U.S. at 187.
[75] Johnson, 480 U.S. at 672.
[76] 29 U.S.C. § 207(i); Pub. L. No. 87-30, §6(g) (May 5, 1961) (originally codified at 29 U.S.C. § 207(g)).
[77] 29 U.S.C. § 213(a)(6); Pub. L. No. 99-602 § 103 (Sept. 23, 1966) (originally codified at 29 U.S.C. § 213(e)).
[78] 29 U.S.C. § 213(b)(23); Pub. L. No. 93-259 (April 8, 1974) (originally codified at 29 U.S.C. § 213(b)(24)).
[79] 29 U.S.C. § 213(a)(17); Pub. L. No. 104-188, § 2105(a) (Aug. 20, 1996).
[80] *Alexander*, 532 U.S. at 292 ("And when, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, we have spoken more bluntly: It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation.").
[81] NPRM at 62152.

employees from the section 13(a)(1) exemptions. Employees who meet the minimum salary level must also meet one of the Part 541 regulations' duties tests.

A. Any Salary Test Must Be Limited to Exclude Only "Obviously Nonexempt Employees"

Because section 13(a)(1) does not include a salary requirement, the only purpose for adding a compensation requirement for exemption approved by courts and valid Department regulations is to exclude "obviously nonexempt" employees. Any salary level that excludes employees who are not "obviously nonexempt" is invalid.

Because failing the salary test excludes an employee from the exemption without further opportunity to meet a duties test, the purpose of the Part 541 minimum salary level is to provide a "ready method of screening out the obviously nonexempt employees" from the section 13(a)(1) exemptions."[82] "The salary level test is intended to help distinguish bona fide executive, administrative, and professional employees from those who were not intended by the Congress to come within these exempt categories. Any increase in the salary levels from those contained in the existing regulation, therefore, has to have as its primary objective the drawing of a line separating exempt from nonexempt."[83] But, the "concept of a dividing line should not be misconstrued to suggest that the Department views the salary level test as an effort to divide all exempt employees from all nonexempt employees."[84]

The Department recognizes this purpose and the importance of staying within its confines; the salary level cannot play "an outsized role in determining whether an individual is employed in a bona fide EAP capacity."[85] A rule "that makes overtime status depend predominantly on minimum salary level, thereby supplanting an analysis of an employee's job duties" is inconsistent with section 13(a)(1).[86]

Yet, in its current proposal, the Department looks beyond the goal of screening out the obviously non-exempt and states a second goal: "to account for the switch to a one-test system in 2004."[87] Before 2004, the Part 541 regulations contained two tests, each with its own salary level: the "long test" and a "short test." In the 2004 regulations, the Department eliminated the long and short tests and replaced them with a standard duties test with a standard salary level. In doing so, the Department eliminated the long test requirement that an exempt employee "not devote more than 20 percent … of his hours of work in the workweek to activities which are not directly and closely related to the performance" of exempt work.[88]

The Department acknowledges that the 20 percent restriction effectively ended in 1991 "when the Federal minimum wage equaled or surpassed the $155 long test salary levels."[89] At the time of the 2004 regulations, then, the 20 percent restriction had been inoperative for 13 years. In the 19 years since

[82] 2004 Final Rule at 22615 (citing the 1949 Weiss Report at 8–9 and 1958 Kantor Report at 2–3).
[83] *Id.*
[84] 2019 Final Rule at 51237.
[85] NPRM at 62160.
[86] Nevada v. U.S. Department of Labor, 275 F. Supp. 3d 795,806 (2017) (summary judgment).
[87] NPRM at 62165.
[88] 29 C.F.R. 541.1(e) (pre-2004, available at https://www.loc.gov/item/cfr1987098-T29CVP541/).
[89] *Id.* at 62164.

the 2004 regulations, no one has challenged elimination of the restriction in federal court, and the Department has not proposed to reinstate the restriction. The Department does not propose to do so now.[90]

Thirty-one years since the 20 percent restriction has been operative, the Department proposes a 35th percentile level, rather than the 20th percentile methodology of 2004 and 2019, to account for this decades-old change to the duties tests. This is a non-sequitur; it makes no sense. Salary level has nothing to do with the amount of time an exempt worker spends doing non-exempt work. Under this proposal, and the standard duties test, an employee earning $1,200 per week who spends 40% of her time doing non-exempt work would be exempt, but an employee paid $800 per week who does not perform *any* non-exempt work would be non-exempt. Pay rate and time spent doing non-exempt work have literally nothing to do with one another. The regulated community has adjusted to the change; the Department should, too.

