STATEMENT
OF
PAUL DECAMP

ON: **BAD FOR BUSINESS:**
DOL'S PROPOSED OVERTIME RULE

TO: **THE UNITED STATES HOUSE OF REPRESENTATIVES,**
COMMITTEE ON EDUCATION AND THE WORKFORCE,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

BY: **PAUL DECAMP**
MEMBER
EPSTEIN, BECKER & GREEN, P.C.

DATE: **NOVEMBER 29, 2023**

PAUL DECAMP
EPSTEIN, BECKER & GREEN, P.C.
1227 25th Street, N.W.
Suite 700
Washington, D.C. 20037
202.861.1819
PDeCamp@ebglaw.com

STATEMENT OF

PAUL DECAMP
EPSTEIN, BECKER & GREEN, P.C.

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

HEARING

BAD FOR BUSINESS: DOL'S PROPOSED OVERTIME RULE

NOVEMBER 29, 2023

Good morning, Chairman Kiley, Ranking Member Adams, and distinguished members of the Subcommittee.

Thank you for inviting me to testify[1] at this hearing to address the Department of Labor's proposal[2] to amend the regulations implementing the executive, administrative, and professional exemptions set forth in section 13(a)(1) of the Fair Labor Standards Act (the "FLSA").[3]

I am a member of the law firm Epstein, Becker & Green, P.C., where I co-chair the national Wage and Hour Practice and serve on the firm's Employment, Labor & Workforce Management Steering Committee.[4] I have devoted most of my professional efforts over the past quarter-century to wage and hour issues. In 2006 and 2007, I served as Administrator of the U.S. Department of Labor's Wage and Hour Division, the chief federal officer appointed by the President of the United States responsible for enforcing and interpreting the Nation's wage and hour laws, including the FLSA. While at the Department, I issued numerous opinion letters regarding the section 13(a)(1) exemptions.

My practice focuses on helping businesses pay their people correctly. I have advised clients across the country in a broad range of industries regarding virtually every significant area of wage and hour compliance, including classifying workers as exempt or non-exempt for purposes of overtime and minimum wage requirements, employee versus independent contractor status, identifying compensable work, calculating overtime, providing meal and rest breaks, and more. I also regularly represent businesses in state and federal administrative agency proceedings, as well as class action and

---

1 I am testifying today in my individual capacity. The opinions expressed in my written and oral testimony are my own and do not necessarily reflect the views of my firm, its attorneys, its clients, or anyone else.

2 Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. 62,152 (Sept. 8, 2023).

3 29 U.S.C. § 213(a)(1).

4 Epstein, Becker & Green, P.C. is a national law firm with approximately 360 attorneys focusing in our core practice areas of employment, labor, and workforce management; health care and life sciences; and litigation. We have roughly 160 attorneys in offices across the country advising, counseling, and litigating on behalf of employers large and small, including with respect to the full range of wage and hour issues arising under federal, state, and local laws.

other complex litigation matters throughout the United States. Over the years I have handled numerous litigation and counseling matters involving the exemptions at issue in the proposed regulation.

I have testified before Congress on several prior occasions—both during and after my time with the Department of Labor—concerning wage and hour policy and enforcement issues, including before this Subcommittee in 2007, 2014, 2021, and 2022. I speak and write on these topics frequently, and I am a member of the *Law360* Employment Editorial Advisory Board and the American Employment Law Council.

Today I testify in opposition to the proposed rule for several reasons:

- First and foremost, the salary level the Department has proposed, along with the methodology used for selecting that level, would fundamentally transform the role and function of the salary threshold into a regulatory device unprecedented in the 85-year history of the FLSA, displacing the duties test as the main determinant of exempt status for a large swath of the Nation's salaried workforce.

- Second, the proposed increase is far larger than comparable prior increases in light of the recency of the previous increase, which went into effect less than four years ago.

