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-C

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

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 in the labor market by offering employees unlimited paid vacation and flexible work arrangements that decouple compensation from hours worked.

The Department of Labor ("Department" or "DOL") published a Final Rule entitled *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, 89 Fed. Reg. 32,842 (Apr. 26, 2024) ("Final Rule"), that eliminates the white-collar exemption for most 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 salary level to define the exemption. Under the Final Rule, an employee may not be exempt unless he or she is paid a fixed weekly salary of at least $1128 (equivalent to $58,656 annually). This minimum salary level would disqualify at least four of Flint Avenue's employees from the white-collar exemption based on salary alone, without regard to the capacity in which they are employed. The Final Rule also includes an automatic update mechanism that raises the minimum salary every three years, starting July 2027.

DOL's use of, and conclusive reliance 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 elevating

salary to become the deciding factor for the exempt status for millions of employees.

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 minimum-pay legislation 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 were correct, then the FLSA would violate the Vesting Clause of Article I, §1 of the Constitution because it contains no intelligible principle to guide the exercise of that authority.

Even if these defects were not fatal, the Final Rule would still be invalid because Defendant Su's unlawful permanent status as Acting Secretary violates the Appointments Clause and the Federal Vacancies Reform Act ("Vacancies Act"). She therefore lacked authority to exercise the Secretary's powers, including promulgating the Final Rule.

STATEMENT OF FACTS

I. LEGAL BACKGROUND

The FLSA generally requires employers to pay their employees a minimum wage (which Congress sets and updates) and overtime pay for all hours worked in excess of a 40-hour workweek. 29 U.S.C. §§ 206–07. The Act contains many exceptions listed at 29 U.S.C. § 213. What is commonly referred to as the "white collar" or "EAP" exemption excludes from the Act's minimum wage and overtime requirements "any employee employed in a bona fide executive, administrative, or professional … capacity, or in the capacity of outside salesman (as such are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of [the APA]." 29 U.S.C. § 213(a)(1). The exemption's text has not materially changed since the

FLSA was enacted in 1938, and it has never mentioned *any* compensation requirement, let alone a minimum weekly salary.

Despite the lack of a compensation requirement in § 213(a)(1)'s text, DOL has required exempt white-collar employees to earn a minimum salary since the statute's inception. *See* 69 Fed. Reg. 22,122, 22,124 (Apr. 23, 2004). Such exempt employees must also perform executive, administrative, and professional duties as defined by DOL regulations that have not been updated since 1949. *Id.* at 22,122. Several federal courts, including this Court, analyzed the FLSA's text to hold that DOL's earliest salary requirement for the EAP exemption was 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, 286–87 (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."). By contrast, other courts have upheld DOL's salary requirements under a deferential standard of review. *See Walling v. Yeakley*, 140 F.2d 830, 833 (10th Cir. 1944) ("[W]e cannot say that it is irrational or unreasonable to include [salary] in the definition and delimitation[s].").

DOL has repeatedly acknowledged that the FLSA's text "does not give the Department authority to set minimum wages for executive, administrative and professional employees." 69 Fed. Reg. at 22,165; *see also* 81 Fed. Reg. 32,391, 32,431 (May 23, 2016) (Salary test is "without specific Congressional authorization."). DOL instead grounds its salary test's legal justification in "the [then] 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))." 81 Fed. Reg. at 32,391. However, the U.S. Supreme Court recently rejected that principle. *Loper Bright Enters. v. Raimondo* and *Relentless, Inc. v. Dep't of Com.*, 144 S. Ct. 2244, 2273 (2024) (*Loper Bright*/*Relentless*) ("*Chevron* is overruled.").

Notwithstanding the lack of textual basis, DOL continued to use a minimum salary test as a proxy for an employee's duties. *See*, *e.g.*, 81 Fed Reg. at 32,404; 89 Fed. Reg. at 32,844. It emphasized that the salary threshold 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"), App.2. DOL has acknowledged that it lacks authority to promulgate a "salary only" test. *See*, e.*g.*, 81 Fed. Reg. at 32,446; 69 Fed. Reg. at 22,173.

