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

Lubbock Division

FLINT AVENUE, LLC, *Plaintiff*, v. 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, *Defendants*.	CASE NO: 5:24-cv-130-H

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR STAY OR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Plaintiff Flint Avenue, LLC ("Flint Avenue") is a small software development and marketing firm with seven employees, all of whom are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act ("FLSA" or "the Act") because they are "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). The "white collar" or "EAP" exemption at § 213(a)(1) allows Flint Avenue to compete against larger and higher-paying companies by offering unlimited paid vacation and other flexible work arrangements that decouple compensation from hours worked.

Without this Court's intervention, a Final Rule promulgated by the Department of Labor ("Department" or "DOL") will eliminate the white-collar exemption for a majority of Flint Avenue's employees. Instead of defining white-collar employees based on the *capacity* in which they are employed—as the Act commands—DOL is impermissibly using the time period on which their pay is computed and the amount of such pay to define the exemption. Starting July 1, 2024, DOL's Final Rule excludes employees unless they are paid a fixed weekly salary of at least $844 (or $43,888 annually). This minimum salary level would disqualify one of Flint Avenue's employees from the white-collar exemption without regard to the capacity in which he is employed. On January 1, 2025, the Final Rule's minimum salary threshold will increase to $1128 (equivalent to $58,656 annually), further disqualifying four more of Flint Avenue's employees without regard to the capacity in which they are employed. DOL's new minimum salary levels would cause significant and irreparable disruption to Flint Avenue, which will have to reclassify most of its employees as hourly workers. Those workers will then no longer be able to benefit from unlimited paid vacation and other flexible work arrangements.

DOL's use of, and conclusive emphasis on, a minimum weekly salary to define the white-

collar exemption defies the FLSA, which exempts "any" worker who is "employed in a [white-collar] *capacity*"—a clear and direct statutory command to focus on the type of work performed. The Final Rule relegates the type of work performed to a secondary consideration while making salary the determinative factor for deciding the exempt status of Flint Avenue's employees.

The FLSA does not delegate authority to set a minimum salary level for the over 45 million white-collar workers nationwide. Only Congress may establish generally applicable rules of private conduct through legislation. Congress has reserved for itself the power to set wages for American workers, including the minimum wage. DOL has usurped Congress's prerogative to establish overtime wages by unilaterally grafting the salary level test onto 29 U.S.C. § 213(a)(1). But if DOL's claimed statutory authority to set a minimum salary for over 45 million white-collar employees is correct, then the FLSA would violate the Vesting Clause of Article I, Section 1 of the Constitution because it contains no intelligible principle to guide the exercise of that authority.

Flint Avenue is likely to succeed on the merits by establishing that the FLSA does not authorize DOL's Final Rule. The company would suffer unrecoverable and therefore irreparable regulatory compliance costs unless this Court enjoins the Final Rule. The public interest and balance of equities favor a stay because unauthorized agency action never serves the public interest, and such relief would not unduly burden DOL. The Court should therefore grant Flint Avenue's motion for a stay "to postpone the [Final Rule's] effective date" or a preliminary injunction "to preserve [Flint Avenue's] status or rights." 5 U.S.C. § 705.

STATEMENT OF FACTS

I. CONGRESS ENACTED THE WHITE-COLLAR EXEMPTION WITHOUT A SALARY REQUIREMENT

The FLSA generally requires employers to pay their employees the federal minimum wage (which Congress sets and updates) and overtime pay (at one-and-half times the regular rate of pay)

for all hours worked in excess of a forty-hour workweek. 29 U.S.C. §§ 206–07. DOL may enforce these requirements against employers, and employees may file suit against their employers for violating the Act. *See Id.* § 216(b). The Act contains many exceptions listed at 29 U.S.C. § 213. What is commonly referred to as the "white collar" or "EAP" exemption from the Act's minimum wage and overtime requirements is codified at § 213(a)(1):

> The provisions of section 206 [minimum wage] and section 207 [overtime] of this title *shall not apply* with respect to—
>
> (1) *any employee employed in a bona fide executive, administrative, or professional capacity* (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (*as such terms are defined and delimited from time to time by regulations of the Secretary* …).

Id. (emphases added). Despite amendments to the FLSA since 1938, the text of the white-collar exemption has not materially changed and has never included a compensation requirement.

II. DOL'S USE OF MINIMUM SALARY TO DEFINE THE WHITE-COLLAR EXEMPTION

DOL's first regulations interpreting the white-collar exemption were issued in 1938 and defined "executive" and "administrative" employees primarily based on performing managerial duties. 3 Fed. Reg. 2518. But such employees must also be paid "not less than $30 … for a workweek." *Id.* "Professional" employees were defined based solely on their duties without any compensation requirement. *Id.* In 1940, DOL revised its regulations to require administrative and professional employees to be paid "on a salary or fee basis at a rate of not less than $200 per month," while "executive" employees must be "on a salary basis at not less than $30 per week." 5 Fed. Reg. 4077. The regulations continued to require that certain duties be performed.

Several federal courts, including this Court, held that DOL's salary requirements for the EAP exemption are unlawful because DOL lacks statutory authority to define the exemption through compensation. *Buckner v. Armour & Co.*, 53 F. Supp. 1022, 1024 (N.D. Tex. 1942) ("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."); *Rosenthal v. Atkinson*, 43 F. Supp. 96, 98 (S.D. Tex. 1942) (Administrative employee who earned $175 per month was exempt, notwithstanding DOL's $200 per month requirement); *Devoe v. Atlanta Paper Co*., 40 F. Supp. 284, 286 (N.D. Ga. 1941) ("The fact that an executive may work for less than $30 per week or even $1 a year does not alter the fact that he is an executive."); *see also Krill v. Arma Corp.*, 76 F. Supp. 14, 17 (E.D.N.Y. 1948) ("It does seem to me though that such a wage prerequisite is an arbitrary and fanciful classification of professional status."). *But See Walling v. Yeakley*, 140 F.2d 830, 832 (10th Cir. 1944) ("[W]e cannot say that it is irrational or unreasonable to include [salary] in the definition and delimitations[.]").

