Litigation Insights

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—TOP THREE HIGHLIGHTS

The following three summaries are this month's Editor's Top Picks from the dozens of decisions added to Moore's Federal Practice and Procedure.

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115 F.4th 1244, 2024 U.S. App. LEXIS 24208 (9th Cir. Sept. 24, 2024) (en banc)

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By Meghan Atwood

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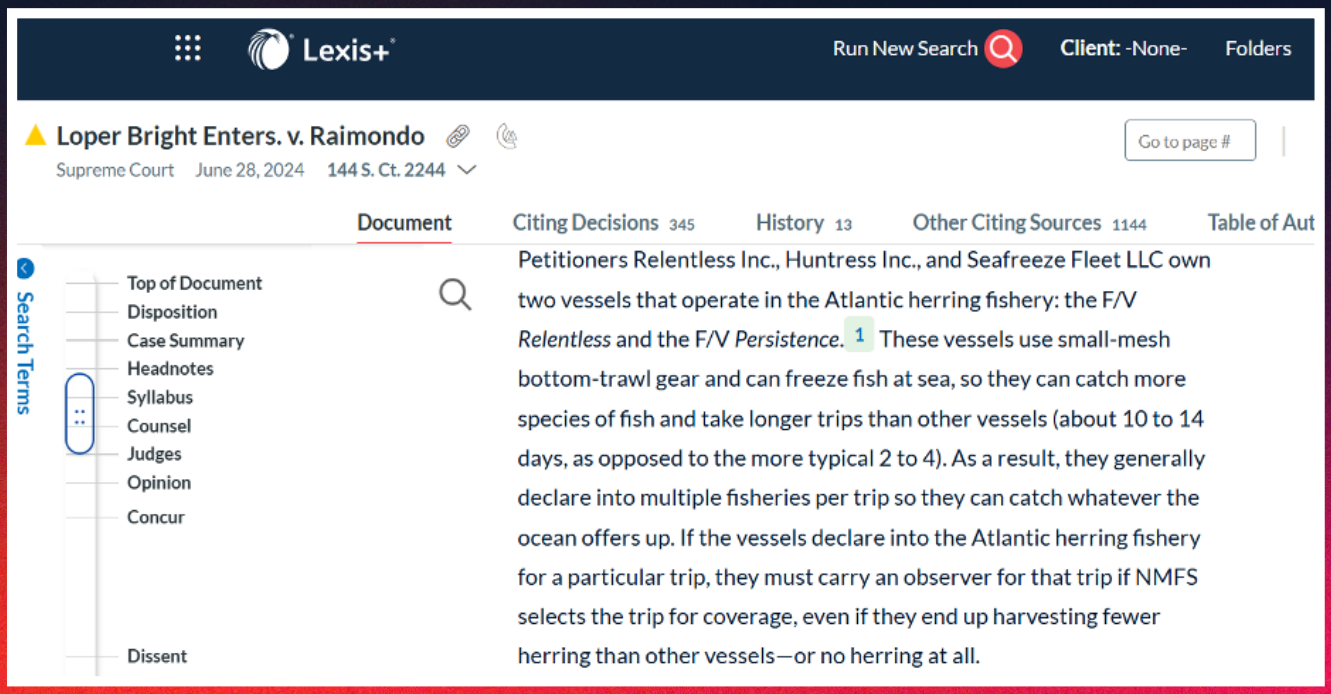