II. RECENT RULEMAKINGS AND LITIGATION

In 2016, DOL departed from its decades-long policy of maintaining a relatively low-salary threshold. It raised the new cutoff from the 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage census region, which is the South, to the 40th percentile. 81 Fed. Reg. at 32,404. This methodology more than doubled the then-existing salary requirement of $455 per week to $913 ($47,476 annually). *Id*. at 32,405. The 2016 Rule also invented an index mechanism to automatically update the standard salary level threshold every three years. *Id.* at 32,430.

The Eastern District of Texas preliminarily and then permanently enjoined the 2016 increase to the EAP minimum salary requirement. *Nevada v. DOL*, 218 F. Supp. 3d 520, 533 (E.D. Tex. 2016) (*Nevada I*); *Nevada v. DOL*, 275 F. Supp. 3d 795, 806 (E.D. Tex. 2017) (*Nevada II*).

The court held that § 213(a)(1) "unambiguously directed [DOL] to exempt from overtime pay employees who perform 'bona fide executive, administrative, or professional capacity' duties." *Id*. It held that the 2016 salary level 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)).

DOL rescinded the 2016 Rule and finalized a new rule in 2019 that raised the minimum weekly salary from $455 to $684, or $35,568 annually. 84 Fed. Reg. 51,230 (Sept. 27, 2019). The Western District of Texas relied on *Chevron* deference to uphold the 2019 salary level against a challenge, and the Fifth Circuit is currently reviewing that decision. *Mayfield v. DOL*, 693 F. Supp. 3d 712, 725 (W.D. Tex. 2023), *appeal docketed,* No. 23-50724 (5th Cir. Oct. 11, 2023).

III. THE CHALLENGED 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, or $58,656 annually. 89 Fed. Reg. 32,842. 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[.]" *Id.* at 32,879 (footnote omitted). This includes 7.7 million white-collar workers who earn more than the salary level DOL set in 2019 but less than what the Final Rule requires. *Id. at* 32,879 (Figure A). DOL estimated that about 4 million of these employees will become non-exempt, *id.* at 33,843, while others will retain their exemption because some employers will respond to the Final Rule by raising salaries. It 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 weekly salary requirement of $844 per week, or $43,888 annually, already took 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. *Id.* at 32,2973. The Eastern District of Texas preliminarily enjoined the Final Rule as to Texas in its capacity as an employer. *Texas v. DOL*, No. 4:24-CV-499-SDJ, 2024 WL 3240618 (E.D. Tex. June 28, 2024).

By the time DOL promulgated the Final Rule, Deputy Secretary of Labor Su had been Acting Secretary for over 300 days, which exceeds the 210 days allowed under the Federal Vacancies Reform Act ("Vacancies Act"). 5 U.S.C. § 3346(a)(1). The President nominated her to be Secretary of Labor, but it has been clear for over a year that she lacks sufficient support to be confirmed. To date, Su has served as Acting Secretary for over 500 days, with no end in sight. DOL has invoked 29 U.S.C. § 552 to justify her serving as Acting Secretary indefinitely.

IV. IMPACT 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." App.48 (Declaration of Amy Wood). It has seven employees, all of whom perform *bona fide* executive, administrative, or professional duties. Flint Avenue has always treated its employees as exempt. It has paid them on a salary rather than on an hourly basis. *Id.* It has never paid its employees overtime pay nor tracked their hours worked each week. *Id*.

At least four Flint Avenue employees—an Office Manager, a Project Manager, a Marketing Manager, and a Junior 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. See also* App.25, 27 (Office Manager Contracts); App.32 (Project Manager Contract); App.37 (Marketing Project Manager Contract); and App.42 (Junior Graphic Designer Contract). The Final Rule prevents Flint Avenue from treating these employees as exempt and would force it to pay them overtime pay whenever they work over 40 hours in a workweek, which happens occasionally. App.51 (Declaration of Ashton Montgomery), App.54 (Declaration of Taylor Soucy).