While the Department continued to include a salary test, it emphasized that the salary thresholds must be set low to "screen[] out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary." 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 7-8 (June 30, 1949) (hereinafter "Weiss Report"). DOL believed that "[i]n an overwhelming majority of cases … personnel who did not meet the salary requirements would also not qualify under other sections of the regulations[.]" *Id.* at 8. It justified the use of the salary level test because it lacked "evidence" that the test makes the EAP exemption ineligible "for any substantial number of individuals who could reasonably be classified for purposes of the act as bona fide executive, administrative, or professional employees." *Id.* at 9. And it acknowledged that it could not adopt a test "based on salary alone." *Id.* at 23.

In 1949, DOL announced "long" and "short" tests to assess whether an employee qualified for the EAP exemption. 14 Fed. Reg. 7705. The long test combined a lower minimum salary level

with a rigorous duties test. *Id.* The short test combined a higher minimum salary level with a relaxed duties test. *Id.*

In 2004, the Department replaced the long and short tests with a standard duties test and set a new minimum salary for all three EAP categories at $455 per week,[1] which equates to $23,660 annually. *Id.* In the 2004 Rule, DOL acknowledged that the FLSA "does not give the Department authority to set minimum wages for executive, administrative and professional employees." 69 Fed. Reg. 22,165. DOL nonetheless said it could use salary as a proxy that "has to have as its primary objective the drawing of a line separating exempt from nonexempt employees." *Id.* at 22,165. The DOL furthermore denied that it had authority to adopt a regulation to automatically update the salary level. *Id.* at 22,171-72.

In 2016, the Department attempted to raise the minimum weekly salary to $913 per week or $47,476 annually. 81 Fed. Reg. 32,391. DOL again confirmed that its salary requirement is "without specific Congressional authorization." *Id.* at 32,431. It nonetheless justified the continued use of a salary test under "the well-settled principle that agencies have authority to 'fill any gap left, implicitly or explicitly, by Congress.' *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 843 (1984))." *Id.* The Eastern District of Texas preliminarily and then permanently enjoined the 2016 increase to the EAP minimum salary requirement. *Nevada v. United States Dep't of Lab*., 218 F. Supp. 3d 520, 533 (E.D. Tex. 2016) (*Nevada I*); *Nevada v. U.S. Dep't of Lab*., 275 F. Supp. 3d 795, 806 (E.D. Tex. 2017) (*Nevada II*). Applying *Chevron* deference, the court held that § 213(a)(1) "unambiguously directed the Department to exempt from overtime pay employees who perform 'bona fide executive, administrative, or professional capacity' duties." *Id*. The 2016

[1] This was the first increase since 1975.

minimum salary requirement would have excluded millions of workers who otherwise would qualify for the EAP exemption and thus "effectively eliminates a consideration of whether an employee performs 'bona fide executive, administrative, or professional capacity' duties." *Id.* at 807 (quoting 29 U.S.C. § 213(a)(1)).

The Department rescinded the 2016 Rule and finalized a new rule in 2019 that raised the minimum salary from $455 to $684 per week, which is equivalent to $35,568 annually. 84 Fed. Reg. 51,230. The Western District of Texas upheld the 2019 salary level against a challenge to its validity. *Mayfield v. U.S. Dep't of Lab*., No. 1:22-CV-792-RP, 2023 WL 6168251, at *4 (W.D. Tex. Sept. 20, 2023), *appeal docketed, Mayfield v. Labr*, No. 23-50724 (5th Cir. Oct. 11, 2023). The court applied *Chevron* deference to hold that the "use of a salary-level test is not arbitrary or capricious," although it recognized that DOL's "primary focus should [still] be an employee's duties." *Id.* at *5.

III. THE 2024 FINAL RULE

On April 26, 2024, DOL promulgated the Final Rule, which raises the minimum weekly salary needed for the white-collar exemption to $1,128, which equates to $58,656 annually. 89 Fed. Reg. 32,842 (Apr. 26, 2024). DOL estimates that "of the approximately 45.4 million full-time salaried white-collar workers in the United States subject to the FLSA, about 12.7 million earn below [this] new salary level[,]" and thus would be ineligible for the white-collar exemption based on their salary regardless of their job duties. *Id.* at 32,879 (footnote omitted). DOL further estimates that "the first-year costs (direct employer costs and payroll increases from employers to workers) of the final rule would be approximately $2.7 billion for private employers." *Id.* at 32,969.

The new $1,128 weekly salary requirement takes effect on January 1, 2025. A lower, interim minimum weekly salary requirement of $844 per week, or $43,888 annually, takes effect

on July 1, 2024. *Id.* at 32,933. The Final Rule also establishes a mechanism that allows DOL to automatically raise the minimum weekly salary level every three years based on its review of census data, and to do so without notice-and-comment rulemaking. The automatic-update provisions are set forth in new 29 C.F.R. § 541.607.

