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; THOMAS E. PEREZ, SECRETARY, DEPARTMENT OF LABOR, in his official capacity as United States 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

BRIEF FOR AMICI CURIAE REPRESENTATIVES ROBERT C. "BOBBY" SCOTT, ALMA S. ADAMS, SUZANNE BONAMICI, KATHERINE M. CLARK, JOHN CONYERS, JR., JOE COURTNEY, DANNY K. DAVIS, SUSAN A. DAVIS, MARK DESAULNIER, MARCIA L. FUDGE, RUBEN GALLEGO, RAÚL M. GRIJALVA, RUBÉN HINOJOSA, BARBARA LEE, FRANK PALLONE, JR., MARK POCAN, JARED POLIS, JANICE D. SCHAKOWSKY, MARK TAKANO, AND FREDERICA S. WILSON, AND SENATORS PATTY MURRAY, TAMMY BALDWIN, SHERROD BROWN, ROBERT P. CASEY, JR., AL FRANKEN, AND BERNARD SANDERS IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

Adina H. Rosenbaum
Sean M. Sherman
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

December 22, 2016

Attorneys for Amici Curiae
Rep. Scott, et al.

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case.

Amici
Representative Robert C. "Bobby" Scott
Representative Alma S. Adams
Representative Suzanne Bonamici
Representative Katherine M. Clark
Representative John Conyers, Jr.
Representative Joe Courtney
Representative Danny K. Davis
Representative Susan A. Davis
Representative Mark DeSaulnier
Representative Marcia L. Fudge
Representative Ruben Gallego
Representative Raúl M. Grijalva
Representative Rubén Hinojosa
Representative Barbara Lee
Representative Frank Pallone, Jr.
Representative Mark Pocan
Representative Jared Polis
Representative Janice D. Schakowsky
Representative Mark Takano
Representative Frederica S. Wilson
Senator Patty Murray
Senator Tammy Baldwin
Senator Sherrod Brown
Senator Robert P. Casey, Jr.
Senator Al Franken
Senator Bernard Sanders

Counsel for Amici
Public Citizen Litigation Group
Adina H. Rosenbaum
Sean M. Sherman

Allison M. Zieve

Respectfully submitted,

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum
Attorney for Amici Curiae Rep. Scott, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

CASES

STATUTORY MATERIALS

MISCELLANEOUS

INTEREST OF AMICI CURIAE[1]

Amici curiae Representative Robert C. "Bobby" Scott, Representative Alma S. Adams, Representative Suzanne Bonamici, Representative Katherine M. Clark, Representative John Conyers, Jr., Representative Joe Courtney, Representative Danny K. Davis, Representative Susan A. Davis, Representative Mark DeSaulnier, Representative Marcia L. Fudge, Representative Ruben Gallego, Representative Raúl M. Grijalva, Representative Rubén Hinojosa, Representative Barbara Lee, Representative Frank Pallone, Jr., Representative Mark Pocan, Representative Jared Polis, Representative Janice D. Schakowsky, Representative Mark Takano, Representative Frederica S. Wilson, Senator Patty Murray, Senator Tammy Baldwin, Senator Sherrod Brown, Senator Robert P. Casey, Jr., Senator Al Franken, and Senator Bernard Sanders are 26 members of the United States Congress who are committed to the right of American workers to receive fair pay for their work. As members of Congress working to ensure that workers are provided fair wages, amici have a strong interest in the proper interpretation and strong enforcement of the Fair Labor Standards Act (FLSA), including the Act's requirement that workers be paid overtime when they work more than 40 hours per

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

week. In the regulation challenged in this case, the Department of Labor took a needed step toward ensuring that workers receive fair pay: It strengthened overtime protections for millions of Americans by setting at $913/week the salary level necessary for workers to be exempt from overtime protections as workers "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Amici are filing this brief to explain that the Department's current regulation is supported by the purpose and history of the FLSA, and Congress has long sanctioned the Department's use, since 1938, of a salary level test to help distinguish exempt and non-exempt workers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Three months after the passage of the FLSA in 1938, the Administrator of the newly created Wage and Hour Division of the Department of Labor promulgated regulations "defining and delimiting" the exemption in section 13(a)(1) of the Act for workers "employed in a bona fide executive, administrative, or professional capacity," 29 U.S.C. § 213(a)(1), often referred to as the "EAP exemption." Those first regulations provided that, in addition to exercising specific types of duties, an employee would be exempt from the FLSA's minimum wage and overtime protections only if compensated "not less than $30" per week. *See* 3 Fed. Reg. 2,515, 2,518 (Oct. 20, 1938). The regulation was an uncontroversial exercise of the Department's broad authority under the statute.