FLINT AVENUE HAS STANDING

To establish Article III standing, a plaintiff must plead: (1) an injury in fact; (2) that is fairly traceable to the challenged action of defendants; and (3) will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). "If a plaintiff is an object of a regulation 'there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.'" *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 264 (5th Cir. 2015) (quoting *Lujan*, 504 U.S. at 561–62). That is because "increased regulatory burden typically satisfies the injury in fact requirement." *Id.* at 266. Hence, courts have found standing to challenge a new regulation to be "self-evident" where plaintiffs were themselves regulated parties. *Am. Secs. Ass'n v. U.S. Dep't of Lab.*, No. 8:22-CV-330-VMC-CPT, 2023 WL 1967573, at *8 (M.D. Fla. Feb. 13, 2023), *appeal dismissed*, 2023 WL 4503923 (11th Cir. May 17, 2023) (collecting cases). Flint Avenue has self-evident standing as a regulated employer that is an object of the Final Rule.

Unless the Court vacates the Final Rule, Flint Avenue would be compelled to raise at least four employees' salaries or pay them a premium for any time worked over 40 hours in a workweek. The Final Rule also prevents Flint Avenue from hiring new exempt employees unless it pays them

at least $58,656 per year, a level that increases automatically every three years. In short, Flint Avenue faces "imminent monetary loss that is traceable to the Department's Final Rule" and would be redressed if the Court vacates it. *Nevada I*, 218 F. Supp. 3d at 526.

Apart from payroll expenses, the Final Rule would impose significant compliance and implementation costs. Flint Avenue must familiarize itself with the regulations and then review, revise, and reissue its employment policies. *See* 89 Fed. Reg. 32,908–10 (assessing regulatory familiarization and adjustment costs). It must expend time and resources to monitor and control weekly hours worked for previously exempt employees who are reclassified as hourly workers to compute and minimize overtime pay. *Id.* at 32,910–11. It must also maintain records of their "[h]ours worked each workday and total hours worked each workweek." *See* 29 C.F.R. § 516.2 (recordkeeping requirements for non-exempt hourly workers); *Rest. L. Ctr. v. U.S. Dep't of Lab.*, 66 F.4th 593, 597–98 (5th Cir. 2023) (recordkeeping costs are irreparable injury). Finally, reclassifying exempt employees as hourly workers precludes work flexibility and unlimited paid vacation that Flint Avenue currently offers. App.48 (Declaration of Amy Wood). Forcing Flint Avenue to rescind these benefits would disrupt employer-employee relations and take away a valuable tool for recruiting and retaining talented employees. *Id.* These compliance and disruption costs are all traceable to the Final Rule and would be redressed by its vacatur.

STANDARD OF REVIEW

Summary judgment is proper where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When evaluating APA challenges on summary judgment, courts apply the APA standard of review. *See Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 627 (5th Cir. 2001). Under that standard, a "reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be …

arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right," or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2). Reviewing courts must exercise independent judgment to "decide *all* relevant questions of law." *Loper Bright*/*Relentless*, 144 S. Ct. at 2265 (emphasis added) (quoting 5 U.S.C. § 706).

Where, as here, a statute delegates discretion to an agency to define certain terms, the court may not defer to the agency's interpretation of its discretion. *Id.* at 2263 Rather, "the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Id*. "The court fulfills that role by recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in reasoned decisionmaking within those boundaries." *Id.* (cleaned up).

ARGUMENT

I. DOL LACKS STATUTORY AUTHORITY FOR THE FINAL RULE'S SALARY LEVEL

"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). As such, agencies "must point to explicit Congressional authority justifying their decisions." *Inhance Techs., L.L.C. v. EPA*, 96 F.4th 888, 893 (5th Cir. 2024). A reviewing court must "independently interpret the statute" to determine "the boundaries of the delegated authority." *Loper Bright*/*Relentless*, 144 S. Ct. 2263. Here, the Final Rule's salary threshold exceeds the boundaries of DOL's delegated authority.