- Third, the provision for automatic triennial increases without further formal rulemaking seems contrary to the requirement of the Administrative Procedure Act that agencies use notice-and-comment rulemaking before issuing substantive rules.[5]

- Finally, the type of power the Department seeks to exercise in the proposed rule is more akin to legislating than regulating. This matter is, at the end of the day, about policy preferences rather than any sort of objective technical expertise in the subject matter. Congress, rather than the Department, should be making these types of broadly impactful decisions.

I. THE SALARY LEVEL HAS NEVER BEFORE SERVED AS A DEVICE TO EXCLUDE LARGE NUMBERS OF INDIVIDUALS WHOSE PRIMARY DUTY QUALIFIES AS EXEMPT.

A. 1940: The Origin of the Salary Requirement

The original version of the Department's regulations implementing the section 13(a)(1) exemptions, issued in October of 1938 during the same month when the FLSA went into effect, contained no salary requirement at all.[6] Instead, the regulations required minimum compensation of "not

---

[5] *See* 5 U.S.C. §§ 551(4) (defining "rule"), 553(b)-(d) (setting forth requirements for rulemaking).

[6] *See* United Sates Department of Labor, "EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL . . . OUTSIDE SALESMAN" REDEFINED: REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER AT HEARINGS PRELIMINARY TO REDEFINITION (the "Stein Report", available at https://www.regulations.gov/docket/WHD-2023-0001/document) at 53-54 (1940) (setting forth complete text of 1938 version of regulations).

less than $30 (exclusive of board, lodging, or other facilities) for a workweek" for "employees employed in a bona fide executive [or] administrative . . . capacity[,]"[7] with no provision addressing compensation for "employees employed in a bona fide . . . professional capacity[.]"[8]

Two years later, the Department conducted public hearings to consider revising the regulations, leading to a document known as the Stein Report. In addressing whether to add a salary component to the executive, administrative, and professional exemptions, the report devoted roughly a dozen pages to the question across the three exemptions.[9] The report observed that the text of the statutory exemptions "implies a status which cannot be attained by those whose pay is close to or below the universal minimum envisaged by the [FLSA]."[10]

The Department recognized that "[i]n some instances, the rate selected will inevitably deny exemption to ***a few employees*** who might not unreasonably be exempted[.]"[11] The report noted that "a rather low salary requirement will not impose an impossible task on those responsible for the enforcement of the [FLSA], because most claims for exemption under this heading can be analyzed without undue difficulty on the basis of the job itself."[12] The Department concluded that "it appears desirable to retain a comparatively low salary requirement."[13] The hearing officer acknowledged that "the [FLSA] applies to low-wage areas and industries as well as to high-wage groups" and thus that "[c]aution therefore dictates the adoption of a figure that is somewhat lower" than salary levels found in the federal workforce.[14]

In the end, the Stein Report recommended, and the Department implemented, a requirement of compensation "on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities)" for executive employees[15], and a requirement of compensation "on a salary or fee basis at a rate of not less than $200 per month (exclusive of board, lodging, or other facilities)" for administrative and most professional employees.[16]

B. 1949: The First Significant Revision to the 1940 Rules

In 1949, the Department undertook a comprehensive review and update of its regulations concerning the executive, administrative, and professional exemptions. That work culminated in a

---

7 *See id.* at 53 (1938 version of section 541.1).

8 *See id.* (1938 version of section 541.2).

9 *Id.* at 5-6, 19-23, 26, 30-32, 42-43.

10 *Id.* at 5.

11 *Id.* at 6 (emphasis added).

12 *Id.* at 22.

13 *Id.*

14 *Id.* at 32; *see also id.* at 43.

15 *Id.* at 54 (1940 version of section 541.1(E)).