Over the seventy-eight years since passage of the FLSA, while the Department of Labor has from time to time revised the scope of the bona fide EAP exemption—for example, by amending the definitions of "executive," "administrative," or "professional," or raising the qualifying salary levels—the use of a salary level test has remained a constant feature. Congress has amended the FLSA a number of times, but never altered the relevant portions of section 13(a)(1) or questioned the Department's authority to "define and delimit" the bona fide EAP exemption. Rather, the salary level test has long been regarded as an essential part of the determination whether an employee works in a bona fide executive, administrative, or professional capacity.

Because use of a salary level test is well supported and long-established, the district court erred in finding that use of the test violates the FLSA. *See* ROA.3816-19 (district court opinion). And once that error is corrected, it becomes clear that the choice of a specific salary level is a matter for the agency to decide, based on notice-and-comment rulemaking, and subject to reversal only to the extent that the choice is arbitrary and capricious. Here, the comprehensive administrative record shows that the Department's choice was reasonable. Accordingly, the district court's order granting a preliminary injunction should be reversed.

ARGUMENT

I. A Salary Level Test Is Supported by the History and Purpose of the FLSA and the Bona Fide EAP Exemption.

The bona fide EAP exemption enacted in 1938 was based on industry wage code provisions promulgated under the earlier National Industrial Recovery Act of 1933 (NIRA), as well as state-law precedents, almost all of which exempted administrative and executive employees based in part on their compensation. *See* U.S. Dep't of Labor, Wage & Hour Div., *Executive, Administrative, Professional … Outside Salesman Redefined, Report & Recommendations of the Presiding Officer* at 20 (Oct. 10, 1940) ("Stein Report") (ROA.1568) (explaining that because ten state laws and 488 out of 534 NIRA wage codes included a salary qualification for exempting executive and administrative employees, "the salary test has been and is widely accepted as appropriate"); *see also Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees*, 81 Fed. Reg. 32,391, 32,394 (May 23, 2016) ("Final Rule"); Cong. Research Serv., *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)*, at 2 & n.4 (May 9, 2005), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1240&context=key_workplace.

Although legislative history about the bona fide EAP exemption is "scant," 81 Fed. Reg. at 32,394, the Stein Report, produced by the Wage and Hour Division

two years after passage of the FLSA, explains that Congress's choice of the words "define" and "delimit" was intended to provide the Department with broad authority "not only for determining *which* employees are entitled to the exemption," "but also for *drawing the line* beyond which the exemption is not applicable." Stein Report at 2 (ROA.1550) (emphasis added). Moreover, "the good faith specifically required by the act," through its use of the statutory term "bona fide," "is best shown by the salary paid." *Id.* at 5 (ROA.1550).

In other words, a salary level test distinguishes bona fide exempt employees from those who are misclassified, because "[i]n no other way can there be assurance that section 13(a)(1) will not invite evasion" of the obligation to pay overtime. *Id.* at 19 (ROA.1567). "Indeed, if an employer states that a particular employee is of sufficient importance to his firm to be classified as an 'executive' 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 he pays for them." *Id.* (emphasis added); *see also id.* at 24-25 (ROA.1572-73). At the same time, professionals engaged in law and medicine were not subject to a salary level test, because an objective basis for identifying those employees existed: The state certification required for those fields was an "adequate equivalent of a salary test" to demonstrate that a purported lawyer or doctor was a "bona fide" professional. *See id.* at 36 (ROA.1584).

As the Ninth Circuit has observed, "[t]he report and recommendations of the presiding officer who conducted hearings on proposed amendments to the regulations in 1940 indicates that the employers participating in the hearings were nearly unanimous in approving the salary test because '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.'" *Craig v. Far W. Eng'g Co.*, 265 F.2d 251, 259 (9th Cir. 1959) (quoting Stein Report at 19 (ROA.1567)). An updated salary level test is the most effective enforcement mechanism for "screening out the obviously nonexempt employees." U.S. Dep't of Labor, Wage & Hour & Public Contracts Div., *Report & Recommendations on Proposed Revision of Regulations, Part 541, under the Fair Labor Standards Act* at 12 (Mar. 3, 1958) ("Kantor Report") (ROA.1759); *see also* Stein Report at 19, 42 (ROA.1567, 1590); U.S. Dep't of Labor, Wage & Hour & Public Contracts Div., *Report & Recommendations on Proposed Revisions of Regulations, Part 541*, at 8-9 (June 30, 1949) (ROA.1652-53) ("Weiss Report"). Conversely, under the district court's approach, which ignores the strong historical and factual correlation between salary and "bona fide" EAP employees, "employees who Congress intended to protect receive neither the higher salaries

and above-average benefits expected for EAP employees nor do they receive overtime pay." 81 Fed. Reg. at 32,392.