The Department once before, in 2016, attempted "to correct the mismatch between the standard salary level (based on the old long test) and the standard duties test (based on the old short test)"[91] –by setting the minimum salary level at the 40th percentile. Then, the Department admitted that 4.2 million employees would be excluded from the exemption based on salary alone. Those regulations were invalidated: "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."[92]

The Department should consider carefully whether a 35th percentile methodology can survive judicial scrutiny. Millions of employees earning below the 35th percentile—$1,059 per week, $55,068 annually—are not "obviously nonexempt," as we explain below.

B. The Proposed Salary Level Would Exclude 11.7 Million White-Collar Employees from the Section 13(a)(1) Exemptions

The Department admits that any regulation adopting a salary-only test for the section 13(a)(1) exemption is invalid.[93] Yet, by its own calculations, 3.2 million employees who perform exempt executive, administrative, or professional job duties will be denied exemption based on salary alone. For these employees, "salary would be determinative of their nonexempt status."[94]

But it's more than 3.2 million.

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[90] NPRM at 62164 ("However, for the reasons discussed in this section, the Department is not proposing in this rulemaking to replace the standard duties test with the long duties test or to return to a two-test system with the long duties test.").
[91] 2016 Final Rule at 32404.
[92] Nevada, 275 F. Supp. 3d at 807.
[93] *Id.* at 62161, n. 120; *see also Nevada,*218 F. Supp. 3d at 531 ("The Department has admitted thatit cannot create an evaluation based on salary alone.").
[94] NPRM at 62170.

About 11.7 million salaried white-collar employees earn below the proposed $1,059 per week, according to the Department's own data.[95] For all 11.7 million, salary is the only test for exemption. An employee earning $600 per week could be the comptroller of a small business or a retail store manager supervising 10 other employees or could manage payroll for a small non-profit. Duties don't matter; none would qualify for exemption although unquestionably performing executive, administrative, or professional job duties.

The employees affected by the proposed salary level increase from $684 to $1,059 is also higher than 3.2 million. About 7.5 million salaried white-collar employees earn above today's minimum of $684 per week but below the proposed $1,059.[96] These 7.5 million employees would be non-exempt for the first time based on salary alone—unless their employers decided to give them a $375 weekly salary increase.

The Department claims that fewer than 7.5 million employees would be impacted by its proposal because not all are currently exempt. But how many fewer is a mystery because there is "no data source that identifies workers as EAP exempt."[97] The CPS MORG data "do not capture information about job duties."[98] To estimate the impact of its proposal, then, the Department uses "probability codes" it developed 25 years ago when the U.S. Government Accountability Office (the "GAO") was attempting to estimate the number of exempt EAP employees.[99] In 1998, for a GAO report, some unnamed "officials at DOL" provided GAO with estimates of the percentage of employees in 257 of 905 occupational classifications.[100] Neither GAO nor the Department provides any information on these officials and their professional expertise, no explanation of the rationale behind the estimates, and no description of the process for assigning these "probability codes." Further, a lot has changed in the last 25 years. The occupational codes have changed; the Part 541 duties tests have changed; and litigation has resulted in thousands of court decisions finding employees to be exempt or non-exempt. Entirely new industries and types of jobs exist in 2023 that could not even have been considered when these codes were developed. The Department claims to have reviewed its O'NET database, created in 1998, to verify that the probability codes are still valid, but they provide no details about that process.

Applying this guess work, the Department's impact analysis claims that "3.4 million employees who meet the standard duties test and earn at least $684 per week but less than $1,059 per week would become eligible for overtime or have their salaries increased to at least $1,059 per week."