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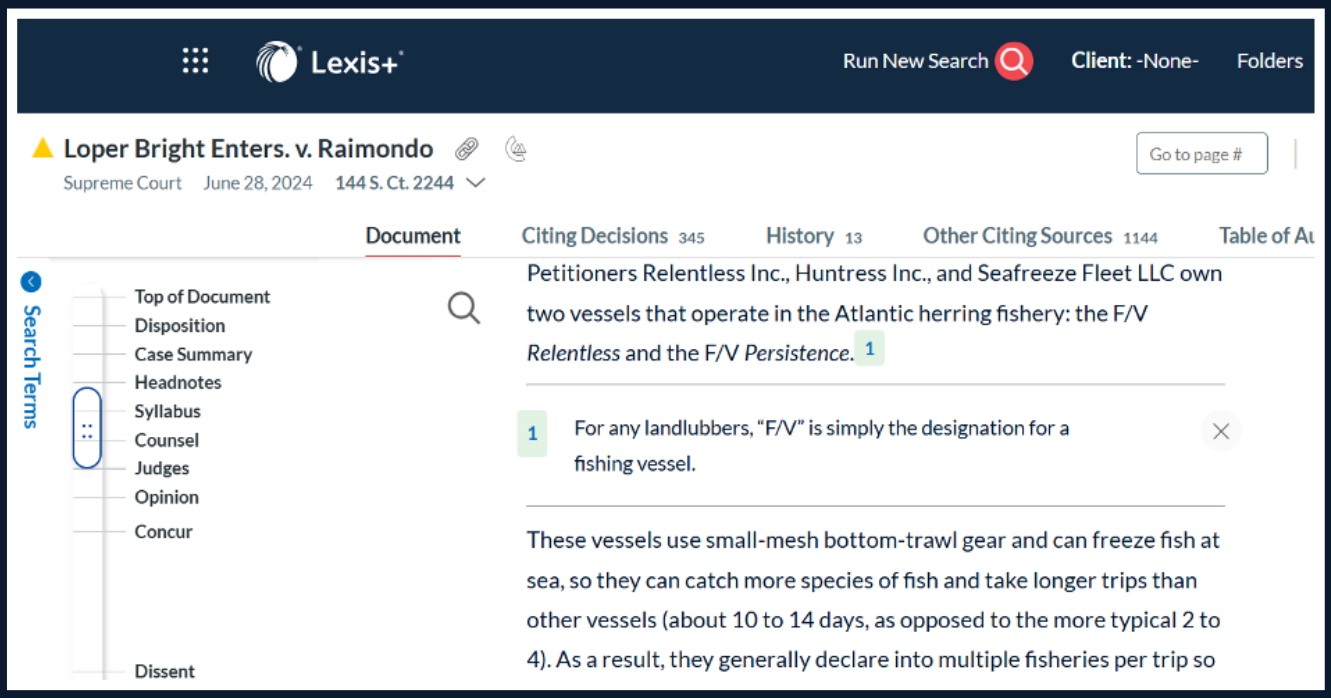

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CLASS ACTIONS

American Pipe Tolling

DeGeer v. Union Pac. R.R. Co.

113 F.4th 1035, 2024 U.S. App. LEXIS 22267 (8th Cir. Sept. 3, 2024)

The Eighth Circuit holds that an individual is considered a member of a class for purposes of *American Pipe* tolling despite a narrowing of the class definition unless the revised definition unambiguously excludes the individual.

Background. A group of Union Pacific Railroad Company employees brought a class action against the company, alleging that its fitness-for-duty program violated the Americans With Disabilities Act (ADA). This program was intended to ensure that employees could safely perform their jobs and meet standards established by regulatory agencies. The Federal Railroad Agency mandates regular testing to assess whether employees in safety-sensitive positions can recognize and distinguish between the colors of railroad signals. Union Pacific used a particular test for this purpose, and employees who failed to meet this test could take a separate color-vision field test to meet the requirements. After a deadly railroad crash, however, Union Pacific updated its fitness program and instituted a new, more difficult, secondary test.

One employee, a member of this class as filed, typically failed the primary test but was able to pass the secondary field test. After Union Pacific replaced the secondary test, he was unable to pass. Though he had worked as a conductor for years without incident, Union Pacific removed him from service and barred him from any job in which he would have to identify traffic signals. This employee was aware of this suit and considered himself a member of the proposed class, although the class definition changed over time. The district court eventually certified the class under a narrowed class definition.

On appeal, the court of appeals reversed this certification. The employee then filed the present suit, alleging violations of the ADA and seeking a declaration that he was a member of the class as it had existed before decertification. If so and his claims were tolled during the pendency of the class action, his suit was timely. In a motion for judgment on the pleadings, Union Pacific argued that the employee was not a member of the class as certified and so was not entitled to *American Pipe* tolling. The district court agreed and dismissed his claims as time-barred.