Accordingly, from 1938 onward, every iteration of Department regulations defining the scope of the bona fide EAP exemption has included a salary level test. *See id*. at 32,395 (providing history of increases in salary levels); Cong. Research Serv., *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)*, *supra* page 4, at 88. Over the same period, the Department has repeatedly reaffirmed that the salary level test is necessary to determine whether employees are "bona fide" executives, administrators, or professionals.

For example, in 1958, the Department under President Eisenhower explained: "The terms bona fide executive, administrative and professional imply a certain prestige, status and importance, and the employee's salary serves as one mark of his status in management or the professions." Kantor Report at 2 (ROA.1751-52). The Department noted that salary "is an index of the status that sets off the bona fide executive from the working squad-leader, and distinguishes the clerk or sub-professional from one who is performing administrative or professional work. Generally speaking, salary is a good indicator of the degree of importance attached to a particular employee's job." *Id.*

The U.S. Government Accountability Office reiterated that point in 1999: "Salary remains a good indicator of the degree of importance attached to a particular employee's job, which provides a practical guide, particularly in borderline cases, for distinguishing *bona fide* executive, administrative and professional employees from those who were not intended by the Congress to come within the categories of this exemption." U.S. Gov't Accountability Off., GAO/HEHS-99-164, *Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place*, App'x III at 52 (Sept. 1999), *available at* http://www.gao.gov/products/gao/hehs-99-164.

Again in 2004, the Department emphasized the importance of a salary level test "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." Dep't of Labor, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,165 (Apr. 23, 2004) (quoting Weiss Report at 11). Indeed, because a salary substantially higher than average is a strong indicator that an employee is a bona fide executive, administrator, or professional, the Department in 2004 added a new innovation, a "highly compensated employee" test. 81 Fed. Reg. at 32,396. Under the "HCE" test, employees who make

substantially more than the salary level threshold ($100,000 under the 2004 regulation) are exempt if they satisfy a minimal duties test. *See id.*[2]

This same point, first acknowledged nearly 80 years ago, underpins the 2016 rule's salary level test: "A high salary is considered a measure of an employer's good faith in classifying an employee as exempt, because an employer is less likely to have misclassified a worker as exempt if he or she is paid a high wage." *Id*. at 32,449. Thus, the decision below, to the extent it suggests that a salary level test is unsupported by the FLSA, belies nearly 80 years of regulation, issued under numerous presidential administrations, and without indication of congressional disapproval.

Further, the decision contradicts this Court's own precedent recognizing that section 13(a)(1) "gives the Secretary broad latitude," and that "the minimum salary requirement" is not "arbitrary or capricious." *See Wirtz v. Miss. Publishers Corp.*, 364 F.2d 603, 608 (5th Cir. 1966). Other courts have likewise recognized that the Department's authority to define and delimit the bona fide EAP exemption includes the ability to set salary levels. *See, e.g.*, *Craig*, 265 F.2d at 258-60; *Walling v. Yeakley*, 140 F.2d 830, 833 (10th Cir. 1944) ("[S]alary is a pertinent criterion and we cannot say that it is irrational or unreasonable to include it in the definition and delimitation."); *see also Auer v. Robbins*, 519 U.S. 452, 457 (1997)

[2] The Final Rule raises this amount to $134,004. 81 Fed. Reg. at 32,393.

("Because the FLSA entrusts matters of judgment such as this to the Secretary, not the federal courts, we cannot say that the [rule that employees who receive pay deductions for disciplinary violations are not paid on a salary basis] is invalid"); *Fanelli v. U.S. Gypsum Co.*, 141 F.2d 216, 218 (2d Cir. 1944) ("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 … binding on the courts[.]").

II. Congressional Action Reflects Agreement with Use of a Salary Level Test.

"[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-28 (2013) (internal quotation marks and citation omitted). Since the Department first included a salary level in 1938, the FLSA has undergone at least ten major amendments, including four bearing directly on section 13(a)(1). *See* Cong. Research Serv., *The Fair Labor Standards Act: An Overview* App'x (June 4, 2013), *available at* https://fas.org/sgp/crs/misc/R42713.pdf (listing FLSA amendments affecting section 13(a)(1)). Yet, despite awareness that the Department had adopted a salary level test, Congress has not

altered the bona fide EAP exemption or amended the FLSA to preclude use of the test.

For instance, by the time of the Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, the Department had adopted and then updated the salary level test on four separate occasions: 1938, 1940, 1949, and 1958. *See* 81 Fed. Reg. at 32,401. The 1961 Amendments altered section 13(a)(1) in three specific ways: First, they authorized the Department to define and delimit the exemption "from time to time," whereas previously the FLSA had not mentioned the timing for updating the regulations. Second, overriding in part the portion of the regulation that limited the amount of non-exempt work performed by exempt employees to 20 percent, the Amendments provided that executive or administrative employees in the retail or service sectors could not be excluded from the definition of "administrative" or "executive" unless more than 40 percent of their work hours were devoted to non-exempt activities. Third, the Amendments stated that subsequent revisions to the regulations were subject to the Administrative Procedure Act. *See* Pub. L. No. 87-30, § 9. Yet the 1961 Amendments did nothing to rescind or even question the salary level test.