IV. IMPACT OF THE FINAL RULE ON FLINT AVENUE

Plaintiff Flint Avenue "is a small software development and marketing firm that competes with larger and higher-paying companies by offering a flexible work culture, including unlimited paid vacation and remote or hybrid arrangements." Declaration of Amy Wood ¶ 4 (Wood Decl.). It has seven employees, all of whom perform *bona fide* executive, administrative, or professional duties and are paid more than $35,568 per year. *Id.* ¶¶ 2, 5, 9. As such, they all qualify for the white-collar exemption under the 2019 Rule.

Flint Avenue employs a junior graphic and web designer who works in a professional capacity and is paid less than the Final Rule's $844 weekly salary requirement that takes effect on July 1, 2024. *Id.* ¶ 5. Like all of Flint Avenue's employees, the junior graphic designer enjoys unlimited paid time off and a flexible work schedule, which she uses to regularly take multiple weeks of vacation to travel or to visit family. *Id.* ¶ 6. Once the Final Rule's $844 weekly salary requirement takes effect, the junior graphic and web designer could no longer be exempt from FLSA's minimum wage and overtime pay requirements. *Id.* ¶ 7. Flint Avenue would be forced to increase her salary—which it cannot afford—or reclassify the designer as an hourly employee—which precludes work flexibility and unlimited paid vacation time.

Four Flint Avenue employees—an Office Manager, a Project Manager, a Marketing Manager, and a Senior Graphic Designer—perform administrative or professional duties and are each paid less than the Final Rule's $1,128 minimum weekly salary, which takes effect on January

1, 2025. *Id.* ¶ 9. Once the $1,128 weekly salary requirement takes effect, these employees would no longer be exempt from the FLSA's minimum wage and overtime pay requirements. Flint Avenue would be forced to increase their salaries—which it cannot afford—or reclassify them as hourly employees—which precludes work flexibility and unlimited paid vacation time. *Id.* ¶ 10.

In short, the Final Rule forces Flint Avenue to either raise the salaries for employees to more than it can afford or reclassify them as hourly employees, thus taking away their desired flexible work arrangements and unlimited paid vacation. *Id.* ¶¶ 11-12.

ARGUMENT

A party is entitled to a preliminary injunction if: "(1) it is substantially likely to succeed on the merits of its claim; (2) it will suffer irreparable injury in the absence of injunctive relief; (3) the balance of the equities tips in its favor; and (4) the public interest is served by the injunction." *Sahara Health Care*, *Inc. v. Azar*, 975 F.3d 523, 528 (5th Cir. 2020). The final two factors merge when the opposing party is the government. *Mock v. Garland*, 75 F.4th 563, 577 (5th Cir. 2023) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Federal courts regularly enjoin agencies from enforcing new regulations pending litigation. *See, e.g., Nevada I*, 218 F. Supp. at 533 (enjoining Department's attempt to raise the salary level needed for the white-collar exemption).

Section 705 of the Administrative Procedure Act further authorizes "the reviewing court" to issue a stay "to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. The factors governing issuance of a preliminary injunction also govern issuance of a § 705 stay. *See, e.g., Texas v. EPA*, 829 F.3d 405, 424, 435 (5th Cir. 2016). As set forth below, Flint Avenue's likelihood of success on the merits, irreparable harm, balance of equities, and the public interest all strongly favor the issuance

of a stay or preliminary injunction. The scope of such relief should be nationwide to prevent the Final Rule from upending millions of employer-employee relations while this case is pending.

I. FLINT AVENUE IS LIKELY TO PREVAIL ON THE MERITS

A. DOL Lacks Statutory Authority for the Final Rule

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Here, § 213(a)'s text unambiguously requires DOL to define the white-collar exemption by whether workers perform executive, administrative, or professional *duties*, without regard to their compensation. DOL itself has repeatedly acknowledged that its salary requirements are "without specific Congressional authorization." 81 Fed. Reg. 32,431. Such "statutory 'silence' simply leaves that lack of authority untouched," and does not grant any judicial deference to DOL's atextual interpretation. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004); *see also Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359, 374 (D.C. Cir. 2022) (Walker, J., dissenting) ("silence indicates a lack of authority"), *cert. granted*, 143 S. Ct. 2429 (2023). And even if salary is relevant, DOL would still lack authority "to categorically exclude those who perform 'bona fide executive, administrative, or professional capacity' duties based on salary level alone." *Nevada II*, 275 F. Supp. at 805. The Final Rule does that to *millions* of white-collar workers, including five Flint Avenue employees, and is therefore invalid.

1. Final Rule Violates § 213(a)(1)'s Unambiguous Text

"In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself." *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436 (2019). "Where, as here, that examination yields a clear answer, judges must stop." *Id.* The FLSA commands that "*any* employee employed in a bona fide

executive, administrative, or professional capacity" is exempt from the Act's minimum wage and overtime requirements. 29 U.S.C. § 213(a)(1) (emphasis added). This text "focuses on 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). While DOL may define the terms "executive," "administrative," or "professional," those terms all "relate to a person's performance, conduct, or function," without mentioning the method or amount of pay. *Nevada II*, 275 F. Supp. 804 (citing The Oxford English Dictionary (1st ed. 1933)).[2]

The use of "employed," "capacity" and "bona fide" reinforce this conclusion. Capacity means the "[a]bility; capability; possibility of being or of doing." *Capacity*, Webster's New International Dictionary (W.T. Harris & F. Sturges Allen eds., 1930). "Bona fide" emphasizes that the "executive, administrative, or professional capacity" must be "[i]n or with good faith; without fraud or deceit; real or really; actual or actually; genuine or genuinely; as, he acted *bona fide*; a *bona fide* transaction." *Bona Fide*, Webster's New International Dictionary (W.T. Harris & F. Sturges Allen eds., 1930); *see also Nevada II*, 275 F. Supp. 804-05 (reaching same conclusion based on dictionary definitions from 1933). And of course, the phrase "*employed in* a bona fide … capacity" requires DOL to "look to what the employees do." *See Dole v. Petroleum Treaters, Inc.*,

[2] The 1933 version of *The Oxford English Dictionary* defines "executive" as one "[c]apable of performance; operative … Active in execution, energetic … Apt or skillful in execution … Pertaining to execution; having the *function* of executing or carrying to practical effect." 3 The Oxford English Dictionary 395 (1933) (emphasis added). It defines "administrative" as "[p]ertaining to, dealing with, the *conduct* or management of affairs; executive … Of the nature of stewardship, or delegated authority … An administrative body; company of men entrusted with management." 1 The Oxford English Dictionary 118 (1933) (emphasis added). "Professional" is defined as a person "[e]ngaged in one of the *learned* or *skilled* professions, or in a calling considered socially superior to a trade or handicraft … That follows an occupation as his (or her) professional, life-work, or means of livelihood … That is *trained* and *skilled* in the theoretic or scientific parts of a trade or occupation … that raises his trade to the dignity of a learned profession." 8 The Oxford English Dictionary 1428 (1933) (emphasis added). *A Dictionary of American English on Historical Principles* contains similar definitions. It defines "executive" as "[a]n employee or official of an organization having directive duties" and as someone that is "[e]nergetic, competent; qualified to direct and control." 2 A Dictionary of American English on Historical Principles 907–08 (William A. Craigie & James R. Hulbert eds., 1940). "Professional" is defined as one "[e]ngaged in an occupation or activity as a profession or means of livelihood." 3 A Dictionary of American English on Historical Principles (William A. Craigie & James R. Hulbert eds., 1942).

876 F.2d 518, 523 (5th Cir. 1989) (recognizing that 29 U.S.C. § 213(b)(6)'s exemption for "any employee *employed as* a seaman" requires courts to "look to what the employees do.").

Hence, "Congress unambiguously intended the white-collar exemption to apply to employees who perform 'bona fide executive, administrative, or professional capacity' duties," without regard for their salary. *Nevada II*, 275 F. Supp. at 805. DOL agrees that "the Act directs that the EAP exemption be based on 'capacity,'" rather than compensation. 84 Fed. Reg. 51,237. The rest of § 213(a)(1)'s text reinforces this conclusion by describing exempt employees of retail or service establishments by reference to their "performance of executive or administrative *activities*." 29 U.S.C. § 213(a)(1) (emphasis added). And instead of creating a special exemption for teachers, Congress emphasized that "any employee *employed in the capacity* of academic administrative personnel or teacher in elementary or secondary schools" is an exempt administrative or professional employee under § 213(a)(1) (emphasis added).

While DOL's earliest EAP regulations used atextual salary requirements to define the exemption, courts have held those early regulations exceeded § 213(a)(1)'s grant of authority. In *Bruckner*, this Court addressed an assistant fire chief who satisfied all the duty requirements of an executive, but he was not paid the $30 per week salary as DOL's 1940 regulations required. 53 F. Supp. at 1024. The court held that DOL's salary requirement exceeded statutory authority because "[o]nly 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. It declared that *all* serving in executive and administrative capacities were exempt." *Id.* (emphasis added). *Bruckner* correctly

recognized DOL's salary rule "was purely an attempted law-making function, while the power delegated to [DOL] was only to define those terms" in § 213(a)(1). *Id.*

Devoe v. Atlanta Paper Co., 40 F. Supp. at 286, likewise concluded that DOL's ability to define the EAP exemption is "marked out by the fair and natural meaning of the words 'bona fide executive … capacity." *Id*. "Although [DOL] may legally define the term administrative employee with wide discretion within the meaning of such term," it "cannot go beyond that and add elements which form no part of such conception. In other words, [DOL] cannot add an element which is not a real incident to executive work." *Id*. *Devoe* held that the salary level of an executive employee is not "a natural and admissible attribute of the term 'bona fide executive and administrative … capacity.'" *Id*. "It might have been wiser for Congress to have classified employees to be covered by the Act upon the basis of their earnings, or to have added … the additional requirement of a minimum salary, but it did not do so[.]" As such, DOL "cannot, by adding such requirement, which has no relation to the character of the work performed, bring within the scope of the Act a class of [white-collar] employees not intended. The fact that an executive may work for less than $30 per week or even $1 a year does not alter the fact that he is an executive." *Id.*

At bottom, DOL lacks authority under § 213(a)(1) to require exempt EAP employees to be paid by a fixed weekly salary, let alone a fixed weekly salary of a specific amount. *Helix Energy*, 598 U.S. at 67 (Kavanaugh, J., dissenting) (DOL's salary regulations "may be inconsistent with the Fair Labor Standards Act"). DOL justifies its departure from statutory text commanding it to focus on duties rather than dollars by asserting that the "amount an employee is paid" is the "best single test" of whether someone works in an executive, administrative, or professional capacity. 89 Fed. Reg. at 32867 (citation omitted). But that fails to explain why a fixed weekly salary is needed. *Helix Energy*, 598 U.S. at 67 (Kavanaugh, J., dissenting) ("It is especially dubious for the

regulations to focus on how an employee is paid (for example, by salary, wage, commission or bonus)[.]"). Additionally, DOL's claim that salary level is the "best single test" is squarely contradicted by its own regulations defining teachers, lawyers, and physicians as exempt professionals without regard to how or how much they are paid. Under 29 C.F.R. § 541.303, "any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge" at an "educational establishment" is exempt as a professional, regardless of compensation. Similarly, § 541.304 provides that anyone employed to practice law or medicine—including relatively lowly paid clerks and interns—are exempt as professionals, regardless of compensation. Like the executive in *Devoe*, the fact that a teacher, lawyer, or physician may work for "less than … even $1 a year does not alter the fact that he is an" exempt professional. 40 F. Supp. at 286. There is no reason why DOL cannot follow § 213(a)(1)'s unambiguous text and define other white-collar employees by their executive, administrative, or professional duties rather than their method or amount of pay. The failure to do so not only violates the statute but is arbitrary and capricious in and of itself.