***American Pipe* Tolling.** The commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action [*American Pipe* & Construction Co. v. Utah, 414 U.S. 538, 554, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)]. Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. So long as asserted class members maintain their status, they enjoy the benefit of tolling when they file an otherwise untimely individual suit.

This tolling rule is grounded in the traditional equitable powers of the judiciary. It furthers the efficiency purpose of class actions by disincentivizing plaintiffs wary of an adverse certification decision from filing needless protective suits, and it serves the reliance interests that statutes of limitations aim to protect. By filing a class action, named plaintiffs put defendants on notice of the substantive claims being brought against them and the number and generic identities of the potential plaintiffs who may participate in the judgment. And, by relying on the class to press their claims, asserted class members cannot be accused of sleeping on their rights.

Employee Was Entitled to Tolling. Tolling ended for the class as a whole when the court of appeals reversed certification. Here, the question was whether it had ended for the employee sooner, when the district court had certified the class under a narrower definition, arguably one not including the employee. The court of appeals noted that other circuits have addressed this precise issue. The Ninth Circuit held that when the scope of the class definition in an initial complaint arguably includes the plaintiff, he or she remains entitled to *American Pipe* tolling unless and until a court accepts a new definition that unambiguously excludes him or her [DeFries v. Union Pac. R.R. Co., 104 F.4th 1091, 1099 (9th Cir. 2024)]. Any ambiguities are resolved in favor of applying *American Pipe* tolling. Applying this test, the Ninth Circuit concluded that the narrowed definition did not unambiguously exclude its color-vision appellant. The Fifth Circuit agreed that only an unambiguous exclusion from the class could end *American Pipe* tolling. It concluded that the district court had certified an expansive class that included the color-vision appellant [Zaragoza v. Union Pac. R.R. Co., 112 F.4th 313 (5th Cir. 2024)].

Here, the Eighth Circuit joined its sister circuits. A district court may limit an asserted class by certifying it under a definition that is unambiguously narrower than originally pleaded, but a plaintiff's individual interests are not abandoned unless there is a class certification decision that "definitively excludes" him or her. Anything short of unambiguous narrowing would undermine the balance contemplated by the Supreme Court in *American Pipe*.

Applying these principles, the court of appeals concluded that the employee's individual claims were tolled until the class was decertified. The court of appeals agreed with the district court that whether the class definition included the employee was a close call. Accordingly, there was genuine ambiguity in the definition's scope. In other words, the final class definition did not unambiguously exclude the employee, and he was entitled to tolling. To hold otherwise, the court of appeals said, would frustrate the purposes of the tolling rule. *American Pipe* does not require bystander plaintiffs to follow the class action closely, looking for any change in the class definition and carefully parsing what it might mean. The employee was a member of the original class that was not unambiguously narrowed when certified, so it was reasonable for him to rely on the class to continue to press his claims.

Because *American Pipe* tolled the employee's claims during the pendency of the class, the court of appeals reversed the district court's judgment and remanded the case for further proceedings.

FEDERAL JURISDICTION

False Claims Act

Stein v. Kaiser Found. Health Plan, Inc.

115 F.4th 1244, 2024 U.S. App. LEXIS 24208 (9th Cir. Sept. 24, 2024) (en banc)

The Ninth Circuit, sitting en banc, holds that the False Claims Act's "first-to-file" rule is not a jurisdictional restriction.

Background. The False Claims Act (FCA) includes a "first-to-file" rule, which states as follows: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action" [31 U.S.C. § 3730(b)(5)]. Two decades ago, the Ninth Circuit labeled this rule "jurisdictional" without any analysis [see United States ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1186–1187 (9th Cir. 2001)]. Later, sitting en banc, the court of appeals reiterated that the first-to file rule was jurisdictional, again without providing any analysis [see United States ex rel. Hartpence v. Kinetic Concepts, Inc., 792 F.3d 1121, 1130 (9th Cir. 2015) (en banc) (citing United States ex rel. Lujan v. Hughes Aircraft Co.)]. In the present case, the en banc court observed, "Simply put, the nature of the first-to-file rule was hardly part of our consideration of these cases."