More recently, Congress has twice amended the FLSA to dictate the specific salary level above which computer professionals would be exempt, while leaving the salary level applicable to the bona fide EAP determination for all other types of

employees in the hands of the Department. First, in 1990, Congress directed that, if paid on an hourly basis, computer professionals would be exempt only if their hourly pay rate was at least 6½ times greater than the minimum wage rate. *See* Pub. L. No. 101-583, § 2. Then in 1996, Congress added a separate exemption for computer professionals and included a statutory salary level test limiting the exemption to those earning more than $27.63 per hour. *See* Pub. L. No. 104-188, § 2105(a), *codified at* 29 U.S.C. § 213(a)(17). By the time of the 1996 Act, the Department had by regulation updated the salary level test on three additional occasions: 1963, 1970, and 1975. *See* 81 Fed. Reg. at 32,401. Again, despite dealing precisely with salary levels, Congress did not amend the bona fide EAP exemption or question the use of a salary level test. To the contrary, it specified one for a category of employees.

Thus, during the almost 80 years in which the Department has used a salary level test, Congress never sought to challenge the legality or wisdom of that approach. To the contrary, for computer professionals, it has enacted a special rule to distinguish exempt employees from others with the same duties but lower pay. The district court erred in failing to respect Congress's view that a salary level test is an appropriate method for implementing the bona fide EAP exemption.

III. The Purpose and History of the FLSA and the Bona Fide EAP Exemption Support the Department's Revised Salary Level Test.

"Ever since the FLSA was enacted, the interests of employers in expanding the [section 13(a)(1)] exemptions as broadly as possible have competed with those of employees in limiting use of the exemptions." U.S. Gov't Accountability Off., *Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place*, *supra* page 8, at 6. Taking into account the views of both employers and workers, the Department has endeavored to "strike[] an appropriate balance between minimizing the risk of employers misclassifying overtime-eligible workers as exempt, while reducing the undue exclusions from exemption of bona fide EAP employees." 81 Fed. Reg. at 32,409. Because a salary level test is consistent with the purpose, history, and congressional understanding of the bona fide EAP exemption, the Department's assessment of the precise dollar amount for the test should be respected, unless it is clearly unreasonable. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984). It is not.

The FLSA, with its minimum wage and overtime requirements, was designed to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas–Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). The bona fide EAP exemption from the overtime requirement was justified, in part, by the fact that workers properly classified as executives, administrators, and professionals "typically earn[] salaries well above the

minimum wage and … enjoy other privileges to compensate them for their long hours of work, setting them apart from the nonexempt workers entitled to overtime pay." 81 Fed. Reg. at 32,395. Workers earning "close to" the minimum wage, by contrast, are not the kind of employees "envisaged by the Act" to be exempt from overtime. Stein Report at 5 (ROA.1553). Accordingly, the bona fide EAP salary level in 1938 ($30 per week) was set at three times the minimum wage ($0.25/hour, or $10 per week). In 2016, before the Department issued the Final Rule, the salary level for bona fide EAP employees ($455 per week, or $11.375 per hour) was only 1.57 times the 2016 minimum wage. *See* 69 Fed. Reg. 22,122, 22,123 (2004).

Thus, by 2016, the 2004 salary level no longer served as an effective basis for separating bona fide executive, administrative, or professional employees from their nonexempt counterparts. The 2004 annual salary level is $23,660, lower than the 2015 poverty level for a family of four and only "slightly higher than the state minimum wage for forty hours of work in several states." 81 Fed. Reg. at 32,400, 32,405-406. Relying on the 2004 level, the salary level test has become untethered from reality: "[s]ome salaried employees [] classified as exempt managers commented that they earn *less* per hour than the employees they supervise." *Id.* at 32,405 (emphasis added).

The Final Rule attempts to remedy this mismatch by updating the salary level with 2015 data. *Id.* at 32,404. In the Final Rule, the Department arrived at an amount that "will ensure that white collar employees who should receive extra pay for overtime hours will do so and that the test for exemption remains up-to-date so future workers will not be denied the protections that Congress intended to afford them." *See id.* at 32,392. Under the new rule, the minimum salary level would be 3.15 times the minimum wage ($913 per week versus $290 per week), 29 C.F.R. § 541.600—essentially the same ratio as in 1938.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order granting a preliminary injunction.

Respectfully submitted,

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum
Sean M. Sherman
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amici Curiae
Rep. Scott, et al.

December 22, 2016

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 3,323 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on December 22, 2016.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum