**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**

**Lubbock Division**

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| FLINT AVENUE, LLC,<br><br>*Plaintiff*,<br><br>v.<br><br>U.S. DEPARTMENT OF LABOR; JULIE SU, Acting Secretary, U.S. Department of Labor, in her official capacity; JESSICA LOOMAN, Administrator, Wage and Hour Division, U.S. Department of Labor, in her official capacity,<br><br>*Defendants*. | CASE NO: 5:24-cv-130-C |

**REPLY BRIEF IN SUPPORT OF PLAINTIFF'S**
**MOTION FOR STAY OR PRELIMINARY INJUNCTION**

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## PRELIMINARY STATEMENT

Plaintiff Flint Avenue LLC ("Flint Avenue") is entitled to a stay or preliminary injunction to prevent irreparable harm it would suffer—in the form of unrecoverable labor costs and/or regulatory compliance costs—if forced to comply with the Department of Labor ("DOL")'s unlawful Final Rule starting July 1. Flint Avenue agrees with DOL that preliminary relief against the salary level that is to take effect on July 1, 2024, would prevent irreparable harm, provided that the Court is able to decide the merits of Flint Avenue's claims by January 1, 2025. *See* Opp. at 35.

## ARGUMENT

### I. FLINT AVENUE WOULD SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION

DOL makes two principal arguments concerning irreparable harm. First, it claims there is some lack of irreparable harm because Flint Avenue discovered and fixed an error in the compensation of an employee whose status will change on July 1 because of the Final Rule. Second, DOL claims that tracking the hours is easy and any cost is *de minimis*.[1]

Right now, as the record shows, Flint Avenue's junior graphic designer employee has an exempt annual salary of $36,000. *See* June 2024 Employment Contract, attached as Exhibit A; *see also* ECF 22-1 ¶ 7 (June 20, 2024 Declaration of Amy Wood). On July 1, 2024, the Final Rule requires Flint Avenue to pay the employee an annual salary of at least $43,888 to exempt that employee. The Final Rule is therefore the but-for cause of Flint Avenue being unable to exempt its graphic designer from the FLSA's requirements. The increase in labor cost needed to exempt that employee is $7,888 per year. That is an unrecoverable and therefore irreparable harm.

[1] As Plaintiff may renew this motion regarding employees affected by the January 2025 salary requirement, only the current exempt employee affected by the July 1, 2024 requirement is addressed here.

It bears mentioning that even before the employee's salary was corrected, Flint Avenue always treated the employee as exempt. The employee's original offer letter states there is no overtime pay and no requirement to track hours worked on a daily or weekly basis. *See* ECF 25-3 (May 2023 Offer Letter). Flint Avenue's recent increase in the employee's annual salary from $31,200 to $36,000 does not create a "self-inflicted" irreparable injury, as DOL contends. Opp at 12. Rather, Flint Avenue was already being injured by DOL's 2019 salary regulation. By raising the employee's salary, Flint Avenue complied with the 2019 salary level (at considerable unrecoverable expense) and is now threatened with further unrecoverable and irreparable costs by the July 2024 salary level. That further injury is irreparable because Flint Avenue cannot recover monetary damages from the DOL for raising the employee's salary by $7,888 per year. *Rest. L. Ctr. v. DOL*, 66 F.4th 593, 597-98 (5th Cir. 2023).

DOL next argues that Flint Avenue may comply with the Final Rule by reclassifying its exempt salaried employee as a non-exempt hourly employee and the costs would be "de minimis." Opp at 12-13. Not so. Flint Avenue would have to revise its contract with the employee, which costs time and effort and disrupts employee-employer relations. It must reevaluate how best to offer work flexibility to an hourly employee, an additional adjustment cost. DOL's argument that Flint Avenue was able to maintain a flexible work arrangement when the employee was non-exempt under the 2019 salary level ignores that Flint Avenue was able to do so only by (inadvertently) not complying with that salary level. When Flint Avenue learned of its non-compliance, it immediately raised the employee's annual salary by nearly $5,000 to preserve the ability to maintain a flexible working relationship that is important to the company's culture. DOL's Final Rule would force Flint Avenue to pay even more to maintain that culture.

In addition to the loss of flexibility, reclassifying the employee would require Flint Avenue to follow DOL's recordkeeping regulations for non-exempt employees, which includes tracking hours worked on a daily and weekly basis. *See* 29 C.F.R. § 516.2. Compliance with such recordkeeping regulations imposes unrecoverable and therefore irreparable costs. *Rest. L. Ctr*, 66 F.4th at 597.

DOL asserts without proof that recordkeeping costs are *de minimis* and so cannot support an injunction. Flint Avenue has never treated its employees, including the junior graphic designer, as non-exempt and has never tracked their time on a daily or weekly basis. Declaration of Amy Wood ¶ 4 (Jun 28, 2024), attached as Exhibit B. Its current billing software does not allow it to do this either. June 28 Wood Decl. ¶ 7.[2] Flint Avenue would have to redesign or purchase new timekeeping software. And the graphic designer and her supervisor will have to take time to track hours by day and week, which takes away from time serving clients. DOL suggests that Flint Avenue could reduce its timekeeping costs by tracking the employee's hours on an "exemption basis" only when there is "variation from a typical schedule." Opp. at 13. But that is not possible because Flint Avenue's business model revolves around its employees having a flexible schedule that varies from week to week depending on project needs. There is no "typical schedule." *Id.*¶ 5.

In addition to daily and weekly timekeeping, Flint Avenue would have to begin tracking the graphic designers' "regular hourly rate of pay" if she were reclassified as a non-exempt hourly employee. *See* 29 C.F.R. § 516.2(a)(6). This is very difficult if Flint Avenue continues to pay the employee at a fixed rate of $3,000 each month. *See* Ex. A. Because the employee works different

[2] DOL cites a spreadsheet containing billing information that Flint Avenue turned over to assert that it is easy to track time. *See* Opp. at 13 n.5 Flint Avenue does not keep billing records by employees in its ordinary course of business and only created that spreadsheet for purposes of this case. June 28 Wood Decl. ¶ 7-8. It does not demonstrate what DOL asserts that it does because such hours are not kept daily or weekly and had to be compiled from longer tranches of data.

hours each week, the rate at which she is compensated per hour worked will vary from week to week and must be recalculated each week. Conversely, if Flint Avenue switches to paying the employees on an hourly basis, that would require significant changes to the employment contract and would disrupt employer-employee relations. While difficult to quantify, such disruption is by no means *de minimis*.

At bottom, Flint Avenue has *never* treated any of its employees as hourly non-exempt workers. It recently raised the salary of an employee by nearly $5,000 per year to avoid doing so. *Compare* Ex. A (June 2024 Contract) *with* ECF 25-3 (May 2023 Offer Letter). The Final Rule would force Flint Avenue to increase its labor costs by another $7,888 per year to avoid being forced to treat an employee as non-exempt. Because it has no experience doing that, it will invariably incur adjustment costs due to being forced into the new relationship and complying with new and unfamiliar regulations. DOL has estimated the Final Rule's adjustment, managerial, and timekeeping costs for the entire workforce to be significant. 89 Fed. Reg. 32,842, 32,909–10, 969 (Apr. 26, 2024). It does not rebut any of those facts but simply asserts that such costs are somehow *de minimis* for a small company. Not so. Even a one-point difference on a 100-point scale for a scholarship application is not *de minimis* and can sustain an injunction. *See Lujan v. U.S. Dept. of Ed.*, 664 F.Supp.3d 701, 721 (W.D. Tex., 2023) (granting injunction); *360 Degrees Education, LLC. et al. v. U.S. Dept. of Ed.*, No. 4:24-CV-00508-P, 2024 WL 3092459 *7 (N.D. Tex. June 21, 2024) (finding even small compliance costs supported irreparable harm for those opposing regulation); *Texas v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 2:24-CV-89-Z, 2024 WL 2277848, 7 (N.D. Tex. May 19, 2024) (unrecoverable revenue is irreparable harm supporting injunction) *see also Louisiana v. Biden*, 55 F.4th 1017, 1034 (5th Cir. 2022) ("[C]omplying with a regulation later held invalid almost always produces the irreparable harm of

nonrecoverable compliance costs[.]).” DOL cites no authority stating that compliance with new regulations is *de minimis*, and Flint Avenue is not aware of any such authority. This Court should not break new ground in finding regulatory compliance to be *de minimis.*

## II. FLINT AVENUE IS LIKELY TO SUCCEED ON THE MERITS

Section 213(a)(1) does not authorize DOL to set a minimum weekly salary for the nation’s 45 million white-collar employees. And if it did delegate such unfettered power, that provision would violate the Vesting Clause.

### A. Section 213(a)(1) Does Not Authorize the Final Rule

#### 1. Wirtz *Is Not Binding Because It Applied a Deferential and Incorrect Standard of Statutory Interpretation*

DOL’s assertion (at 15-16) that this Court is bound by *Wirtz v. Mississippi Publishers Corp*, 364 F.2d 603 (5th Cir. 1966), is wrong because *Wirtz* does not speak to whether the Final Rule is precluded by the statutory text as independently interpreted by the Court, which the Supreme Court made clear today is the proper mode of analysis under the Administrative Procedure Act (“APA”). *Loper Bright Enters. v. Raimondo* and *Relentless, Inc. v. Dep’t of Com.*, 603 U.S. __, slip op. at 18 (2024) (“the role of the reviewing court under the APA is, as always, to independently interpret the statute[.]”).

*Nevada v. DOL* held that *Wirtz* “is not binding” because it “did not evaluate the lawfulness of a salary-level test under *Chevron* step one,” which requires analyzing the text. 218 F. Supp. 3d 520, 531 n.3 (E.D. Tex. 2016). The appellee in *Wirtz* challenged DOL’s 1963 salary level as being “not rationally related” to the FLSA’s grant of authority to define “whether an employee is employed in a bona fide executive capacity.” *Id.* at 608. While *Wirtz* quoted the text, it did not analyze it. *Nevada*, 218 F. Supp. at 531 n.3. Instead, it deferred to DOL’s “broad latitude” to conclude that the 1963 salary level was not “arbitrary or capricious.” *Wirtz*, 364 F.2d at 608. *Wirtz*

followed other circuit decisions that upheld DOL's salary requirement as being not "irrational or unreasonable." *Walling v. Yeakley*, 140 F.2d 830, 833 (10th Cir. 1944) (cited at *Wirtz*, 364 F.2d at 608), and as "a reasonable exercise of authority delegated to the Administrator." *Craig v. Far W. Eng'g Co*., 265 F.2d 251, 259 (9th Cir. 1959) (cited at *Wirtz*, 364 F.2d at 608). In other words, *Wirtz* and cases it relied on effectively skipped to the second step of *Chevron* deference, which gives an agency's regulations "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984).

The Supreme Court's decision in *Loper Bright* makes clear that such a deferential mode of analysis is wrong. It "defies the command of the APA that 'the reviewing court'—not the agency whose action it reviews—is to 'decide *all* relevant questions of law' and 'interpret . . . statutory provisions.'" *Slip Op.* at 21. To be sure, *Wirtz* predates *Chevron*. But the "arbitrary and capricious" standard under which *Wirtz* upheld DOL's 1963 salary rule is the same as *Chevron* deference at step two, which requires Courts to uphold agency regulations "unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 844. Following *Wirtz* would impermissibly resurrect *Chevron* deference by another name. Indeed, *Wirtz* would be even more egregious because it did not attempt to independently discern the unambiguous meaning of statutory text using tools of interpretation before deferring to the agency. This Court has already independently analyzed § 213(a)(1) to conclude that it does not authorize DOL to enact a salary requirement for white-collar employees, *Buckner v. Armour & Co*., 53 F. Supp. 1022, 1024 (N.D. Tex. 1942). *Loper Bright* vindicates this Court's original approach, which should be followed instead of *Wirtz*'s deferential analysis. The Supreme Court was explicit: "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Slip op.* at 35.

"Fifth Circuit precedent is implicitly overruled if a subsequent Supreme Court opinion 'establishes a rule of law inconsistent with' that precedent." *Hines v. Quillivan*, 982 F.3d 266 (5th Cir. 2020) (quoting *Gahagan v. USCIS*, 911 F.3d 298, 302 (5th Cir. 2018)); *see also Acosta v. Hensel Phelps Constr. Co*., 909 F.3d 723, 742 (5th Cir. 2018) (overturning precedent where "an intervening Supreme Court decision fundamentally changes the focus of the relevant analysis.") (cleaned up). *Acosta* held that the Supreme Court's application of *Chevron* deference in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), was a "fundamental change" that overruled Fifth Circuit precedent interpreting a statute to limit DOL's regulatory authority. 909 F.3d at 743. *Loper Bright* also was a "fundamental change" in the other direction, overturning precedent that deferred to DOL's expansive interpretation of its statutory authority, including *Wirtz*'s deferential "arbitrary and capricious" standard.

In any event, a decision upholding DOL's 1963 salary rule has no bearing today because DOL has significantly changed its methodology since then. *Wirtz* never considered whether this methodology is consistent with the FLSA much less whether DOL may exclude millions of white-collar workers from the EAP exemption based on their salary alone.[3] *See Nevada*, 218 F.Supp.3d at 530 n.3 ("*Wirtz* offers no guidance on the lawfulness of the Department's Final Rule salary-level."). DOL does not estimate how many of the nation's white-collar employees would be excluded from the EAP exemption based on the July 1 weekly minimum of $844, but that figure must range between 4 million and 8.3 million. *See* 89 Fed. Reg. at 32,879.[4] That is between 9

[3] Nor did *Wirtz* have occasion to consider the major questions doctrine and the constitutional avoidance canon raised in this case. *See Ochoa-Salgado v. Garland*, 5 F.4th 615, 619 (5th Cir. 2021) (holding that a prior decision is binding on an issue only if: "(1) a party *raises* [that] issue and (2) a panel gives that issue *reasoned consideration."*) (collecting cases) (emphasis in original).

[4] DOL's graph shows that a minimum weekly salary of $684 excluded 4 million white-collar workers while a minimum weekly salary of $942 excludes 8.4 million. The July 1 level must lie somewhere between those figures.

percent and 19 percent of the estimated 45.4 million white-collar workers nationwide. *See id*. That is far more than what is needed to "screen[] out the obviously nonexempt employees." Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) 7-8.

Flint Avenue's junior employee illustrates how the Final Rule far exceeds the salary test's limited screening function that *Writz* upheld. DOL suggests her billing records are a proxy of hours worked. Opp at 13 n.5. Those records show that she billed 569.5 hours between when she was hired as a graphic designer in May 2023 and May 2024, *id.* (citing ECF 25-1), which average to approximately 11 hours per month.[5] Even if her salary is less than the $844 per week that the Final Rule sets, she earns that pay by working far fewer hours than is typical. Flint Avenue's graphic designer is a creative professional who decides when she works, how she works, has unlimited vacation days, and is well compensated for the time she puts in. By any commonsense definition, she is a white-collar professional who does not suffer from "detrimental" labor conditions that the FLSA was enacted to correct and eliminate. *See* 29 U.S.C. § 202. While *Wirtz* approved a salary test, it did not approve one that excludes Flint Avenue's graphic designer and others like her who indisputably work in a bona fide professional capacity but are arbitrarily excluded from the EAP exemption by DOL's salary requirement.

2. *Section 213(a)(1) Does Not Grant DOL the Power to Set Salary Levels*

DOL claims "the FLSA explicitly leaves gaps" and "provides the Department with the power to fill these gaps through rules and regulations." Opp. at 19 (quoting *Long Island Care at*

[5] Hours billed of course is not the same as "hours worked," which Flint Avenue does not track and which DOL defines through convoluted regulations that Flint Avenue would have to follow if the Court does not grant an injunction. *See* 29 C.F.R. Part 785.

*Home, Ltfd. v. Coke*, 551 U.S. 158, 162 (2007)). But that argument begs the question. The precise issue here is "what gap" the FLSA left for DOL to "fill." To answer that question, the Court must apply traditional tools of statutory interpretation, starting with the text and without deference to the agency. *Loper Bright,* slip op. at 35.

Section 213(a)(1) does not delegate to DOL authority to define and delimit the EAP Exemption however it wants. Rather, any definition must be based on the employee's "bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). DOL cannot claim that salary level is somehow an "attribute" of "executive, administrative, or professional capacity." *See* Opp at 19. This Court rejected that argument back in 1942. *Buckner*, 53 F. Supp. at 1024. Justice Kavanaugh agrees that § 213(a)(1) requires DOL to examine whether "the employee performs executive [, administrative, or professional] duties, not how much an employee is paid." *Helix Energy Sols. Grp. Inc. v. Hewitt*, 598 U.S. 39, 67 (2023) (Kavanaugh, J., dissenting); *see also Nevada v. DOL*, 275 F. Supp. 3d 795, 805 (E.D. Tex. 2017) (holding that § 213(a)(1) unambiguously requires DOL to define the EAP exemption based on job duties).

DOL further claims that the term "bona fide" allows it to use salary as a proxy to assess the "employer's good faith." *See* Opp. at 17. But "bona fide" does not refer to the employer's good faith. Rather, "bona fide modifies the terms executive, administrative, and professional capacity," which "suggests the exemption should apply to those employees who, in good faith, perform *actual* executive, administrative, or professional capacity duties." *Nevada*, 275 F. Supp. 3d at 805 (emphasis added). Hence, the focus of the inquiry must be on the employee's duties, and DOL may not use salary as a proxy for the "bona fide … capacity" in which workers are employed.

3. *Congress Did Not Ratify DOL's Atextual Interpretation*

DOL's argument that Congress "ratified" its atextual interpretation of § 213(a)(1) in the 1949 Amendments to the FLSA is wrong. Opp at 20-21. To be sure, Congress has "the power to ratify ... acts which it might have authorized and give the force of law to official action unauthorized when taken." *Tiger Lily, LLC v. HUD*, 992 F.3d 518, 524 (6th Cir. 2021). But such ratification requires Congress to have "expressly approved the agency's [otherwise unlawful] interpretation." *Id; accord Alabama Ass'n of Realtors v. HHS*, 539 F. Supp. 3d 29, 42 (D.D.C. 2021), *aff'd* 141 S. Ct. 2485 ("To [ratify], however, Congress must make its intention explicit.") (citing *United States v. Heinszen & Co.*, 206 U.S. 370, 390 (1907)).

The 1949 Amendments merely stated that "[a]ny order, regulation, or interpretation of the Administrator of the Wage and Hour Division … shall remain in effect … *except to the extent [it] may be inconsistent with the provisions of this Act*[.]" Fair Labor Standards Amendments of 1949, ch. 736, § 16(c), 63 Stat. 920 (emphasis added). The "provisions of this Act" include § 213(a)(1), which the 1949 Amendments revised to state that FLSA's wage-and-hour requirements "shall not apply with respect to … any employee employed in a bona fide executive, administrative, professional, or local retailing, or in the capacity of outside salesmen." 62 Stat. 917, § 13(a). Thus, Congress did not expressly approve DOL's salary regulations notwithstanding the § 213(a)(1)'s text; it instead confirmed that any regulation defining and delimiting the EAP exemption must be consistent with § 213(a)(1)'s instruction to do so based on the "bona fide … capacity" in which workers are employed.

What remains of DOL's ratification argument amounts to nothing more than legislative acquiescence—*i.e.*, that Congress never expressly repudiated DOL's atextual interpretation of § 213(a). But "[t]he doctrine of legislative acquiescence is as best only an auxiliary tool for … interpreting ambiguous statutory provisions." *Jones v. Liberty Glass Co.*, 332 U.S. 524, 533

(1947). It cannot trump the FLSA's plain text. *See Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1196 (11th Cir. 2019) ("'[L]egislative silence is a poor beacon to follow' in construing a statute. And [the Supreme Court] has repeatedly warned that congressional silence alone is ordinarily not enough to infer acquiescence."). "[M]ere congressional acquiescence in [DOL's] assertion that [its salary regulation] was supported by [law] . . . does not make it so, especially given that the plain text . . . indicates otherwise." *Tiger Lily*, 992 F.3d at 524.

4. *The Major Questions Doctrine Forecloses DOL's Assertion of Authority*

DOL attempts to satisfy the major questions doctrine by arguing that § 213(a) contains an "explicit statutory authorization to the Department to define and delimit the EAP exception." Opp. at 24. But that authorization instructs DOL to define and delimit the exception based on the "bona fide … capacity" in which workers are employed, not by their salary. The Department has repeatedly recognized that its salary rules are "without specific Congressional authorization." 81 Fed. Reg. 32,391, 32,431 (May 23, 2021); *see also* 69 Fed. Reg. 22,122, 22,165 (Apr. 23, 2004) (acknowledging that § 213(a)(1) "does not give the Department authority to set minimum wages for executive, administrative and professional employees."). Section 213(a)(1) thus does not clearly authorize DOL to define and delimit the EAP exemption *through a minimum weekly salary.*

Next, DOL claims the major questions doctrine does not apply because it has exercised power to enact a salary test "for approximately 85 years." Opp. at 24. But immediately after DOL's first salary regulations, multiple courts that independently analyzed statutory text, including this Court, held such regulations exceeded the authority granted under § 213(a). *Buckner*, 53 F. Supp. at 1024; *Rosenthal v. Atkinson*, 43 F. Supp. 96, 98 (S.D. Tex. 1942); *Devoe v. Atlanta Paper Co*., 40 F. Supp. 284, 286 (N.D. Ga. 1941). DOL's salary tests survived only because courts of appeal subsequently upheld them under a deferential standard of review. *See, e.g.*, *Walling*, 140 F.2d at

832. The Supreme Court today makes clear that such deference was wrong, and that this Court's original approach in *Buckner* was correct. *See Loper Bright slip op* at 16 ("courts must exercise independent judgment in determining the meaning of statutory provisions"). DOL's salary regulations have a long history only beacause they were improperly shielded from meaningful judicial review since the 1940s. DOL therefore cannot hide behind that ill-gotten longevity to dodge the major questions doctrine.

Finally, DOL argues that the "'sheer scope' of the agency's claimed authority" is limited because the July 1 salary level would affect the classification of *only* a million workers. Opp. at 24 (quoting *West Virginia v. EPA*, 597 U.S. 697, 721 (2022)). But the proper measure of the scope for major questions purposes is not the power an agency exercises but rather "the authority it claims." *West Virginia*, 597 U.S. at 726. Here, the authority DOL claims is far greater in scope than the July 1 salary level—indeed, it intends to raise the salary level to far greater heights by 2025 to be raised automatically periodically after that. At bottom, DOL has claimed authority to set a minimum wage for over 45 million white-collar salaried employees nationwide, 89 Fed. Reg. at 32,842, nearly a third of the nation's labor force. That is a "vast swath of American life" by any measure. *West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring). DOL's claim of power to regulate tens of millions of American workers presents a major question. *NFIB v. DOL*, 595 U.S. 109 (2022) (per curiam); *id.* at 124 ("If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.") (Gorsuch, J. concurring).

**B. No Intelligible Principle Guides DOL's Claimed Salary-Setting Authority**

DOL's non-delegation argument relies on decades-old and unpersuasive out-of-circuit cases that did not even apply the intelligible-principle test. *See* Opp. at 26 (citing *Walling*, 140

F.2d at 832, and *Fanelli v. U.S Gypsum Co*, 141 F.2d 216, 218 (8th Cir. 1944)). The Court should instead follow binding Fifth Circuit precedent requiring courts to apply the intelligible-principle test rigorously and to reject DOL's claim of "unfettered discretion" to set salary levels. *See Jarkesy v. SEC*, 34 F.4th 446, 460 (5th Cir. 2022), *affirmed on other grounds*, No. 22-859 (June 27, 2024).

While *Walling*, 140 F.2d at 832, and *Fanelli*, 141 F.2d at 218, upheld salary-level rules against nondelegation challenges, neither applied an intelligible-principle test. Nor did they explain how the FLSA's text provides a limiting principle to guide the Secretary's exercise of discretion. *Walling* concluded that Congress may delegate an open-ended authority for "the Secretary to make "rational[] and reasonabl[e]" rules. 140 F.2d at 832. But that is an arbitrary-and capricious-standard that flunks the intelligible-principle test. *See Panama Refin. Co. v. Ryan*, 293 U.S. 388, 420 (1935) (rejecting suggestion that delegation is permissible because the Executive is presumed to act "for what he believes to be the public good."). *Fanelli* was even more perfunctory—it concluded that the "define and delimit" delegation was within Congress' power without any discussion of the intelligible principle needed to guide its salary settings powers. 141 F.2d at 216.