The plaintiffs in this case brought an FCA action against various defendants, alleging Medicare fraud. The district court dismissed the lawsuit as barred by the first-to-file rule, because it "related" to earlier-filed, pending FCA actions against the same defendants named in this action or against related entities. A three-judge panel of the Ninth Circuit affirmed, applying the circuit precedent that the first-to-file rule is jurisdictional. The court then took this case en banc and overruled that precedent.

False Claims Act's First-to-File Rule Is Not Jurisdictional. Overruling its precedent, the en banc court concluded that the FCA's first-to-file rule is not jurisdictional. In doing so, the court followed the Supreme Court's recent teaching that a statutory bar is jurisdictional only if Congress "clearly states" that it is [see Santos-Zacaria v. Garland, 598 U.S. 411, 416, 143 S. Ct. 1103, 215 L. Ed. 2d 375 (2023); Wilkins v. United States, 598 U.S. 152, 156–159, 143 S. Ct. 870, 215 L. Ed. 2d 116 (2023); Boechler, P.C. v. Comm'r, 596 U.S. 199, 203, 142 S. Ct. 1493, 212 L. Ed. 2d 524 (2022); Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153, 133 S. Ct. 817, 184 L. Ed. 2d 627 (2013)].

The court of appeals started with the text of the first-to-file rule, noting that it does not use the term "jurisdiction" [see 31 U.S.C. § 3730(b)(5)]. Rather, the text addresses only who may bring an action and when; it says nothing about the court's adjudicatory authority. And the court pointed out that the statute does not include any other textual clue pointing to jurisdiction.

The court also found it significant that other provisions in the FCA do use explicitly jurisdictional language [see, e.g., 31 U.S.C. § 3730(e) (enumerating several different contexts in which "[n]o court shall have jurisdiction over an action brought under subsection (b)"); 31 U.S.C. § 3732(a), (b) (identifying which judicial districts have jurisdiction over specific FCA actions, and providing for supplemental federal jurisdiction over state claims)]. The court explained that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in doing so [see Kucana v. Holder, 558 U.S. 233, 249, 130 S. Ct. 827, 175 L. Ed. 2d 694 (2010)].

In holding that the FCA's first-to-file rule is not jurisdictional, the Ninth Circuit joined the First, Second, Sixth, and D.C. Circuits [see United States ex rel. Bryant v. Cmty. Health Sys., Inc., 24 F.4th 1024, 1036 (6th Cir. 2022);

United States v. Millenium Lab'ys, Inc., 923 F.3d 240, 248–251 (1st Cir. 2019); United States ex rel. Hayes v. Allstate Ins. Co., 853 F.3d 80, 85–86 (2d Cir. 2017) (per curiam); United States ex rel. Heath v. AT&T, Inc., 791 F.3d 112, 119–121 (D.C. Cir. 2015)]. By contrast, the Fourth, Fifth, and Tenth Circuits have held that the first-to-file rule is jurisdictional [see United States ex rel. Carter v. Halliburton Co., 866 F.3d 199, 203 (4th Cir. 2017); United States ex rel. Branch Consultants v. Allstate Ins. Co., 560 F.3d 371, 376 (5th Cir. 2009); Grynberg v. Koch Gateway Pipeline Co., 390 F.3d 1276, 1278 (10th Cir. 2004)]. However, the Ninth Circuit observed that, like its own previous precedent, the precedents from the latter three circuits predated the Supreme Court's reinvigoration of the clear-statement rule and did not engage in any independent analysis of the jurisdictional question.

Disposition. Applying its corrected understanding of the nonjurisdictional nature of the FCA's first-to-file rule, the Ninth Circuit reversed in part the district court's holding that it lacked jurisdiction over the plaintiffs' case, and remanded to the three-judge appellate panel for further proceedings.

Concurrence—En Banc Determination Should Not Have Been Needed. Circuit Judge Forrest, who wrote the opinion for the unanimous en banc court, also filed a concurring opinion that was joined by Circuit Judge Bumatay. The concurrence pointed out that the Ninth Circuit's previous position (overruled in this case) that the first-to-file rule was jurisdictional had arisen from statements that were dicta. That is, those statements simply labeled the first-to-file rule as jurisdictional without any analysis of the jurisdictional issue, in cases in which the jurisdictional issue was not necessarily involved [see Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1186–1187 (9th Cir. 2001); United States ex rel. Hartpence v. Kinetic Concepts, Inc., 792 F.3d 1121, 1130 (9th Cir. 2015) (en banc)].