As the Eastern District of Texas recently explained, § 213(a) "requires that [EAP] exemption status turn on duties—not salary." *Texas*, 2024 WL 3240618, at *11. The statutory text does not permit DOL to mandate *any* minimum salary level—a conclusion reinforced by the FLSA's structure and the Major Questions Doctrine. And even if salary were 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. 3d at 805. The Final Rule does that to *millions* of white-collar workers—including at least four Flint Avenue employees—and is therefore invalid.

A. Section 213(a)(1) Forecloses Any Minimum Salary Requirement

"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). "An examination of the ordinary meaning of the EAP Exemption's undefined terms shows that the Exemption turns on an employee's functions and duties, requiring only that they fit one of the three listed, *i.e.*, 'executive,' 'administrative,' or 'professional capacity.' The exemption does not turn on compensation." *Texas*, 2024 WL 3240618, at *7. Thus, while DOL may define the terms "executive," "administrative," or "professional," it must do so with respect to "a person's performance, conduct, or function," not the method or amount of pay. *Nevada II*, 275 F. Supp. 3d at 804 (citing *Oxford English Dictionary*, 1933 ed.).

When the FLSA was enacted, "[t]he Oxford English Dictionary defines 'executive' as someone '[c]apable of performance; operative … [a]ctive in execution, energetic … [a]pt or skillful in execution.'" *Nevada I*, 218 F. Supp. 3d at 529 (quoting *The Oxford English Dictionary*,

1933 ed.). Nothing in this definition speaks to an employee's salary level. "Administrative is defined as '[p]ertaining to, or dealing with, the conduct or management of affairs; executive.'" *Id.* "[A]nd the dictionary defines 'professional' as "[p]ertaining to, proper to, or connected with a or one's profession or calling … [e]ngaged in one of the learned or skilled professions … that follows an occupation as his (or her) profession, life-work, or means of livelihood." *Id*. So, like the term "executive," the plain meaning of the terms "administrative" and "professional" have no relation to salary level nor to how much an individual is paid.

The use of "employed," "capacity" and "bona fide" reinforce this conclusion. Capacity means "[o]utward condition or circumstances; relation; character; position; as in the *capacity* of a mason or carpenter." *Texas*, 2024 WL 324618, at *7 (quoting *Webster's New Int'l Dictionary* 396 (2d ed. 1934)). "The ordinary meaning of this term suggests a functional inquiry into the nature of an employee's duties within his workplace and industry, rather than his compensation." *Id.*; *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 161 (2012) ("The statute's emphasis on the 'capacity' of the employee counsels in favor of a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works.").

"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 *Oxford English Dictionary*, 1933 ed.)). 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.*, 876 F.2d 518, 520, 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.").

In short, while DOL may define and delimit the EAP exemption's operative terms, they all "concern an employee's duties—not his salary." *Texas*, 2024 WL 3240618, at *9. Even DOL agrees that "the Act directs that the EAP exemption be based on 'capacity,'" not compensation. 84 Fed. Reg. at 51,243. Courts must presume that "Congress says what it means and means what it says." *Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016). Here, "Congress created the EAP Exemption for '*any employee* employed in a bona fide executive, administrative, or professional capacity.'" *Texas*, 2024 WL 3240618, at *11 (quoting 29 U.S.C. § 213(a)(1)). Section 213(a)(1) does not merely exempt "'most' employees who meet the duties test (plus a salary threshold) or 'some' employees who meet the test (plus a salary threshold)." *Id.* Because the Act requires exempting "any" employee who meets the duties test, "a Department-invented [salary] test, untethered to the text of the FLSA, that systematically deprives employees of the EAP Exemption when they otherwise meet the FLSA's duties test, is necessarily unlawful." *Id.*

While DOL's earliest EAP regulations used atextual salary requirements to define the exemption, courts have held those early regulations to exceed § 213(a)(1)'s grant of authority. In *Buckner*, 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 its 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). *Buckner* 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, 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 "can not go beyond that and add elements which form no part of such conception. In other words, [DOL] can not 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 286–87.

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 32,867 (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 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. *See* 29 C.F.R. §§ 541.303, 541.304.

Section 541.303 states that "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 lowly paid clerks and interns—are exempt 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 286–87. There is no reason why DOL cannot follow § 213(a)(1)'s text and define other white-collar employees by their executive, administrative, or professional duties rather than their method or amount of pay.

To be sure, it may take effort for DOL to develop new regulations that respond to changes in technology and the labor market, such as by defining duties for new classes of professionals like graphic designers whom Flint Avenue employs. But that is precisely what Congress commanded DOL to do: define executive, administrative, and professional duties "from time by time by regulation[.]" 29 U.S.C. § 213(a)(1). Yet, "[t]he job duty requirements in the regulations have not been changed since 1949." 69 Fed. Reg. 22,122. It thus has defied Congress's clear command and instead has defined the EAP exemption through compensation rather than duties.

B. The FLSA's Structure Confirms DOL May Not Mandate a Salary Threshold

Section 213's structure confirms that Congress did not intend DOL 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 FLSA exemption, 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 amount needed. It exempts from overtime pay employees of retail or service establishments if their pay exceeds 1.5 times the federal minimum wage. *Id.* § 207(i). And married house parents in nonprofit boarding schools are exempt if they "are together compensated, on a cash basis, at an annual rate of not less than $10,000." *Id.* § 13(b)(24).

The omission of similar compensation requirements in 29 U.S.C. § 213(a)(1) reinforces 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 n.180 (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), (11)). The "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 "which 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 sets clear parameters, such as "a rate of not less than $27.63 an hour" under § 213(a)(17), and "an annual rate of not less than $10,000" under § 213(b)(24). As with employer size in *Addison*, 322 U.S. at 614, if Congress intended compensation to be a requirement for the white-collar exemption at § 213(a)(1), it would have included 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.

C. The Major Questions Doctrine Forecloses DOL's Assertion of Power to Set a Minimum Wage for Millions of White-Collar Workers

DOL's use of a salary level to "define and delimit" the EAP exemption cannot be squared with the Major Questions Doctrine, which requires courts to reject agencies' claims that Congress conferred regulatory authority on subjects of "vast economic and political significance" in the

absence of a clear statement. *West Virginia v. EPA*, 597 U.S. 697, 716 (2022) (cleaned up). DOL claims authority to set minimum wages for "approximately 45.4 million full[-]time 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 such power to set a minimum wage for white-collar workers 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 Ass'ns*, 531 U.S. 457, 468 (2001).

A clear statement is thus needed to support DOL's claimed power to set minimum wages for white-collar employees. *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("Congress [must] speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."). As explained above, nothing in the FLSA contains a "clear statement" authorizing DOL to define the EAP exemption based on compensation. Indeed, DOL has repeatedly acknowledged that salary levels it implements are "without specific Congressional authorization." 81 Fed. Reg. at 32,431. The Major Questions Doctrine requires the Court to agree with DOL's own conclusion that statutory text "does not give the Department authority to set minimum wages for executive, administrative and professional employees." *See* 69 Fed. Reg. at 22,165.

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

Even if compensation level can sometimes be relevant for defining executive, administrative, and professional employees, the Final Rule is still unlawful. DOL admits a "salary only" test for the exemption is "precluded by the FLSA." *See*, *e.g.*, 81 Fed. Reg. 32,446 n.84, 69 Fed. Reg. 22173 (DOL "does not have authority under the FLSA to adopt a 'salary only' test[.]").

The original justification for the salary test is to screen out "the *obviously* nonexempt employees, making an analysis of duties in such cases unnecessary." Weiss Report at 8 (emphasis added). Under this rubric, the test may not exclude employees whose compensation is not "obviously" deficient. The plain language of the FLSA grounds the EAP Exemption in the duties that employees perform; the determination of whether an employee meets the exemption therefore must involve at least some consideration of such duties. DOL thus agrees 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 Final Rule does. It sets the salary threshold so high that it cannot serve as a plausible proxy for job duties. It instead becomes a *de facto* salary-only test where employees' duties, functions, tasks, and activities no longer matter when determining their exempt status. According to DOL, "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 the new salary level of $1,128 per week." 89 Fed. Reg. 32,879 (footnote omitted). 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. This includes 7.7 million white-collar workers who earn more than the salary level DOL set in 2019 but less than the $58,656 required by the Final Rule. *Id.* at 32,879 (Figure A).[1] Regardless of their duties, millions become ineligible for the EAP exemption solely due to their salary levels. Because "the EAP Exemption requires that

[1] DOL expected that approximately 4 million of these employees will become non-exempt. 89 Fed. Reg. at 32,893. The remainder would retain their exempt status because employers respond to the Final Rule by raising their salaries.

exemption status turn on duties—not salary—and the 2024 Rule's changes make salary predominate over duties for millions of employees, the changes exceed the authority delegated by Congress to define and delimit the relevant terms." *Texas*, 2024 WL 3240618, at *11.

E. *Wirtz* Does Not Rescue the Final Rule

The Fifth Circuit's decision in *Wirtz v. Miss. Publishers Corp*, 364 F.2d 603 (5th Cir. 1966), does not rescue the Final Rule. *Wirtz* involved a challenge on arbitrary and capricious grounds—not, as here, whether a salary level exceeds DOL's statutory authority. As such, its conclusion that DOL's 1963 weekly salary requirement was not "arbitrary and capricious," *id.* at 608, has no bearing on Flint Avenue's statutory authority argument against this Final Rule.

As *Nevada I* recognized, *Wirtz* "is not binding" because it "did not evaluate the lawfulness of a salary-level test under *Chevron* step one," 218 F. Supp. 3d at 530 n.3, which requires analysis of statutory text. *Wirtz* is even more inapplicable after *Loper Bright*/*Relentless* overturned *Chevron* and required courts to "independently interpret the statute" to "fix[] the boundaries of the delegated authority," with no deference to the agency's reasonable interpretation. 144 S. Ct. at 2263. Without independently analyzing the FLSA's text, *Wirtz* followed other circuit decisions that upheld DOL's salary requirement as being not "irrational or unreasonable," *Walling*, 140 F.2d at 833) (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). Such a deferential standard of review on a statutory question is precisely what *Loper Bright*/*Relentless* prohibits. Indeed, *Wirtz*'s "arbitrary and capricious" standard would effectively resurrect *Chevron*, which gives an agency's regulations "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 844 (1984)), *overruled in Loper Bright*/*Relentless*, 144 S. Ct. at 2263. In short, *Wirtz* is pre-*Chevron* and—more

importantly—pre-*Loper Bright*/*Relentless* precedent that does not speak to whether the plain meaning of the statutory text authorizes DOL's salary level requirement.[2]

Moreover, 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 the Final Rule's 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. *See Nevada I*, 218 F.Supp.3d at 530 n.3 ("*Wirtz* offers no guidance on the lawfulness of the Department's Final Rule salary-level."); *Texas*, 2024 WL 3240618, at *9 (footnote omitted) ("*Wirtz*'s approval of the Department's salary thresholds that were in effect over fifty years ago … cannot be extended to bless *any and all* salary thresholds adopted by the Department.").

II. THE FINAL RULE VIOLATES ARTICLE I'S VESTING CLAUSE

If, contrary to its text, § 213(a)(1) somehow authorized 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." *Id*. "This text permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

"Vague congressional delegations undermine representative government because they give unelected bureaucrats—rather than elected representatives—the final say over matters that affect the lives, liberty, and property of Americans." *Consumers' Research v. FCC*, 2024 WL 3517592, at *10 (5th Cir. July 24, 2024). Regulation promulgated by the Executive Branch must therefore

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[2] 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) (footnote omitted) (emphasis in original).

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*, 597 U.S. at 737 (Gorsuch, J., concurring) (quoting The Federalist No. 11, p. 85 (C. Rossiter ed. 1961) (A. Hamilton)), 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)). The Fifth Circuit enforces the intelligible-principle test rigorously and has recently struck down statutory schemes as violating the Vesting Clause when the text uses vague aspirations instead of specific and objective parameters to guide an agency's discretion. *Consumers' Research*, 2024 WL 3517592, at *10. *See also Jarkesy v. SEC*, 34 F.4th 446, 462 (5th Cir. 2022), *aff'd on other grounds*, 144 S. Ct. 2117 (2024).

Here, 29 U.S.C. § 213 (a)(1) does not set forth *any* intelligible principle for DOL to establish a 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" capacity. It does not even mention salary—let alone establish guideposts, factors, or considerations that might fix 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[.]" 81 Fed. Reg. at 32,432 (emphasis added).

Nor does the FLSA's "remedial purpose" furnish an intelligible principle because the Supreme Court made clear that "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, 541 (1935), fall short. *See also Consumers' Research*, 2024 WL 3517592, at *10 (rejecting vague aspirations such as "sufficient" and "affordable"). The Court has also held that the white-collar exception set forth at § 213(a)(1) is as much a 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.

No 'intelligible principle' supports DOL's salary-level test, nor its indexing mechanism. Whether by the plain meaning of the statute or the Vesting Clause, DOL's salary test cannot stand.

III. THE AUTOMATIC INDEXING PROVISION EXCEEDS STATUTORY AUTHORITY

The Final Rule mandates automatic updates to the salary level on July 1, 2027, and every three years thereafter. 89 Fed. Reg. at 32,973. Because the Rule's baseline salary level is unlawful, automatic updates to it are likewise unlawful. *See Nevada II*, 275 F.Supp.3d at 807–08 (holding indexing mechanism was unlawful because baseline salary test was unlawful). But even if that were not so, automatic indexing still would exceed DOL's statutory authority and violate the APA's notice-and-comment requirement.

DOL has previously admitted that the FLSA does not authorize it to automatically update the white-collar salary level. *See* 81 Fed. Reg. at 32,431 (Section 213(a)(1) "does not reference automatic updating"); 69 Fed. Reg. 22,171–72 ("Further, the Department [found] nothing in the legislative or regulatory history that would support indexing or automatic increases."). It now claims its prior view was wrong and that it may put the salary threshold on autopilot solely because

Congress did not explicitly prohibit indexing. *See* 89 Fed. Reg. at 32,857. That is exactly backward. Courts "do not merely presume that a power is delegated if Congress does not expressly withhold it, as then agencies would enjoy virtually limitless hegemony[.]" *Contender Farms*, 779 F.3d at 269 (quoting *Texas v. U.S. Dept. of the Interior*, 497 F.3d 491, 503 (5th Cir. 2007)); *accord La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act … unless and until Congress confers power upon it.").

The indexing provision's one-time, "fire and forget" approach is the opposite of Congress's command that DOL define and delimit the EAP exemption "from time to time by regulations." 29 U.S.C. § 213(a)(1). Congress knows how to authorize automatic indexing in the labor context. For instance, 29 U.S.C. § 1083(c) provides for indexing excess compensation related to "funding standards for single-employer defined benefit pension plans. Tellingly, Congress has not indexed any parts of the FLSA—not the minimum wage, *id.* § 206, nor the hourly wage for computer employees, *id.* § 213(a)(17), nor the annual compensation for "nonprofit … parents," *id.* § 213(b)(24). Section 213(a)(1)'s lack of explicit language authorizing indexing confirms that even if Congress authorized a salary-level test (which it did not), it never authorized indexing; instead, DOL must define and delimit the EAP exemption "from time to time by regulations."

Automatic indexing also unlawfully evades the APA's notice-and-comment procedures for substantive rulemaking. *See* 5 U.S.C. § 553. DOL has not claimed any exception to notice-and-comment. Nor are there any. Rather, DOL seeks to dispense with "difficulty with updating the earnings thresholds" periodically by indexing the EAP salary. 89 Fed. Reg. at 32,858. But an agency must follow the APA's notice-and-comment provisions regardless of whether they bring "difficulty." *See U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979). Any increase in the salary level must be based upon public comments and information extant at the time of the

increase. *Id.* DOL cannot put the salary-level test on autopilot to evade APA procedures and the Congressional Review Act.