*Walling* and *Fanelli* are inconsistent with Fifth Circuit precedent requiring a rigorous analysis of whether any "intelligible principle" guides DOL's discretion. *Jarkesy*, 34 F.4th at 460. *Jarkesy* held that Congress violated the Vesting Clause by giving the Securities and Exchange Commission ("SEC") "unfettered discretion" to decide whether to bring enforcement actions in federal court or in-house tribunals. *Id.* at 461. Here, DOL insists that "Congress entrusted to the Secretary" the decision "whether to treat salary level as an attribute of" working in an EAP capacity. Opp. at 19. If true, § 213(a)(1) would grant DOL "unfettered discretion" whether to include a salary test for the EAP exemptions—its regulations have a minimum salary requirement

for graphic designers like Flint Avenue's employee while arbitrarily exempting teaching, legal, and medical professionals from having to earn a minimum salary. *See* 29 C.F.R. §§ 541.303-04. What's worse, the text is devoid of any guidance as to *how much* the salary level should be—it does not even require DOL to set a "reasonable" or "appropriate" level.

DOL may not rely on extratextual limits because "*Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 472 (2001) (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). Nor may DOL rely on the FLSA's supposed remedial purpose to supply an intelligible principle for delimiting an *exemption* to the FLSA's requirement. *See Encino Motorcars, LLC v. Navarro,* 584 U.S. 79, 89 (2018). DOL's reliance on *Mayfield v. DOL*, 2023 WL 6168251 (W.D. Tex. Sept. 20, 2023), cited at Opp at 26, is therefore also misplaced because that decision improperly found an intelligible principle in the FLSA's "general policy of correct[ing] and ... eliminat[ing]" detrimental labor conditions. *Id.* at *8 (quoting 29 U.S.C. § 202). Just as the statutory goal of eliminating securities fraud failed to guide SEC's "unfettered discretion" in choosing a prosecutorial forum in *Jarkesy*, 34 F.4th at 460, the elimination of detrimental labor conditions fails to serve as an intelligible principle here.

DOL claims open-ended discretion to decide whether each type of white-collar employee—*e.g.*, graphic designers vs. teachers—must make a minimum weekly salary and how much. This is nothing short of raw exercise of legislative power forbidden by the Constitution.

*Buckner*, 53 F. Supp. at 1024 ("Only Congress had the arbitrary power to make the exception that an executive who received a salary less than $30 per week should not be exempt.").

### III. THE PUBLIC INTERESTS AND BALANCE OF EQUITIES FAVOR AN INJUNCTION

Irreparable harm to Flint Avenue outweighs any possible harm to DOL, which has no legitimate interest in enforcing an unlawful regulation. The balance of interest tips even more so in Flint Avenue's favor if, as DOL urges in the alternative, the Court limits an injunction or stay to Flint Avenue and its single affected employee. *See* Opp. at 29. The July 1 minimum wage would apply to all other employers and employees, and DOL's affected interest would be *de minimis.* Neither DOL nor the public will suffer while the serious legal and constitutional issues raised here are litigated.

## CONCLUSION

For all these reasons, Flint Avenue respectfully requests that the Court grant its motion for a stay or injunction.

June 28, 2024

Respectfully Submitted

*/s/ Sheng Li*

Sheng Li, *pro hac vice*
John J. Vecchione, *pro hac vice* forthcoming
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210
sheng.li@ncla.legal
john.vecchione@ncla.legal

Karen Cook
KAREN COOK PLLC
(214) 593-6429
karen@karencooklaw.com
S. Michael McColloch
S. MICHAEL MCCOLLOCH PLLC
6060 N. Central Expressway, Suite 500
Dallas, Texas 75206
(214) 643-6055
smm@mccolloch-law.com
*Attorneys for* Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on June 26, 2024, an electronic copy of the foregoing was filed electronically via the Court's ECF system, which effects service upon counsel of record

/s/ Sheng Li