2. The FLSA's Structure Reinforces § 213(a)(1)'s Unambiguous Text

Section 213's structure confirms that Congress did not intend to impose a minimum salary for white-collar employees. Other parts of § 213 define exemptions based on job duties and functions, without mentioning the type or amount of pay. *See*, *e.g.*, 29 U.S.C. § 213(a)(5) (exempting fishermen); *id.* § 213(a)(10) (exempting certain switchboard operators); *id.* § 213(a)(12) (exempting seamen on foreign vessels); *id.* § 213(a)(15) (exempting babysitters and caregivers).

When the type of pay (*e.g.*, weekly salary versus hourly rate) is relevant for an exemption to the FLSA's minimum wage or overtime requirements, Congress has explicitly said so. Certain

agricultural workers are exempt if they are "paid on a piece rate basis" under § 213(a)(6). A criminal investigator paid "availability pay" is exempt under § 213(a)(16). Section 13(a)(19) exempts baseball players "compensated pursuant to a contract that provides a weekly salary." Local delivery drivers are exempt under § 13(b)(11) if "compensated for such employment on the basis of trip rates." When the type *and* amount of pay are relevant, the FLSA is even more explicit by clearly and precisely stating the pay level needed. It exempts from overtime pay employees of retail or service establishments if their pay exceeds 1.5 times the federal minimum wage and more than half of such pay comes from commissions. *Id.* § 207(i). Certain computer programmers and systems analysts are exempt from overtime under § 13(a)(17) if "compensated on an hourly basis … at a rate not less than $27.63 an hour." Section 13(b)(23) exempts married couples serving as house parents in a nonprofit boarding school who "are together compensated, on a cash basis, at an annual rate of not less than $10,000."

The omission of similar compensation requirements in 29 U.S.C. § 213(a)(1) reinforce the conclusion that Congress did not define the white-collar exemption based on a weekly salary set by DOL. *See Texas v. United States*, 809 F.3d 134, 182 (5th Cir. 2015) ("to express or include one thing implies the exclusion of the other, or of the alternative.") (citing Black's Law Dictionary 701 (10th ed. 2014)). Congress knows how to create exemptions that have compensation requirements. It used explicit language to add compensation requirements in some exemptions but not in others. The lack of any explicit compensation requirement in the white-collar exemption confirms it falls within the latter category. In *Addison v. Holly Hill Fruit Products*, 322 U.S. 607 (1944), the Supreme Court held that the lack of an employer-size requirement in a now-repealed FLSA exemption meant DOL lacked authority to define that exemption based on employer size. The Court explained that "if Congress intended to allow the Administrator to discriminate between

smaller and bigger establishments …, Congress wholly failed to express its purpose. Where Congress wanted to make exemption depend on size, as it did in two or three instances not here relevant, it did so by appropriate language." *Id.* at 614 (citing 29 U.S.C. § 213(a)(2), (8), (10)). Importantly, Congress's "appropriate language" in other size-based exemptions clearly defined the parameters: the exemption at § 213(a)(8) applies to newspapers "with a circulation of less than four thousand" and § 213(a)(10) applies to independent telephone companies "what has not more than seven hundred and fifty stations."

Here, Congress failed to express any intent to define white-collar employees exempt under § 213(a)(1) based upon how or how much they are paid. And other exemptions based on the method and amount of pay include appropriate language that set clear parameters, such as "a rate not less than $27.63 an hour" under § 213(a)(17), and "an annual rate of not less than $10,000" under § 213(b)(23). As with employer size in *Addison*, 322 U.S. at 614, if Congress intended compensation level to be a requirement for the white-collar exemption at § 213(a)(1), it would have defined an explicit level with appropriate language. Just as DOL may not infer an implicit grant of authority to define the exemption at issue in *Addison* based on employer size, so too it may not infer an implicit grant of power to define the white-collar exemption based on salary level.

3. Judicial Deference Cannot Save DOL's Atextual and Illogical Interpretation

Consistent with § 213(a)(1)'s clear text and structure, DOL has repeatedly conceded that it lacks specific authorization to impose a minimum salary level on exempt white-collar employees. *See, e.g.*, 69 Fed. Reg. 22,165 (acknowledging that FLSA "does not give the Department authority to set minimum wages for executive, administrative and professional employees."); 81 Fed. Reg. 32,391 (confirming that DOL's salary-level requirement is "without specific Congressional authorization."). The Department has nonetheless claimed that, under *Chevron* deference, its

salary-level regulations fall within its "authority to 'fill any gap left, implicitly or explicitly, by Congress.'" *Id.* (quoting *Long Island Care*, 551 U.S. at 165 and *Chevron*, 467 U.S. at 843)). *Id.* DOL's salary-level requirement has been upheld only by courts that apply a deferential standard of review. *Mayfield*, 2023 WL 6168251, at *4 (applying *Chevron*); *Wirtz v. Miss. Publishers Corp.*, 364 F.2d 603 (5th Cir. 1966) ("We cannot say that the minimum salary requirement is arbitrary or capricious."); *Yeakley*, 140 F.2d at 832 ("we cannot say that [the minimum salary requirement] is irrational or unreasonable"). However, the Final Rule is not entitled to any judicial deference, and its atextual interpretation of § 213(a)(1) is invalid.