16 *Id.* at 54 (1940 version of section 541.2(A) for administrative employees), 55 (1940 version of section 541.3(B) for professional employees other than licensed and practicing attorneys or physicians).

document known as the Weiss Report.[17] Reflecting on the Wage and Hour Division's first roughly nine years of interpreting and enforcing a salary standard in the regulations, the Weiss Report had this to say:

> In this long experience, the salary tests, even though too low in the later years to serve their purpose fully, have amply proved their effectiveness in ***preventing the misclassification by employers of obviously nonexempt employees***, thus tending to reduce litigation. They have simplified enforcement by ***providing a ready method of screening out the obviously nonexempt employees***, making an analysis of duties in such cases unnecessary.[18]

The Department noted that "[t]here was ***no evidence, moreover, that the salary tests had in the past resulted in defeating the exemption for any substantial number of individuals*** who could reasonably be classified for purposes of the [FLSA] as bona fide executive, administrative, or professional employees."[19] Significantly, the report acknowledges that "[t]he Administrator [of the Wage and Hour Division] is not authorized to set wages or salaries for executive, administrative, or professional employees. Consequently, improving the conditions of such employees is not the objective of the regulations."[20] Instead, [t]he salary tests in the regulations are essentially guides to help in distinguishing bona fide executive, administrative, and professional employees from those who were not intended by the Congress to come within these categories."[21] The Department determined that "[a]ny increase in the salary levels from those contained in the present regulations must, therefore, have as its primary objective the drawing of a line separating exempt from nonexempt employees rather than the improvement of the status of such employees."[22]

The report observed that "if the salary levels are selected carefully and ***if they approximate the prevailing minimum salaries for this type of personnel*** and are above the generally prevailing levels for nonexempt occupations, they can be useful adjuncts in satisfying employers and employees as well as the [Wage and Hour Division] as to the exempt status of the particular individuals."[23] Thus, "[a]ny new figure recommended should also be somewhere near the lower end of the range of prevailing salaries for these employees."[24]

---

17 United States Department of Labor, REPORT AND RECOMMENDATIONS ON PROPOSED REVISIONS OF REGULATIONS, PART 541: DEFINING THE TERMS "EXECUTIVE" "ADMINISTRATIVE" "PROFESSIONAL" "LOCAL RETAILING CAPACITY" "OUTSIDE SALESMAN" AS CONTAINED IN SECTION 13(A)(1) OF THE FAIR LABOR STANDARDS ACT OF 1938, PROVIDING EXEMPTIONS FROM THE WAGE AND HOUR PROVISIONS OF THE ACT (the "Weiss Report", available at https://www.regulations.gov/docket/WHD-2023-0001/document) (1949).

18 *Id.* at 8 (emphases added)

19 *Id.* at 9 (emphasis added).

20 *Id.* at 11.

21 *Id.*

22 *Id.*

23 *Id.* at 12 (emphasis added, footnote omitted).

24 *Id.*

Considering an increase to the 1940 salary level of $30 per week for the executive exemption, the Weiss Report remarked that "although in some instances starting salaries of supervisory employees may be below $55, generally salaries for such employees are at least at that level, and therefore a $55 a week test ***would not defeat the exemption for any significant number of individuals who might be classified as bona fide executives***."[25] The Department reiterated that "[t]he salary test for bona fide executives ***must not be so high as to exclude large numbers of the executives of small businesses from the exemption***."[26]

The Weiss Report ultimately recommended, and the Department adopted, a $55 weekly salary threshold for the executive exemption[27] and a $75 weekly salary threshold for the administrative and professional exemptions[28], with all three exemptions having a separate, abbreviated duties test for individuals with a weekly salary of not less than $100[29], meant to include "only those persons about whose exemption there is normally no question."[30]

C. 1958: Review of the Salary Standards in the Regulations

In 1958, nine years after the Weiss Report and 18 years into the Department's use of a salary requirement in the regulations, the Department revisited the salary standards. The result, known as the Kantor Report, is just 12 pages long.[31] In this document, the Department affirmed that "the salary tests" in the regulations "simplify enforcement by ***providing a ready method of screening out the obviously nonexempt employees. Employees who do not meet the salary test are generally also found not to meet the other requirements of the regulations.***"[32] Since 1940, the Department continued, "there have been ***no indications that the salary tests have resulted in defeating the exemption for any substantial number of individuals*** who could reasonably be classified for purposes of the [FLSA] as bona fide executive, administrative, or professional employees."[33]

The Kantor Report recommended, and the Department approved, increases in the salary thresholds to "$80 a week for executives and $95 a week for administrative and professional employees."[34] In the view of the report's author, these new thresholds "will assist in demarcating the 'bona

---

25 *Id.* at 14 (emphasis added).