Judge Forrest observed that in every other circuit, such dicta in previous cases would not constrain a current three-judge panel's ability to analyze whether the first-to-file rule is jurisdictional. But the Ninth Circuit stands alone in treating dictum as precedent [see United States v. Johnson, 256 F.3d 895, 914–916 (9th Cir. 2001) (per curiam) (opinion of Kozinski, J.) ("[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense."); see also Enying Li v. Holder, 738 F.3d 1160, 1164 n.2 (9th Cir. 2013) ("Well-reasoned dicta is the law of the circuit.")]. Therefore, the three-judge panel in this case felt bound to apply the previous dicta despite their tension with intervening Supreme Court precedent, and the en banc court had to convene in order to correct the law of the circuit.

Judge Forrest found the Ninth Circuit's dictum-is-binding rule "most troubling" because it is contrary to the constitutional restriction of federal courts' authority to decide only cases and controversies [see U.S. Const. Art. III § 2, cl. 1]. To treat dicta—statements about issues that reach beyond the case or controversy presented—"challenges this critical constitutional limitation."

Judge Forrest closed by stating that although the en banc court reached the correct result on the merits of this case, "the proper role of dicta is what we really need to set right. Our treatment of dicta is contrary to our common-law tradition, the jurisprudence of the Supreme Court and all our sister circuits, and our [prescribed] constitutional role. It is within our power to get back on track. I hope that someday soon we will."

STANDARDS OF REVIEW

Review of Agency Action

Mayfield v. U.S. DOL

117 F.4th 611, 2024 U.S. App. LEXIS 23145 (5th Cir. Sept. 11, 2024)

The Fifth Circuit has upheld the Department of Labor's minimum salary rule under the Fair Labor Standards Act's White Collar exemption. The court of appeals held that the "major questions" doctrine does not prevent the Department of Labor from promulgating a rule that limits the scope of the Act's exemption for executive, administrative, and professional employees to those workers whose salaries are below a specified level.

Background. The Fair Labor Standards Act (FLSA) sets out a variety of standards and protections governing labor conditions [see 29 U.S.C. § 201 et seq.]. For example, it sets a minimum wage and requires overtime for work beyond 40 hours per week [29 U.S.C. §§ 206(a), 207(a)(1)]. The FLSA defines covered workers broadly [see 29 U.S.C. § 203(e)(1) ("employee" is "any individual employed by an employer")], but it also contains a series of exemptions that exclude certain types of employees from that definition. One of those exemptions is for "any employee employed in a bona fide executive, administrative, or professional capacity" [29 U.S.C. § 213(a)(1)]. That exemption, known as the "EAP Exemption" or the "White Collar Exemption," empowers the Secretary of the Department of Labor (DOL) to "define[] and delimit[]" the "terms" of the exemption [29 U.S.C. § 213(a)(1)].

The EAP Exemption, like many of the other FLSA exemptions, defines qualifying workers through duties and job types [see 29 U.S.C. § 213(a)(3), (5), (8), (10), (12), (15)–(19)]. But for more than 80 years, the DOL has repeatedly issued a Minimum Salary Rule that prevents a worker from qualifying for the exemption if his or her salary falls below a specified level. The DOL has long justified this rule on the ground that the terms used in the EAP Exemption connote a particular status and prestige that is inconsistent with low salaries.

In 2019, the DOL issued a new version of the Minimum Salary Rule, raising the minimum salary required to qualify for the EAP Exemption from $455 per week to $684 per week [see 84 Fed. Reg. 51230, 51231 (Sept. 26, 2019)].

The plaintiff, a small-business owner, sued the DOL, claiming that the 2019 Rule exceeded DOL's statutorily conferred authority. According to the plaintiff, his business succeeded by offering high bonus payments to his best-performing managers. He asserted that the 2019 Rule forced him to pay a higher salary to all managers regardless of performance, leaving him with insufficient funds to reward the best performers.

