**No. 16-41606**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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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.*

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

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# BRIEF FOR THE STATES OF MISSOURI, COLORADO, MONTANA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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**SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

| *Amici Curiae* | Counsel for *Amici Curiae* |
|---|---|
| • The State of Missouri | • Joshua D. Hawley, Missouri Attorney General<br>• D. John Sauer, Missouri State Solicitor (lead counsel) |
| • The State of Colorado | • Cynthia H. Coffman, Colorado Attorney General |
| • The State of Montana | • Tim Fox, Montana Attorney General |
| • The State of Wyoming | • Peter K. Michael, Wyoming Attorney General |

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## STATEMENT OF INTEREST OF AMICI

*Amici Curiae* include the States of Missouri, Colorado, Montana, and Wyoming. In order to exercise their sovereign functions, *amici* operate numerous state agencies employing thousands of executive, administrative, and professional ("EAP") workers impacted by the Final Rule of the Department of Labor ("Department") challenged in this case. The loss of the EAP exemption in 29 U.S.C. § 213(a)(1) for these workers would disrupt state budgets and undermine the ability of state agencies to deliver critical government services to each State's citizens. Further, *amici* States have a strong sovereign interest in shielding from undue federal interference their authority to govern the terms on which they and their agencies employ personnel. Moreover, each *amicus* State is charged with preventing disruption of employer-employee relations and protecting economic freedom and economic growth within its borders. For all these reasons, *amici* States have a strong interest in the outcome of this appeal.

## SUMMARY OF ARGUMENT

In its Final Rule, the Department has interpreted the phrase "any employee employed in a bona fide executive, administrative, or professional capacity," 29 U.S.C. § 213(a)(1), to exclude millions of employees who are unquestionably employed in a bona fide executive, administrative, or professional capacity. As the district court found, this interpretation directly contradicts the plain text of the

statute. Moreover, even if there were any ambiguity in the statute's text, the Department's construction would still run afoul of several clear-statement rules adopted by the Supreme Court to safeguard important constitutional values, including federalism and the separation of powers. Under these clear-statement rules, any ambiguity in the statute must be resolved against the Department, and the Department's interpretation warrants no *Chevron* deference.

*Chevron* calls for the reviewing court to employ "traditional tools of statutory construction" in determining whether the statute contains an ambiguity that implies a delegation of authority to an agency, and whether an agency's construction of a statute is permissible. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Such "traditional tools of statutory construction" include longstanding clear-statement rules that the Supreme Court applies to safeguard constitutional values. These clear-statement rules include the canon of constitutional avoidance, the rule that Congress does not purport to interfere with sovereign state functions or disrupt the federal-state balance without a clear and unmistakable statement, the rule that sweeping delegations of legislative authority are not found in vague or ancillary statutory terms, and the presumption that Congress will speak very clearly when it authorizes agencies to decide questions of enormous political and economic significance. Where an agency's interpretation would contravene such clear-statement rules, the Supreme

Court rejects that interpretation and does "not extend *Chevron* deference" to the agency. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("*SWANCC*").

Each of these clear-statement rules is applicable in this case. First, the venerable canon of constitutional avoidance dictates that the reviewing court must reject an agency interpretation that raises grave constitutional questions, so long as there is a "competing plausible interpretation" that does not raise such "serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). In other words, the avoidance canon inverts the usual presumption under *Chevron*—when the agency's interpretation raises serious constitutional questions, the agency must show that the statute is *not* ambiguous and that there is no "competing plausible interpretation" that lacks similar constitutional difficulties. *Id.*