26 *Id.* at 15 (emphasis added).

27 *Id.* at 89 (1949 version of section 541.1(F)).

28 *Id.* at 89 (1949 version of section 541.2(E) for the administrative exemption), 90 (1949 version of section 541.3(E) for the professional exemption).

29 *Id.* at 89-90.

30 *Id.* at 23.

31 *See* United States Department of Labor, REPORT AND RECOMMENDATIONS ON PROPOSED REVISIONS OF REGULATIONS, PART 541, UNDER THE FAIR LABOR STANDARDS ACT: DEFINING THE TERMS "EXECUTIVE" "ADMINISTRATIVE" "PROFESSIONAL" "LOCAL RETAINING CAPACITY" "OUTSIDE SALESMAN" (the "Kantor Report", available at https://www.regulations.gov/docket/WHD-2023-0001/document) (1958).

32 *Id.* at 3 (emphasis added).

33 *Id.* (emphasis added).

34 *Id.* at 9.

fide' executive, administrative and professional employees ***without disqualifying any substantial number of such employees***."[35] He commented that "this may result in ***loss of exemption for a few employees*** who might otherwise qualify for exemption[.]"[36] The report also proposed an increase to $125 per week for the salary thresholds applicable to the abbreviated duties tests for the three exemptions, which the Department likewise accepted.[37]

D. The Proposed Rule Rejects 85 Years of Department Precedent and Would Transform the Salary Threshold into a Completely New Regulatory Device.

The Stein, Weiss, and Kantor Reports established the foundation upon which the Department conducted its subsequent revisions of these regulations. Every subsequent rulemaking since then, save for the 2016 final rule invalidated by a federal court and abandoned by the Department on appeal, as well as the present proposed rule, has remained true to the core principle that the main purpose of the salary threshold is to weed out individuals who are plainly non-exempt and who would not otherwise satisfy the duties test for exemption. The goal, as described by the Department, is to make applying the exemptions more efficient by avoiding unnecessary and ultimately fruitless inquiries in job duties when the salary is low enough to serve as a reliable proxy for non-exempt status.[38]

Indeed, even the current proposed rule concedes the regulation's lineage, stating that "[t]he Department first focused on ***the salary level's historic function of screening obviously nonexempt employees from the exemption***, a 'principle [that] has been at the heart of the Department's interpretation of the [executive, administrative, and professional] exemption for over 75 years.'"[39]

The current proposed rule, however, would stand nearly a century of regulatory precedent on its head. Unlike every prior version of the regulations that has gone into effect, in which the salary threshold excludes, at most, "a few" employees, or not a "substantial number", or not a "large number", the current proposal would deny exempt status to ***at least 3.4 million individuals*** whose duties qualify for exempt status and whom the Department views as exempt under existing regulations.[40] The reason for qualifying the number as "at least" 3.4 million is that the actual number is likely to be quite a bit higher because of the Department's use of ***2022*** data, rather than current data, to prepare its estimates regarding the impact of the proposed rule.[41] Buried in a footnote, the Department admits that if it had used fourth-quarter 2023 economic data instead, the proposed salary figure would be $1,140 per week, or $59,285 per year, or nearly eight percent higher than the salary figure used to

---

35 *Id.* at 5 (emphasis added).

36 *Id.* at 7 (emphasis added).

37 *Id.* at 10.

38 In 2004, the Department also modernized the duties tests for the exemptions, in addition to updating the salary thresholds. But the approach to setting the salary level adhered to the principles the Department articulated in 1940, 1949, and 1958. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,165-72. (Apr. 23, 2004) (final rule).

39 88 Fed. Reg. at 62,165 (citation omitted).

40 *See id.*at 62,154, 62,169-73.

41 *See id.* at 62,153 n.3.

generate the economic impact calculations.[42] In the same footnote, the Department states its intention to use current data when it releases its final rule, projecting a level of $1,158 per week, or $60,209 per year—more than nine percent higher than the figure used for the economic impact analysis—in the event that the Department issues the final rule in the first quarter of 2024.[43] To the extent that the Department were ultimately to adopt a salary threshold higher than the figure contained in the proposed rule, the effect would necessarily be to exclude a higher number of workers from exemption.

What the preamble to the proposed rule makes abundantly clear is that the Department is no longer seeking to use the salary threshold to weed out the obviously non-exempt. Instead, the Department goes to great lengths to criticize the Department's 2004 revisions to the duties tests for these exemptions, and it seeks to use the salary threshold to exclude from exemption roughly the same number of workers the Department now believes the regulations ***would have*** excluded ***if*** the Department had not updated the duties tests a generation ago.[44]

In short, the Department would have the salary threshold serve a function it has previously never served: excluding from exemption millions of individuals who currently meet the standards for exemption, solely because they, in the Department's view, may not meet either a duties test or a salary concept that has not been part of the regulations since 2004. Trying to use the salary threshold to implement through the back door a duties standard for measuring exemption abandoned long ago is, at best, a thoroughly disingenuous way to regulate these exemptions. To the extent that the Department does not like the current duties tests, it can change those tests. The Department, however, does not appear to have the appetite to do the hard work necessary to revise the duties standards in line with the criticisms the Department levels at its own 2004 regulations.

Since the passage of the FLSA in 1938, the salary threshold has never once served as a ***substitute*** for the duties test. To the extent that the salary threshold excludes more than a *de minimis* number of workers who satisfy the operative duties test for exemption, that threshold is absolutely inconsistent with the Department's long history of regulating under the FLSA. In addition to being bad practice and bad policy, the sharp regulatory departure from precedent the Department would make now, nearly 100 years into interpreting the FLSA, does not bode well for the treatment the Department's work may receive in court.

II. THE PROPOSED SALARY THRESHOLD INCREASE IS HISTORICALLY EXCESSIVE IN LIGHT OF THE MOST RECENT UPDATE LESS THAN FOUR YEARS AGO.

The proposed rule would increase the weekly salary threshold for the executive, administrative, and professional exemptions from $684, a level that went into effect in January of 2020, to $1,059.[45] This proposal represents a change of just under 55 percent in a span of less than four years. That

---

42 *See id.*

43 *See id.*

44 *See id.* at 62,157-69.

45 As discussed in Part I.D above, that figure will probably end up being higher in the final rule if the Department adheres to its articulated methodology for setting the salary threshold.

increase on its face seems precipitous and unnecessary, and the history of salary threshold increases over the past 80-plus years confirms the anomalous nature of the proposal.

As a matter of historical practice, increases in the salary threshold tended to happen gradually, or in relatively small increments, or both. The timeline of salary threshold increases for these exemptions dating back to 1938 is as follows:

Year	Long duties test			Short duties test	Annual increase
	Executive	**Administrative**	**Professional**		
1938	$30/wk	$30/wk	N/A	N/A	N/A
1940	$30/wk	$200/mo	$200/mo	N/A	N/A
1949	$55/wk	$75/wk	$75/wk	$100/wk	6.97%
1958	$80/wk	$95/wk	$95/wk	$125/wk	4.25%
1963	$100/wk	$100/wk	$115/wk	$150/wk	4.56%
1970	$125/wk	$125/wk	$125/wk	$200/wk	4.20%
1975	$155/wk	$155/wk	$170/wk	$250/wk	6.34%
	Standard duties test				
2004	$455/wk				3.78%
2020	$684/wk				2.58%
(2023)	$1,059/wk				***11.55%***