Bottom line: 11.7 million "nonhourly" employees earn below the Department's proposed minimum salary of $1,059 per week. For these employees, salary alone will determine their exempt status. Of these, 7.5 million employees earn above the current minimum salary level and thus their exempt status is determined by applying the duties tests. The Department claims that only 3.4 million of these employees are currently exempt. But the Department has not proven that they can know this

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[95] *Id.*
[96] *Id.* at Figure A.
[97] *Id.* at 62185.
[98] *Id*. at 62189.
[99] *Id. See also* Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place, GAO/HEHS-99-164 (1999) ("GAO Report), *available at https://www.gao.gov/assets/hehs-99-164.pdf*.
[100] GAO Report at 40-41.

number with any certainty. In any case, whether the number is 11.7 million, 7.5 million, or 3.4 million, a substantial number of employees who are not "obviously non-exempt" will be denied the exemption based on salary alone.

C. No Further Adjustment to the Salary Level Should Be Made to Account for the 2004 Duties Test Changes

The 3.2 million figure is a made-up number based on a made-up concept of a "long test salary level." According to the Department, 3.2 million employees earn between "the long test salary level" of $925 and the proposed salary level of $1,059.[101] The Department spends many pages justifying its proposed 54 percent increase to the salary level by comparing it to this "long test salary level" of $925 and a "short test salary level" of $1,378 – rather than to the current actual salary level of $684. The proposed $1,059 is only $134 per week more, a 14 percent increase over the $925 "long test salary level." It is also 30 percent lower than the $1,378 "short test salary level." Thus, the Department asserts, we have reached a wonderful compromise:

> While, for the reasons discussed herein, none of these alternatives were used as a method to establish the proposed salary test level, they confirm that the proposed salary level of the 35th percentile of weekly earnings of all full-time salaried employees in the lowest-wage Census Region (the South) is an appropriate salary level.[102]

We disagree. The "long test" and the "short test" are terms we have not considered since the Department's regulatory changes in 2004, which eliminated those tests,[103] and should have no place in determining an appropriate increase to the minimum salary level for exemption today. For the last 19 years, application of the section 13(a)(1) exemptions has been determined by a standard duties test (and a shortened duties test for highly compensated employees). The "long test salary level," the Department claims, is derived by applying current salary data to methodologies used prior to 2004 to set the minimum salary for exemption. The salary levels for triggering the short test basically were pulled out of a hat, but the Department uses 149 percent of the "long test salary level" for the "short test salary level," which is an average of historical ratios of short to long test.[104]

Apples to oranges. Pretending that there is some precise figure to be extrapolated from applying yesterday's methodologies to today's data ignores that the Department's methodologies before 2004 were inconsistent and based on different types of data. The Department detailed this history in its 2004 rulemaking, and we should be reminded of it here. [105] There is no regulatory history from 1938 regarding the rationale for setting the initial salary level at $30 per week, although the 1940 Stein Report indicates that level was somehow adopted from the National Industrial Recovery Act and state law.[106] Between

[101] *Id.* at 62170 & Figure A.
[102] *Id.* at 62174.
[103] 2004 Final Rule, 69 FR 22122 (April 23, 2004).
[104] NPRM at 62170.
[105] 2004 Final Rule, 69 FR at 22165-66.
[106] *Id.* at 22165.

1938 and 1975, the Department increased the salary levels every five to nine years, and the largest increase was only $50 per week.[107]

"In 1940, the Department considered salary surveys by government agencies, experience under the National Industrial Recovery Act, and federal government salaries."[108] The Department used the salary data to "determine the average salary that was the dividing line between exempt and nonexempt employees" and "to find the percentage of employees earning below various salary levels."[109] The Department cautioned that as "these figures are averages, and the act applies to low-wage areas and industries as well as to high-wage groups," the salary level should be "a figure that is somewhat lower, though of the same general magnitude" of the averages.[110]