The Supreme Court is currently considering whether to overrule judicial deference that DOL has invoked to defend its salary regulations. *See Loper Bright Enters. v. Raimondo*, No. 22-451, *cert. granted* on Question 2 of Pet. (May 1, 2023) and *Relentless v. Dep't of Com.*, No. 22-1291, *cert. granted* on Question 1 of Pet. (Oct. 13, 2023). Judicial deference to an agency's statutory interpretation violates Article III of the Constitution by "[t]ransferring the job of saying what the law is from the judiciary to the executive." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). That is true for deference under *Chevron*, *Skidmore*, or any other name. *Relentless v. Dep't of Commerce*, Oral Argument Tr. at 52-53 (Justice Kavanaugh explaining that "if we throw the term 'deference' into *Skidmore* deference, we're going to walk into another problem … like the one we have with *Chevron* deference."); *Loper Bright v. Raimondo*, Oral Arg. Tr. 38-39 (Justice Kavanaugh explaining that "*Skidmore* … respects contemporaneous and consistent interpretations … but the word 'deference' I wouldn't have … used there."). Such deference also constitutes "systematic bias in favor of the government" that deprives litigants of due process. Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1195 (2016). Article III requires this Court to exercise its independent judgment and "say

what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The APA likewise commands that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Courts exercising their independent judgment—as opposed to deferring to the agency—agree that § 213(a)(1) does not authorize DOL to set a minimum salary requirement for exempt white-collar employees. *Bruckner*, 53 F. Supp. at 1024; *Devoe*, 40 F. Supp. at 286. This Court should hold so here.

To the extent judicial deference to an agency's interpretation of § 213(a)(1) could ever be appropriate, § 213(a)(1)'s silence regarding the method and amount of compensation *cannot* be a basis for deference. "Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Texas v. United States*, 497 F.3d 491, 502-03 (5th Cir. 2007). Hence, "an administrative agency does not receive deference under *Chevron* merely by demonstrating that 'a statute does not expressly *negate* the existence of a claimed administrative power[.]" *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 269 (5th Cir. 2015) (quoting *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994)). If anything, such "silence indicates a lack of authority." *Loper Bright*, 45 F.4th 359 (Walker, J., dissenting) (citing *U.S. Telecom Ass'n*, 359 F.3d at 566).

Deference to DOL is especially inappropriate under the major questions doctrine, which requires "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*, 573 U.S. 302, 324 (2014) (denying *Chevron* deference to agency interpretation "laying claim to extravagant statutory power over the national economy"). DOL is setting a minimum wage for "approximately 45.4 million

fulltime salaried white-collar workers in the United States subject to the FLSA." 89 Fed. Reg. at 32,879. It is "highly unlikely that Congress would" leave to "agency discretion" the power to set minimum wages for such a broad swath of the economy. *MCI Telecom. Corp. v. AT&T Co*., 512 U.S. 218, 231 (1994). Granting DOL power to set a minimum wage for the EAP exemption is especially illogical given what the exemption is from: the FLSA's minimum wage requirement set by Congress. 29 U.S.C. §§ 206(a)(1), 213(a)(1). "Congress … does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001).

It defies belief for Congress to have hidden within an *exemption* from a statutory minimum wage the power for DOL to impose its own regulatory minimum wage on white-collar employees. Every other provision of the FLSA that imposes a minimum compensation requirement does so with a clear statement that establishes a pay level set by Congress. *See*, *e.g*., 29 U.S.C. §§ 206(a)(1), 207(i), 213(a)(17)(D); 213(b)(24)(B). That is unsurprising. "The basic and consequential tradeoffs involved" in proscribing minimum pay for millions of Americans "are ones that Congress would likely have intended for itself." *West Virginia v. EPA*, 597 U.S. 697, 730 (2022) (citing W. Eskridge, Interpreting Law: A Primer on How to Read Statutes and the Constitution 288 (2016)). Section 213(a)(1)'s silence establishes that Congress did not grant DOL the power to set a minimum salary for white-collar workers.

Even if judicial deference to agencies survives in some form after *Loper Bright* and *Relentless*,[3] there can be no basis to defer to DOL's interpretation that § 213(a)(1) impliedly authorizes it to dictate a minimum salary requirement for over 45 million white-collar employees nationwide. Granting regulatory power over such a significant portion of the economy requires a

[3] These cases are scheduled to be decided before the end of June 2024.

clear statement from Congress, *Utility Air Reg. Grp.*, 573 U.S. at 324, which DOL admits the FLSA lacks, 81 Fed. Reg. 32,391.

4. The Final Rule Unlawfully Excludes Millions of White-Collar Workers from the Exemption Based on 'Salary Alone'

Even if compensation level can be sometimes relevant for defining executive, administrative, and professional white-collar employees, DOL may not use a test "based on salary alone" to exclude otherwise exempt employees. Weiss Report at 23. Indeed, DOL's original justification for the salary test is to screen out "the *obviously* nonexempt employees, making an analysis of duties in such cases unnecessary." *Id.* at 8 (emphasis added). Under this rubric, the test may not exclude employees whose compensation is not "obviously" deficient. *Nevada II* held that, even under *Chevron*, § 213(a)(1) prohibits any salary test that excludes a significant number of employees performing EAP duties. 275 F.Supp.3d at 806. And DOL agreed that a salary test would be, "at minimum, in tension with the FLSA" if it results in significant numbers of employees "becoming nonexempt based on their salaries alone, even though the Act directs that the EAP exemption be based on 'capacity.'" 84 Fed. Reg. 51,243.