The Supreme Court's various clear-statement rules provide specific applications of this canon of avoidance. One deeply entrenched rule presumes that Congress will speak in clear and unmistakable language if it wishes to interfere with the sovereign functions of the States or to disrupt the balance of authority between the States and the federal government. This rule safeguards principles of federalism that are central to our Nation's unique form of government and critical to preserving individual liberties. *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) ("*Bond II*"). The Supreme Court has applied this rule in a host of cases, in

a wide variety of contexts. Most notably, in *Gregory v. Ashcroft*, the Supreme Court expressly instructed that such a clear-statement rule applies when the federal government seeks to regulate the relations between the sovereign States and their employees. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). Under *Gregory*, this Court "must be absolutely certain that Congress intended such an exercise" of agency authority against the States. *Id.* Because the Department's interpretation contradicts the plain meaning of the statute, no such "absolute certain[ty]" is possible here. *Id.* Thus, the federalism clear-statement rule directly forecloses the Department's application of its radical reformulation of the EAP exemption in § 213(a)(1) to the States.

Similarly, the Supreme Court has repeatedly held that "sweeping delegations of legislative authority" require clear and unambiguous authorization from Congress. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion). Much like the federalism canon, this clear-statement rule safeguards critical constitutional interests, because broad delegations of legislative authority undermine the separation of powers. *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989). To safeguard the separation of powers, the Supreme Court has applied this nondelegation clear-statement rule in a series of cases. Here, the Department's interpretation would discern a "sweeping delegation of legislative authority" to regulate a massive sector of the American labor force in

statutory language that provides, at best, extremely vague and dubious support for the Department's view.

Relatedly, the Supreme Court has also held that Congress does not grant authority to decide questions of great political and economic importance, or radically to revise the regulation of entire industries, through vague and indistinct statutory language. In other words, Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The Supreme Court has applied this principle of interpretation in a host of cases, including very recently in *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). In *King*, the Supreme Court refused to conclude that Congress had delegated "a question of deep economic and political significance" to the IRS, absent a very clear statement to that effect. *Id.* "[H]ad Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.* So also here, this Court should require a clear statement in the text of the FLSA that Congress intended to permit the Department to subject literally millions of EAP workers to minimum-wage and overtime standards. And, of course, no such clear statement exists. On the contrary, the statutory language states the exact opposite—*any* bona fide EAP worker is exempt from those standards. The district court's interpretation of § 213(a)(1) is correct.

## ARGUMENT

The Department of Labor has interpreted the phrase "***any*** employee employed in a bona fide executive, administrative, or professional capacity," 29 U.S.C. § 231(a)(1) (emphasis added), to exclude *millions* of employees "employed in a bona fide executive, administrative, or professional capacity," because they do not meet the Department's arbitrary and escalating salary threshold. The district court's conclusion that the plain text of the statute forecloses this interpretation is demonstrably correct. Moreover, the district court's interpretation draws additional support from a series of clear-statement rules that the Supreme Court has applied, over many decades, to reject interpretations of federal statutes that would interfere with state sovereignty, disrupt the balance of authority between the federal government and the States, grant sweeping delegations of legislative authority in vague statutory provisions, or impliedly authorize agencies to impose drastic economic consequences on the American people. All of these clear-statement rules are plainly applicable in this case, and each one independently mandates that any putative statutory ambiguity must be resolved *against* the Department's interpretation.

## I. The Canon of Constitutional Avoidance and the Supreme Court's Clear-Statement Rules Resolve Statutory Ambiguity, and an Agency Interpretation That Runs Afoul of These Interpretive Principles Merits No Deference Under *Chevron*.

Under *Chevron*, "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). "If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

In answering both of these questions—*i.e.* "whether Congress has directly spoken to the precise question at issue," and "whether the agency's answer is based on a permissible construction of the statute," *id.* at 842-43—courts are to "employ[] traditional tools of statutory construction." *Id.* at 843 n.9; *see also INS v.Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) (same). These "traditional tools of statutory construction" include the full panoply that devices that courts employ to

discern statutory meaning, including all well-established "canons of textual construction." *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring in part and concurring in the judgment).

It is indisputable that *Chevron*'s "traditional tools of statutory construction" include the longstanding clear-statement rules that the Supreme Court has adopted to address critical concerns relating to federalism and the separation of powers. These rules include the canon of constitutional avoidance, the rule that Congress must speak clearly and unmistakably before interfering with state sovereign functions or intruding upon the federal-state balance, the rule that sweeping delegations of legislative authority must be made in clear and unmistakable language, and the rule that Congress is presumed not to delegate authority to decide issues of great public importance through vague statutory language. *See infra* Part II. A reviewing court must consider and apply all these clear-statement rules in discerning both whether a statute is sufficiently ambiguous to warrant administrative deference, and whether an agency's construction of a federal statute is permissible, under *Chevron*.

The Supreme Court has repeatedly emphasized that such clear-statement rules are ordinary rules of interpretation, like any other rules. "Part of a fair reading of statutory text is recognizing that Congress legislates against the backdrop of certain unexpressed presumptions." *Bond v. United States*, 134 S. Ct.

2077, 2088 (2014) ("*Bond II*") (quotation omitted). "Among the background principles of construction that our cases have recognized are those grounded in the relationship between the Federal Government and the States under our Constitution." *Id.* For example, the Court's "precedents make clear that it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute." *Id.* at 2090. "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). Similarly, "[t]he implausibility of Congress's leaving a highly significant issue unaddressed (and thus 'delegating' its resolution to the administering agency) is assuredly one of the factors to be considered *in determining whether there is ambiguity*" under *Chevron*. *Christesen v. Harris County*, 529 U.S. 576, 589 n.* (2000) (Scalia, J., concurring in part and concurring in the judgment) (emphasis in original). In short, these clear-statement rules are just as much "tools of statutory construction" as familiar canons like *eiusdem generis* and *noscitur a sociis*. If anything, the clear-statement rules are *more* integral to sound statutory interpretation than ordinary canons, because the clear-statement rules safeguard fundamental constitutional values.

Accordingly, the Supreme Court has squarely held that its constitutional clear-statement rules—such as the presumption against interpretations of federal statutes that would interfere with state sovereign functions—apply to resolve ambiguity and foreclose agency interpretations that might otherwise be entitled to *Chevron* deference. For example, the Court expressly stated that it will "not extend *Chevron* deference" in circumstances "[w]here an administrative interpretation of a statute invokes the outer limits of Congress's power," absent "a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). "This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. "This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173. "Thus, 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress,'" and such a construction is entitled to no deference under *Chevron*. *Id.* (quoting *Edward J. DeBartolo Corp.*

*v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

Therefore, the statute in this case "must be read consistent with principles of federalism inherent in our constitutional structure," as well as other constitutional canons of construction adopted by the U.S. Supreme Court. *Bond II*, 134 S. Ct. at 2088. Those canons of construction apply to resolve any perceive ambiguities on which the Department might otherwise rely to claim *Chevron* deference.

## II. Several Principles of Interpretation that Safeguard Fundamental Constitutional Values, Including Federalism and the Separation of Powers, Eliminate Any Perceived Ambiguity in the FLSA and Support the District Court's Textual Interpretation of the Statute.

Several long-established rules of interpretation, adopted by the Supreme Court to protect federalism and the separation of powers, apply to the provision of the FLSA in this case. These rules require an unmistakably clear statement from Congress before a federal statute should be deemed to grant authority to the Department to transform the regulation of a massive sector of the American workforce, and to impose radical consequences on state agencies and state budgets. These rules dictate that any ambiguity in the statute must be resolved against the Department, and that the Department's interpretation must be rejected.

### A. Because the Department's interpretation of § 213(a)(1) raises difficult constitutional questions, the canon of constitutional avoidance directs that any perceived ambiguity must be resolved against the Department.

One of the most venerable principles of statutory interpretation is the canon of constitutional avoidance. "[I]t is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Bond II*, 134 S. Ct. at 2087 (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)). "The Court will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This rule requires a reviewing court, when confronted with competing permissible interpretations of a federal statute, to adopt the interpretation that avoids presenting a difficult or thorny constitutional question. *See id.* ("Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."). "The canon of constitutional avoidance . . . is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

The various clear-statement rules that the Supreme Court has adopted to vindicate federalism and the separation of powers—discussed further below—are all specific applications of this general rule of avoidance. Accordingly, in cases where any of these versions of the avoidance canon applies, the canon effectively inverts the usual interpretive presumptions of *Chevron*. When an agency's interpretation of a statute raises serious constitutional questions, the agency must do more than show that its interpretation is merely textually plausible. It must show that there is no "competing plausible interpretation" that does not raise such "serious constitutional doubts." *Clark*, 543 U.S. at 381. If there is such a competing plausible interpretation, under "ordinary tools of statutory construction," the reviewing court must adopt the competing interpretation that is not constitutionally problematic.

These principles are fatal to the agency's interpretation in this case. Though the agency argues at length that its interpretation of the statute is defensible, it cannot dispute that its interpretation raises, at very least, serious constitutional questions about the state-federal balance and sweeping delegation of authority. Moreover, the agency does not, and cannot, contend that the district court's alternative interpretation is, at very least, a "competing plausible interpretation" that does not raise the same constitutional concerns. *Id.* In such circumstances, the

agency's interpretation is entitled to no deference, and the reviewing court must adopt the alternative interpretation that raises no constitutional doubt.

### B. The agency's interpretation runs afoul of the rule that Congress must make a clear and unmistakable statement before disrupting the federal-state balance or interfering with the sovereign functions of the States.

One of the most deeply entrenched versions of the canon of avoidance is the rule that a federal statute will not be construed to interfere with sovereign state functions or disrupt the balance of authority between the federal government and the States without an unmistakably clear statement of Congress's intent to do so.

The Supreme Court has long recognized that principles of federalism are fundamental to our republican form of government. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond v. United States*, 564 U.S. 211, 220-21 (2011) ("*Bond I*") (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). "The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Id.* at 221. "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* "By denying any one government complete jurisdiction over all the concerns of public

life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake." *Id.* at 222.

Due to the basic importance of federalism, the Supreme Court exercises particular vigilance in reviewing statutes that run counter to federalism's structural principles. "The principles of limited national powers and state sovereignty are intertwined. . . . Impermissible interference with state sovereignty is not within the enumerated powers of the National Government, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States." *Bond I*, 564 U.S. at 225 (citations omitted). "This federalist structure of joint sovereigns . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.* at 458.

One of the most important methods that the Supreme Court uses to defend principles of federalism is to insist that federal statutes speak in clear and unmistakable language when they purport to interfere with state sovereignty or alter the balance of authority between the federal government and the States. "Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." *Gregory*, 501 U.S. at 460. "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461.

The Supreme Court has reaffirmed and applied this clear-statement rule in an unbroken line of cases. "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (alterations and quotation marks omitted) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring to issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971). "Because such legislation

imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 16 (1981).

Accordingly, this clear-statement rule has protected the States from undue federal interference in a wide variety of contexts over many decades. For example, in interpreting federal statutes, the Supreme Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947). The Court has stated that it "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bass*, 404 U.S. at 349. Congress must speak very clearly before it will be presumed to have interfered with the States' ability to exercise "decision[s] of the most fundamental sort for a sovereign entity," and those that implicate "the character of those who exercise government authority," such as the identity and qualifications of state judges. *Gregory*, 501 U.S. at 460. The Court requires a clear statement from Congress before adopting any statutory interpretation that "would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. Similarly, the Court requires an

exceptionally clear statement before it will presume that Congress intends to abrogate state sovereign immunity. *See Sossamon v. Texas*, 563 U.S. 277, 284 (2011). Congress must speak equally clearly to exercise its enforcement powers under Section 5 of the Fourteenth Amendment. *Pennhurst*, 451 U.S. at 16-17. Likewise, Congress must speak "unambiguously" and "with a clear voice" in order to impose conditions upon the States pursuant to its powers under the Spending Clause. *Id.* at 17; *see also Bond II*, 134 S. Ct. at 2088-89 ("It has long been settled, for example, that we presume federal statutes do not abrogate state sovereign immunity, impose obligations on the States pursuant to section 5 of the Fourteenth Amendment, or preempt state law.") (citations omitted).

There is no question that the agency's interpretation of the statute in this case would "affect[] the federal balance" and "effect a significant change in the sensitive relation between federal and state" government, triggering application of the federalism clear-statement rule. *Bass*, 404 U.S. at 349. In *National League of Cities v. Usery*, the Supreme Court emphasized the federalism interests raised by the very issue in dispute in this case: "One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime." 426 U.S. 833, 845 (1976).

To be sure, in *Garcia*, the Supreme Court retreated from directly policing the application of the FLSA's minimum-wage and overtime standards to state agencies. *Garcia v. San Antonio Metro. Transit Auth*., 469 U.S. 528, 547 (1985).[1] But this retreat was not due to any failure to recognize the gravity of the federalism interests threatened by the Department's regulation of state agencies *qua* employers; rather, the retreat arose from the Supreme Court's conclusion that workable standards for judicial review were unavailable. *Garcia* stated: "What has proved problematic is *not* the perception that the Constitution's federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations." *Id.* at 547 (emphasis added); *see also id.* at 538-39 (noting the difficulty of reaching a workable principle for discerning which functions of government constituted "traditional government functions" exempt from federal regulation under the Commerce Clause). In fact, *Garcia* repeatedly emphasized that applying FLSA's wage and hour standards to state governments and agencies raised critical constitutional questions implicating the federal structure: "The central theme of *National League of Cities* was that the States occupy a special position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position." *Id.* at 547. Because the Supreme Court in *Garcia* retreated from *directly* protecting the States' "special

[1] *Amici* concur in Appellees' position that *Garcia* should be overruled, but concede that only the Supreme Court has the prerogative of doing so.

position in our constitutional system," *id.*, the *indirect* protection of such interests through the application of clear-statement rules became all the more important.

For these very reasons, in *Gregory*, the Supreme Court explicitly instructed that the federalism interests at stake in *Garcia*, *National League of Cities*, and this case warrant the application of a clear-statement rule to the minimum-wage and overtime provisions of the FLSA. Noting that "application of the plain statement rule thus may avoid a potential constitutional problem," the Supreme Court in *Gregory* stated: "Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, ***we must be absolutely certain that Congress intended such an exercise.*** '[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'" *Gregory*, 501 U.S. at 464 (emphasis added) (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, p. 480 (2d ed. 1988)).

In other words, in *Gregory*, the Supreme Court directed that the federalism clear-statement rule applies in this precise context. "Mere constitutional ambiguity" is not enough to warrant agency regulation of the States in this context—rather, the reviewing court "must be absolutely certain that Congress intended such an exercise" of agency authority. *Id.* In the absence of such

"absolute[] certain[ty]," *id.*, the statute cannot be interpreted to authorize such an intrusion on state authority. This rule inverts the *Chevron* presumption. Statutory ambiguity does not confirm the Department's position; rather, ambiguity is *fatal* to the Department's position.

Thus, both *Garcia* and *Gregory* expressly confirm that the application of FLSA's minimum-wage and overtime standards to the States and their agencies—especially the radical revision of those standards at issue here—involves an exercise at the outer limits of Congress's power under the Commerce Clause. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. . . . Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-73.

The application of this clear-statement rule resolves this case. Whatever the merits of the Department's (dubious) claim that the statute is sufficiently ambiguous to warrant the agency's counter-textual interpretation, certainly the district court's interpretation is at least *plausible*. In fact, the district court's interpretation is *the only* plausible interpretation. As long as the district court's interpretation is, at very least, a "competing plausible interpretation" that does not raise the same "serious constitutional doubts" as the agency's interpretation, this

court must adopt it. *Clark*, 543 U.S. at 381. And for the same reasons, this Court must "not extend *Chevron* deference" to the Department's interpretation where this clear-statement rule resolves any ambiguity against the Department. *SWANCC*, 531 U.S. at 172.

### C. The Department's interpretation violates the rule that "sweeping delegations of legislative power" must be expressed clearly and unmistakably.

In addition, the Department's interpretation in this case violates the rule that Congress does not engage in sweeping delegations of legislative power through vague statutory terms. For over a century, the Supreme Court has recognized that broad delegations of legislative authority to administrative agencies raise grave questions implicating the separation of powers and the constitutional structure of government. "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,' U.S. CONST., Art. I, § 1, and we long have insisted that 'the integrity and maintenance the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)).

As in *Garcia*, the Supreme Court has largely retreated from enforcing the nondelegation doctrine through judicial invalidation of federal statutes, and it has sought instead to address nondelegation concerns by requiring a clear statement from Congress to authorize sweeping delegations of authority. The Court itself has stated: "In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 374 n.7. "Rather than overturning administrative statutes on that ground [of nondelegation] . . . the Court has long enforced the nondelegation doctrine by narrowly construing administrative statutes that otherwise risk conferring unconstitutionally excessive agency discretion." John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223 (2000).

Such "narrow constructions to statutory delegations," *Mistretta*, 488 U.S. at 374 n.7, plainly entail the application of a clear-statement rule. For example, in *American Petroleum*, a plurality of the Supreme Court refused to adopt an interpretation of a statute that would involve "sweeping delegation of legislative power" that "might be unconstitutional under the Court's reasoning" in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); the plurality concluded that "[a]

construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion). The *American Petroleum* plurality specifically required "a clear mandate in the Act" before it would adopt the interpretation that would create non-delegation concerns. "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view" of the disputed statutory language. *Id.* at 645.

The Supreme Court has imposed this clear-statement rule to reject interpretations of federal statutes that would have involved sweeping delegations of legislative authority in other contexts as well. *See, e.g.*, *National Cable Television Ass'n v FCC*, 415 U.S. 336, 341-42 (1974) (reading the Independent Offices Appropriations Act "narrowly to avoid constitutional problems" raised by a putative grant of open-ended authority to the agency to impose "fees" on regulated parties, and holding that a "fee" must reflect a benefit to a regulated party); *Federal Power Commission v. New England Power Co.*, 415 U.S. 345, 349-51 (1974). Notably, the reviewing court need not decide that the statute would be *actually* unconstitutional under the agency's broad interpretation; rather, the clear-statement rule applies if the agency's interpretation would be constitutionally problematic. "Whether the present Act meets the [nondelegation] requirement of

*Schechter* and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems." *National Cable*, 415 U.S. at 342.

In this case, the agency's interpretation of the statute plainly runs afoul of this clear-statement rule. It is beyond dispute that the agency's interpretation of the statute entails a "sweeping delegation of legislative power," *American Petroleum*, 448 U.S. at 646, to exercise *de facto* economic control over millions of workers nationwide, including many thousands of state employees. *See* 81 Fed. Reg. 32,391, 32,405 (May 23, 2016) (noting that the Department of Labor estimates that the Final Rule will eliminate the statutory exemption for 4.2 million workers nationwide). The Final Rule will have avulsive consequences for state budgets and critical state governmental functions in States across the country. "A construction of the statute that avoids this kind of open-ended grant" of authority—such as the interpretation adopted by the district court—"should certainly be favored." *American Petroleum*, 448 U.S. at 646.

**D. The Department's interpretation violates the presumption that Congress does not grant authority to decide questions of great public significance through vague or ambiguous statutory language.**

Closely related to the non-delegation canon, the Supreme Court has also repeatedly held that Congress does not grant authority to impose drastic economic consequences, or radically revise the regulation of entire industries, through vague

and indistinct statutory language. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

*Whitman* is instructive here. In *Whitman*, the Supreme Court determined that provisions of the Clean Air Act instructing EPA to set ambient air quality standards "requisite to protect the public health" with "an adequate margin of safety" did not confer on EPA the statutory authority to consider economic costs in setting the standards. *Id.* at 465. The agency focused on the statutory terms "requisite" and "adequate" to argue that Congress had impliedly granted authority to consider economic costs in setting such air-safety standards. *Id.* at 468. Stating that Congress's "textual commitment must be a clear one," the Supreme Court rejected EPA's argument, and finding it "implausible that Congress would give to the EPA through these modest words the power to determine whether implementation costs should moderate national air quality standards." *Id.* at 468.

The Supreme Court has applied this clear-statement rule in other contexts as well. For example, in *MCI v. AT&T*, the Court refused to interpret the vague and indistinct word "modify" in the Communications Act to imply a broad grant of authority to transform regulation of an entire industry. "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or

even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements." *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994). "[A]n elimination of the crucial provision of the statute for 40% of a major sector of the industry is much too extensive to be considered a 'modification.'" *Id.* at 231. Likewise in this case, the agency relies on language that is at least as vague in seeking to impose "an elimination of the crucial provision of the [FLSA]"—*i.e.*, the EAP exemption—for a vast subset of "a major sector of the industry"—*i.e.*, the entire EAP workforce nationwide.

Similarly, in *Food & Drug Administration v. Brown & Williamson Tobacco Corporation*, 529 U.S. 120, 159 (2000), the Supreme Court refused to interpret the vague word "drug" in the Food, Drug, and Cosmetic Act to imply a broad grant of authority to the FDA to regulate the entire tobacco industry. Noting that "the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy," *id.*, the Supreme Court rejected this sweeping grant of authority premised on a single statutory phrase, instead requiring a much clearer statement of congressional intent. "As in *MCI*, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160.

In the last few years, moreover, the Supreme Court has repeatedly reaffirmed this clear-statement rule against delegating "decision[s] of such economic political significance" through vague language. *Id.* In *King v. Burwell*, the Supreme Court held that the availability of tax-credit subsidies for persons purchasing health care on federal exchanges presented "a question of deep economic and political significance that is central to this statutory scheme," and concluded that "had Congress wished to assign that question to an agency, it surely would have done so expressly." 135 S. Ct. 2480, 2489 (2015) (citation omitted). "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *Brown & Williamson*, 529 U.S. at 159, 160)).

The authority that the Department would arrogate to itself in this case contains just as much "economic and political significance," and equally impacts "a significant portion of the American economy," as in the foregoing cases. *Brown & Williamson*, 529 U.S. at 159-60. The scope of the EAP exemption is unquestionably "a question of deep economic and political significance that is central to this statutory scheme." *King*, 135 S. Ct. at 2489. If Congress had

wanted to confer authority to impose minimum-wage and overtime standards on millions of EAP workers nationwide, "it surely would have done so expressly." *Id.* It did not do so. On the contrary, Congress expressly exempted *all* EAP workers from such standards. 29 U.S.C. § 213(a)(1). The Department's contrary interpretation thus runs afoul of this clear-statement rule as well.

## CONCLUSION

For the reasons stated, *amici curiae* respectfully request that this Court affirm the district court's order granting a preliminary injunction against the enforcement Department of Labor's Final Rule interpreting 29 U.S.C. § 213(a)(1), as described at 81 Fed. Reg. 32,291.

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## CERTIFICATE OF SERVICE

On January 24, 2017, this brief was served via CM/ECF on all registered counsel and was transmitted to the Clerk of the Court.

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## CERTIFICATE OF COMPLIANCE

This brief complies with (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6485 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the same program used to calculate the word count); and (3) Fifth Circuit Rule 25.2.13.

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