"In 1949, the Department looked at salary data from state and federal agencies, including the Bureau of Labor Statistics (BLS). The Department considered wages in small towns and low-wage industries, wages of federal employees, average weekly earnings for exempt employees and starting salaries for college graduates."[111] The Department "then set a salary level at a 'figure slightly lower than might be indicated by the data' because of concerns regarding the impact of the salary level increases on small businesses: 'The salary test for bona fide executives must not be so high as to exclude large numbers of the executives of small establishments from the exemption.'"[112]

It was not until 1958 that the Department mentioned a 10 percent level. But the data used to determine the 10 percent was the actual salaries paid to employees who qualified for exemption as determined during Wage and Hour Division investigations in 1955. The Department grouped the data "by geographic region, broad industry groups, number of employees and size of city.[113] "The Department then set the salary tests for exempt employees 'at about the levels at which no more than about 10 percent of those in the lowest-wage region, or in the smallest size establishment group, or in the smallest sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests.'"[114]

The Department followed similar 10 percent methodology in 1963 but used salary data for exempt employees collected in a special survey conducted by the Wage and Hour Division in 1961.[115] In 1970, "the Department examined data from 1968 Wage and Hour Division investigations and 1969 BLS wage data."[116] In 1975, the Department set the salary levels based on increases in the Consumer Price index; but the adopted levels were "intended as interim levels 'pending the completion and analysis of a study by the Bureau of Labor Statistics covering a six month period in 1975.'"[117]

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[107] *Id.*
[108] *Id.*
[109] *Id.* at 22166.
[110] *Id.* (citing the 1940 Stein Report at 32).
[111] *Id.* (citing the 1949 Weiss Report at 10, 14–17, 19).
[112] *Id.* (quoting 1949 Weiss Report at 15).
[113] *Id.* (citing the 1958 Kantor Report at 6).
[114] *Id.* (citing the 1958 Kantor Report at 6-7).
[115] *Id.* (citing 28 FR 7002 (July 9, 1963)).
[116] *Id.* (citing 35 FR 884 (January 22, 1970)).
[117] *Id.* (citing 40 FR 7091 (February 19, 1975)).

Thus, both the data sets and the line drawing of the past were different from the 2004 and 2019 regulations. Except for the anomaly of 1975, the Department used the salaries paid to employees who it knew through investigations met the applicable salary and duties tests—that is, salaries of exempt employees. The BLS wage data the Department now uses does not identify employees who are exempt, as no such data exists.[118] The CPS MORG survey data from BLS only reports "nonhourly" earnings for full-time workers. In the Department's view, such data is "an approximate proxy for compensation paid to salaried workers."[119] It is not. "Nonhourly" means any employee that is not paid on an hourly basis. That includes salaried employees, but also employees paid on a piece rate by commissions or any other method. Employees paid on a salary basis as required for exemption cannot be separated from the data. We cannot know how many of such employees are included in the data or whether they fall at the high end or low end of earnings.

The methodologies of the past also analyzed the data sets with a finer comb. The Department looked to actual exempt salaries paid in the lowest-wage region, lowest-wage industries, smallest business, and smallest cities. In its current proposal, the Department limits its analysis to nonhourly earnings in the lowest-wage Census Region (currently the South).[120]

Salaries paid in the lowest-wage industries, by small businesses, and in rural areas are now deemed irrelevant. Such salaries, if studied, likely would be on the low end of salaries paid in the nation. Ignoring such data artificially increases the earnings levels in the data set used to set the proposed minimum salary level. The Department's choice to use the South Census region inflates the earnings in its data set even further, as that region includes data from high-wage areas.

The South Census region does include some states with relatively low wages. However, it also includes very high-income states as well. The Washington, D.C., metropolitan area is part of this region and is one the wealthiest (and most expensive) regions in the country. Five of the eight counties with the highest median incomes in America are located in the Washington metro area.[121] Accordingly, Washington D.C., Virginia, and Maryland have the first, ninth, and 10th highest average salaries for non-hourly workers in the U.S.[122] The South Census region is no longer a good proxy for low-wage areas because it now includes very wealth jurisdictions. Instead, if any salary level tests are valid, and any increase justified at this time, the Department should use the 20th percentile of non-hourly employee earnings in the 10 lowest-wage states. In 2022 this figure was $769 a week.[123] If the Department wants to use a region that reflects earnings in low-wage areas, it should at least use states with lower earnings,