The plaintiff did not argue that the DOL lacked the authority to raise the minimum salary or that the particular salary level the DOL chose was invalid. Rather, he argued that the DOL has always lacked the authority to define the EAP Exemption in terms of salary level.

The plaintiff and the DOL filed motions for summary judgment. The district court granted the DOL's motion and denied the plaintiff's motion. The plaintiff timely appealed.

Fifth Circuit Precedent Did Not Govern This Case. The Fifth Circuit panel began by rejecting the DOL's contention that the plaintiff's challenge to the Minimum Salary Rule was foreclosed by Wirtz v. Miss. Publishers Corp. In Wirtz, the Fifth Circuit considered a claim that the Minimum Salary Rule was unjustified because it was not rationally related to whether an employee is employed in a "bona fide executive . . . capacity" [see 29 U.S.C.

§ 213(a)(1)]. Because the FLSA gives the DOL broad latitude to define the meaning of "bona fide executive," the court in Wirtz found that the Minimum Salary Rule is not arbitrary or capricious [Wirtz v. Miss. Publishers Corp., 364 F.2d 603, 608 (5th Cir. 1966)].

In the present case, the panel concluded that Wirtz did not control its analysis. Wirtz addressed whether the Minimum Salary Rule is arbitrary and capricious, but the plaintiff in this case argued that it exceeds the DOL's statutory authority. The court pointed out that the Administrative Procedure Act (APA) clearly distinguishes between those two types of challenges, making them separate bases for setting aside agency action [compare 5 U.S.C. § 706(2)(A) (arbitrary and capricious) with 5 U.S.C. § 706(2)(C) (exceeding statutory authority)]. The court explained that holding that a rule survives a particular type of APA review does not determine how it fares under other types of review, even if both types of review raise similar issues.

Challenge to Department of Labor's Power to Impose Minimum Salary Rule Did Not Implicate "Major Questions" Doctrine. Next, the court of appeals considered whether the "major questions" doctrine had a role in the court's analysis in this case. The Supreme Court has described the "major questions" doctrine as follows [West Virginia v. EPA, 597 U.S. 697, 723, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022) (internal quotation marks and citation omitted)]:

> [I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.

The Fifth Circuit pointed out that any one of three circumstances will trigger the doctrine: (1) when the agency claims the power to resolve a matter of great political significance; (2) when the agency seeks to regulate a significant portion of the American economy or require billions of dollars in spending by private persons or entities; and (3) when the agency seeks to intrude into an area that is the particular domain of state law [West Virginia v. EPA, 597 U.S. 697, 743–744, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022) (Gorsuch, J., concurring); see also Texas v. Nuclear Regul. Comm'n, 78 F.4th 827, 844 (5th Cir. 2023)].

The Fifth Circuit concluded that the "major questions" doctrine was not triggered in this case, because the Minimum Salary Rule did not have vast political or economic significance and did not intrude into an area that is the particular domain of state law.

The court of appeals observed that although no case has set the threshold for economic significance for purposes of the "major questions" doctrine, recent cases applying the doctrine based on economic significance have involved hundreds of billions of dollars of impact [see, e.g., Biden v. Nebraska, 600 U.S. 477, 143 S. Ct. 2355, 2362, 216 L. Ed. 2d 1063 (2023) ($430 billion); West Virginia v. EPA, 597 U.S. 697, 715, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022) ($1 trillion by 2040)]. In this case, the impact of the 2019 Minimum Salary Rule was roughly $472 million in the first year, including both the costs of implementing the Rule and the transfers from employers to employees. The court of appeals opined that although the Supreme Court's recent decisions had not set the lower bound of economic significance, the gap between the economic impact in those cases and in the present case was too large to warrant applying the "major questions" doctrine in this case based on economic significance.

The appellate panel also noted that the 2019 Rule removed 1.2 million workers from the EAP Exemption who would otherwise have been exempt [see 84 Fed. Reg. 51238 (Sept. 27, 2019)]. Because 1.2 million workers was a small percentage of the overall workforce, the court concluded that regulating that number of workers did not trigger the "major questions" doctrine.

Turning to political significance, the Fifth Circuit reasoned that even assuming that labor relations are a politically controversial topic, whether to use salary level to determine which employees should be exempt from various FLSA protections was not in line with the types of issues that have been considered politically contentious enough to trigger the doctrine [see West Virginia v. EPA, 597 U.S. 697, 729–730, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022) (how much coal-based energy generation country should engage in)]. Nor was this a case in which the agency newly asserted a power that enabled it to enact a program that Congress had considered and rejected [see West Virginia v. EPA, 597 U.S. 697, 731, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022)].

The court of appeals also pointed out that the Supreme Court's major-questions analysis turns in part on whether the agency has previously claimed the authority at issue [see West Virginia v. EPA, 597 U.S. 697, 721–723, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022)]. In this case, the DOL asserted an authority that it had asserted continuously since 1938. Although a particular edition of the Minimum Salary Rule could raise issues because of the salary level it specifies, the plaintiff's argument was that any consideration of salary was improper. That meant that even though the particular salary level in this case was new, the assertion of authority to consider salary was not.

Minimum Salary Rule Does Not Exceed Department of Labor's Statutory Authority. Next, the Fifth Circuit panel rejected the plaintiff's argument that the 2019 Minimum Salary Rule exceeded the DOL's statutory authority. In Loper Bright Enters. v. Raimondo, the Supreme Court clarified that "courts decide legal questions by applying their own judgment," even in agency cases [Loper Bright Enters. v. Raimondo, 603 U.S. —, 144 S. Ct. 2244, 219 L. Ed. 2d 832, 854 (2024)]. If Congress has clearly delegated discretionary authority to an agency, the judicial role is to independently interpret the statute and effectuate the will of Congress, subject to constitutional limits and the requirements of the APA [Loper Bright Enters. v. Raimondo, 603 U.S. —, 144 S. Ct. 2244, 219 L. Ed. 2d 832, 856 (2024)].

Because the FLSA contained an uncontroverted, explicit delegation of authority to the DOL, the question was whether the Minimum Salary Rule was within the outer boundaries of that delegation [Loper Bright Enters. v. Raimondo, 603 U.S. —, 144 S. Ct. 2244, 219 L. Ed. 2d 832, 856 (2024)]. The Fifth Circuit started with the text of the explicit delegation, which gives the DOL authority to "define[] and delimit[]" the terms of the EAP Exemption [29 U.S.C. § 213(a)(1)]. Thus, promulgation of the Minimum Salary Rule can be construed in two ways, both of which are consistent with the DOL's statutorily conferred authority. One such understanding is that by promulgating the Rule, the DOL defined in part what it means to work in an executive, administrative, or professional capacity (namely, to earn at least a particular amount of money). The other way of viewing promulgation of the Minimum Salary Rule is to construe it as an exercise of the power to delimit the scope of the EAP Exemption. That is, by promulgating the Rule, the DOL set a limit on what is otherwise defined by the text of the Exemption. The court of appeals concluded that under either understanding of what the DOL did when it promulgated the Rule, its action was within the scope of its authority.

The court rejected an argument that the Minimum Salary Rule arbitrarily imposes a new requirement that lacks a textual basis because the statute speaks only of duties. The court acknowledged that using salary level as a criterion for EAP status does have a textual foundation in the FLSA. But the terms in the EAP Exemption,

particularly "executive," connote a particular status or level, for which salary may be a reasonable proxy. The court pointed out that distinctions based on salary level are also consistent with the FLSA's broader structure, which sets out a series of salary protections for workers that common sense indicates are unnecessary for highly paid employees.

Although using salary as a proxy for EAP status is a permissible choice, given the strong link between salary and the job duties identified in the FLSA, the court cautioned that the use of a proxy characteristic will not always be a permissible exercise of the power to define and delimit. If a proxy characteristic frequently yields different results than the characteristic Congress initially chose, then use of the proxy would not be so much defining and delimiting the original statutory term as replacing it. But that was not the case with the Minimum Salary Rule.

The court of appeals also found it immaterial that Congress had not included in the EAP Exemption an explicit reference to a salary requirement. The court explained that the question in this case was not whether the Exemption's terms should be interpreted to contain a salary requirement. Rather, the question was whether the power conferred by the explicit delegation to "define[] and delimit[]" the terms of the statute allowed the DOL to impose a salary requirement. The court said that even if Congress acted intentionally by omitting a salary requirement from the EAP Exemption, that does not mean that the power it conferred excludes the option of imposing the requirement.