Yet, that is precisely what the Find Rule would do. According to DOL, "of the approximately 45.4 million fulltime salaried white-collar workers in the United States subject to the FLSA, about 12.7 million earn below the new salary level of $1,128 per week." 89 Fed. Reg. 32,879. The Final Rule therefore would make 12.7 million white-collar workers, or approximately 28 percent of such workers nationwide, categorically ineligible for the white-collar exemption based on salary alone, without regard for the *capacity* in which they are employed.[4] The Final Rule's interim salary level of $844 per week suffers from the same defect: while it excludes fewer

[4] This includes 7.7 million white-collar workers who earn more than the salary level DOL set in 2019 but less than the level required by the Final Rule. *Id.* Figure A.

workers based on salary alone, that figure still numbers in the millions. *Id.* Figure A. Both salary levels contradict § 213(a)(1)'s command to exempt "any" employee who performs executive, administrative, or professional duties. *See Nevada II*, 275 F.Supp.3d at 806.

B. The Final Rule Violates Article I's Vesting Clause

If, contrary to its text, § 213(a)(1) did authorize DOL to set a minimum salary for white-collar employees, then it would violate Article I, Section 1 of the Constitution, the Vesting Clause, which states: "All legislative Powers herein granted shall be vested in a Congress of the United States." "This text permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

Regulation promulgated by the Executive Branch must be governed by an objective standard—*i.e.*, law established by Congress. *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). Otherwise "unaccountable 'ministers'" become lawmakers, *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring), which frustrates the nation's "constitutional design." *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (emphasizing that Congress cannot "announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.").

Thus, "when Congress confers decision making authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman*, 531 U.S. at 472 (alteration in original) (quoting *J.W. Hampton*, 276 U.S. at 409)). Nothing in 29 U.S.C. § 213(a)(1) sets forth any intelligible principle for DOL to establish the salary level test or the parameters of such a test. The statute merely instructs the Secretary to "define[] and delimit[]" the meaning of "executive," "administrative" and "professional." It does not mention salary let alone establish guideposts, factors, or considerations

that might establish a ceiling over which DOL could not set the salary-level test. DOL has acknowledged this lack of guidance: "Congress did not set forth *any criteria*, such as a salary level test, for defining the EAP exemptions, but instead delegated that task to the Secretary." 81 Fed. Reg. 32432 (emphasis added).

Nor does the FLSA's "remedial purpose" furnish an intelligible principle. The Supreme Court has rejected the notion that a "general outline of policy," *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 417 (1935), or "statement of … general aims," *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935), can form an intelligible principle. And in any event, the Court has held that the white-collar exception set forth at § 213(a)(1) is as much part of the purpose of the Act as the FLSA's supposed "remedial purpose." *Encino Motorcars, LLC v. Navarro,* 584 U.S. 79, 89 (2018). As such, the Act's supposed remedial purpose cannot guide the interpretation of an explicit exception to its minimum wage and overtime requirements.

The text of § 213(a)(1) lacks an intelligible principle to guide the Department's setting of minimum salary levels. DOL's claim of salary-setting power thus violates Article I's Vesting Clause, which prohibits the delegation of legislative powers. The Court must avoid such an unconstitutional interpretation of the FLSA.

II. THE FINAL RULE INFLICTS IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION

A showing of irreparable harm requires a demonstration of "harm for which there is no adequate remedy at law." *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 585 (5th Cir. 2013) (citing *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008)). "In determining whether costs are irreparable, the key inquiry is 'not so much the magnitude but the irreparability.'" *Rest. L. Ctr. v. U.S. Dep't of Lab*., 66 F.4th 593, 597 (5th Cir. 2023) (quoting *Texas*, 829 F.3d at 433-34). "[T]he nonrecoverable costs of complying with a putatively invalid

regulation typically constitute irreparable harm." *Id*.; *accord BST Holdings, LLC v. OSHA, U.S. Dep't of Lab*., 17 F.4th 604, 618 (5th Cir. 2021) ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs.") (quoting *Texas*, 829 F.3d at 433).

DOL estimates that the Final Rule imposes $2.7 *billion* in annual costs on private employers such as Flint Avenue. 89 Fed. Reg. 32,969. This includes "adjustment costs" because employers must "evaluate the exemption status of employees, update and adapt overtime policies, notify employees of policy changes, and adjust their payroll systems." *Id.* at 32,909. Employers also face "managerial costs" because they "must spend more time developing work schedules and closely monitoring an employee's hours." *Id.* at 32,910. Numerous commenters also told DOL that the Final Rule would reduce workplace flexibility by reclassifying some workers as hourly employees, but DOL did not quantify such costs. *Id.* at 32,911. These costs are all unrecoverable and thus irreparable because DOL is protected by sovereign immunity. *Wages & White Lion Invs., L.L.C. v. United States Food & Drug Admin*., 16 F.4th 1130, 1142 (5th Cir. 2021).

The Final Rule requires Flint Avenue to either dramatically raise the salary of five employees—which imposes obvious unrecoverable labor costs—or reclassify them as hourly workers—which imposes unrecoverable adjustment and managerial costs. Wood Decl. ¶¶7-12. Either way, Flint Avenue faces unrecoverable and thus irreparable costs. *Id.* For reclassified employees, Flint Avenue will incur additional costs in the loss of the ability to offer them schedule flexibility and unlimited paid time off, causing disruption in employee relations and taking away an important recruitment and retention tool. Flint Avenue would also incur irreparable recordkeeping costs because the FLSA requires it to track the hours of non-exempt employees.

Rest. L. Ctr., 66 F.4th at 598 (compliance with FLSA recordkeeping requirements is irreparable harm).

These irreparable harms are imminent. On July 1, 2024, Flint Avenue will be forced to reclassify a junior employee whose weekly salary falls below the Final Rule's $844 interim minimum wage. Wood Decl. ¶¶ 7-8. It will thus suffer irreparable adjustment, managerial, scheduling, and recordkeeping costs associated with that reclassification. On January 1, 2025, Flint Avenue will incur additional irreparable costs with respect to four of its other employees whose salaries fall below the Final Rule's $1,128 weekly minimum wage. *Id.* ¶¶ 9-10. And of course, Flint Avenue will incur higher labor and managerial costs for any new employees it hires. These regulatory costs are significant to a small business like Flint Avenue. *Id*. ¶¶ 7-12. All of them are unrecoverable and thus constitute irreparable harm justifying an injunction.

III. THE PUBLIC INTEREST AND BALANCE OF INTERESTS FAVORS AN INJUNCTION

"The government's and the public's interests merge when the government is a party." *Mock*, 75 F.4th at 577 (citing *Nken*, 556 U.S. at 435). Flint Avenue's likelihood of success on the merits is a strong indicator that a preliminary injunction serves the public interest because "[t]here is generally no public interest in the perpetuation of unlawful agency action." *Texas v. Biden*, 10 F.4th 538, 560 (5th Cir. 2021) (quoting *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)). To the contrary, the Final Rule would significantly harm the public interest if allowed to go into effect. The irreparable harm it inflicts upon Flint Avenue would be multiplied a million-fold across employers of the approximately 7.7 million white-collar workers nationwide

whom the Final Rule would exclude from the EAP exemption based on salary alone. 89 Fed. Reg. 32,879, Figure A.

Additionally, the balance of interests supports an injunction because irreparable harm to Flint Avenue far outweighs any conceivable injury to DOL. On one side of the ledger is the certainty that the Final Rule will force Flint Avenue to expend considerable unrecoverable resources on labor, adjustment, management, and recordkeeping costs—not to mention disrupted employment relationships. As a small business, Flint Avenue has limited means to bear these significant costs and disruptions.

On the other side, DOL cannot point to any injury remotely approaching the irreparable harm to Flint Avenue. It has no interest in enforcing an unlawful salary level pending judicial review because such interim enforcement will cause significant disruption to DOL, employers, and employee when the Court ultimately sets aside the Final Rule. Countless employer, including Flint Avenue, will simply face irreparable adjustment costs all over again when the unlawful salary level is vacated. Accordingly, the public interest and the equities support a stay or injunction.

IV. THE SCOPE OF THE RELIEF SHOULD BE NATIONWIDE

At the very least, a stay or injunction must render the Final Rule inapplicable to Flint Avenue. But such relief should also have nationwide scope. While some courts disfavor nationwide injunctive relief, that principle does not apply to cases "involving new federal regulations, given the text of the APA." *Labrador v. Poe*, 144 S. Ct. 921, 932 (2024) (Kavanaugh, J., concurring in grant of stay). That is because the APA's text authorizes courts reviewing agency action to issue nationwide relief. When a court issues a final decision under 5 U.S.C. § 706 to "set aside" an unlawful agency action, be it a narrow adjudicatory order or a nationwide rule, that action ceases to have any force. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev.

933, 1012-13 (2018) ("Unlike judicial review of statutes, in which courts enter judgments and decrees only against litigants, the APA … [goes] further by empowering the judiciary to act directly against the challenged agency action.").

The same is true of interim relief authorized under 5 U.S.C. § 705 "to postpone the effective date of an agency action … pending conclusion of the review proceedings." This "is most naturally read to mean that the agency action—a rule or order—takes no effect as to anyone anywhere, not that it takes effect as to everyone but the parties to a legal challenge." T. Elliot Gaiser, Mathura Sridharan, and Nicholas Cordova, *The Truth of Erasure: Universal Remedies for Universal Agency Actions*, at 10, Chicago L. Rev. (forthcoming).[5] This conclusion is reinforced by an earlier sentence in § 705 that allows the agency to "postpone the effective date of action taken by it, pending judicial review." If an agency exercises such power with respect to a rule—as the Securities and Exchange Commission just did with its climate-disclosure rule,[6] then that rule is postponed for everyone, not just litigants. The same must be true when a court postpones a rule under § 705. The Fifth Circuit recently exercised this power to issue a nationwide stay of DOL's vaccine mandate before it could affect millions of workers. *BST Holdings*, 17 F.4th at 619. This Court should do the same here. Otherwise, as with the unlawful vaccine mandate, the Final Rule will upend millions of employer-employee relationship nationwide.

CONCLUSION

For all these reasons, Plaintiffs respectfully request that the Court postpones the Final Rule before its interim salary level becomes effective on July 1, 2024, or in the alternative, that it enjoins the Final Rule from applying with respect to Flint Avenue.

[5] Available at http://dx.doi.org/10.2139/ssrn.4830962
[6] SEC Order Issuing Stay, No. S7-10-22 (April 4, 2024).

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Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2024, an electronic copy of the foregoing was filed electronically via the Court's ECF system, which effects service upon counsel of record. I further certify that, pursuant to the Court's June 6, 2024 Order (ECF 5), I served the foregoing on the U.S. Attorney for the Northern District of Texas, Leigha Simonton, and Chief of the Civil Division for the Northern District of Texas, Ken Coffin, at the following address:

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