[118] NPRM at 62185.
[119] *Id.* at 62152, n. 3.
[120] NPRM at 62152.
[121] These counties are Arlington, Fairfax, Falls Church, and Loudon counties, in Virginia, and Howard County, Maryland. See Steven Ross Johnson, "The Richest 14 Counties in the U.S.," U.S. News and World Report, Dec. 23, 2022 at https://www.usnews.com/news/healthiest-communities/slideshows/richest-counties-in-america
[122] Author's analysis of January 2020 to August 2023 CPS ORG data.
[123] Based on 2020-Aug. 2020 CPS ORG data, the 10 states with lowest median earnings for non-hourly workers are (in order from lowest to highest earnings) Mississippi, Oklahoma, Arkansas, West Virginia, Alabama, Louisiana, North Dakota, Florida, Kentucky, and South Carolina. In 2022 the 20th percentile of the non-hourly earnings distribution in these states was $769 a week.

rather than a Census region that includes some of the highest-earning jurisdictions in America. The historical stereotype that the South has low wages is no longer accurate. Virginia and Maryland do not.

When proposing a minimum salary level in 2003, the Department acknowledged that "equivalency to either the current long or short test salary levels is not appropriate" *because of* the switch to a one-test system.[124] The Department was aware that it was changing to a single test and that its data set included both exempt and non-exempt employees. To account for these differences, the Department in 2004 set the salary level to exclude the lowest 20 percent of non-hourly employees, rather than the 10 percent used beginning in 1958.[125] The Department did not see a mismatch in 2004 or 2019 caused by the move to a standard duties test because it had adjusted the salary level to reflect the change in duties test. It seems odd for the Department to change its mind now, 20 years later, without explanation.

The Department's precipitous jump from setting the minimum salary level at the 20th percentile to setting it at the 35th percentile is based entirely on the "the switch to a one-test system in 2004." But that switch was fully accounted for in 2004 by moving from the 10th to the 20th percentile. There is no basis for nearly doubling it again.[126]

III. The Proposed Rule Would Hurt Salaried Employees

This proposed rule would hurt salaried employees without raising their pay. It would do so in three ways. First, this rule would force employers to effectively treat all employees making below the new salary threshold as hourly workers. Affected salaried employees would have to track their hours, adding more bureaucracy and red tape to their daily responsibilities. A portion of each employee's day would need to be spent tracking and reporting the employee's hours in detail. Whether or not employers formally convert affected salaried employees into hourly workers, this rule would force employers to treat them like hourly workers.

Salaried employees perceive this as a demotion. As a law firm briefing clients about the new rule explained:

> Many employees associate prestige with being classified as an exempt-salaried employee, especially since the white-collar exemptions require a certain level of supervisory responsibility or discretion and independent judgment. Oftentimes, exempt employees like the flexibility that comes with being salaried, and they don't want to track and record their hours worked. Managers, who will now have to clock in and out with their direct reports, may be particularly

[124] 2003 NPRM, 68 FR 15560, 11570 (March 31, 2003).
[125] 2005 Final Rule at 22168.
[126] A cynic might suggest that the only reason the Department did not fully double its methodology to the 40th percentile is the court's decision in *Nevada* finding the 40th percentile invalid.

sensitive to this change. Therefore, even if their pay remains the same, employees may view a switch to non-exempt status as a demotion.[127]

In the past, when a higher percentage of the workforce was employed in the manufacturing industry and other factory work, there was a stronger connection between hours worked and goods produced. In the modern economy, millions more workers have jobs in which they are assigned specific tasks and goals to complete, not a set number of hours per day or week. Forcing employers to treat salaried workers making less than $55,068 as hourly workers, when the workers themselves do not want to be treated as such, makes little sense in the modern economy.

Second, employers would respond by restricting flexible work arrangements. As the Department knows, employers must document compliance with overtime rules. Failure to track a non-exempt employee's putatively "off the clock" work can incur potentially significant legal liability. This is why employers provide much more generous remote and flexible work options to exempt than non-exempt employees. Virtually all employers who permit remote work and flexible work arrangements allow exempt employees to use them. Only about half allow workers covered by overtime regulations to do so.[128] As the head of human resources for Pitney Bowes explained to reporters, the company turned down requests from overtime-eligible staff to work from home because: "You just don't take the [legal] risk."[129]

So not only would the Department's proposed rule give salaried employees a perceived demotion, but it would push employers to restrict remote and flexible work options. This will make it much harder for currently salaried employees to balance work and family obligations. Surveys show employees highly value flexible work arrangements—and want more of them.[130] The Department's proposed rule would instead curtail their working flexibility—making their workdays more difficult.

Third, the Department's proposed rule would make workers less productive. Requiring currently salaried employees to spend part of their workdays tracking their hours limits the time they can spend doing the work about which they are passionate, creating products that their customers love, and providing services that help their communities grow. The Department's proposed rule would shift workers' efforts toward bureaucratic compliance and away from productive work. Reducing job flexibility could also make workers less productive. Some studies find that remote work increases employees'

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[127] Fisher Phillips, *Labor Department's Proposed Overtime Rule Could Raise Salary Floor to $55k: Here are 8 Ways Employers Can Prepare Now*, August 30, 2023. https://www.fisherphillips.com/en/news-insights/labor-departments-proposed-overtime-rule-could-raise-salary-floor.html

[128] World at Work, *Survey of Workplace Flexibility 2013*, Figure 8. World at Work surveyed 566 companies about their human resources policies. Among employers who offered each workplace a flexibility option, World at Work found that 99 percent of exempt, but only 62 percent of nonexempt, employees could telework on an ad hoc basis; 95 percent of exempt, but only 48 percent of nonexempt, employees could telework at least once a month; and 98 percent of exempt, but 48 percent of nonexempt employees could telework at least one day a week, but not full time.

[129] Paul Davidson, "More American Workers Sue Employers for Overtime Pay," *USA Today*, April 19, 2012.

[130] McKinsey & Co., *Americans are embracing flexible work—and they want more of it*, June 23, 2022. https://www.mckinsey.com/industries/real-estate/our-insights/americans-are-embracing-flexible-work-and-they-want-more-of-it

productivity.[131] Productivity has already declined more during the Biden Administration than during any other presidential administration in modern history, and this rule would only exacerbate the decline.[132]

The Department's proposed rule would hurt salaried workers without raising their pay. Research shows employers primarily respond to expanded overtime eligibility by reducing base earnings to reflect expected overtime—leaving total earnings unchanged.[133] This is especially true for salaried employees. Salaried workers are paid for work performed, not hours logged. When employers reclassify salaried employees as hourly workers, they simply set their hourly wages to equal exactly what they earned before—including expected overtime payments. Expanding overtime eligibility has little effect on workers' total pay. Moreover, workers' earnings track their productivity over time.[134] So by reducing productivity the Department's proposed rule could reduce their pay.

IV. The Department Lacks Authority to Automatically Update Earning Requirements

The Department proposes adding a new section (541.607) to the regulations that would add a mechanism to automatically update the salary levels every three years, without further notice-and-comment rulemaking.

The Department's proposal is undemocratic. With a stroke of its pen, the Department eliminates its statutory obligation to propose changes to regulations and the public's statutory right to comment on those proposals. Perhaps recognizing it usurpation of this right, the proposal allows for a delay in the automatic updates if the *Department* decides that "unforeseen economic or other conditions warrant."[135] That phrase, of course, is not in the proposed new section 541.607(d) but only in the NPRM and then left undefined; the only example given of such circumstances in the NPRM is the COVID pandemic. In short, in the future, the only time the public will have an opportunity to debate changes to the Part 541 earnings requirements is when the Department decides to let us speak.