In holding that the DOL has the statutory authority to promulgate the Minimum Salary Rule, the Fifth Circuit joined the Second, Sixth, Tenth, and D.C. Circuits [see Prakash v. Am. Univ., 727 F.2d 1174, 1177–1178 (D.C. Cir. 1984); Walling v. Morris, 155 F.2d 832, 836 (6th Cir. 1946), vacated on other grounds sub nom. Morris v. McComb, 332 U.S. 422, 68 S. Ct. 131, 92 L. Ed. 44 (1947); Fanelli v. U.S. Gypsum Co., 141 F.2d 216, 218 (2d Cir. 1944); Walling v. Yeakley, 140 F.2d 830, 832–833 (10th Cir. 1944)].

Minimum Salary Rule Does Not Violate Nondelegation Doctrine. Lastly, the Fifth Circuit panel rejected the plaintiff's argument that interpreting the EAP Exemption as granting the DOL authority to issue the 2019 Minimum Salary Rule violated the nondelegation doctrine. This argument was based on a contention that the EAP Exemption lacks an intelligible principle to guide the DOL's power to define and delimit the Exemption's terms.

The court of appeals explained that the intelligible-principle test requires Congress to set out guidance that delineates the relevant general policy, the public agency that is to apply it, and the boundaries of that delegated authority [see Mistretta v. United States, 488 U.S. 361, 372–373, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989)]. Applying that test to the EAP Exemption, the court found at least two principles to guide and confine the authority delegated to the DOL: (1) the FLSA's statutory directive to eliminate substandard labor conditions that are detrimental to the health, efficiency, and general wellbeing of workers [see 29 U.S.C. § 202(a), (b)]; and (2) the text of the Exemption itself [see 29 U.S.C. § 213(a)(1)]. The court acknowledged that the guidance provided by these provisions is not straightforward, and the boundaries it delineates are neither clear nor uncontroversial. But the intelligible-principle test is not demanding [see Gundy v. United States, 588 U.S. 128, 146, 139 S. Ct. 2116, 204 L. Ed. 2d 522 (2019)], and both the FLSA's purpose and the text of the Exemption itself provide at least some guidance for how the DOL can exercise its authority. Therefore, they are each independently sufficient to satisfy the nondelegation doctrine's requirements.

The court explained that the DOL can look to whether a particular group of workers is subject to the substandard labor conditions the FLSA seeks to remedy, to determine whether the EAP Exemption should be clarified to include or exclude that group of workers. The DOL is also constrained by the qualification that the FLSA should

improve working conditions "without substantially curtailing employment or earning power" [29 U.S.C. § 202(b)]. So while the FLSA's purpose addresses what workers should be protected from, it nevertheless guides and limits the DOL's authority to enact a rule determining which workers require protection.

In the text of the EAP Exemption itself, the words "executive," "administrative," and "professional" each have meaning. That meaning both guides and limits the DOL's power to "define[] and delimit[]" them. The DOL can enact rules that clarify the meaning of those terms or, as in the case of the Minimum Salary Rule, impose some limitations on their scope. The court acknowledged that the Exemption's text does not provide a precise line for what is permissible and what is not. "But an intelligible principle is a guide, not a definitive guide, to what can and cannot be done. As such, the Exemption itself provides an intelligible principle for the [DOL's] power to define and delimit its terms."

In holding that the DOL's authority to define and delimit the terms of the EAP Exemption is guided by an intelligible principle, the Fifth Circuit joined the Second and Tenth Circuits [Fanelli v. U.S. Gypsum Co., 141 F.2d 216, 218 (2d Cir. 1944); Walling v. Yeakley, 140 F.2d 830, 832–833 (10th Cir. 1944)].

Conclusion and Disposition. Because setting a minimum salary level for the EAP Exemption was within the DOL's power, and because that power was guided by the FLSA's purpose and the text of the exemption, the Fifth Circuit affirmed the district court's judgment in favor of the DOL.