IV. THE ACTING SECRETARY WAS NOT PROPERLY APPOINTED

DOL may define and delimit the EAP exemption only "by regulations of the Secretary." 29 U.S.C. § 213(a)(1). Su had served for over 300 days as Acting Secretary by the time she promulgated the Final Rule, well after the Vacancies Act's 210-day limit on acting service. 5 U.S.C. § 3346(a)(1). She therefore could not exercise the Secretary's authority needed to promulgate the Final Rule.

DOL contends the Vacancies Act's limit does not apply because 29 U.S.C. § 552 allows the Deputy Secretary to serve as Acting Secretary upon his "death, resignation, or removal from office." *See* Answer, ECF38 ¶ 45. But that statute could only provide an alternative basis to the Vacancies Act's otherwise "exclusive means for *temporarily* authorizing an acting official" if it "designates an officer or employees to perform the duties of a specified office *temporarily* in an acting capacity. 5 U.S.C. § 3347(a)(1). Here, Su is performing the duties of the Secretary *indefinitely*. To date, she has served for over 500 days as an acting department head—shattering the previous record of 215 days[3]—with no end in sight. While the President has nominated Su to serve as Secretary, it has been clear for at least a year (*i.e.*, 365 of those 500+ days) that she lacks sufficient support to be confirmed.

Nothing in § 552 authorizes the Deputy Secretary to assume the Secretary's role indefinitely. Interpreting the statute to authorize indefinite acting status without Senate

[3] This record was held together by Acting Homeland Security Secretary McAleenan (Trump) and Acting Commerce Secretary Blank (Obama). Anne Joseph O'Connell, *Actings*, 120 Colum. L. Rev. 613, 646 (2020). The previous longest serving Labor Secretary was Acting Secretary Ford (Reagan), who served for 210 days. *Id.*

confirmation would render it constitutionally infirm because advice and consent are unwaivable duties. *Cf. Clinton v. City of New York*, 524 U.S. 417, 439–40 (1998) (holding that Congress could not license the president to veto line items of a budget bill because Congress, not the president, was responsible for appropriations). Section 552 thus cannot support Su's indefinite appointment. Even if, as DOL contends, § 552 allows Su to perform the Secretary's duties indefinitely, then it would fail to satisfy 5 U.S.C. § 3347(a)(1) as a designation to "temporarily" perform the Secretary's duties. The Vacancies Act's 210-day limit would apply, and any of Su's official acts thereafter as Acting Secretary, including the Final Rule, would be void. *See Asylumworks v. Mayorkas*, 590 F.Supp.3d 11, 25 (D.D.C. 2022).

V. THE FINAL RULE SHOULD BE VACATED

The APA requires that courts '"shall'—not may—'hold unlawful and set aside' agency action." *Nat'l Ass'n of Priv. Fund Managers v. SEC*, 103 F.4th 1097, 1114 (5th Cir. 2024) (citation omitted (quoting 5 U.S.C. § 706)). *See also* E. Gaiser, M. Sridharan & N. Cordova, *The Truth of Erasure: Universal Remedies for Universal Agency Action* at 3, Chicago L. Rev. (forthcoming) ("Every circuit has recognized that the APA authorizes them to vacate a rule."). Hence, "[v]acatur is the only statutorily prescribed remedy for a successful APA challenge to a regulation." *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374–75 (5th Cir. 2022). This Court should apply the "default" remedy and set aside the Final Rule. *Data Mktg. P'ship, LP v. DOL*, 45 F.4th 846, 859 (5th Cir. 2022).

CONCLUSION

For all these reasons, the Court should grant Plaintiff's motion for summary judgment and vacate the Final Rule before its January 1, 2025, effectiveness date.

August 7, 2024

Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2024, an electronic copy of the foregoing was filed electronically via the Court's ECF system, which effects service upon counsel of record.

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