As a way of controlling for the different time intervals between rulemakings, the foregoing table shows, in the final column, the annual compounding increase in the salary thresholds from one rulemaking to the next.[46] As the chart demonstrates, the rate of increase reflected in the proposed rule is two to three times the historical norm over the course of the FLSA's regulations, and nearly 66

[46] The final column in the table shows the annual compounding increase between the items from one rulemaking to the next that show the greatest percentage disparity. So, for example, in evaluating the change from the 1949 levels to the 1958 levels, the greatest percentage disparity exists in the salary levels for the executive exemption under the long duties test, and the final column calculates the annual percentage increase, compounded, necessary to grow the $55 weekly figure to $80 over nine years. The math involved (1) plugging into a roots calculator the salary level for one rulemaking divided by the comparable figure from the previous rulemaking, and then (2) determining the relevant root of that fraction expressed as (1 / the number of years between the rulemakings). For purposes of the change from 2020 to 2023, the final column considers this a four-year increment rather than three years because the 2020 rule went into effect on January 1 of that year, whereas the 2023 proposed rule would not go into effect until sometime in 2024. To the extent that the weekly figure adopted in the final rule exceeds $1,059 per week, the annual percentage change would increase as well.

percent higher than the ***highest*** level of annual increase ever seen since 1940 when the FLSA regulations first required a salary.

Never before has the Department come even close to an increase of this magnitude over such a short period of time. It should not do so here.

III. AUTOMATIC TRIENNIAL UPDATING WITHOUT FURTHER RULEMAKING APPEARS TO VIOLATE THE ADMINISTRATIVE PROCEDURE ACT.

The proposed rule would create a new provision in the regulations whereby the Department would automatically update, every three years, the salary levels pertinent to the exemptions, without resort to further notice and comment procedures.[47] That approach would appear to involve a clear violation of the requirement in the Administrative Procedure Act (the "APA") that agencies go through notice-and-comment rulemaking before issuing "rules" as defined by the statute..

The APA defines a "rule" in pertinent part as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]"[48] The statute provides that "[g]eneral notice of proposed rule making shall be published in the Federal Register," and that "[t]he notice shall include", inter alia, "reference to the legal authority under which the rule is proposed" and "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[49] An exception to this requirement of notice-and-comment rulemaking exists for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" as well as "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[50]

There can be no doubt that the salary threshold for exemption under the FLSA qualifies as a rule, as the Department intends it to be part of the legally operative test for determining whether an employee qualifies for exemption. The FLSA itself contains no provision calling for automatic periodic updates without formal rulemaking as some sort of exception to the APA. The Department wants to arrogate for itself the authority to "set it and forget it", articulating a methodology to govern salary thresholds in perpetuity, but with subsequent applications of that methodology immune from the normal constraints on agency action.

Nothing in the FLSA or the APA allows the Department to exempt itself from the procedural requirements that govern making substantive changes to a regulation prescribing the standards for exemption.

---

47 *See* 88 Fed. Reg. at 62,240 (setting forth proposed 29 C.F.R. § 541.607).

48 5 U.S.C. § 551(4).

49 *Id.* § 553(b)(2)-(3).

50 *Id.* § 553(b).

IV. CONGRESS, NOT THE DEPARTMENT OF LABOR, SHOULD MAKE THESE KINDS OF DECISIONS.

As discussed above, the Department conducted public hearings in 1940, two years after Congress enacted the FLSA, to consider revising the exemption regulations issued in 1938. The result of that process, the Stein Report, predicated the entire endeavor with a heading that reads: "EXEMPTION SHOULD BE INTERPRETED NARROWLY"; the report then observes that "[t]he general rule in a statute of this nature, that coverage should be broadly interpreted and exemptions narrowly construed, is so well known as to need little elaboration here."[51] After announcing that interpretive prism for viewing the FLSA's executive, administrative, and professional exemptions, the Stein Report proceeded to recommend extensive changes to both the duties standards and the compensation requirements for these exemptions, including implementing a salary threshold.