There is no evidence that Congress intended that the salary level test for exemption under section 13(a)(1) be updated without notice-and-comment rulemaking. In the 85-year history of the FLSA, Congress has never provided for automatic increases of any earnings requirements in the Act: not the minimum wage under section 6, the tip credit wage under section 3(m), or the hourly wage for exempt

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[131] Nicholas Bloom, James Liang, John Roberts & Zhichun Jenny Ying, *Does Working from Home Work? Evidence from a Chinese Experiment*, NBER Working Paper 18871, March 2013.
[132] Aaron Hedlund, Rachel Oglesby, and Matthew Lobel, *Help Wanted: An Economic Productivity Agenda to Boost Workers*, America First Policy Institute, July 18, 2023. https://americafirstpolicy.com/latest/research-report-help-wanted-an-economic-productivity-agenda-to-boost-workers
[133] For a review of the academic literature on this topic, finding that employers respond to expanded overtime eligibility by implementing offsetting reductions to base wages, see James Sherk, *Salaried Overtime Requirements: Employers Will Offset Them with Lower Pay*, Heritage Foundation Backgrounder No. 3031, July 2, 2015. https://thf_media.s3.amazonaws.com/2015/pdf/BG3031.pdf
[134] James Sherk, *Workers' Compensation: Growing Along with Productivity*, Heritage Foundation Backgrounder No. 3088, May 31, 2016. https://www.heritage.org/jobs-and-labor/report/workers-compensation-growing-along-productivity
[135] NPRM at 62179.

computer employees under section 13(a)(17) of the Act. Although Congress has provided indexing under other statutes, it has never done so under the FLSA.

The Department finds its authority for automatic updates in the section 13(a)(1) instructions to define and delimit the exemptions and Congress' failure to restrict the Department's use of the salary level tests.[136] As discussed above, neither the "define and delimit" delegation nor Congress' failure to act provide authority to create by regulation what is contrary to the text of section 13(a)(1).

Of course, the Department is not quite sure itself whether it has authority for automatic salary increases. In 1970, for example, a "union representative recommended an automatic salary review" based on an annual BLS survey, the National Survey of Professional, Administrative, Technical, and Clerical Pay.[137] The Department quickly dismissed the idea as "needing further study," although stating that the suggestion "appear[ed] to have some merit particularly since past practice has indicated that approximately 7 years elapse between amendment of these salary requirements."[138] In 2004, the Department rejected indexing because it was contrary to congressional intent and disproportionately impacted lower-wage geographic regions and industries—and because the Department intended to do its job:

> [S]ome commenters ask the Department to provide for future automatic increases of the salary levels tied to some inflationary measure, the minimum wage or prevailing wages. Other commenters suggest that the Department provide some mechanism for regular review or updates at a fixed interval, such as every five years. Commenters who made these suggestions are concerned that the Department will let another 29 years pass before the salary levels are again increased. The Department intends in the future to update the salary levels on a more regular basis, as it did prior to 1975, and believes that a 29-year delay is unlikely to reoccur. The salary levels should be adjusted when wage survey data and other policy concerns support such a change. Further, the Department finds nothing in the legislative or regulatory history that would support indexing or automatic increases. Although an automatic indexing mechanism has been adopted under some other statutes, Congress has not adopted indexing for the Fair Labor Standards Act. In 1990, Congress modified the FLSA to exempt certain computer employees paid an hourly wage of at least 6.5 times the minimum wage, but this standard lasted only until the next minimum wage increase six years later. In 1996, Congress froze the minimum hourly wage for the computer exemption at $27.63 (6.5 times the 1990 minimum wage of $4.25 an hour). In addition, as noted above, the Department has repeatedly rejected requests to mechanically rely on inflationary measures when setting the salary levels in the past because of concerns regarding the impact on lower wage geographic regions and industries. This reasoning applies equally when considering automatic increases to the salary levels. The Department believes that

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[136] NMPM at 62177-78.
[137] 1970 Final Rule, 35 FR 883, 884 (Jan. 22, 1970).
[138] *Id.*

> adopting such approaches in this rulemaking is both contrary to congressional intent and inappropriate.[139]

The Department changed its mind in 2016, referring only to the define and delimit language in section 13(a)(1) for its authority.[140] Shrugging its shoulders at the inconsistency with its 2004 rulemaking, the Department stated:

> "While we agree with commenters that our decision to institute automatic updating in this Final Rule departs from our 1970 and 2004 rulemakings, these past statements in no way foreclose our current action."

After the court in *Nevada* invalidated automatic updating in 2019, the Department changed its mind again. The Department did not adopt a proposal to automatically update the salary levels, finding that automatic updates would "deprive the Department of flexibility to adapt to unanticipated circumstances."[141]

And now, here we are. The Department has changed its mind yet again.

The many comments submitted in 2015[142] and 2019[143] objecting to automatic updates are still relevant here, as the legal and policy arguments have not changed. In particular, the Department should consider, and we hereby incorporate into this rulemaking record, the comments to the 2015 NPRM of the U.S. Chamber of Commerce, the Partnership to Protect Workplace Opportunity, the Associated Builders and Contractors, the International Franchise Association, and Seyfarth Shaw.

Let us summarize those arguments here.

Automatic updates are contrary to the text of section 13(a)(1). As noted above, the text of section 13(a)(1) does not contain any salary requirements and adding such requirements by regulations is inconsistent with the FLSA. If salary requirements are permissible under section 13(a)(1), that provision directs the Department to define and delimit the exemptions "from time to time by regulations of the Secretary." This directive, "from time to time," does not allow the Department to set it and forget it. The Department is authorized to change the definitions of the regulations—either the salary or duties tests—by regulation subject to the provisions of the Administrative Procedure Act.

Automatic updates violate the APA. The APA requires the Department to implement each change to the salary levels through notice and comment rulemaking. The Department's rationale for automatic updates boils down to "notice and comment rulemaking is hard" and "we seem unable to regularly update the salary levels through rulemaking." As in 2016, the Department seems to be missing the point of the APA: Congress intended rulemaking to be hard. Notice and comment rulemaking on the Part 541 exemptions has achieved the purpose of the APA by ensuring vigorous public debate about the salary

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[139] 2004 Final Rule, 69 FR 22121, 22171-72 (April 23, 2024).
[140] 2016 Final Rule, 81 FR 32391, 32430-43 (May 23, 2016).
[141] 2019 Final Rule, 84 FR 51230, 51252 (Sept. 27, 2019).
[142] Available at https://www.regulations.gov/document/WHD-2015-0001-0001.
[143] Available at https://www.regulations.gov/docket/WHD-2019-0001.

levels, including the methodology for setting those levels. The regulatory history shows that the Department has adjusted its proposals based on public comment. Proposed salary levels have been increased and decreased in the final regulations. For example, in 2004, in response to the public comments, the Department increased its proposed standard salary level from $425 per week to $455 per week, and the annual compensation for the highly compensated test from $65,000 to $100,000. Automatic updates frustrate this process, cutting off all future public debate. This is not fixed by the proposal (in the NPRM's preamble but not in the regulations) that the Department could call for notice and comment rulemaking "where economic or other conditions merit."[144] Only the Department, then, can decide whether it allows the public to comment on a salary level increase. That is not the Department's choice. Congress set the rules in the APA requiring notice and comment rulemaking. The Department must follow those rules.

Automatic updates bypass the requirements of the Regulatory Flexibility Act ("RFA") and Executive Order 13563 to adopt regulations, and regulatory changes, only after determining that the benefits justify its costs, that it is tailored to impose the least burden on society, and that it maximized net benefits.[145] Automatic updates will both ratchet up the number of employees impacted by and the costs of future increases to the salary levels. Looking in its own crystal ball, the Department estimates annual impact and costs by year 10 at more than 5 million employees and more than $2.7 billion dollars. It could well be much higher as we cannot really anticipate what the 35th percentile of "nonhourly" wages will be in 2033. The idea that the Department can impose such a burden on the public without further notice and comment rulemaking is nauseating. Instead, the Department should just do its job.

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The Department should withdraw its proposed regulations in their entirety because it has no authority to add compensation requirements for the section 13(a)(1) exemptions. However, if the Department moves forward, any salary level increase should be limited to the 20th percentile of non-hourly workers in the 10 lowest-wage states.

Respectfully submitted,

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144 NPRM at 62179.
145 NPRM at 62182.

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