One significant problem with that approach is that it reflects an understanding of the FLSA's exemptions that, while consistent with judicial decisions of the day, is contrary to current Supreme Court case law. In *Encino Motorcars, LLC v. Navarro*[52], the Supreme Court flatly disavowed that interpretive view:

> ***The Ninth Circuit also invoked the principle that exemptions to the FLSA should be construed narrowly. 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.***[53]

Thus, from almost the very beginning of the FLSA regulations, the Department has constructed a set of regulations that flow from the legally incorrect premise that exemptions are subject to narrow construction. Indeed, that original sin of construing these exemptions narrowly permeates the regulations and informs both the duties components and the salary components of the regulations. Nor has any of the Departments subsequent rulemakings on this subject in any way attempted to cure this problem or to disavow reliance on the narrow construction principle. Instead, the Department has merely continued to build higher, adding additional stories to an edifice with a fatally flawed foundation.

On a related note, as the Supreme Court has shown in recent years an increased vigilance in policing the ever-porous boundary between Articles I and II of the Constitution, there is reason to suspect that the entire business of imposing a salary requirement for these exemptions may be beyond

---

51 Stein Report, *supra* note 6, at 2.

52 138 S. Ct. 1134 (2018).

53 *Id.* at 1142 (citations omitted, emphases added).

the proper authority of the Department. Although the federal courts have thus far not rejected that authority, and a few decisions from half a century ago lend at least some, albeit tenuous, support to the Department's exercise of power in this area, we have recently witnessed the emergence of the major questions doctrine, the apparent reinvigoration of the non-delegation doctrine, and the active consideration of whether to overrule *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[54], a decision that has for almost 40 years governed the standards for judicial deference to federal agency rules. Indeed, the United States Court of Appeals for the Fifth Circuit is currently examining this very question, whether the Department has the authority to impose a salary requirement for the FLSA exemptions.[55]

Ultimately, regardless of whether the Department has the legal authority to establish a salary threshold, or this specific salary threshold, for these exemptions, as a constitutional matter this action is more properly Congress's domain. There is no objectively "correct" salary threshold for these exemptions, nor is this a matter for which there is meaningful administrative experience worthy of deference. The history of the Department's regulations in this space demonstrates that decisions about exemptions, including setting and modifying salary thresholds, are simply a reflection of policy preferences that vary from administration to administration. The traditional rationale for delegating rulemaking authority to agencies simply does not apply in this instance.

When it comes to issuing nationwide standards concerning which employees should and should not be exempt from federal overtime and minimum wage standards under FLSA section 13(a)(1), it should be Congress that makes those decisions, not the Department. Congress should retain control over the policy, including addressing the growing disconnect between the FLSA—a statute already in its ninth decade, grounded in industrial and agricultural economic realities that in large part exist only in the history books—and today's fast-changing economy, driven by information and technology that evolve at a pace unimaginable in 1938. It is time for Congress to take back the reins and to make the hard policy choices inherent in addressing wage and hour issues.

V. CONCLUSION

For these reasons, I oppose the proposed rule. It is grossly out of step with historical practice, it unnecessarily deprives millions of individuals of exempt status, and it probably violates the Administrative Procedure Act and possibly the Constitution. Chairman Kiley, Ranking Member Adams, and members of the Subcommittee, thank you for the opportunity to share these views with you today. Please let me know what else I can do to help you in this matter.

---

[54] 467 U.S. 837 (1984).

[55] *See* Mayfield v. Dep't of Lab., *appeal docketed*, No. 23-50724 (5th Cir. Oct. 11, 2023).